UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

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| In re: | ) | Bankr. No. 03-10194 |
| | ) | Chapter 7 |
| TRI-STATE ETHANOL COMPANY LLC | ) | |
| | ) | DECISION RE: TRI-STATE |
| Debtor. | ) | FINANCIAL, L.L.C.'S |
| | ) | MOTION FOR RECUSAL |

The matter before the Court is the *Motion for Recusal* filed by Tri-State Financial, L.L.C.; the joinders thereto filed by James G. Jandrain, Randall P. Kramer, and ICM, Inc.; and the objections thereto filed by First Dakota National Bank and Trustee John S. Lovald. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A). This *Decision* and accompanying *Order* shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052 and 9014(c). As set forth below, the motion will be denied.

I.

Tri-State Ethanol Company, L.L.C., owned an ethanol plant near Rosholt, South Dakota. The plant was the company's primary asset. When the plant was built, the general contractor was North Central Construction, Inc. ("North Central")[1]. The four original investors in Debtor, and their approximate initial percentage of ownership, were Tri-State Corn Processors, a farmers co-operative, 26%; several investors from Omaha, Nebraska, known as "the Omaha group," 42%; Williams Bio-Energy, 16%; and North Central, 16%. The plant was in operation during 2002 but was shut down in November of that

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[1] During the pendency of this case, North Central became known as American Prairie Construction Company.

year for maintenance. At the time of the shutdown, the plant was running inefficiently and was faced with high propane costs. An explosion occurred at the plant on December 31, 2002, while it was shut down. During 2003, Debtor used insurance proceeds to repair the damage. The plant, however, did not resume ethanol production.

Tri-State Ethanol Company, L.L.C. ("Debtor"), filed a Chapter 11 petition in bankruptcy on May 23, 2003. In the early months of the case, several matters were addressed; some were contested:

| FILING DATE | SUMMARY OF MATTER AND DISPOSITION |
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| May 30, 2003 | Oral motion for use of cash collateral made by Debtor. A telephonic hearing with parties in interest was held. Debtor's request for authority to use cash collateral of $24,000 to meet payroll and related expenses that day was approved. |
| June 5, 2003 | *Emergency Motion Authorizing Secured Creditor to Pay Debtor's Casualty Insurance Premium* filed by First Dakota National Bank ("First Dakota"). No party appeared in opposition to the motion, which was considered on shortened notice, and it was granted. No appeal was taken.[2] North Central filed an untimely response regarding the content of any order approving the motion. |

[2] Throughout this decision, the Court indicates when appeals were not taken from more significant orders. Some of those orders may have been interlocutory in nature. However, any party seeking appellate review of such an interlocutory order could have sought leave to appeal under 28 U.S.C. § 158(a)(3) and Fed.R.Bankr.P. 8003.

June 12, 2003 *Motion for Authorization to (1) Enter Into Compromise and Settlement Agreement with National Farmers Union Property & Casualty Company on Business Interruption Policy and (2) Request for Expedited Ruling and Hearing* filed by Debtor. Debtor's attendant request for limited and shortened notice was denied by order entered June 12, 2003, for lack of cause shown. No appeal was taken. Objections to Debtor's *Motion for Authorization* were filed by Klein National Bank, Peoples State Bank, South Dakota Board of Economic Development, and First Dakota. Most of the objectors expressed concerns about the disposition of the settlement proceeds; there were limited objections regarding the settlement itself. At the hearing, the parties reported to the Court they agreed the settlement could be entered into, but any proceeds would be distributed only upon subsequent order. No appeal was taken.

June 12,2003 *Emergency Motions Authorizing Secured Creditor to Extend Credit to Pay Debtor's Payroll and for Preliminary Rule 4001(c) Hearing* filed by First Dakota. No party appeared at the hearing in opposition to the motion, which was held on shortened notice, and the motion was granted. No appeal was taken.

June 25, 2003 *Motion for Use of Cash Collateral* filed by Debtor. Debtor also requested and received a preliminary hearing. Responses were filed by the South Dakota Board of Economic Development, First Dakota National Bank, Klein National Bank, Peoples State Bank, and Farmers Cooperative Elevator Company. At the preliminary hearing, Debtor was authorized to use $31,500.00: $6,500.00 to pay employees' health insurance, $20,000 for payroll and taxes, and $5,000 for electricity, which was in accord with the several responses. No appeal was taken.

July 8, 2003 *Motion to Compel Acceptance or Rejection of Lease and for Relief of Stay* filed by JCB Finance, L.L.C., regarding Debtor's lease of a skid steer loader and a forklift. Debtor filed a response stating it intended to assume the leases as part of its Chapter 11 plan. The parties reported an agreement at the hearing. Debtor was directed to notice the agreement for objections. Debtor failed to timely notice the agreement for objections, so the matter was placed back on the calendar for September 22, 2003. At the continued hearing, Debtor was directed to notice the settlement for objections by September 24, 2003. Debtor filed a motion for approval of its assumption of the leases on September 24, 2003, and amended the motion on September 25, 2003. Debtor's amended motion was uncontested, but apparently no proposed order was submitted. The leases were eventually abandoned by order entered January 22, 2004, when Debtor defaulted.

July 11, 2003 *Motion Seeking Adequate Protection or, in the Alternative, Relief From the Automatic Stay* filed by First Insurance Funding Corporation, which financed funding for insurance premiums. Debtor and First Insurance Funding soon reached an agreement, which was approved without objection after notice. No appeal was taken.

Aug. 14, 2003 *Motion for Partial Relief From Automatic Stay* filed by Debtor so it could continue participation in a consolidated state court litigation commenced pre-petition by North Central. An objection was filed by the South Dakota Board of Economic Development wherein it incorporated its response to a companion pleading in Adv. No. 03-1032 (discussed below). The Peoples State Bank, Klein National Bank, and the South Dakota Corn Utilization Council joined Economic Development's objection. Ronning Engineering Company, Inc., and Determan Brownie, Inc., joined the Corn Utilization Council's objection. First Dakota and North Central each objected on substantive and procedural grounds.

As a companion to its partial relief from stay motion, Defendant-Debtor filed in Adversary No. 03-1032 a *Motion for Voluntary Abstention under 28 USC § 1334(c)(1)*. Defendant South Dakota Board of Economic Development filed an objection saying the Bankruptcy Court was better suited to expeditiously resolve the matter. Defendants South Dakota Corn Council, Peoples State Bank, Klein National Bank, Ronning Engineering Company, Inc., and Determan Brownie, Inc., all joined Economic Development's objection. Plaintiff North Central and Defendant First Dakota also objected on substantive grounds.

The Court took both motions under advisement and addressed them in a decision entered November 14, 2003. The Court denied both motions and directed the parties to continue their litigation in Adversary No. 03-1032. No appeals were taken.

Sept. 17, 2003 *Motion to Compel Compliance* filed by the United States Trustee due to lack of F.D.I.C. insurance on certain of Debtor's deposits. Debtor objected, arguing an account "sweep" agreement complied with 11 U.S.C. § 345 and the "sweep" agreement was being noticed for objections, which motion is discussed below. First Dakota also filed a response along the same lines. At the hearing, arguments of counsel were received. The Court declined to make an exception to § 345 by allowing the sweep agreement. The parties submitted an agreed order that comported with the Court's conclusions. No appeal was taken.

Sept. 18, 2003 *Motion for Extension of the Exclusive Period to File a Disclosure Statement and Plan,* wherein Debtor requested an extension to December 31, 2003, to file a plan. Debtor reviewed what it had been doing since the petition was filed. It stated it had determined, "based on the damage done [to its ethanol plan] by the explosion [on December 31, 2002] and the production history of the plant, that re-engineering and reconstruction would be needed in order to allow the plant to restart." It also stated David VanderGriend, President of ICM, Inc. ("ICM"), had "issued a report dated August 7, 2003, detailing the re-engineering and reconstruction [of the ethanol plant] needed along with cost estimates and his recommendations." Debtor further stated the next step was to "find the necessary infusion of capital to proceed with the VanderGriend recommendations. That required cooperation by

> First Dakota National Bank working with the Debtor[,] and a new funding source[,] Tri-State Financial, LLC." This statement appears to be one of the first formal acknowledgments of the existence of Tri-State Financial, L.L.C. ("Tri-State Financial"), in the case file. Debtor described Tri-State Financial in the motion as "a new limited liability company composed of investors who were willing to invest funds in the re-engineering and reconstruction of the Tri-State Ethanol plant to allow it to restart and to operate competitively in the marketplace. Some of the current interest holders in Tri-State Ethanol became investors in Tri-State Financial." No objections to this motion were filed, and Debtor's exclusivity period for filing a plan was extended to December 31, 2003.

On September 25, 2003, Debtor filed three motions. The first was an amended motion to assume leases on equipment, which was approved without objection, as discussed above. The second was a *Motion to Confirm and Establish Debtor in Possession Account at First Dakota National Bank*, in which Debtor sought court approval for an exception to § 345. The United States Trustee objected, saying the proposed account "sweep" did not comply with § 345. The United States Trustee also argued other banks in the region were capable of pledging securities under § 345(b)(2) and Debtor had not shown First Dakota was unable to pledge such securities or obtain a bond under § 345(b)(1). Both parties requested a continuance of the original hearing date. Evidence was received on October 22, 2003, and the parties were directed to submit an agreed order with which the United States Trustee was comfortable. The agreed order was submitted and entered. No appeal was taken.

Debtor's third motion filed on September 25, 2006, was the *Motion to: (1) Approve Stipulation and Agreement for Post-petition Financing, Use of Cash Collateral and Plan Treatment of First Dakota National Bank; (2) Incur Debt with Administrative Expense Priority over other Administrative Expenses (Super Priority); (3) Grant a Post-petition Lien on All of Tri-State Ethanol's Pre-petition Assets to Secure the Grant of an Administrative Expense Priority; and (4) Authorizing the Debtor to Contract for the Re-engineering and Reconstruction of the Plant* ("Motion to Approve Re-engineering[3] Stipulation") and an accompanying *Stipulation and Agreement for Post-petition Financing, Use of Cash Collateral and Plan Treatment of First Dakota National Bank* ("Stipulation"). The Stipulation was composed of several provisions for funding a re-engineering of the ethanol plant. As summarized by the Court in a December 12, 2003, decision, these provisions included:

1. Debtor would contract with a company called ICM and a general contractor, which also might be ICM, to reconstruct the ethanol plant in the manner outlined in an August 7, 2003, report by David VanderGriend, the President of ICM. The August 7, 2003, report was defined as the "Startup Plan." The parties to the Stipulation estimated that

[3] Various parties have used various terms to describe the post-petition work that was done at the ethanol plant to increase its production capacity and improve efficiency. The Court uses the term "re-engineering" herein to refer to that project.

interim overhead costs between September 2003 and January 2004 would be $270,530 and that startup costs, through the first 14 days of production, would be $467,500.

2. Debtor would contract with "an independent management firm ... to direct the future operations" of the ethanol plant. The management that was hired would be acceptable to both Tri-State Financial and the Bank.

3. Tri-State Financial and the Bank would approve all expenditures in advance and Tri-State Financial and the Bank would also approve in writing any expenditures incurred in addition to the "Budget," a term that was defined as Exhibits 1, 2, and 3 attached to the Stipulation. Exhibit 2 itemized a budget for the ethanol plant for September 2003 to January 2004. Exhibit 3 itemized three specific expenses and miscellaneous costs for the first fourteen days of production following the re-engineering and the reconstruction of the plant.

4. Tri-State Financial would loan Debtor not less than $2,000,000 to finance the "Startup Plan," interim costs, and startup costs. The $2,000,000 was to include "the funds that Tri-State Financial has already advanced to [Debtor] to finance [Debtor's] post-petition operating expenses." Debtor would not make any payments to Tri-State Financial or pay any interest on the loan until Debtor obtained confirmation of a plan. If the loan is not repaid by September 1, 2004, it will then bear interest at the prime rate (defined in the Stipulation) or 6%, whichever is less, with a repayment term of 20 years. Tri-State Financial would receive a superpriority lien under 11 U.S.C. § 364(d)(1) on all of Debtor's tangible, pre-petition assets, both real and personal.

5. After using the $2,000,000 in credit from Tri-State Financial, Debtor also would use $663,599.75 that is in its debtor-in-possession account (August 26, 2003, balance) at the Bank plus "any bioenergy or other government payment right, any further business interruption or other insurance settlement or litigation proceeds stemming from construction or design deficiencies or other pre-petition claims, and all other

receipts of the Debtor which are the proceeds of pre-petition claims and all other receipts of the Debtor which are pre-petition rights" received by Debtor during the re-engineering and the reconstruction of the plant. These potential receipts were defined as the "Authorized Cash Collateral" that is secured to the Bank. The total Authorized Cash Collateral used was not to exceed $1,386,599.75. For the use of this cash collateral, the Bank would receive a superpriority lien under § 364(d)(1) on all of Debtor's tangible pre-petition assets, both real and personal). For Debtor's use of this cash collateral, the Bank would also receive under 11 U.S.C. §§ 361(a) and 363(a) a replacement lien effective on the petition date in all of Debtor's "rights in presently existing and after acquired tangible and intangible pre-petition and post-petition assets, the rents, issues, products, proceeds and profits thereof, including any causes of action or proceeds arising out of or relating to the Debtor or its successor's assertion of any claims" under several Bankruptcy Code sections, corn and other inputs, bioenergy and other government benefits including any rights Debtor may have in tax credits, proceeds of lawsuits, insurance settlement or litigation proceeds and inventory and equipment. "This grant, however, provided there is no default, shall in no way limit the Debtor's right to transfer the Debtor's tax credits to equity holders of the Reorganized Debtor free from any such security interest, to be freely used by and available to such equity holders."

6. To the extent that both the Bank and Tri-State Financial have a superpriority lien on the same pre-petition assets, Tri-State Financial shall have first priority on the first $1,000,000 in assets, the Bank shall have a second priority for the cash collateral used up to $1,000,000, Tri-State Financial shall have third priority for "any additional cash collateral advanced" up to $1,500,000, and the Bank shall have fourth priority "in the amount of any additional funds advanced." If Tri-State Financial advances more than $2,500,000, it will be treated as an unsecured administrative claim under 11 U.S.C. § 364(c)(1).

7. Debtor agreed that it would bear "any shortfall in the funds needed for the Startup Plan, interim costs and

startup costs." Debtor stated that it now had the necessary funds or it would have them available when they were needed.

8. Phase II improvements as set forth in the Startup Plan, except the thermal oxidizer that may not be legally required, would be completed with financing through operating profits or additional capital. No distributions will be made to equity holders until Debtor, the Bank, and Tri-State Financial are satisfied that the Phase II improvements have been appropriately financed.

9. Debtor warranted that all issues with Alliance Pipeline Company have been resolved and that the plant will receive an uninterrupted supply of natural gas pursuant to a currently existing contract between Debtor and Alliance Pipeline Company.

10. The Bank holds a pre-petition a claim of $8,757,521.53 on the original construction note plus accruing interest and attorneys' fees and a second claim of $627,577.88 on an operating note plus accruing interest and attorneys' fees. The Bank is over secured. Debtor's original debt agreements with the Bank will remain in full force and effect and will be recognized and assumed in Debtor's plan. The Bank will continue to waive its right to assess a default rate of interest so long as no default or breach of the Stipulation occurs.

11. Debtor will begin making payments to the Bank on March 1, 2004, or 30 days after the plant recommences production, whichever is earlier. These payments will be $117,700 per month on the original note and $10,500 per month on the operating note. "To the extent a reorganization plan has not yet been approved, these [payments] will be considered as adequate protection payments to [the Bank] and junior lieners whose equity position in the Debtor's assets is being eroded by the accrual of interest on Debtor's obligations to [the Bank]."

12. Debtor will file and serve its plan by January 1, 2004. Debtor must obtain confirmation of a plan by July 1, 2004, that has terms consistent with the Stipulation.

13. Upon confirmation of a plan proposed by Debtors, Tri-State Financial's "position will be converted purely to equity and [the Bank] shall retain its position in the Pre-Petition Collateral and the Post-Petition Collateral provided for under [the Stipulation]." Further, the Stipulation provided that Rosholt Farmers Elevator and other producers who have unsecured claims for corn previously sold to Debtor will be "invited to contribute their claims dollar for dollar with the capital contributed by [Tri-State] Financial equity holders and will become equity owners upon confirmation." When Tri-State Financial's lien position is converted to an equity position, Tri-State Financial agreed to disclose to the Bank "the identities of all equity owners of the Reorganized Debtor and the ownership interest of each." [Footnote omitted.]

14. If Debtor defaults on its monthly payments to the Bank under either the Stipulation or Debtor's confirmed plan, the Bank will be entitled, upon an affidavit of default, to its choice of relief from the automatic stay or conversion of Debtor's Chapter 11 case to a Chapter 7 case or dismissal of the Chapter 11 case.

15. Debtor will release and discharge the Bank and its participating lenders from all claims that Debtor or its assigns now has against the Bank or its participating lenders, specifically including any "lender liability" claims, for damages caused by or arising out of the loan transactions, loan servicing, or any negotiations concerning the sale of Debtor's assets or the assumption of the Bank's rights in the loans.

16. Before confirmation, Debtor will cure any delinquencies on any obligation secured by an interest superior to the Bank, including real estate taxes and TIF bond payments, but excluding North Central's claim and any other unliquidated claim.

17. The Bank will not advance its state court cause of action (Civ. No. 03-91 in Roberts County, South Dakota) against guarantors Tri-State Corn Processors Cooperative, Randy Kramer, and James Jandrain so long as there is no default under the Stipulation. If a default occurs, these guarantors agree to execute confessions of judgment

within ten days of a written demand by the Bank. The lawsuits will be dismissed upon confirmation of a plan.

18. Debtor will maintain casualty insurance that is acceptable to the Bank and Tri-State Financial on all personal property and real property improvements and the Bank and Tri-State Financial shall be named the loss payee and mortgagee.

19. Nothing other than the entry of an order approving the Stipulation was required to make the Bank's and Tri-State Financial's rights under the Stipulation "valid, enforceable, attach and perfected[.]"

*In re Tri-State Ethanol Company LLC*, Bankr. No. 03-10194, slip op. at 4-8 (Bankr. D.S.D. Dec. 12, 2003).

Objections to the Motion to Approve Re-engineering Stipulation were filed by the South Dakota Board of Economic Development, the South Dakota Corn Utilization Council, Interstates Electric & Engineering Company, Inc. ("Interstates Electric"), North Central, and Gaylor Engineering. Debtor resolved the objections of the South Dakota Board of Economic Development and the South Dakota Corn Utilization Council. An evidentiary hearing was held October 22, 2003, to address the remaining objections. The Court received several exhibits and the testimony of David VanderGriend of ICM; William Taylor, the attorney who had been representing Debtor in the state court litigation surrounding the plant and its construction; James G. Jandrain and John Hoich, members of the Omaha Group and investors in Tri-State Financial; and Dan Swanda, a lending officer from First Dakota who handled complex loans. At the conclusion of the hearing, the Court requested proposed findings of fact and conclusions of law from each party.

On October 8, 2003, creditor Eugene Paulson[4] filed, while Debtor's Motion to Approve Re-engineering Stipulation was pending, a *Motion for Reduction of Debtor[']s Exclusivity Period to Original 120 Days*. Debtor and First Dakota each objected, and the South Dakota Corn Utilization Council joined First Dakota's objection. Following a hearing on October 22, 2003, the Court reserved a ruling until other pending matters were resolved, including Debtor's Motion to Approve Re-engineering Stipulation. The Court deemed Paulson's *Motion for Reduction* moot when Debtor's extended exclusivity period expired December 31, 2003.

On October 14, 2003, Debtor filed, also while Debtor's Motion to Approve Re-engineering Stipulation was pending, a *Motion for Use of Cash Collateral*. Debtor wanted permission to borrow $50,211.30 from Tri-State Financial and $25,105.65 from First Dakota to pay eight full-time employees and a property insurance premium. First Dakota filed a response and clarified it had consented to Debtor's use of $25,106.65 in cash collateral and the amount to be borrowed from Tri-State Financial was $25,106.65, not $55,106.65. The motion was approved in the amounts as clarified by First Dakota,

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[4] The motion contained signature lines for both Roger Hansen and Paulson, but only Paulson signed it.

and First Dakota was given a replacement lien. This was Debtor's only transaction with Tri-State Financial that was court-approved. The only other request for approval of an agreement with Tri-State Financial was the Motion to Approve Re-engineering Stipulation.

Debtor filed a second cash collateral motion on November 26, 2003, while its Motion to Approve Re-engineering Stipulation was still pending. Debtor sought use of First Dakota's cash collateral to pay a liability insurance premium. First Dakota filed a response stating it consented to Debtor's use of $40,000.00 and clarified Debtor was actually asking for retroactive relief since the Bank had already wired funds to prevent the insurance policy from being cancelled. North Central objected on the grounds the motion did not contain all the information required by local rule and on the grounds it was also entitled to adequate protection. Upon the parties' agreed orders (preliminary and final), Debtor was authorized to use the $40,000.00, and First Dakota was given a replacement lien.

Two other pleadings were filed while the Court had under advisement Debtor's Motion to Approve Re-engineering Stipulation. On December 9, 2003, Zurich American Insurance Company filed a motion seeking payment of post-petition insurance premiums and a deadline for Debtor to assume or reject the contract of insurance. The motion was withdrawn before the scheduled hearing. The other was a motion filed by Eugene Paulson on December 10, 2003, in which he sought the appointment of a Chapter 11 trustee and an unsecured creditors committee. Paulson argued unsecured creditors holding smaller claims were not being appropriately recognized and Debtor was losing about $7,000.00 per day because the ethanol plant was still shut down. Debtor filed an objection stating it had been "consistently attempting to obtain the necessary funding to reconstruct the Ethanol plant and ha[d] worked to protect the interest of all involved[.]" The United States Trustee responded, stating he would fulfill any order of the Court to appoint a committee. He also stated an appointment of a trustee would take some time since the person appointed would have to have a background check and be bonded. The United States Trustee opined operation of the plant would more properly be the result of a confirmed plan. Five creditors also objected to Paulson's motion on various grounds. The Court directed the United States Trustee to again attempt the appointment of an unsecured creditors committee but denied Paulson's request for a Chapter 11 trustee for lack of cause. No appeal was taken. However, the United States Trustee later reported he was unable to constitute a committee.

On December 12, 2003, the Court entered its Decision on Debtor's Motion to Approve Re-engineering Stipulation. Therein, the Court reviewed applicable law and concluded:

The Stipulation proposed by Debtor cannot be approved for three primary reasons. First, the Stipulation's wide-sweeping provisions are more akin to the basis for a plan of reorganization and should not be approved absent the full disclosure, notice, and balloting provisions that are provided by the confirmation process. As noted in *BankWest v. Todd*, 49 B.R. at 636-37, a large-scale cash collateral agreement is not appropriate until a plan is on the table. The Stipulation proposed by Debtors and the consenting lenders does more than provide operating funds until a plan is confirmed. It not only proposes substantial alterations to Debtor's ethanol plant and the incurrence of substantial debt, it also proposes to change the position of present equity holders. That should only be done through the confirmation process.

Second, Debtor failed to show that the necessary credit and use of cash collateral could only be obtained through a superpriority lien. Of the three components necessary for allowing a superpriority lien -- that the financing deal is an exercise of sound and reasonable business judgment, that alternative financing is not available, and that the proposed financing is in the best interests of the bankruptcy estate and creditors -- none were met. See *Swedeland*, 16 F.3d at 564, and *Phase-I,* 285 B.R. at 495-96.

While there was some evidence that the Stipulation was the product of a reasonable business judgment, it was tainted by the fact that Debtor primarily dealt with insiders. Moreover, the Stipulation provided that some insiders' equity positions could be improved and some insiders' personal guarantees of Debtor's operating note would be put on hold.

There was no evidence that Debtor could not obtain alternative financing, such as offering a security interest in unencumbered assets. According to Debtor's own schedules, its assets exceed its liabilities by over $7,000,000. Debtor offered no supporting documentation when Jandrain tried to dispute that number at the hearing. Further, the record was weak regarding what other prospective lenders were contacted, what terms they were offered, and why they refused to deal with Debtor.

> As to whether the proposed financing was in the best interest of the bankruptcy estate and creditors, the record was essentially nonexistent. What the effect that the financing deal would have on other creditors was simply unknown. As noted in *Seth Co.*, 281 B.R. at 153, a superpriority lien is an extraordinary remedy. It should be given only when the proponents have clearly met all the requirements of § 364(d). That was not accomplished in this case.
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> Finally, Debtor's Motion to Approve [Multi-faceted Stipulation] and the attendant Stipulation will not be approved because Debtor failed to show that existing creditors are adequately protected. *See Swedeland*, 16 F.3d at 564, and *Mosello*, 195 B.R. at 292. To demonstrate adequate protection, Debtor needed to present good appraisals and valuations that permitted the Court to compare the current value of the plant to its projected value following the re-engineering and reconstruction. The only current valuation the Court had was the value that Debtor had put in its schedules, and Debtor's insiders took exception to that value at the hearing. The only projected value of the plant following the re-engineering and reconstruction was $24.2 million as stated in testimony by Jandrain and Swanda, but there was little documentation to support that number. The Court also needed to know Debtor's current equity position, if any, based on the present position of its several secured creditors, and it needed to know how these secured creditors' positions would be affected by the re-engineering and reconstruction and by the superpriority liens that Debtor wanted to give. Without those numbers, the Court could not determine if existing secured creditors' claims needed protection from erosion and, if so, to what extent.

*In re Tri-State Ethanol Company LLC*, Bankr. No. 03-10194, slip op. at 27-30 (Bankr. D.S.D. Dec. 12, 2003). No appeal was taken.

William L. Biggs, Debtor's out of state counsel, filed a fee application on December 29, 2003. Responses filed by the United States Trustee and North Central in mid January 2004 disclosed a possible conflict of interest between Biggs' firm's representation of both Debtor and some equity security holders who had formed Tri-State Financial. The Court took the fee application under advisement and directed the United States Trustee to investigate further Biggs' law firm's possible conflict of interest. The United States Trustee's investigation resulted in a motion to vacate the order approving the employment of Biggs' law firm. Biggs and his firm responded by withdrawing as counsel and declaring they would not seek any fees from Debtor or the bankruptcy estate. The withdrawal was approved by order entered February 27, 2004. No appeal was taken.

Debtor filed a plan and disclosure statement on December 31, 2003. At a hearing on February 10, 2004, Debtor was directed to make changes to the disclosure statement to resolve the objections filed by North Central. Debtor filed the amended disclosure statement and another plan on February 17, 2004. Debtor's plan was set for a confirmation hearing on April 7, 2004. Debtor filed another modified plan on March 2, 2004, and it was set for a confirmation hearing on April 7, 2004.

On January 21, 2004, Debtor sought approval to finance $117,126.00 in various insurance premiums. No objections to the motion were filed, and the motion was granted. Debtor filed a similar motion on April 9, 2004, to finance its property insurance premiums. That motion, too, was approved, with some clarifications in the order to address concerns raised by First Dakota.

Eugene Paulson filed a second motion for appointment of a Chapter 11 trustee on February 12, 2004. Objections were again filed by various creditors, and an evidentiary hearing was set for April 7, 2004.

Eugene Paulson and Roger Hansen filed a plan and disclosure statement on February 23, 2004. A hearing on their disclosure statement was also set for April 7, 2004.

By motion filed February 27, 2004, Debtor sought another extension of its exclusivity period to obtain confirmation of a plan. Tri State Corn Processors Cooperative joined. The motion was denied because it had not been filed before the first extended exclusivity period expired, as required by 11 U.S.C. § 1121(d). No appeal was taken.

Tri-State Financial first formally appeared in the case on March 8, 2004, when Attorney Biggs, Debtor's former counsel, filed a notice of appearance on the entity's behalf.

During this first year of the case, two adversary proceedings were commenced. Debtor, Tri State Corn Processors Cooperative, and Traverse Guarantors commenced Adversary No. 03-1053 against Traverse Electric Cooperative, Inc., on October 31, 2003. They alleged Traverse Electric Cooperative violated the automatic stay when it collected on a letter of credit. Tri State Corn Processors Cooperative and Traverse Guarantors were dismissed as plaintiffs on January 8, 2004, for lack of standing. The adversary proceeding itself was dismissed on March 3, 2004, when the parties failed to comply with a scheduling order.

North Central commenced Adversary No. 03-1032 against Debtor and several other parties involved in the ethanol plant construction. North Central sought a determination of the validity, priority, and extent of the liens and other encumbrances on Debtor's assets. This adversary proceeding was, in significant measure, a continuation of the state court action that had been pending when Debtor filed for bankruptcy relief. Counter and cross-claims followed. Defendant First Dakota sought partial summary judgment in late 2003. The issue presented was the impact of certain lien waivers. Plaintiff North Central filed a cross motion in mid-January 2004. Responses and briefs were received. Some contested discovery issues arose in the interim.

As a consequence of the partial summary judgment motions in Adversary No. 03-1032 and the effect the ruling might have on confirmation of a plan, by order entered March 24, 2004, the Court cancelled the April 7, 2004, hearings on Hansen and Paulson's disclosure statement and second motion for appointment of a Chapter 11 trustee and on confirmation of Debtor's March 2, 2004, plan.

While the partial summary judgment motions were pending, the Court continued to receive ballots on Debtor's plan and responses to Paulson and Hansen's disclosure statement and second motion for appointment of a trustee. In the interim, Debtor sought and obtained approval of another insurance premium financing agreement. Debtor also sought approval of settlements with the South Dakota Board of Economic Development and the South Dakota Corn Utilization regarding plan treatment.

On May 10, 2004, the Court entered its decision on the cross-motions for partial summary judgment in Adversary No. 03-1032. First Dakota's motion was denied, and North Central's motion was granted in part. First Dakota appealed the decision. The United States District Court for the District of South Dakota dismissed the interlocutory appeal *sua sponte* for procedural miscues.

On May 10, 2004, the Court scheduled a status conference for May 25, 2004, on the pending matters in the main case. At the status conference, Hansen and Paulson's disclosure statement and second motion for appointment of a Chapter 11 trustee and Debtor's modified plan were reset for an evidentiary hearing on June 21-22, 2004. Debtor's pending settlement motions with the South Dakota Board of Economic Development and the South Dakota Corn Utilization were set to be heard with the evidentiary confirmation hearing on June 21-22, 2004.

On May 26, 2004, creditors William F. Murphy Self Declaration of Trust and Mike D. Murphy ("Murphy Trust") filed their own plan and disclosure statement. The hearing on their disclosure statement was set for June 21-22, 2004, with the several other matters.

On May 26, 2004, the United States Trustee filed a *Motion to Dismiss or Convert to Chapter 7* on the grounds Debtor was behind on quarterly fee payments and there was an inability to confirm a plan. The United States further stated,

> Once the Court determines that cause exists to dismiss or convert this case, it should consider the best interests of creditors and the estate before deciding whether to dismiss or convert the case. *In re Mazzocone*, 180 B.R. 782, 785 (E.D. Pa. 1995). The Debtor has significant assets which, if properly marketed, could generate sufficient cash to pay secured claims and at least a portion of the unsecured claims. United States Trustee believes that it is in the best interests of the creditors in this case that it be converted to a chapter 7 proceeding.

Many objections to this motion were filed, including approximately 85 form-type objections by corn producers who were owed money for corn they had delivered to Debtor's ethanol plant. The form objections stated:

> I, [name or names inserted] have a claim for corn delivered to Tri State Ethanol LLC and/or a claim for the guarantors paid Travers Electric cooperative. I object to dismissal or conversion to Chapter 7 of this bankruptcy. I support the debtor's reorganization plan, as this plant is very much needed in the community and should be given a working chance to recover.

A signature followed.

In its objection to the United States Trustee's motion to dismiss or convert, Debtor addressed only the quarterly fees. It said the check initially had been mailed to the wrong address and the error had now been corrected. The Murphy Trust responded and urged the Court to consider its liquidation plan before ruling on the United States Trustee's motion. In an objection filed June 8, 2004, the Tri State Corn Processors Cooperative stated:

> Progress on the improvements to the Debtor's facility is good and it is anticipated the facility will be operational soon. The proposed Plan by the Debtor is in the best interest of Tri State Corn Processors Cooperative, whose membership consists of local individuals including many farmers. Conversion or dismissal at this time would damage those individuals.

This was the first indication the Court found in the record that re-engineering work on Debtor's ethanol plant had continued, even though Debtor had failed to obtain court approval for that work. The South Dakota Board of Economic Development made a similar comment in its June 11, 2004, objection. First Dakota's objection filed on June 17, 2004, elaborated:

> The Debtor has various owners who have been funding its employee, insurance and other overhead costs, as well as the necessary reconstruction and re-engineering of the Debtor's plant. First Dakota believes that if the case converted to Chapter 7, there is very substantial risk that Tri-State Financial, LLC, will no longer fund the reconstruction and start-up and operation of the plant, and the value of the plant would be reduced to liquidation value. First Dakota is informed that if the

> case is dismissed, the owners of the Debtor will complete the construction process and fund the start-up process which should result in generation of sufficient revenues to pay all creditors in full, preserve the positions of employees and save the equity positions of the corn producers and other owners of the plant.

Ronning Engineering responded saying it preferred conversion over dismissal since a return to the state court litigation -- if the case were dismissed -- would be expensive and detrimental to it.

On June 18, 2004, Paulson and Hansen filed a pleading that essentially said they were withdrawing their proposed plan and disclosure statement if a Chapter 11 trustee were not appointed. Therein, they too referenced the reconstruction and re-engineering that apparently was continuing on the ethanol plant:

> [The South Dakota Board of Economic Development] claim[s] that they support the Debtor[']s plan because they believe, for whatever reason, that their plan will somehow repay the creditors. Yet they know nothing about whether the Debtor has the funds necessary to implement their plan. They seem to know nothing about the millions of dollars that are being expended on the plant now and for the last several months. . . .
>
> . . . .
>
> We believe from information and belief that the Yankton Bank [First Dakota] has pretty much called the management shots on this business frm the first. We also believe that they are pretty much responsible for it being in the shape it is in at this point. We believe, from the information that we have been able to obtain, that they may be paying for the supposed improvement that are going on now. . . .

*Motion for Permission to Withdraw Disclosure ...*, pp. 1-2, by Eugene Paulson and Roger Hansen (June 18, 2004) (file doc. 676).

Hansen and Paulson went on to argue against some of the reconstruction and re-engineering proposals made by ICM.

Jerrold L. Strasheim, out of state counsel for Tri-State Financial, L.L.C., made his first appearance in the case on June 18, 2004, when he sought and obtained admission *pro hac vice* through local counsel Terry N. Prendergast.

A hearing on the several pending matters was held June 21, 2004. Debtor withdrew its modified plan, and a July 28, 2004, hearing was set for confirmation of another modified plan Debtor intended to file. The hearings on Hansen and Paulson's disclosure statement, the United States Trustee's motion to dismiss or convert, Hansen and Paulson's second motion for appointment of a Chapter 11 trustee, and Murphy Trust's disclosure statement were continued to July 28, 2004. Debtor's proposed settlements with the South Dakota Board of Economic Development and the South Dakota Corn Utilization Council were approved.

During the June 21, 2004, hearing, Debtor, North Central, Interstates Electric, Tri-State Financial, and John Hoich reported an agreement on the record that would be noticed for objections. The report was initially given by Ronald J. Hall, counsel for North Central.

> Your Honor, this is an agreement for resolution of North Central's claim as well as or -- and objections as well as Interstates Electric's objections and claims.

> And the agreement is both with the debtor and with Tri-State Financial, LLC, as well as John Hoich [sic] wh -- it's my understanding -- has personally committed to this deal. And the deal is as follows:
>
> North Central has agreed to sell and Tri-State Financial, LLC/John Hoich [sic] as a buyer have agreed to purchase North Central's claim in Class 12 and North Central's equity interest in Class 18 of the debtor's plan for a purchase price of two point five million ($2,500,000), which will be payable in full upon North Central's delivery of an appropriate document transfer and assignment of its claim and interest to the buyer, and that transfer will be without recourse.
>
> Second, this purchase does include the purchase and transfer of Interstates Electric's Class 13 claim for the price of four hundred seventy-five thousand dollars ($475,000) cash payable in full out of the total purchase proceeds upon Interstates Electric delivering appropriate transfer document. And again that -- [the Court interrupted to clarify the amount] Again that, that transfer by Interstates Electrics will receive the balance of its claim in Class 13 in the amount of thirty-four thousand seven hundred eighty-three dollars $34,783) under the plan as modified, and that will be over three years at nine percent.
>
> Third, the purchaser and -- or the parties agree that that total purchase price of two point five million will be allocated as follows: For North Central, North Central's Class 12 claim, one point five million, for North Central's Class 18 interest -- equity interest, one million; and obviously four hundred and seventy-five thousand dollars($475,000) of that amount, of the one point five in class -- in North Central's Class 12, four hundred seventy-five thousand dollars ($475,000) of that is to be allocated to Interstates Electric's Class 13 claim.

TRANSCRIPT OF RECORD at 8-9, *In re Tri-State Ethanol Company LLC*, Bankr. No. 03-10194 (June 21, 2004)(file doc. 974).

Debtor's group health insurance provider, Wellmark Blue Cross and Blue Shield of South Dakota, sought relief from the stay on June 7, 2004, to cancel the policy due to a default on premium payments. Though Debtor did not resist, the Court was made aware the parties were working on an agreed order.

Debtor filed its modified plan on June 25, 2004, and a confirmation hearing was set for July 28, 2004. While this modified plan was pending, on July 2, 2004, Debtor filed another motion to incur secured debt. Therein, Debtor stated:

> Debtor is in the business of providing ethanol to various customers and is in the process of rehabilitating its plant so that it may continue to provide such ethanol and in the process thereof, needs the sum of $160,000.00 for the months of July and August in order that wages can be paid and expenses paid as shown above.

The source of the funds was to be First Dakota. Debtor requested preliminary authority for $35,000 by July 9, 2004, for wages and attendant insurance and taxes, "and equipment and utility payments shortly after such date." The motion went on to state Debtor contemplated it would be "up and running in the middle of August and the Plan will be confirmed prior to the end of August." First Dakota filed a response saying it had agreed to allow Debtor to use collateral in the amount stated but not to loan Debtor additional funds; the South Dakota Board of Economic Development and the South Dakota Corn Utilization Council joined First Dakota's response. North Central filed a response setting forth concerns about the lien to be given to First Dakota and whether it (North Central) would remain adequately protected. At the preliminary hearing on July 9, 2004, Debtor was authorized to use $10,401.49 for payroll.

On July 14, 2004, North Central filed a *Motion to Approve Compromise Settlement and Release* regarding the deal among North Central, Debtor, Tri-State Financial, and Interstates Electric Engineering Company, Inc., as had been referenced on the record June 21, 2004. Tri-State Financial filed a response stating the "orally announced stipulation does not include all terms of the settlement and in some aspects is unclear or incomplete, or both...." It went on to state the parties were still negotiating. Debtor filed a response and stated, "[T]he Motion does accurately reflect the Agreement made by Debtor in Court but ... Debtor is in a position in which it would be quite difficult for Debtor to enter into the proposed Agreement unless North Central Construction and Tri-State Financial are able to reach an Agreement." An evidentiary hearing on North Central's motion was set for July 28, 2004, with the several other matters. The Court later amended the scheduling order to move this matter to the afternoon of July 27, 2004, since it apparently would affect confirmation of Debtor's proposed plan on July 28, 2004.

Hansen and Paulson filed another plan and disclosure statement on July 23, 2004, thus rendering their earlier ones moot. The earlier ones were taken off the July 28, 2004, calendar.

On July 27, 2004, the Court first met with counsel in Chambers, and then counsel negotiated privately. On the record, the Court reported North Central's motion to approve its agreement with Debtor, Interstates Electric, and Tri-State Financial apparently was moot because the parties now disputed whether they had a deal on June 21, 2004. The Court also stated it could not force Tri-State Financial to consummate a deal. The Court accordingly advised the parties the confirmation hearing set for the next day would be a contested matter and confirmation appeared "difficult to obtain" based on the in-chambers discussion. The Court advised the parties it would take up the United States Trustee's motion to dismiss or convert as the second matter of the day if Debtor did not obtain confirmation of its modified plan.

On July 28, 2004, the Court took appearances and called the hearing on the confirmation of Debtor's second modified plan dated June 24, 2004. Debtor's counsel, A. Thomas Pokela, advised the Court Debtor was joining the United States Trustee's motion to dismiss. In response, the Court stated, "I guess what I am interested in is whether it would be appropriate to dismiss or convert, and that under the Code is in -- I think in the best interest of the creditors."

Attorney Pokela acknowledged the Court's statement and asked whether the Court wanted a witness or argument on that issue. The Court left that decision to Attorney Pokela. Attorney Pokela then presented as a witness David VanderGriend, the owner and president of ICM. VanderGriend testified, on direct and cross-examination, ICM had been working, without a contract, for six months to re-engineer Debtor's ethanol plant to increase its production capacity to 20 million gallons per year. He said ICM had expended $1.2 million to date and "Mr. Hoich and his group" had put an additional $900,000 into the re-engineering project. VanderGriend stated ICM expected to be paid for its work but it had agreed to take an equity position in the plant in exchange.

VanderGriend testified the plant, after completion of additional work at a cost of over $200,000, would be operational September 1, 2004, would be licensed by the state by September 15, 2004, and, once operating, would produce at 20 million gallons about two weeks later and at 22 million gallons six months later. VanderGriend testified the plant should cash flow within 90 days after start-up. VanderGriend opined the plant would generate sufficient revenues to allow Debtor to pay all its creditors in full over time. He estimated creditors' claims would total $5 million. He did not know how much it would cost Debtor to resolve pending construction-related litigation. He did not know whether some natural gas pipeline issues had been resolved.

VanderGriend stated a subsidiary of ICM, United Bio Energy, was expected to be hired by Debtor to operate the plant. He testified Debtor's staff had doubled from the original six to twelve, the twelve would constitute permanent staff, and another 20 permanent employees would eventually be added to make the plant the largest employer in Rosholt, South Dakota.

Regarding the value of the plant, VanderGriend testified it was currently worth about $25 million and would be worth 50% more as an operable facility. These values generated additional questions and clarifications during the remainder of the hearing.

The Court questioned VanderGriend about the value of the claims against Debtor. VanderGriend again stated he thought the claims totaled about $5 million. The Court directed the witness to a liquidation analysis that indicated secured and unsecured claims totaled just over $19 million. In response, VanderGriend acknowledged he had no idea what kind of payments would be required to pay creditors. VanderGriend further testified operating funds that would be needed would be about $2 million per year.

James Jandrain, who holds an ownership interest in Debtor, next testified on Debtor's behalf. He is a Certified Public Accountant and holds a law degree but is not a licensed attorney. Jandrain acknowledged "all the members of the Co-op" and Randy Kramer had given personal guarantees "on a temporary operating loan" related to the ethanol plant before the plant filed bankruptcy.

Jandrain acknowledged claims against Debtor totaled just over $19 million. He reviewed an exhibit forecasting Debtor's income and expenses and acknowledged it did not include costs associated with pending litigation. He testified the plant would need an additional $3.5 million to become operational. Jandrain also testified Debtor already had spent for operating costs around $800,000 it had received as a government subsidy payment. Jandrain acknowledged present equity holders' interests would be diluted due to the need for additional capital. Finally, Jandrain acknowledged if the case were dismissed there was no binding agreement with creditors regarding how and when they would be paid and Debtor had no plan to resolve the present state court litigation.

Debtor also called Steven Heesch, a Rosholt area farmer who was the chairman of Debtor's board of directors and who was also on the board of directors for Tri State Corn Processors Cooperative. Heesch testified the government subsidy payment was still being held by Debtor and had not been expended. Heesch testified he had been contacted by about nine potential buyers for the plant, including a couple just recently. He further stated an agent of another potential buyer had toured the plant since the bankruptcy began. Heesch testified the ethanol plant, after the explosion, had been completely repaired before Debtor filed bankruptcy but had not been "started up." Heesch said the bankruptcy filing was precipitated by a sale that fell through and First Dakota's impending foreclosure action. He acknowledged Debtor would again face the foreclosure action if the case were dismissed.

The Court received closing arguments from counsel. The United States Trustee, the Murphy Trust, North Central, Interstates Electric, and Ronning Engineering all argued in favor of conversion. First Dakota, Tri State Corn Processors Cooperative, and Debtor argued in favor of dismissal. The Court briefly noted problems with Debtor's plan and questioned whether this case had been filed in good faith and whether it was continuing in good faith. The Court ordered the case to be converted to Chapter 7 on oral findings and conclusions:

> The most important advantage to conversion is that the Chapter 7 Trustee is independent, does not have a vested interest in who gets paid, when and how much. It would appear that the Chapter 7 Trustee may be able to get the plan[t] up and running within a relatively short period of time or offer the plan[t] for sale, also within a relatively short period of time. They may be able to [employ] ICM if that's appropriate and move for credit to complete the upgrade project, again if that's appropriate. They can also quickly assess independently whether dismissal is appropriate.
>
> A dismissal, as has been pointed out in argument by counsel, puts everybody back to start. It puts them back into the place unknown as far as we're concerned.
>
> Today we have a plan to get the plant back on track,

> and also we've got litigation that looms. The only evidence we have today is the plant's total worth was -- I think the testimony was twenty-five million. Unsecured and secured debt is somewhere and estimated, I would say administrative costs would be somewhere in the range of twenty million. So for a sale, if that were to be effectuated, it would appear that everybody would be paid in full.
>
> And for these reason I think that the case will be converted to a Chapter 7. As a caveat I would say that the debtor's principals and the debtor's counsel and other parties in interest I'm sure are aware, but I would caution them, that they would have to fully cooperate with the Chapter 7 Trustee to protect all of the debtor's assets from this moment forward and help him or her in the process of them doing their job the most quickly and efficient way.

TRANSCRIPT OF RECORD at 91-92, *In re Tri-State Ethanol Company LLC*, Bankr. No. 03-10194 (July 28, 2004)(file doc. 1322)(bracketed notes correct transcriptionist errors). The conversion order was entered July 29, 2004. No appeal was taken. The United States Trustee appointed John S. Lovald as the Chapter 7 trustee.

By motion filed August 3, 2004, Trustee Lovald promptly sought authority to complete the re-engineering of the plant and to operate it for three months. He proposed to use an account balance of $546,221.53, which was First Dakota's cash collateral, and a line of credit of $4,000,000 from a new business entity called "New Corp." A budget attached to the trustee's motion indicated $1.5 million of the total funds requested would be needed to complete the re-engineering project. Trustee Lovald sought preliminary authority to use $33,927.90 in cash collateral within the week to pay insurance premiums and another $64,654.00 for the coming payroll. The South Dakota Board of Economic Development filed a response to clarify the $1.5 million Trustee Lovald sought to finish the re-engineering of the plant did not include any pre-conversion debt. A preliminary order was entered August 5, 2006, to allow the trustee's use of $33,927.90 in cash collateral to pay insurance premiums.

North Central filed an objection to the trustee's proposed expenditure of $1.5 million to complete the re-engineering and to the request for credit authority of $4 million. First Dakota filed an objection similar to North Central's. Interstates Electric also joined North Central's objections. It further stated it was confused by the significant increase in projected costs to complete the project from those presented by Debtor's witnesses at the July 28, 2004, hearing. Interstates Electric also argued grounds for giving the proposed creditors a super priority lien status were not shown and no showing had been made that completion of the re-engineering was appropriate when an attempted start-up of the plant might reveal latent problems that would actually decrease the value of the plant.

Trustee Lovald filed a supplement to his motion to list those persons or entities that had agreed to invest in New Corp. and the amounts each had pledged. Radio Engineering Industries, Inc., was to be the largest investor in New Corp. at $2,260,000 pledged; ICM was to be the second largest at $872,000. Tri-State Financial was not listed.

A preliminary hearing on the contested amount of Trustee Lovald's preliminary request was held August 6, 2004. The hearing minutes provided:

> Trustee Lovald was authorized to use preliminary cash collateral of approximately $70,000 to meet today's payroll, employ a consulting engineer, pay a necessary state permit fee, and other immediate related expenses. After receipt of the report from the estate's engineer, Trustee Lovald may authorize ICM to resume construction pending a final credit and cash collateral hearing on August 17, 2004, at 2:00 p.m. in Sioux Falls. ICM shall receive a priority lien for the reasonable and necessary costs for this interim construction. The last date for objections to Trustee Lovald's final request for use of cash collateral and to incur secured debt shall be moved back from August 23, 2004, to August 16, 2004, at 4:00 p.m.

Upon Trustee Lovald's request, the final hearing was rescheduled to August 25, 2004. The trustee's request was based upon several purchase offers he had received for the ethanol plant in its present state. On August 24, 2004, Trustee Lovald filed a second motion to reschedule. This time he said he had a purchase offer from ABUS, L.L.C., to purchase the plant. The hearing was rescheduled to September 2, 2004.

Upon the trustee's request at the September 2, 2004, hearing, most of the relief requested in his cash collateral and credit motion was deferred. The Court approved a limited use of $186,703.60 in cash collateral from Debtor's former debtor-in-possession account. First Dakota was also permitted to apply the balance of the bankruptcy estate's checking account, about $253,296.40, as adequate protection payments for August and September 2004 (partial) and a "loan" payment. First Dakota's interest rate during "these periods" was not to exceed 9%. No further hearings were held on the deferred portions of the motion, and Trustee Lovald withdrew it on March 11, 2005.

On August 25, 2004, Trustee Lovald filed a motion for an extension of time in which the estate had to assume or reject any [unnamed] executory contracts since a potential purchaser of the plant might not want to continue some of them. Aux Sable Liquid Products, L.P., ("Aux Sable") objected. It apparently held one of the executory contracts the Chapter 11 debtor-in-possession had assumed. Aux Sable argued against the delay since it would only increase its administrative claim "with little hope of payment due to the replacement liens and the 'pending approval' [of a] Super Priority Lien of First Dakota National Bank." At the hearing, the parties agreed to an extension through November 30, 2004.

By motion filed September 10, 2004, Trustee Lovald sought approval of the terms regarding a sale by auction of the estate's assets, in essence the ethanol plant. Two potential buyers, Aux Sable and EXL Group, L.L.C. ("EXL") objected. At the conclusion of the hearing, the objections were overruled in part and sustained in part, and the sale terms and bidding procedures were set forth in the minutes and an order. The auction was set for October 22, 2004.

On September 23, 2004, Trustee Lovald filed a follow-up sale motion that included the sale terms and bidding procedures previously established by order and that identified EXL as the proposed initial buyer whose bid would be subject to upset at the October 22, 2004, in-court auction. EXL's offer was $18,800,000 and the assumption of a $1,500,000 construction debt to VanderGriend Construction and ICM that was incurred post-conversion. Approximately 81 form objections were filed that identified the objector and the amount of their claim and stated the plant should not be sold to EXL because it had no ties to the Rosholt area. The form objection further stated a sale

> to a consortium of Tri-State Financial LLC or its members and unsecured creditors who are willing to waive their claims against the bankruptcy and take an equity interest in the new entity formed by the consortium. Under the consortium approach, the Rosholt community and its businesses would undoubtedly benefit more than with a sale to EXL. More importantly, Claimant expects a better return on the equity that Claimant will obtain for waiver of its claim. . . . The approach of the consortium will come closer to paying Claimant, and other Claimants waving their unsecured claims, in full. Claimant does not

see how this can hurt other creditors.

One of the objectors using the form pleading was James Jandrain, who said he held an unsecured claim for $31,512.50. Tri-State Financial objected to this sale motion on the grounds the sale price to EXL was too low and the sale terms "unjustly" did not provide for payment of post-petition, pre-conversion re-engineering costs. Tri-State Financial briefly outlined its proposed purchase by a consortium it was leading. Tri State Corn Processors Cooperative joined Tri-State Financial's objection.

While the trustee's follow-up sale motion was pending, on October 4, 2004, Tri-State Financial filed a motion asking the Court, on shortened notice, to change some of the sale terms established by the September 22, 2004, order. Tri State Corn Processors Cooperative joined Tri-State Financial's motion. Responses were received from Trustee Lovald, EXL, who joined Trustee Lovald's objection in addition to setting forth its own objections, and First Dakota, who opined Tri-State Financial should be compensated, "even if on a quantum merit basis," through the sale process or a subsequent claim allowance.

The Court entered a written decision and denied the motion by order entered October 8, 2004. The Court concluded Tri-State Financial's motion did not raise any arguments it could not have raised earlier when the bidding procedures motion was considered.

The Court also responded to each of Tri-State Financial's four requests:

> As noted above, Tri-State Financial's concerns regarding the bidding procedures order were essentially four-fold. Even if these objections are considered at this late date, they are essentially without merit.
>
> First, Tri-State Financial wants to eliminate all prequalification standards for bidders except for the making of a security deposit. Alternatively, it wants to be allowed to submit financial information about itself other than "CPA audited or reviewed financial statement." As Trustee Lovald aptly stated, the standards for being a qualified bidder for this particular sale of an ethanol plan[t] were designed to insure that the successful high bidder can close the sale within a reasonable time. With such a large sale needing to take place in a relatively short period of time, this requirement is prudent and necessary. Moreover, Trustee Lovald stated that the financial information offered by Tri-State Financial likely will meet the minimum requirements set forth in the bidding procedures order. Thus, Tri-State Financial is not prejudiced solely because it does not have audited financial statements to give the Trustee to become a qualified bidder.
>
> Second, Tri-State Financial wants to delay the closing date to December 1, 2004, and it is willing to assume the expenses of maintaining the plant until closing if it is the high bidder. Had this objection been raised timely, it likely could have been reflected in the bidding procedures order. At this juncture, however, it is too late to make this change, especially where it would be necessary for Trustee Lovald and other interested parties to identify and quantify the maintenance expenses that would be assumed by the bidder.
>
> Third, Tri-State Financial wants to be deemed a qualified bidder if its offer includes, as a substantial part of the compensation package, waivers of administrative or general unsecured claims against the Chapter 7 estate. Tri-State Financial and Tri State Corn Processors informally raised this objection through their

> oral arguments at the hearing on the bidding procedures motion. As the Court found on the record at that hearing, a claim waiver bid would not comport with §363(k). Moreover, as the Court previously stated, these administrative or general unsecured claims that would be waived must first be valued through appropriate litigation. Consequently, Tri-State Financial in its Motion to Amend has not identified what manifest error of law or fact the Court made in concluding that cash-only bids, except as modified by § 363(k), would be accepted.
>
> Fourth, Tri-State Financial wants the bid procedures order modified to allow Trustee Lovald significant discretion in deciding whether Tri-State Financial has the ability to close a sale by December 1, 2004, and if so satisfied, to not require it to provide other financial information. As Trustee Lovald has explained, that is precisely what the bidding procedures order now does. The order states that Trustee Lovald will advise potential bidders of the minimum financial information required, and he will request more if he needs it. Under the minimum financial standards, audited financial statements are not required if the accuracy of the statement is attested to by the bidder or its representative. Thus, the order already provides for what Tri-State Financial has requested.

*In re Tri-State Ethanol Company LLC*, Bankr. No. 03-10194, slip op. at 9-11 (Bankr. D.S.D. Oct. 8, 2004).

By order entered *sua sponte* on October 18, 2004, the October 22, 2004, in-court auction was rescheduled to October 26, 2004. The undersigned had a family emergency.[5]

On October 18, 2004, ICM filed an application for allowance of an administrative expense for the re-engineering of the plant, work which it said Debtor had requested in the ordinary course of its

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[5] The undersigned's mother passed away on October 18, 2004.

business. On October 26, 2004, the Court granted ICM's request for limited notice but also sought an amended application with some changes to the attached itemization. The Court also cautioned counsel the Chapter 11 debtor-in-possession had not obtained authority for ICM to incur the subject post-petition expenses. ICM filed an amended application on November 17, 2004. It stated, "While in Chapter 11, the debtor in possession and other parties in interest, requested [ICM] to re-engineer [the] plant." ICM stated it had already received $1,190,000.00 from Tri-State Financial for its post-petition work "to remedy a multitude of engineering problems with the ethanol plant," and it sought another $2,324,466.12 as an administration expense. It stated its "contribution was necessary to preserve the estate and made a substantial contribution to it" by increasing its production capacity of the ethanol plant. In the amended application, ICM further stated it

> regrets having completed this work without having first obtained the approval and protection of a Court order granting it a super priority under the Code. It asks the Court to make an equitable award based on *quantum meruit*, or, the entry of such *nunc pro tunc* orders as may be necessary to insure that ICM, Inc. (characterized by several parties as the "White Knight" in this case) be treated with fundamental fairness.

*Amended Application for Allowance of Administrative Expense*, pp. 1-2, by ICM, Inc. (Nov. 17, 2004) (file doc. 1137). Trustee

Lovald and North Central both requested ICM's administrative expense claim be deferred until after the plant sale closed. At a hearing on the matter held February 8, 2005, which was just after the plant was sold to Tri-State Financial, ICM withdrew its amended application because it felt its claim could now be paid as a general unsecured claim.

At the October 26, 2004, in-court auction, ABUS, L.L.C., was the successful high bidder at $28 million on agreed sale terms, which changed in noted respects during the long hearing. In his affidavit in support of his objection to Tri-State Financial's instant recusal motion, Trustee Lovald adeptly described what happened on the sale day and what transpired thereafter, all of which resulted in Tri-State Financial's being the successful purchaser of the ethanol plant on February 4, 2005, for $27,900,000:

> 3. Trustee filed a motion with the Court to approve a set of bid procedures to be followed by all parties wishing to bid on the plant.
>
> 4. One of those procedures was that once the high bidder was identified, the sale must close within 30 days of the approval of the sale.
>
> 5. Trustee was expending cash funds of approximately $60,000 per month to maintain the plant, and to maintain security at the plant, preparatory to the closing of the sale.
>
> 6. Trustee requested the 30 day closing requirement because that was the approximate time that Trustee

estimated that the estate would run out of funds to pay for plant preservation and security. Other than the fact that the estate would run out of funds, there was no major significance associated with picking that date for the closing of the sale.

7. The morning wrangling that Affiant Larsen refers to was an exchange between Attorney James Canon, who represented one of the three potential bidders, EXL Group, who was requesting a clarification from the Court that the form contract that had been submitted by EXL with the lead bid for the sale of the plant contained a 'performance guarantee'.

8. The procedure that had been followed by Trustee with respect to the initiation of the bid process was to obtain a lead bid, which in this case was submitted by the EXL Group for $18,800,000 plus an offer on the part of the EXL Group to pay $1,500,000 to ICM for the post-conversion work in completing the plant retrofit. In other words, the opening bid submitted for the plant by the EXL Group was $20,300,000. The matrix of a proposed contract was included within the bid.

9. Attorney Carlon was pointing to certain phrases within the attached contract matrix in claiming that those words created a performance guarantee on the part of the contractor ICM as well as the Chapter 7 Estate. Trustee's position was that no such performance guarantee had been offered as part of the bid process and after extensive exchanges and arguments over the course of the mornings session it was so determined. Attorney Carlon then announced that the EXL Group would not be an active bidder. The performance guarantee issue had never been raised before by Attorney Carlon in any discussions with the Trustee. In several telephone conferences with Attorney Carlon the day prior to the bid hearing process, Attorney Carlon had stated that his client was ready, willing and able to "blow the competition away" during the course of the bidding process, it came as a complete surprise to Trustee that the EXL Group was not willing, able or prepared to participate in an open bidding process for the sale of the plant.

10. After the morning session, that left the

Chapter 7 Estate with two potential bidders Tri-State Financial and ABUS. ABUS indicated to the Court that the requirement that the successful party would have to close the sale within 30 days of approval presented an impediment with its potential lenders in that it would not be able to bid if the closing date remained firm for that time frame. ABUS indicated it would need 15 more days, to approximately December 15, 2004 to be prepared to close the sale. That announcement presented a serious problem for the Chapter 7 Estate inasmuch as it indicated that there would be only one bidder at this sale who was ready, willing and able to bid, which would be Tri-State Financial, and that Tri-State Financial would only be required to bid the first increment above the $20,300,000 bid which would bring the estate $20,400,000 for the sale of the plant. Trustee was aware that a sale at that level would not allow any payment, based on the projections at the time for unsecured creditors of the estate which were identified in the neighborhood of $5,000,000 to $6,000,000. During the course of the afternoon session, during a recess, Trustee and his attorney encouraged ABUS to make a "non-qualified bid" at a level considerably above the lead bid submitted by the EXL Group. That bid was presented at the level of $25,000,000 with a contingency that the closing date be moved to December 15, 2004. Trustee and Trustee's attorney announced to the Court that because of the substantial increase in funds to the estate offered by that bid, that Trustee was prepared to withdraw the Sale Motion and re-notice the higher bid because it was clearly in the interest of all creditors of this bankruptcy estate to obtain the maximum dollar return for the sale of the plant.

11. The Court did not "force" Tri-State Financial or its representatives to agree to different terms for the bidding process. When Trustee announced that he was prepared to withdraw the Sale Motion, because of the substantially higher offer received for the plant, David Nadolski, as the attorney for Tri-State Financial, announced in open Court, on the record, that Tri-State Financial was ready, willing and able to finish the bidding process and was agreeable to a 15 day extension of the closing date to December 15,2004.

12. It was also agreed by the parties as a part of the bidding process that the successful bidder would advance funds to the Chapter 7 Estate to provide for plant preservation and security from and after November 30, 2004, when the estate's funds ran out.

13. At the bid hearing most people in the courtroom were either affiliated with Tri-State Financial, which was also an investor in the original plant, or were local farmers from the Rosholt area who at the time were supportive of the Tri State Financial effort to acquire the plant. A good example of that bias is represented by the multiple pleadings which clearly were a fill-in-the-blank form process that were filed prior to the bid hearing urging the Court to disallow the sale terms and allow Tri-State Financial to credit bid with filed proofs of claim for the plant. There were also rumors circulating prior to the hearing that ABUS (an Australian group) was going to immediately fire all the local employees, should it acquire the plant.

. . . .

15. There are multiple individuals and businesses in the Rosholt area and beyond that were creditors in this bankruptcy that, had Tri-State Financial been the successful bidder for the plant at the level of $20,400,000, would have received nothing on their unsecured claims. Trustee, and the Court *in* its supervisory role, both had a duty to maximize the return to all creditors in this bankruptcy. The actions taken at the hearing, which were all consented to by Tri State Financial, were taken to achieve that result. Had Tri-State Financial not agreed to the extended closing date Trustee would have withdrawn the Sale Motion. Trustee had no duty to Tri-State Financial to act in a manner detrimental to the unsecured creditors in proceeding with a bid process where three bidders had indicated a willingness to bid, but only one was prepared to proceed.

. . . .

17. Trustee does not recollect that the time for the retention of the bid deposits that were required by the three bidders on the plant was a major bone of contention

Trustee does recall that the bid deposit submitted by Tri-State Financial was timely returned to Tri-State Financial, prior to the scheduled ABUS closing in December 2004.

18. ABUS was required to close this sale by December 15, 2004. The day before the scheduled closing Trustee was contacted and advised by the attorney for ABUS that a glitch had occurred in regard to the lenders providing the financing and that ABUS would be delayed in closing the sale by approximately 10 days. Trustee advised ABUS that Trustee could do nothing to extend the closing date, at which time ABUS filed a motion with the Bankruptcy Court to extend the date to close by a short period of time

19. Tri-State Financial objected to the extension, and at the short hearing held by the Bankruptcy Court with regard to the motion for extension, the Court informed ABUS that an extension would not be allowed inasmuch as Tri-State Financial announced at that hearing that it was ready, willing and able to close the sale on the same terms provided that the Court give it an equivalent amount of time to prepare for closing. Without any hesitation the Court agreed to do so, and allowed Tri-State Financial an opportunity to close the sale on or before February 4, 2005.

. . . .

21. When Tri-State Financial encountered problems with the lender it had identified as the source of funds to acquire the plant, the Court clarified for Tri-State Financial and the parties that although February 4th fell on a Saturday, and was not on a business day, that Tri-State Financial could close the plant sale through the delivery of appropriate funds to Trustee on the appointed date of February 4, 2005.

22. When Tri-State Financial's financing fell through on the afternoon of Friday, February 3rd, Trustee and Trustee's attorney worked with Tri-State Financial to insure that if Tri-State Financial could procure back-up closing finds by the next day, that the sale would be closed in Sioux Falls, South Dakota as opposed to

> Minneapolis, which was the location of Tri-State Financial's original lender. That process was successfully completed on the afternoon of Saturday, February 4, 2005.

*Affidavit of John S. Lovald*, ¶¶ 3-22 (pertinent paragraphs) (July 20, 2006)(attachment to file doc. 1893).

In late 2004 and early 2005, while the sale of the ethanol plant was being finalized and some attendant motions regarding the sale were resolved, Trustee Lovald obtained court authority to transfer certain executory contracts to the eventual purchaser. He also sought and obtained authority to disburse a portion of the expected sale proceeds to certain secured creditors holding undisputed claims and the IRS on an administrative claim and to remove judgments from the estate's real property that was being sold. As part of the agreement among the active parties regarding the disbursement of sale proceeds, it was also determined Trustee Lovald should set aside $5,800,000 for payment of North Central's claim once the final claim amount was determined.

After the sale, final orders were able to be entered only on some professionals' fee applications and Trustee Lovald's motion to pay two more secured creditors. Otherwise, administration of the case soon bogged down. North Central commenced litigation against Tri-State Financial in federal district court over the settlement that had been reported to the Bankruptcy Court on June 21, 2004.

Both North Central and Tri-State Financial filed vehemently-objected-to applications, motions, and claims regarding what they each thought they were owed from the bankruptcy estate. They each filed different discovery and procedure-related motions that resulted in additional forays. Trustee Lovald commenced an adversary proceeding against Tri-State Financial, Adversary No. 05-1006, seeking a determination Tri-State Financial's post-petition claim should be considered a capital contribution and any allowed claim should be subordinated.

The Court scheduled a joint trial in Adversary No. 05-1006 and the pending contested matters regarding Tri-State Financial's claim for May 2 and 3, 2005. The scheduling order was entered March 23, 2005. Tri-State Financial challenged the Court's authority to combine the matters for hearing, and it sought a delay in the May hearing because: a key witness, James Jandrain, was unavailable to prepare until after the tax season ended April 15, 2005; Jandrain and Tri-State Financial's attorney, Jerrold Strasheim, were preparing for an April 26, 2005, mediation before federal Magistrate Judge John E. Simko on the federal district court matter between North Central and Tri-State Financial; Attorney Strasheim needed to attend some depositions on other issues in the bankruptcy case; Attorney Strasheim was scheduled for a vacation between May 12, 2005, and May 24, 2005; and Attorney Strasheim had a trial in Nebraska on June 2 and 3, 2005.

By letter decision entered March 31, 2005, the Court denied Tri-State Financial's motion to reschedule, primarily because the Court had advised counsel on March 2, 2005, of its intention to combine any subordination adversary proceeding with the pending contested matters regarding Tri-State Financial's claim and because the issues to be litigated had been on the table for some time. The Court also denied the request because it did not have alternative open court dates available within the next few months.

In part because of a delay in completing discovery due to Attorney Strasheim's law partner's spouse's death and in part because later dates became open, the Court subsequently rescheduled the May 2 and 3, 2005, joint hearing on Adversary No. 05-1006, and the contested matters regarding Tri-State Financial's claim to May 11 and 12, 2005.

Less than a month before the rescheduled hearing date, North Central moved to intervene in both the adversary and contested matters. The Court set a deadline for responses, which were received from Trustee Lovald, Tri-State Financial, and Tri State Corn Processors Cooperative. A written decision was entered May 4, 2005. The Court denied the motion because an intervention would delay the matter, North Central's interests were adequately represented by Trustee Lovald, and the litigation would not alter any party's equity position in Debtor, which was one of North Central's significant concerns. No appeal was taken, but a month later North Central asked the Court to reconsider.

At the May 11, 2005, hearing on the contested matters related to Tri-State Financial's claim and related Adversary No. 05-1006, appearances were made by Robert E. Hayes for Trustee Lovald and Attorney Strasheim for Tri-State Financial. Attorney Hayes reported a settlement had been reached with Tri-State Financial that would be reduced to writing and noticed for objections. Attorney Strasheim confirmed Attorney Hayes' report.

Trustee Lovald's settlement with Tri-State Financial was noticed for objections on May 17, 2005. It provided Tri-State Financial would be allowed a Chapter 11 administrative expense of $793,654.42 for advances it made to Debtor between May 23, 2003, and July 28, 2004, and it would have a general unsecured claim of $1,190,000.00 for its post-conversion advances. The $1,190,000.00 would be paid after all other timely filed general unsecured claims were paid. The only objector was North Central Construction.

While the settlement motion regarding Tri-State Financial's claim was pending, three contested matters dealing with the allowance of North Central's claim were also placed on the table.[6]

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[6] These matters, all pending, are: North Central's April 13, 2005, *Motion to Authorize Payment of Claim*; Trustee Lovald's

After some delays for discovery and a possible settlement, the contested matters regarding North Central's claim were set for an evidentiary hearing on August 29, 2005.

On June 10, 2005, Tri-State Financial commenced an adversary proceeding, No. 05-1009, against Trustee Lovald and North Central. It sought a determination that North Central's liens should be transferred to the bankruptcy estate and North Central's claim should be treated as unsecured and equitably subordinated to all other general unsecured claims.

On June 15, 2005, the Court directed Trustee Lovald to file an interim report detailing the estate's funds on hand and the list of claims yet unpaid. The Court also directed Debtor to provide a current list of equity security holders as an amendment to document 82, the initial report of equity holders.

On June 24, 2005, Trustee Lovald reported he was holding $11,527,312.42 in proceeds from the sale of the ethanol plant. He listed the claims he had already paid, which totaled $16,888,317.63, and he estimated he needed $14,709,765.11 to pay

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April 19, 2005, objection to North Central's proof of claim; and Tri-State Financial's April 28, 2005, objection to North Central's proof of claim. [Note: Tri-State Financial's objection to North Central's proof of claim, which was combined with an objection to a motion, is out of sequence on the docket. The Clerk's office had to do some corrective docketing so the objection to claim was appropriately recognized as a separate contested matter on the electronic docket.]

all claims in full, including Tri-State Financial's subordinated claim and the untimely filed claims.

On June 24, 2005, Debtor reported the equity holders were: Tri-State Financial, 40.3%; Tri State Corn Processors Cooperative, 27.5%; North Central, 16.1%; and Williams Bio-Energy, 16.1%. Debtor further stated a group of investors transferred their individual interests to Tri-State Financial on June 17, 2003, and no other assignments or transfers had occurred thereafter.

On July 7, 2005, Trustee Lovald asked the Bankruptcy Court to allow him to bring Gaylor Engineering into Adversary No. 05-1009 by third-party complaint or for the Court to abstain from hearing that adversary and allowing the parties to return to state court. The Court denied the trustee's motion the same day because of the timing and because the adversary did not lend itself to a third-party complaint against Gaylor Engineering. The denial was without prejudice to an objection by Trustee Lovald to Gaylor Engineering's proof of claim and without prejudice to Trustee Lovald's commencing an adversary proceeding against Gaylor Engineering so the validity, priority, and extent of any lien claimed by Gaylor Engineering could be resolved. Trustee Lovald commenced an adversary proceeding against Gaylor Engineering on July 13, 2005, Adversary No. 05-1011. He voluntarily dismissed it a month later.

In early July 2005, Tri-State Financial filed a motion seeking an order compelling North Central to produce certain records related to earlier insurance litigation surrounding the plant construction and subsequent explosion. That motion is still pending due to subsequent settlement proposals, discussed below.

Trustee Lovald reached a settlement with Aux Sable on its executory contract claim and noticed it for objections on July 11, 2005. No objections were filed, and the motion was granted.

Trustee Lovald also reached a settlement with Murphy Trust on its claim and noticed it for objections on August 25, 2005. Tri-State Financial objected on the grounds a condition of liability had not been met by Murphy Trust regarding one of the subject notes. After an evidentiary hearing was set, the parties agreed to submit the matter on stipulated facts and briefs. The matter is still under advisement. A decision has been delayed twice by reported global settlements that the Court understood (apparently incorrectly the first time) would also resolve Tri-State Financial's objection to Trustee Lovald's proposed settlement with Murphy Trust. A decision has subsequently been delayed by the instant recusal motion.

Magistrate Judge John Simko reported to the undersigned he had conducted a mediation on July 26, 2005, that had resulted in a settlement of the three contested matters regarding North Central's claim set for hearing on August 29, 2005. On the parties' behalf, he requested time for them to document their agreement and asked that the August 29, 2005, hearing be cancelled. Based on that report, the Bankruptcy Court cancelled the August 29, 2005, hearing and waited for the settlement to be filed and noticed for objections. A settlement was not timely filed.

A telephonic hearing on an earlier-filed objection by Trustee Lovald to Gaylor Engineering's proofs of claim was held November 8, 2005. Appearances included Trustee Lovald, his counsel, counsel for Tri-State Financial (telephonic), counsel for North Central (telephonic), and counsel for Gaylor Engineering. Counsel for Trustee Lovald and Gaylor Engineering advised the Court the mediated settlement, which the parties were having difficulty reducing to writing, included a provision that assigned to Tri-State Financial the estate's claim against Gaylor Engineering. Counsel for Gaylor Engineering expressed some concerns about that proposal, including the trustee's ability to assign the claim, the lack of identifiable consideration to the bankruptcy estate for the assignment, indemnity issues, and the possible loss of counterclaims or defenses. Counsel for Trustee Lovald reported unresolved indemnity provisions in two sections were the main roadblocks to the parties' efforts to memorialize the mediated settlement, and he discussed how that problem tied into his attempts to settle Gaylor Engineering's claim. Some options for the disposition of Gaylor Engineering's claim and the indemnity issues were discussed. Counsel for North Central stated it was their position the mediated settlement was binding as made July 26, 2005. No parties took issue with the Court's questions and statements about the present status of the mediated settlement. Ultimately, the Court stated it appeared the parties were close to "being on the same page." The hearing was continued to November 18, 2005. The Court advised the parties that if the mediated settlement were not finalized within those ten days, then on November 18, 2005, the parties and Court would discuss how to proceed.

Shortly before the November 18, 2005, continued hearing on Gaylor Engineering's claim, counsel for North Central sent the Court a letter and several attachments. It was not considered or treated as a filed document.

At the continued hearing on Gaylor Engineering's proof of claim held November 18, 2005, the sole topic was the parties' inability to memorialize the mediated settlement and North Central's desire to push the matter for court approval. Attorney Strasheim, counsel for Tri-State Financial, referenced the recent letter North Central had written the Court, which with attachments totaled 44 pages. The Court advised the parties he had "not had time to go through it." According to Patrick Lee-O'Halloran, counsel for North Central, the attachments included a "transcript of the settlement as read into the record" and "the latest draft of the agreement." Attorney Strasheim stated his objection to North Central's letter and the inappropriateness of that type of communication with the Court. The Court responded stating any effort to enforce the mediated settlement would have to be done by motion and a hearing. Counsel for North Central stated he wrote the letter because he and Trustee Lovald had "some disagreements" as to "what the procedure is and what the law is in terms of your enforcement of the agreement." He reiterated his opinion the parties had mediated a binding and enforceable agreement before Judge Simko. The Court stated any motion to approve would need to be filed by Trustee Lovald under Fed.R.Bankr.P. 9019 but any party could bring a motion to compel the trustee to recognize the settlement. The parties rehashed some of their arguments from November 8, 2005, regarding what issues remained after the mediated settlement. The Court advised counsel, and counsel for Tri-State Financial in particular, sanctions would be considered if meritless obstructions or objections to the finalization of the settlement were demonstrated. Counsel for Tri-State Financial took exception to the Court's comments, but the Court noted Tri-State Financial had now backed away twice from settlements announced on the record. Counsel for Tri-State Financial again took exception. Ultimately, it was decided the parties should again try to mediate their remaining differences before Judge Simko.

On November 21, 2005, North Central filed a *Motion to Enforce Mediated Settlement Agreement*. Therein, it argued the parties had reached an enforceable agreement through Judge Simko's mediation, and Trustee Lovald should be compelled to notice that settlement for objections. In its supporting brief, North Central stated only an indemnity issue remained before the parties would have a written agreement. It argued Tri-State Financial should not be allowed to use that dispute to undo the agreement the parties recited on the record in front of Judge Simko at the conclusion of the mediation.

On December 14, 2005, Tri-State Financial objected to North Central's motion. It argued a final agreement was never reached. It also contested this Court's jurisdiction on "specific performance" grounds and because some of the mediation had addressed the District Court lawsuit between North Central and Tri-State Financial in addition to the contested matters and related adversary proceedings before the Bankruptcy Court. Tri-State Financial also complained North Central had improperly disclosed settlement discussions to the Bankruptcy Court, most notably in the letter the Court received from North Central just before the November 18, 2005, continued hearing on Trustee Lovald's objection to Gaylor Engineering's claim.

Also on December 14, 2005, Trustee Lovald filed a response to North Central's *Motion to Enforce Mediated Settlement Agreement*. He acknowledged a provision regarding an indemnity provision had kept the parties from completing a written stipulation. Trustee Lovald also opined, contrary to North Central's assertions,

> the agreement reached at the mediation is too imprecise for this Court to enforce. The specific language of the disputed indemnity provisions is not contained in the mediation transcript. Further, the negotiations that have occurred during the drafting process have resulted in an impasse over the indemnification language. Applying basic rules of contract formation, there is simply no agreement to be enforced against any of the parties.

Trustee Lovald also noted in his response "several of the agreements reached at the mediation required further expansion and clarification" and "terms of the written agreement have moved well beyond the scope of the 'core agreements' recited at the conclusion of the July 26, 2005 mediation." It urged the Court not to let North Central use the pending motion to "bootstrap" into an agreement the precise indemnification language that North Central wanted.

The parties attempted another mediation with Judge Simko in early December 2005 to iron out remaining differences. Again, the parties left without a written agreement, and they were not able to achieve one thereafter. By order entered January 20, 2006, an evidentiary hearing on North Central's *Motion to Enforce Mediated*

*Settlement Agreement* was set for February 9, 2006. On February 2, 2006, in anticipation of the evidentiary hearing and to recognize the concerns Tri-State Financial had about North Central's disclosure of settlement discussions, the Court sealed the July 26, 2005, mediation transcript until further order.

Following a dyspeptic pre-hearing conference with counsel for interested parties on February 6, 2006, an evidentiary hearing on North Central's *Motion to Enforce Mediated Settlement Agreement* was held before the Bankruptcy Court on February 9, 2006. At the outset, Attorney Strasheim, counsel for Tri-State Financial, sought, with one exception, an order barring as evidence "any part of any record of the mediation proceedings on either July 26th or December 8th of last year[.]" He stated he did not know the Court had sealed the transcript earlier. During a colloquy with the Court regarding Federal Rule of Evidence 408 and its impact, Attorney Strasheim suddenly announced Tri-State Financial did "not oppose enforcement of [the] core agreements" reached at the July 26, 2005, mediation and "there were things that were not agreed to and those would be the things that could not be enforced." Attorney Strasheim argued at length his personal written understanding of the July 26, 2005, mediation results constituted eleven "core agreements" Tri-State Financial was agreeable to having the Court enforce. He took great exception to the Court's finding that the core agreements from the mediation would be whatever the parties had recited and affirmed on the record with Judge Simko at the conclusion of the July 26, 2005, mediation. The hearing was recessed so the Court and interested parties could review the sealed transcript. When the hearing continued, the parties offered no meaningful argument that the transcript included the negotiations leading to their settlement or that it represented anything other than their consensus, *i.e.*, there was nothing Judge Simko had ordered them to do. Accordingly, the Court concluded the transcript contained only the results of the parties' mediation and was therefore admissible. The Court also stated the simplest resolution of the matter was to have Trustee Lovald file a motion to approve the mediated agreement and attach the transcript as the record of that agreement.[7]

Attorney Strasheim continued to argue the transcribed agreement was not enforceable for various reasons, and he also publicly expressed his concern whether the undersigned "has been a neutral unbiased fair tribunal as far as [Tri-State Financial] is concerned[.]" In particular, he relayed concerns about the short answer period the Court had set in Adversary No. 05-1006 and the Court's denial of continuances requested by Tri-State Financial in

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[7] During this hearing, the Court erroneously referred to the mediated settlement of July **28**, 2005, instead of July **26**, 2005.

connection with the auction sale of the ethanol plant. Counsel for Tri-State Financial then renewed Tri-State Financial's objection to the Bankruptcy Court's subject matter jurisdiction and continued arguing he, and apparently his client, would not recognize the record made at the conclusion of the July 26, 2005, mediation as the best record of the "core agreements" reached that day. He further argued some of the agreements reached that day were unenforceable due to lack of specificity. Following additional arguments by counsel for Tri-State Financial and other parties, the Court unsealed the transcript of the mediation results, again stated it was accepting the transcript as the record of the agreement the parties made on July 26, 2005, and directed Trustee Lovald to notice the agreement for objections. The Court indicated enforceability of the agreement could be raised later.

Nonetheless, Attorney Strasheim renewed his objection that the transcript contained privileged matters. Attorney Strasheim next wanted admitted "twenty drafts and these e-mails," that apparently were exchanged between the parties after July 26, 2005, but he also wanted to "reserve the right to, to the privilege of them because I think that they complete the picture." After the Court stated Tri-State Financial would need to waive the privilege if it wanted the documents admitted, Attorney Strasheim stated the post-mediation documents should be considered under the Rule of

Completeness. He also argued the mediation results transcript contained other statements, admissions, and language and, though he could not specifically identify them in the transcript, he did not agree these other parts were admissible. Attorney Strasheim then again offered his own written rendition of the "core agreements." The Court restated its previous ruling that the transcript was the best memorialization of the mediation results. Some colloquy followed on the impact of subsequent negotiations on the "core agreements," but there was no dispute the core agreements were never formally rescinded by the parties. A short recess was taken to allow Attorney Strasheim to present any other evidence he had. After the break, he again sought admittance of a large number of exhibits (A through VVV) that apparently included written exchanges between the parties *after* the July 26, 2005, mediation. North Central objected on grounds of relevance, authentication, and hearsay. The Court sustained the objection on relevance. Attorney Strasheim presented the documents again on an "offer of proof," which the Court did not understand.[8] He next moved to dismiss North Central's motion, which was denied, and then asked the Court for an extended time in which to file an appeal, which was also

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[8] The Court took Tri-State Financial's Exhibits A through VVV on this "offer of proof" but did not review them. The exhibits are still in the hands of one of the appellate courts.

denied. The Court offered to submit proposed findings and conclusions to the District Court to alleviate any concerns regarding the Court's jurisdiction over that portion of the mediation agreement involving the District Court matter between North Central and Tri-State Financial. In response, Attorney Strasheim said "I am not insisting on the Court do that with respect to that one issue," but he still said he was objecting to "subject matter and core jurisdiction." The Court clarified its ruling and stated it was only ruling an agreement had been reached on July 26, 2005; the Court left it to Trustee Lovald to decide whether to seek approval of the mediated agreement. During the following week, the parties wrangled over the proposed dispositional order. An order was eventually entered on February 21, 2006. Tri-State Financial appealed the order on February 23, 2006.[9]

On February 21, 2006, Trustee Lovald filed his motion to

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[9] The United States District Court for the District of South Dakota, the Hon. Charles B. Kornmann, dismissed the appeal on April 12, 2006, as "being totally without merit" and for lack of jurisdiction over the Bankruptcy Court's interlocutory order regarding the mediated settlement. The District Court remanded for further proceedings, "including any consideration of awarding terms or costs in connection with the filing of the appeal." To date, no parties to the appeal have sought terms or costs. Tri-State Financial appealed Judge Kornmann's ruling to the United States Court of Appeals for the Eighth Circuit on April 27, 2006. That appeal was dismissed on Tri-State Financial's motion on May 22, 2006.

approve the mediated settlement. It was followed by an amended motion on February 24, 2006, that better set forth the several contested matters and adversary proceedings the settlement purported to resolve. Two objections were filed. Tri-State Financial objected[10] raising several of the same objections it had made at the February 9, 2006, hearing. Though the mediated agreement had not yet been court-approved, Tri-State Financial also argued North Central and Trustee Lovald had breached the agreement. Gaylor Engineering objected because the settlement purported to sell to Tri-State Financial a "perceived cause of action [held by the bankruptcy estate] against Gaylor" but Trustee Lovald had not shown the consideration for that sale nor shown how a sale to Tri-State Financial rather than a public auction was in the estate's best interest. Gaylor Engineering said the mediated settlement was also prejudicial to it because the settlement did not clearly preserve its ability to assert against Tri-State Financial "all available defenses and the concomitant counterclaim for payment."

An evidentiary hearing was held May 4, 2006. Trustee Lovald

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[10] Trustee Lovald took issue with Tri-State Financial's standing to object based on terms of the mediated settlement. The challenge was dismissed as untimely, but the Court noted the mediated settlement nonetheless included terms that precluded Tri-State from later objecting to it, which the Court could recognize independent from Trustee Lovald's late-filed objection to Tri-State Financial's standing.

was the only witness. The only exhibits were the July 26, 2005, mediation results transcript and a May 1, 2006, statement by Trustee Lovald of the remaining claims against the estate. Trustee Lovald estimated that day that he had sufficient funds to pay 95% of the unsecured creditors' claims.

The Court denied approval of the settlement, in part because of the proposed assignment of the estate's claim against Gaylor Engineering to Tri-State Financial, for which Trustee Lovald was unable to identify or quantify the consideration to be given by Tri-State Financial. The Court also concluded the proposed settlement was unreasonable because it inexplicably moved Tri-State Financial's previously subordinated unsecured claim, as was provided in the trustee's May 2005 proposed settlement with Tri-State Financial, into the class of general unsecured claims. The Court was unwilling to recognize this improved status for Tri-State Financial's $1,190,000 unsecured claim for two reasons. First, the claim had arisen from post-petition re-engineering work at the ethanol plant the Court earlier had not authorized. Second, Trustee Lovald had estimated the class of unsecured claim holders would face a shortfall. Some colloquy followed regarding the estimated amount of any shortfall. The Court concluded Trustee Lovald had failed to demonstrate the proposed assignment to Tri-State Financial of the estate's claim against Gaylor Engineering was reasonable. Though his retirement was pending, the Court also advised the parties of his intentions to finish the case.

The next long-pending matter taken up for hearing by the Court, following its disapproval of the mediated settlement, was Trustee Lovald's May 17, 2005, proposed settlement with Tri-State Financial.[11] North Central, the lone objector, withdrew its objection as the June 13, 2006, hearing commenced. The Court nonetheless asked Trustee Lovald to make his record in support of the settlement.

Before the trustee's presentation started, Attorney Strasheim announced Tri-State Financial was preparing a motion asking the Court to recuse itself. Attorney Strasheim explained he was making the announcement to avoid "sandbagging" complaints and because he did not want to wait to make the announcement until it was known whether it would get a favorable ruling on the proposed settlement. He stated Tri-State Financial intended to ask the Court to recuse itself "from anything that we're a party [to] or that effects [sic by transcriptionist] us."

Testimony and two exhibits from Trustee Lovald were received. The Court approved Trustee Lovald's May 17, 2005, settlement with Tri-State Financial.

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[11] The hearing was rescheduled once to accommodate a vacation trip taken by Attorney Strasheim.

First Dakota added to the post-sale litigation by initiating two contested matters. The first was filed in early April 2005 when First Dakota requested attorneys' fees and other costs under § 506(b). Following a hearing, the Court received closing arguments in mid-July 2005 and entered a written decision September 27, 2005, allowing First Dakota $180,706.20 of the $195,076.15 it sought.[12] The second was filed in early August 2005 when First Dakota sought an additional $173,253.27 under § 506(b) as a pre-payment charge. Objections were filed by Tri-State Financial. It argued the charge was not enforceable under South Dakota law or federal bankruptcy law. It also argued First Dakota had breached "its duty of good faith and fair dealing" with Debtor under the original loan and by such material breach, Debtor was discharged from any liability on the pre-payment penalty. Trustee Lovald filed an objection and appeared to have been a bit blindsided by First Dakota's request, in light of the full payment with interest on First Dakota's note and the pending attorneys' fees motion under § 506(b). He, too, argued federal bankruptcy law rendered the penalty unenforceable. Greenway Consulting, L.L.C., also filed an objection but withdrew it when the matter came up for

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[12] A subsequent request by First Dakota for the Court to amend the decision is still pending, in part because the related motion by First Dakota for payment of a pre-payment penalty is also pending.

hearing.

Trustee Lovald eventually reached a settlement with First Dakota on the pre-payment penalty. Tri-State Financial objected, and a hearing was held March 24, 2006. Based on the Court's preliminary findings, Trustee Lovald withdrew his settlement motion. That put First Dakota's original request for the payment back on the table. An evidentiary hearing was held May 4, 2006. The matter was taken under advisement.

More routine matters in the case were also addressed in late 2005 and the first half of 2006. In early September 2005 and again in late January 2006, Trustee Lovald filed several objections to the claims of more minor parties. Most were easily resolved; either the creditor did not respond to the objection, or Trustee Lovald withdrew his objection after further discovery.

Trustee Lovald's objection to the proof of claim filed by Western Biomass Energy, L.L.C. ("Western Biomass"), required an evidentiary hearing. Western Biomass had sought $33,350.33. Trustee Lovald objected, saying corporate records did not support the amount of the claim and a contract clause regarding payment of a bonus had never been authorized by Debtor. An evidentiary hearing was held October 12, 2005. The Court received four exhibits and the testimony of Randy Kramer, one of two shareholders of Western Biomass. At the hearing, Trustee Lovald stated he was challenging only $17,500.00, which represented the bonus portion of the total claim. On examination, Kramer acknowledged Debtor's board of directors had never officially assumed Tri State Corn Processors Cooperative's liability to Western Biomass. The Court, therefore, sustained the trustee's objection and advised Kramer he might need to look to Tri State Corn Processors Cooperative for payment of Western Biomass' bonus claim. No appeal was taken.

Trustee Lovald's objection to the proof of claim filed by James Jandrain also required an evidentiary hearing. Jandrain, who, as discussed above, holds direct or indirect equity interests in both Debtor and Tri-State Financial, filed a proof of claim for $53,327.50 for accounting and related services he said he rendered for Debtor pre-petition.[13] Briefs, numerous exhibits, and Jandrain's testimony were received. The trustee's objection was sustained, and the Court adopted his brief as the Court's general findings and conclusions. The Court specifically concluded corporate records indicating Debtor had authorized Jandrain to perform the services for an agreed compensation were insufficient. Jandrain timely appealed the Court's decision on May 11, 2006. The United States District Court for the District of South Dakota, Hon.

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[13] Jandrain did not file a proof of claim while the case was under Chapter 11.

Charles B. Kornmann, upheld the Bankruptcy Court's decision by order entered August 22, 2006.

On June 20, 2006, Trustee Lovald filed a motion to approve his settlement with North Central. Before the objection period on that motion expired, Tri-State Financial filed a motion asking the Court to allow it to intervene in the contested matter of Trustee Lovald's objection to North Central's proof of claim, despite the fact Tri-State Financial had its own objection to North Central's proof of claim and despite the fact Trustee Lovald had just noticed a settlement of North Central's claim for objections. On June 28, 2006, the Court entered an order holding Tri-State Financial's intervention motion in abeyance pending a resolution of Trustee Lovald's proposed settlement with North Central.

On June 29, 2006,[14] Tri-State Financial filed a *Motion for Recusal* regarding the undersigned. The Court set July 20, 2006, as the deadline for filing any joinders in or responses to the recusal motion. James Jandrain, Randy Kramer, and ICM joined the motion.

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[14] Mid-morning on June 27, 2006, local counsel for Tri-State Financial, placed a highly imprudent telephone call to the undersigned's chambers in Pierre. He told the undersigned's judicial assistant the undersigned's law clerk could not assist him and he needed to talk to the undersigned on a "personal matter." When the undersigned returned the telephone call, he learned the attorney wanted to speak to him about Tri-State Financial's planned recusal motion. The content of his short, yet ill-advised, conversation with the Court is not included herein nor is it a factor in this Court's decision on the recusal motion.

Tri-State Financial set forth six "Basis for Bias," some of which intertwined. It offered one affidavit, that of a Rosholt area newspaper reporter, in support of its motion. The three joinders were all "bare" joinders; none set forth any additional grounds for recusal, and none specifically stated why they had joined Tri-State Financial's motion.[15]

Objections were filed by First Dakota and Trustee Lovald.[16] First Dakota opined the Court was able to make objective decisions. It also stated Tri-State Financial "has been extraordinarily litigious, difficult to deal with and otherwise counterproductive throughout the Chapter 7 process." It also stated

> but for the excesses of [Tri-State Financial], all creditors, including [Tri-State Financial], would likely have already been paid. To the extent this Court or the appeals courts have, based on the record of [Tri-State Financial]'s tactics and behavior in this Chapter 7 case drawn, [sic] conclusions unfavorable to [Tri-State Financial], such conclusions are not grounds for recusal.

*Objection to Motion for Recusal*, pp. 1-2, by First Dakota (July 20,

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[15] Local counsel for Tri-State Financial who signed the recusal motion and counsel for the parties who filed joinders to Tri-State Financial's recusal motion have had limited involvement in the case. The Court trusts each of these attorneys obtained and read all relevant pleadings and transcripts and reached an independent conclusion that recusal was warranted. *See* Fed.R.Bankr.P. 9011(b).

[16] Eugene Paulson also submitted a response by facsimile transfer. Since an original, signed document was not received timely, his response could not be considered.

2005) (file doc. 1892).

In his objection, Trustee Lovald set forth the applicable law and argued Tri-State Financial had failed to show bias and its motion was untimely. He also submitted an affidavit. Therein, he detailed the ethanol plant sale process, including both in and out-of-court discourse among the parties. He further stated he had attended all hearings since the case was converted to Chapter 7 and had "not witnessed any bias against or for Tri-State Financial or its representatives." Trustee Lovald included in his affidavit the reasons he believes the Court had correctly ruled on the objections to the proofs of claims filed by Randy Kramer[17] and James Jandrain. He also stated any argument by Tri-State Financial regarding a return on equity is "reckless and misleading" since any meaningful return to equity holders could only be generated if remaining claims are slashed substantially. Trustee Lovald said any contrary suggestion by Tri-State was a "red herring." He further opined the undersigned "has been fair to all parties involved in this bankruptcy, but does have the overriding motivation to see the estate closed and unsecured creditors paid in a timely fashion." Trustee Lovald also stated:

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[17] The Court assumes Trustee Lovald was referring to the proof of claim filed by Western Biomass Energy, L.L.C., which was signed by Randy Kramer as its president.

> This case has reached the point where the only major obstacle preventing final administration of the case is the claim of North Central Construction. Tri-State Financial has been and continues to be engaged in a bitter vendetta with this creditor and appears to want to use the estate, and the estate's resources, to continue the dispute unabated. That course of action could tie up the estate for years to come, and substantially reduce the estate's cash, because of the priority position held by North Central Construction....
>
> . . . .
>
> Trustee respectfully submits that the Motion for Recusal submitted by Tri-State Financial is nothing more than a thinly veiled and stale attempt to judge shop in an attempt to dominate and control all decisions in the administration of this case, and to hijack the estate's limited resources to engage in endless litigation with North Central Construction....

*Affidavit of John S. Lovald*, ¶¶ 36-38 (pertinent parts) (July 20, 2006) (attachment to file doc. 1893). Both Trustee Lovald and First Dakota opined a change of judge at this stage would further delay case administration.

At the time Tri-State Financial filed its recusal motion, several contested matters were pending: the objections to North Central's claim, a motion from North Central seeking payment, and the trustee's proposed settlement of North Central's claim; one discovery related motion and one "intervention" motion by Tri-State Financial regarding objections to North Central's claim; First Dakota's request for payment of a pre-payment penalty (under advisement); First Dakota's motion requesting a clarification and amendment of its § 506(b) claim for attorneys' fees (under advisement); and a fee application by an estate accountant (uncontested); Trustee Lovald's proposed settlement of the Murphy Trust's claim (under advisement); a fee application by one of the Chapter 7 estate's attorneys; and Trustee Lovald's objection to Clapper Corporation's proof of claim.

Of the six associated adversary proceedings, two have been resolved by dismissal, Nos. 03-1053 and 05-1011. Pending are: Adversary No. 03-1032, commenced by North Central on July 14, 2003, which is essentially a continuation of the state court action regarding lien priorities and claim amounts, and which was prematurely reported settled twice; Adversary No. 05-1009, commenced by Tri-State Financial against Trustee Lovald and North Central on June 10, 2005, in which Tri-State Financial seeks a subordination of North Central's allowed claim; and Adversary No. 06-1018, commenced on August 15, 2006, in which Trustee Lovald alleges negligence and breach of contract and seeks indemnity and damages from Gaylor Engineering arising from the initial plant construction.

Also pending are Adversary No. 05-1006, in which Trustee Lovald sought a subordination of Tri-State Financial's claim, and Tri-State Financial's January 24, 2005, administrative expense application. It appears, however, the parties actually resolved or intended to resolve both through the settlement that was approved June 14, 2006. Upon disposition of the instant recusal motion, the Court will clarify these matters with the Clerk and affected parties.

A few days after it filed the recusal motion, Tri-State Financial filed a motion seeking authority to depose Trustee Lovald regarding the recusal motion. Since the recusal motion was pending against the undersigned and since Tri-State Financial had requested therein that the undersigned not preside over "all litigation of every kind and nature" involving it in this case, the Court referred the deposition motion to the Hon. Robert J. Kressel, Bankruptcy Judge for the District of Minnesota, who is authorized to hear conflict cases. Judge Kressel denied Tri-State Financial's deposition motion. Tri-State Financial then filed a *Motion to Reconsider, Set Aside, Alter and/or Amend Orders*. It challenged the order transferring the deposition motion to Judge Kressel and it challenged Judge Kressel's order denying the deposition motion. Since Tri-State Financial's motion to amend principally challenges Judge Kressel's order, its disposition is also before Judge Kressel.

Even after more than 70 pages, not everything that has transpired in this case and the related adversary proceedings has been reiterated herein. The Court has attempted, however, to provide a sufficiently thorough review of what has transpired to date so it may appropriately consider the recusal motion filed by Tri-State Financial.

II.

Section 455 of Title 28 of the federal code demands that a federal judge recuse himself *sua sponte*. It provides:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> . . . .
>
> (d) For the purposes of this section the following words or phrases shall have the meaning indicated:
>
> > (1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation. . . .

28 U.S.C. § 455 (in pertinent part). Section 455 applies to Bankruptcy Court judges. *Smith v. Edwards & Hale, Ltd. (In re Smith)*, 317 F.3d 918, 932 (8th Cir. 2002). The statute was designed to promote public confidence in the impartiality of the judicial process. *Ouachita National Bank v. Tosco Corp.*, 686 F.2d 1291, 1300 (8th Cir. 1982)(cited in *Moix-McNutt v. Coop (In re Moix-McNutt)*, 215 B.R. 405, 409 (B.A.P. 8th Cir. 1997)). Judicial

impartiality is presumed, so a party seeking recusal bears a substantial burden to prove otherwise. *United States v. Denton*, 434 F.3d 1104, 1111 (8th Cir. 2006). Whether to recuse himself is committed to the court's sound discretion. *Dossett v. First State Bank*, 399 F.3d 940, 953 (8th Cir. 2005).

Section 455(a) sets forth an objective standard of reasonableness. *United States v. Martinez,* 446 F.3d 878, 883 (8th Cir. 2006). The issue is whether the judge's impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case. *Id.* (cites therein). In contrast, under § 455(b)(1), actual bias or prejudice must be demonstrated. *O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 988 (7th Cir. 2001).

In essence, a judge need not recuse himself for bias or prejudice if "his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task." *Liteky v. United States*, 510 U.S. 540, 551 (1994). Opinions garnered from earlier proceedings are also not disqualifying. *Id.* However,

> [a] favorable or unfavorable predisposition can also deserve to be characterized as "bias" or "prejudice" because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment."

*Id.* Some courts have denominated this as the pervasive bias exception to the extrajudicial source doctrine.[18] *Id.* (cite therein). In this Circuit, a pervasive bias is aptly described as "a deep-seated favoritism or antagonism" held by a judge from whatever source "that would make fair judgment impossible." *United States v. Larsen*, 427 F.3d 1091, 1095 (8th Cir. 2005). When a request for recusal is based on a judge's in-court conduct, the requesting party must show "the judge had a disposition 'so extreme as to display clear inability to render fair judgment.'" *Denton*, 434 F.3d at 1111 (quoting *Liteky*, 510 U.S. at 551).

Whether a court is applying § 455(a) or § 455(b)(1), the Supreme Court has provided significant guidance.

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. *See United States v. Grinnell Corp.*, 384 U.S., at 583, 86 S.Ct., at 1710. In and of themselves (*i.e.*, apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated

[18] The doctrine may be better described as a "factor" since the presence of an extrajudicial source does not necessarily establish bias, nor does the absence of an extrajudicial source necessarily preclude bias. *Liteky*, 510 U.S. at 554-55.

> favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. . . . *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration-even a stern and short-tempered judge's ordinary efforts at courtroom administration-remain immune.

*Id.* at 555-56 (emphasis in the original); *see United States v. Sypolt*, 346 F.3d 838, 839 (8th Cir. 2003).

Finally, though there is no procedure set forth in § 455, a recusal request must nonetheless be timely. *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 664 (8th Cir. 2003). For a request to be timely, it must be made "at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim" *Id.* (quoting *Apple v. Jewish Hospital & Medical Center*, 829 F.2d 326, 333 (2nd Cir. 1987)). If there is a delay, the requesting party has the burden to show good cause for the untimeliness. *Holloway v. United States*, 960 F.23d 1348, 1355 (8th Cir. 1992).

III.

Tri-State Financial sets forth six "Basis for Bias" in its

*Motion for Recusal.* At the beginning of part IV of its recusal motion, Tri-State Financial referenced § 455(a), and at the beginning of part V, it referenced § 455(b)(1) and incorporated by reference all the "allegations" in part IV. Though there is marked duplication of allegations within the six bases, the Court first separately addresses each as to content. The Court then sequentially applies § 455(a), § 455(b)(1), and the Due Process Clause under the collective light of the six bases. Trustee Lovald's objection that the recusal motion was untimely is also addressed.

*Basis No. 1*

Tri-State Financial argued the Court holds an "insuppressible conviction" Tri-State Financial and the Omaha Group "thumbed their noses at his judicial authority, abused the bankruptcy process, and nefariously schemed to get control of [Debtor]" and the Court's rulings, in particular the Court's denial of Debtor's Motion to Approve Re-engineering Stipulation and the conversion of the case to Chapter 7, have been designed to economically punish them for their behavior. Tri-State Financial also took issue with what it described as "gratuitous" statements by the Court "denouncing" these parties at the July 28, 2004, hearing, where confirmation of Debtor's modified Chapter 11 plan and the United State Trustee's motion to dismiss or convert were on the table. Tri-State

Financial believes a new judge is needed so its claim for the re-engineering of the ethanol plant can be fairly decided.

In this portion of its recusal motion, Tri-State Financial acknowledged Debtor, ICM, and Tri-State Financial proceeded with the re-engineering of the plant at some point before the Court entered its December 12, 2003, decision denying Debtor's September 25, 2003, Motion to Approve Re-engineering. Tri-State Financial said it did so on the advice of in-state counsel and former out-of-state counsel. Tri-State Financial further acknowledged the same parties conferred after the Court's denial and again decided to proceed. It also inferred the Court knew at some unstated date the project had already begun and/or was continuing and the undersigned failed to order Debtor, ICM, or Tri-State Financial to stop the re-engineering project.

It is true the Court denied Debtor's Motion to Approve Re-engineering Stipulation and to incur the attendant debt. As set forth in the December 12, 2003, Decision, the proposal was denied because such "wide-sweeping provisions" are better addressed through a plan confirmation process, Debtor had not met its burden of proof for giving superpriority liens to the creditors involved, some of whom were insiders, and Debtor had failed to show existing creditors were adequately protected. In its discourse in the recusal motion, Tri-State Financial somehow interprets that decision as damning evidence the Court does not like Tri-State Financial and its principals and attorney, the Court concluded the re-engineering was not a worthwhile project, and Tri-State Financial and its principals should be punished. Such overwrought inferences are not supported by the record and are paranoic in tenor. They also simply ignore Debtor was then in a Chapter 11 bankruptcy in which the goal should have been to financially reorganize the Debtor and pay creditors, not necessarily re-engineer the plant. At neither the hearing on Debtor's Motion to Approve Re-engineering Stipulation nor any subsequent hearing did Debtor or Tri-State Financial make a record that demonstrated the re-engineering was necessary for Debtor to fulfill its Chapter 11 duties and goals.

There is also no legal support for Tri-State Financial's statement the Court should have *sua sponte* stopped the re-engineering project once it learned Debtor was proceeding without appropriate authority.[19] Raising that issue was the prerogative of the United States Trustee or one of the creditors, not the Court.

Several times in its recusal motion, Tri-State Financial stated the re-engineering project was effected without court

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[19] The first indication the Court could find in the record that the re-engineering project had continued was on June 8, 2004. Whether there was any mention of it orally during an earlier hearing is unknown.

approval to "preserve" the "going concern value" of the ethanol plant. That premise, however, cannot be found in Debtor's actual Motion to Approve Re-engineering Stipulation. Instead, in the motion Debtor stated the re-engineering project was necessary for the plant to "operate competitively in the market place" and allow it "to repay creditors and to effectuate a plan absolutely and unconditionally[.]" Why Tri-State Financial is now attempting to recast the purpose of the re-engineering project is unknown.

Finally, Tri-State Financial stated another judge should "resolve any claims that [Tri-State Financial] violated [the undersigned]'s order [date or topic of order not stated]." The statement is pointless. There are no matters pending before the Court in which Debtor's failure to get court authority for the re-engineering project is at issue, and no such issues are expected to arise in the future. Tri-State Financial's claim was resolved by order approving stipulation entered June 14, 2006. Under the approved stipulation, Tri-State Financial will receive $793,654.42 as an administrative expense claim (primarily for payroll, insurance, and other operating expenses and United States Trustee's fees) and $1,190,000.00 as a subordinated general unsecured claim (for payments it made in March 2004 and June 2004 to ICM for equipment). In other words, Tri-State Financial is now assured that it will receive all or nearly all of its claim arising from the re-engineering project and other post-petition expenses it paid for Debtor.[20]

*Basis No. 2*

Tri-State Financial claimed a "fully informed person on the street might reasonably also doubt [the undersigned]'s impartiality because he appears to have a deep seated dislike for, distrust of, and antagonism toward [Tri-State Financial] and certain members from the Omaha Group who are important witnesses in the disputes [delineated above]." In support, Tri-State Financial submitted the affidavit of Grace "Mimi" Larsen, a reporter from Rosholt, where the ethanol plant is located, who met with the undersigned following the in-court auction of the ethanol plant on October 26, 2004.

According to Reporter Larsen's affidavit, as summarized in part and quoted in part by Tri-State Financial in its recusal motion, the Court "strongly dislikes and is antagonistic" toward John Hoich, a member of Tri-State Financial and the Omaha Group, "apparently" because Hoich is wealthy and played a role in the re-engineering project "or because [the undersigned] believes that Hoich 'hit on' his clerk." Tri-State Financial's use of the word "apparently" indicates only supposition, which it is, especially as

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[20] Trustee Lovald testified on May 4, 2006, he would have sufficient funds to pay approximately 95% of unsecured claims.

to its erroneous conclusion the undersigned does not like Hoich because he is wealthy or involved with Tri-State Financial, the Omaha group, the re-engineering project, or David VanderGriend. To the extent the Court formed an opinion that Hoich is arrogant because of his demeanor on the witness stand and his questionable conversation with a member of the Clerk's office staff, the Court is justified in having that opinion, regardless of whether the Court actually conveyed those impressions to the reporter. Further, the Court has no recollection of stating to Reporter Larsen that he enjoyed watching Hoich "sweat" during the ethanol plant sale.

Tri-State Financial's concluding statement in paragraph 4.14 of its recusal motion that Tri-State Financial "lost out in its attempt to buy the Ethanol Plant" is a puzzling misstatement of the record. Tri-State Financial was ultimately the successful buyer and closed the sale in February 2005.

Tri-State Financial and Reporter Larsen again relied upon only supposition when they stated the undersigned "appears" to have a "strong dislike for and distrust of James Jandrain" and this dislike "probably" arose from Jandrain's testimony in support of Debtor's Motion to Approve Re-engineering Settlement and his involvement with David VanderGriend. Again, the Court has no personal opinion about James Jandrain, let alone a negative one because he was involved, to an unknown extent, in the re-engineering project or with David VanderGriend.

Tri-State Financial and Reporter Larsen have apparently also concluded, based on Larsen's newspaper interview with the Court, the undersigned has hostile feelings toward Tri-State Financial or its out-of-state counsel, Attorney Strasheim, in whole or in part because Attorney Strasheim is a former bankruptcy judge and may have been employed in this case to foster an advantageous relationship with the Court. The Court has no personal relationship with Attorney Strasheim and has no knowledge of what motivated Tri-State Financial to hire him. Why in-state counsel introduced Attorney Strasheim to the Court as a former bankruptcy judge at Attorney Strasheim's first hearing on June 21, 2004, is also unknown, but to surmise the Court was negatively disposed to Tri-State Financial or Attorney Strasheim thereafter is a *non sequitur*.

Tri-State Financial made erroneous and ill-founded conclusions when it stated the Court "implicitly, if not explicitly, accused important witnesses associated with [Tri-State Financial] and the Omaha group of not being truthful." Tri-State Financial's only accurate statement in paragraph 4.16 of its recusal motion is that the Court stated in its December 12, 2003, decision that Debtor's proposed re-engineering settlement was "tainted" because it involved insiders and would benefit guarantors. The statement was part of the Court's exemplification of Debtor's failure to carry its burden of proof for giving superpriority liens to the insider-creditors. Any other deduction Tri-State Financial has made from that portion of the decision is at best unfounded rhetoric and at worst ill-conceived bibliomancy.

Contrary to Tri-State Financial's assessment, the Court holds no disdain for the re-engineering project itself. The Court was unwilling to approve the massive project outside the context of a Chapter 11 plan. Unequivocally, the Court also relayed to parties on several occasions its concern the project had proceeded without court approval although Debtor remained in Chapter 11. Nonetheless, the Court also recognized the value of the project itself. At the July 28, 2004, hearing during its findings and conclusions regarding conversion of the case to Chapter 7, the Court stated:

> It would appear that the Chapter 7 Trustee may be able to get the plan[t] up and running within a relatively short period of time or offer the plant for sale, also within a relatively short period of time. They may be able to employee [sic] ICM if that's appropriate and move for credit to complete the upgrade project, again if that's appropriate.

TRANSCRIPT OF RECORD at 91, *In re Tri-State Ethanol Company LLC*, Bankr. No. 03-10194 (July 28, 2004)(file doc. 1322)(bracketed notes correct transcriptionist errors).

*Basis No. 3*

Tri-State Financial stated recusal is warranted because "the pattern of [the Court]'s rulings ... have given every appearance of being improperly vindictive, punitive or both." It surmised the decision to convert the case to Chapter 7 was targeted at Debtor, Tri-State Financial, and the Omaha group and was

> vindictive or punitive mainly for what [the Court] had decided was disregard of his judicial authority, but also perhaps for what he had decided was a scheme and also perhaps, as suggested by the Larsen affidavit, to put or keep Strasheim in his place. This is a more likely explanation than his discussion on July 28, 2004, of Chapter 11 confirmation standards.

*Motion for Recusal*, ¶ 4.20, Tri-State Financial, L.L.C. (June 29, 2006) (file doc. 1873). It also surmised this punishment may have sprung from Tri-State Financial's failure to consummate a settlement with North Central that was recited on the record June 21, 2004.

On July 27, 2004, when North Central's motion to approve its agreement with Debtor and Tri-State Financial was on the table, the Court confirmed with counsel -- several times -- that the oral agreement North Central, Debtor, and Tri-State Financial recited on the record June 21, 2004, had not included any provision that it was conditioned on confirmation of a plan. Tri-State Financial's statement that the Court attempted that day "to influence [Tri-State Financial] to agree to pay $1 million for equity while not disclosing to all parties that [Debtor's] Chapter 11 plan could not be confirmed" is inaccurate and erroneously assumed the Court had a significant understanding of the implications of the parties' June 21, 2004, deal as it related to either North Central or Tri-State Ethanol (the Court was focused on the implications of the settlement as it related to Debtor). At the July 27, 2004, hearing, the Court stated it could not force Tri-State Financial to settle with North Central, and the Court denied North Central's motion requesting approval of that settlement, which was the disposition Tri-State Financial had sought that day. Further, the Court's statements on July 27, 2004, regarding the confirmability of Debtor's proposed plan were to advise the parties what matters would be at issue at the next day's confirmation hearing, nothing more.

At the hearing on July 28, 2004, the Court's statements about the confirmability of Debtor's plan, especially as to feasibility, were a part of its findings and conclusions regarding its decision to convert the case to Chapter 7. The ultimate failure of Debtor, Tri-State Financial, and North Central's June 21, 2004, settlement may have played a role in Debtor's decision not to go forward with confirmation of a plan on July 28, 2004, and to consent to dismissal of the case; the failure of the parties' June 21, 2004, deal, however, was not a material factor in the Court's decision to convert the case to Chapter 7 rather than dismiss it.

In this section of its recusal motion, Tri-State Financial referenced other paragraphs in the motion and thus provided a lengthy discourse on why it had surmised the Court punished Tri-State Financial or ICM for re-engineering the ethanol plant without court authority and forced it to settle with Trustee Lovald. It says the Court held a hearing on March 2, 2005, to decide whether Trustee Lovald's objection to Tri-State Financial's administrative expense claim "should be sustained without an evidentiary hearing." It also stated the Court had prematurely concluded in its December 12, 2003, decision denying Debtor's Motion to Approve Re-engineering Stipulation that Tri-State Financial was precluded from receiving any administrative expense claim.

Tri-State Financial has reached an overblown conclusion about the purpose of the March 2, 2005, hearing. The initial hearing on Tri-State Financial's administrative expense claim was specifically set as a telephonic hearing, which the Court frequently conducts. The scheduling order for a telephonic hearing on a contested matter, including this one, advises parties an evidentiary hearing will be set, if needed. What actually happened during the March 2, 2005, hearing is set forth in the Court's March 14, 2005, letter decision:

> A telephonic hearing was held March 2, 2005. Tri-State Financial first argued that North Central did not have standing to object. North Central defended saying its position as an equity security holder could be eroded by any payments made to Tri-State Financial on these loan claims. Tri-State Financial countered that since only Debtor would receive any estate residual, only Debtor, not its shareholders, had standing to protect that potential recovery.
>
> Tri-State Financial next requested an evidentiary hearing on its administrative expense claim. Facts Tri-State Financial claimed were in dispute included whether the unsecured loans for operating expenses were made in the ordinary course of Debtor's business and thus did not need court approval under 11 U.S.C. § 364(a) and whether the loans for equipment purchases constituted a substantial contribution to the estate for which the estate must compensate Tri-State Financial. It argued that since the loans benefitted Debtor and enhanced the sale of the ethanol plant, the estate should not reap a windfall of almost $2,000,000.00 while Tri-State Financial was punished in the same amount for failing to obtain court approval. Finally, Tri-State Financial argued Trustee Lovald should commence an adversary proceeding under Fed.R.Bankr.P. 7001(8) if he wanted Tri-State Financial's loan claim subordinated.
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> Counsel for Trustee Lovald restated the trustee's position that Tri-State Financial did not hold an administrative claim. He argued that by financially supporting Debtor through unauthorized loans, Tri-State Financial instead had made an equity contribution.

*In re Tri-State Ethanol L.L.C.*, Bankr. No. 03-10194, slip op. at 7 (Bankr. D.S.D. March 14, 2005). The findings and conclusions the Court made in that interim decision are also best considered from reading the actual decision, not from Tri-State Financial's recollections in its recusal motion.

> *Discussion - standing of North Central Construction.* A Chapter 7 debtor has standing to object only if the contested matter might produce or affect any surplus in the bankruptcy estate that would be returned to the debtor. *Nangle v. Surratt-States (In re Nangle)*, 288 B.R. 213, 215-16 (B.A.P. 8th Cir. 2003)(a Chapter 7 debtor holds a pecuniary interest and may object to a proposed settlement if there is a reasonable possibility of a surplus after all estate debts are paid). A shareholder of a Chapter 7 debtor-corporation, however, does not enjoy the same standing. Generally, an action to enforce corporate rights or redress injuries to a corporation may not be maintained by a shareholder in his own name, even though the perceived injury to the corporation may result in a decline in the value of the stock. *Sinclair v. Hawke*, 314 F.3d 934, 939 (8th Cir. 2003)(cites therein).
>
> The Bankruptcy Appellate Panel in this Circuit has held that a shareholder of a Chapter 7 debtor would have standing to object to a proposed settlement by the case trustee if the shareholder could establish that a successful objection would result in an estate surplus. *Yates v. Forker (In re Patriot Co.)*, 303 B.R. 811, 815 (B.A.P. 8th Cir. 2003). While the decision acknowledged that the objector was the *sole* shareholder of the debtor, the Court's conclusion did not appear to hinge on that fact. In light of *Sinclair*, 314 F.3d at 939, however, that distinction undoubtedly remains important. *See, e.g., Freishtat v. Blair (In re Blair)*, 319 B.R. 420, 436 (Bankr. D. Md. 2005)(sole shareholder had standing to object to fee application where its outcome would affect her pecuniary interest).
>
> Accordingly, the Court concludes that North Central does not have standing, as an equity holder in Debtor, to object to Tri-State Financial's administrative expense claim against the bankruptcy estate. Moreover, as long as sufficient funds have been placed in escrow to pay North Central's non equity claim in full, North Central also does not have standing to object as an estate

creditor. North Central will, therefore, need to look to Debtor to protect any potential estate surplus from improper or exaggerated claims.

*Discussion - necessity of an evidentiary hearing on Tri-State Financial's administrative expense claim.* A Chapter 11 debtor-in-possession may incur unsecured post-petition debt without court-approval if the debt is incurred in the ordinary course of business and if the debt constitutes an administrative expense under § 503(b)(1). 11 U.S.C. §§ 364(a), 1107, and 1108. Two tests are usually employed when determining whether unsecured credit is being incurred in the ordinary course of business. *In re Blessing Industries, Inc.*, 263 B.R. 268, 272 (Bankr. N.D. Iowa 2001)(cites therein). The *vertical* test is whether a reasonable creditor would view the transaction as deviating from the debtor's normal day-to-day operations. *Id.*

> If the transaction is something that might be considered "unusual, controversial or questionable" the creditors have a right to be notified so that they have an opportunity to object.

*Id.* (quoting *In re Husting Land & Dev., Inc.*, 255 B.R. 772, 779 (Bankr. D. Utah 2000)). The horizontal test considers whether the credit transaction falls within a range of accepted practices within the debtor's particular industry. *Blessing Industries,* 263 B.R. at 272 (cites therein).

For the unsecured debt to be an administrative expense under § 503(b)(1), it must represent "actual, necessary costs and expenses of preserving the estate," a provision which courts generally have construed narrowly. *AgriProcessors, Inc. v. Iowa Quality Beef Supply Network, L.L.C.* (*In re Tama Beef Packing, Inc.*), 290 B.R. 90, 96 (B.A.P. 8th Cir. 2003). Two questions need to be answered. First, did the expense arise from a transaction with the bankruptcy estate? *Id.* Second, did the transaction benefit the estate in some demonstrable way? *Id.*

The claimant must show that *other* unsecured

> creditors received tangible benefits from the services or goods provided by the claimant. *In re Jack Winter Apparel, Inc.*, 119 B.R. 629, 633 (E.D. Wisc. 1990); *Kinnan & Kinnan Partnership v. Agristor Leasing*, 116 B.R. 162, 166 (D. Neb. 1990); *In re Herrick*, Bankr. No. 184-00041, slip op. at 2 (Bankr. D.S.D. May 9, 1988). Incidental benefit to the estate or extensive participation in the case, standing alone, is not a sufficient base for an administrative [expense] status. *Jack Winter Apparel, Inc.*, 119 B.R. at 633. A creditor's efforts undertaken solely to further its own self-interest [are] not compensable. *Id.*
>
> *In re Bellman Farms, Inc.*, 140 B.R. 986, 995 (Bankr. D.S.D. 1991). The claimant's burden is by a preponderance of evidence. *Id.*; *In re Bridge Information Systems, Inc.*, 288 B.R. 133, 137-38 (Bankr. E.D. Mo. 2001); and *In re Hanson Industries, Inc.*, 90 B.R. 405, 409 (Bankr. D. Minn. 1988).
>
> Tri-State Financial undoubtedly will have a difficult time establishing that the subject loans it made to Debtor during the Chapter 11 administration were made in the ordinary course of Debtor's business, especially where Debtor sought court approval for other loans for the same or similar purposes. Nonetheless, the Court will give Tri-State Financial an opportunity to make that showing.

*In re Tri-State Ethanol L.L.C.*, Bankr. No. 03-10194, slip op. at 7-10 (Bankr. D.S.D. March 14, 2005). While Tri-State Financial considers the interim decision as implicit evidence the Court had pre-judged its administrative expense claim, the decision demonstrates otherwise. The Court reviewed the applicable law and the facts of record. While the Court set forth the legal burdens Tri-State Financial faced and also forewarned Tri-State Financial it had a difficult road to travel based on the present law and fact, the Court did not foreclose the administrative claim.

Tri-State Financial again misstated the record when it alleged

> without warning or request, on March 23, 2005, [the Court] sua sponte entered an order shortening the time for [Tri-State Financial] to file its answer to April 8, 2005, fixing April 22, 2005, as the deadline to complete discovery and scheduling a trial on May 2, 2005, thereby arbitrarily depriving [Tri-State Financial] of the benefits of the Federal Rules of Bankruptcy Procedure for adversary proceedings. Later he denied [Tri-State Financial]'s request for a continuance.

*Motion for Recusal*, ¶ 4.33, Tri-State Financial, L.L.C. (June 29, 2006)(file doc. 1873). The Court advised the parties in the March 14, 2005, interim decision that all matters regarding Tri-State Financial's claim would be heard together:

> The Court, however, is not going to hold successive hearings on Tri-State Financial's alternative theories of recovery and the objections thereto. Consequently, any objection to Tri-State Financial's alternative theory that it holds a general unsecured claim for repayment of these loans [footnote omitted] should be filed promptly, and any adversary proceeding by Trustee Lovald or another party in interest that Tri-State Financial's claim should be subordinated under 11 U.S.C. § 510© and Fed.R.Bankr.P. 7001(8) should be commenced promptly. A combined evidentiary hearing/trial date will then be set by separate order.

*In re Tri-State Ethanol L.L.C.*, Bankr. No. 03-10194, slip op. at 10 (Bankr. D.S.D. March 14, 2005). That the answer period in the adversary proceeding had to be shortened to accomplish that directive was obvious. Tri-State Financial's subsequent motion to reschedule and extend certain deadlines was denied because, as related above, the Court had earlier advised counsel that all matters related to Tri-State Financial's claim would be heard together and because alternative court dates were not readily available. What Tri-State Financial also failed to recall in its recusal motion is its second motion to reschedule *was* granted after some unavoidable discovery problems arose and a date on the Court's calendar became available.

Tri-State Financial has also concluded the Court forced it to settle with Trustee Lovald and the Court somehow dictates Trustee Lovald's decisions regarding the claims to which he will object. Both conclusions defy the record and inappropriately castigate the Court's and Trustee Lovald's professionalism and character. If anything has encouraged settlements in this case -- and should continue to encourage them -- it is the fact that the estate has sufficient funds to pay all or nearly all claims and the fact that litigating the construction-related disputes would be horrendously expensive and time-consuming.

As to which claims Trustee Lovald files objections, the Court simply has no knowledge of the disputed claims or the grounds for those disputes until Trustee Lovald files his objections. That Reporter Larsen surmised otherwise demonstrates an ignorance, in general, of the Court's actual relationship with all case trustees and, in particular, of the statutory duty Trustee Lovald has to investigate each of the many claims in this case and litigate those that are objectionable.

Similar to its allegations regarding the Court's treatment of John Hoich, James Jandrain, and Attorney Strasheim, which are discussed above, Tri-State Financial claimed this Court punished Randy Kramer for being a member of the Omaha Group by reducing his claim. As noted above, Randy Kramer did not file a claim in this case. As also discussed above, the claim held by Western Biomass, the corporation of which Kramer owns half the stock, was reduced because there was no record Debtor had agreed to pay that company a $17,500.00 bonus. There was no punishment; there simply was no evidence to support that portion of Western Biomass' claim. Tri-State Ethanol also argued the Court has not applied that same standard to other creditors' claims. It has, to James Jandrain's.[21] No other claims of a similar nature have yet come before the Court.

Finally, under this third "Basis for Bias," Tri-State Financial said the Court "appears to have decided that as punishment there should be no return to holders of equity interests in [Debtor.]" It reaches this conclusion based on the Court's "withholding of any rulings on [Tri-State Financial]'s objections to claims and by his rulings on appointment of professionals and

[21] In this section, Tri-State Financial repeated its charges that the Court punished James Jandrain by denying his claim. Those charges are discussed above.

allowance of their fees."

As discussed by Trustee Lovald in his response and affidavit regarding Tri-State Financial's recusal motion, there has never been any legitimate expectation equity holders would receive a significant return on their investments in this case. Moreover, contrary to Tri-State Financial's contentions, that reality is not a product of this Court's action.

Tri-State Financial's allegations regarding the Court's orders on the appointment and compensation of professionals is discussed below.

*Basis No. 4*

Tri-State Financial claimed a "fully informed average person on the street might also reasonably doubt [the Court]'s impartiality based on a pattern of prejudgments, discriminatory, and unfair treatment of [Tri-State Financial] as compared to other litigants in the case." It again offered as evidence its allegations that the Court blamed Tri-State Financial when it, Debtor, and North Central failed to consummate the deal they reported on the record June 21, 2004. As discussed above, the only thing the Court confirmed with counsel in Chambers and during the July 27, 2004, hearing was that the parties had not stated on the record June 21, 2004, that confirmation of Debtor's pending Chapter 11 plan was a condition of the agreement. Moreover, the

June 21, 2004, agreement was never approved and is no longer at issue.

Tri-State Financial offered the in-court auction of the ethanol plant as additional evidence the Court has favored other parties over it. Trustee Lovald's July 20, 2006, affidavit lays that allegation to rest. As he recites, any changes to the sale terms and conditions made on the sale day were by mutual consent of all the parties involved. For Tri-State Financial to make charges to the contrary is reckless. *See* S.D.C.L. ch. 16-18, appendix, Rule 3.3, SOUTH DAKOTA RULES OF PROFESSIONAL CONDUCT; *Midwest Motor Sports v. Arctic Sales, Inc.*, 347 F.3d 693, 697-98 (8th Cir. 2003)(South Dakota's Rules applied in matter before federal district court). That Reporter Larsen, who is not law trained, left the sale hearing with misconceptions and an incomplete comprehension of what had taken place is understandable. Any changes to the sale terms and conditions made that day, however, were done only with the consent of all interested parties. Further, the changes benefitted the estate, and thus creditors, by insuring the best sale price and sale terms were obtained. Moreover, no appeal or motion to alter or amend the sale order was timely filed. Tri-State Financial was the ultimate purchaser when the original bidder could not close timely, and Tri-State Financial's back up bid became the successful bid.

It is true the Court denied an earlier motion by Tri-State Financial to change some of the sale terms. That motion, which was filed *after* a contested motion to set sale terms had been resolved, requested substantial changes Tri-State Financial could and should have requested when the sale terms motion was pending. In an October 8, 2004, letter decision denying Tri-State Financial's motion to amend the same terms order, the Court thoroughly addressed Tri-State Financial's four concerns. To allude the sale term changes Tri-State Financial wanted through that motion and the sale term changes that were made by mutual consent on the sale day were essentially the same and were only granted because some other party requested them is an oversimplification -- if not misstatement -- of the record by Tri-State Financial.

Under this fourth "Basis for Bias," Tri-State Financial repeated its allegation that in March 2005 the Court pre-judged its administrative expense claim, shortened the answer time in the related adversary proceeding commenced by Trustee Lovald, and denied its motion to delay the hearings on its claim and the related adversary proceeding. Those allegations are addressed above, including those portions of the record Tri-State Financial has misinterpreted or simply ignored. In this section of its recusal motion, however, Tri-State Financial relied on these allegations for its conclusion that the Court has become a "virtual advocate against [Tri-State Financial]." It also added two more allegations:

> In considering whether to confirm [Debtor]'s modified plan of Reorganization, Judge Hoyt invoked his duty to independently apply confirmation standards [and i]n considering attorneys fees for the Trustee and creditors, [the Court] does not invoke his duty to independently pass on such fees. In both cases, there is likely injury to [Tri-State Financial] which is known to [the Court].

*Motion for Recusal*, ¶ 4.34, by Tri-State Financial, L.L.C. (June 29, 2006) (file doc. 1873).

Tri-State Financial has again misstated the record. A confirmation hearing was never held in this case so no objections of any nature were ever formally considered. Objections to confirmation by North Central were still on the table for the evidentiary confirmation hearing set for July 28, 2004. When the confirmation hearing was called as the first matter on the calendar that day, Debtor announced it was consenting to dismissal of the case.

As to the Court's rulings on professional's fee applications, the Court identified fifteen fee applications that have come before it in this case to date. Five of those have been contested. One, an application by Debtor's original counsel and his firm, was withdrawn. One application by special counsel for the estate was approved with modifications made at the request of the United

States Trustee. In another, filed by a creditor's attorney, the United States Trustee withdrew its objection. Creditor First Dakota's request for attorneys' fees under § 506(b) was reduced following a hearing, and the order is still subject to a motion to amend. The fifth, by one of the estate's special counsel, has yet to be set for hearing.

Of the ten uncontested fee applications, no objections were filed, and the Court found no basis to bring the matters on for hearing *sua sponte*. The Court finds it difficult to understand how Tri-State Financial can castigate the Court for not "objecting" to any of these ten fee applications when Tri-State Financial itself did not file objections to any of them.

Tri-State Financial made similar allegations regarding applications to employ estate professionals and conflict of interest issues. It is true Debtor's original out-of-state bankruptcy counsel faced removal due to alleged conflicts of interest created by his and his firm's representation of both Debtor and some equity security holders who had formed Tri-State Financial. The Court, however, never entered a ruling on that matter. The attorney and his firm withdrew from continued representation of Debtor and withdrew their fee application. One of the estate's attorneys, Robert E. Hayes, is presently facing conflict of interest charges by Tri-State Financial, which were made as part of its objection to his fee application. That matter has not yet been set for hearing. The Court knows of no other similar employment or conflict of interest issues.

Tri-State Financial claimed the Court has Trustee Lovald under his "control and [Trustee Lovald is] not independent." In this portion of its motion, Tri-State Financial offered as evidence the fact Trustee Lovald changed his position on whether the parties had reached a settlement following the mediation with Judge Simko, and it alleged the Court became a "virtual advocate" for North Central at the May 4, 2006, hearing on Trustee Lovald's motion to approve the mediated settlement.

Tri-State Financial's allegations are again overstated. It is undisputed Trustee Lovald initially took the position the parties' mediated settlement with Judge Simko could not be presented by him for approval by the Bankruptcy Court. Trustee Lovald, however, in his objection to North Central's motion, acknowledged "core agreements" had been reached that day. He also identified an indemnity issue as the major stumbling block that had prevented the completion of a written agreement. At the February 9, 2006, hearing, Tri-State Financial also agreed some "core agreements" had been reached in the mediation. Based on that record, the Court concluded the core agreements constituted a stipulation Trustee Lovald could notice for objections. The Court further concluded the transcript of the settlement report the parties made before Judge Simko after the mediation was the best evidence of what constituted the core agreements. That Trustee Lovald then advocated in support of approval of the "core agreements" in a subsequent motion was legally prudent and consistent with the record on February 9, 2006. Moreover, Trustee Lovald's motion to approve the mediated settlement was later denied. The Court, thus, could not have then "pre-judged" the trustee's motion. Moreover, the Court gave North Central little input at the May 4, 2006, hearing on the trustee's settlement motion because North Central did not have a pleading on the table.

In this portion of the recusal motion, Tri-State Financial also stated:

> On July 7, 2005, counsel for the Trustee had filed a motion for leave to make Gaylor Engineering a party to the Trustee's litigation in [North Central]'s claim. The logical reason for this is that Gaylor Engineering and [North Central] can be expected to point the finger at each other for defective engineering and defective construction as the party to blame for the Ethanol Plant not working as it was supposed to work. On the same day, Judge Hoyt sua sponte denied the Trustee's Motion.

*Motion for Recusal*, ¶ 4.37, by Tri-State Financial, L.L.C. (June 29, 2006) (file doc. 1873). Though it is unclear, apparently Tri-State Financial believed the Court's denial of this motion was intended to favor another party and punish it. As the Court stated in its ruling on the trustee's motion to bring Gaylor Engineering into an adversary on a third party complaint, the motion was untimely, and the existing adversary did not lend itself to a third-party complaint against Gaylor Engineering. The denial was without prejudice to a subsequent contested matter or adversary proceeding regarding Gaylor Engineering's claim. In fact, such an adversary proceeding was commenced by Trustee Lovald against Gaylor Engineering while this recusal motion was under advisement.

*Basis No. 5*

Tri-State Financial contended the Court "at times appears to have aligned himself with [North Central] and in favor of [North Central]. It charged the Court has "yet to question the enforceability, validity or amount of the Claim of [North Central] or [North Central]'s motives in opposing [Debtor] and [Tri-State Financial] every step of the way." It further claimed the Court has "indulged" North Central "in nearly all its tactics of questionable motivation."

It is true the Court has not yet ruled on North Central's claim. Trustee Lovald's and Tri-State Financial's respective objections to North Central's claim have not yet been heard. The parties' interceding attempts to achieve a global settlement have delayed resolution, not the Court. Further, Trustee Lovald has now reached a settlement with North Central, and that settlement, to which Tri-State Financial has objected, is ready to be set for hearing. If the trustee's settlement is not approved, then Trustee Lovald's and Tri-State Financial's objections to North Central's claim will be on the table, along with the attendant July 8, 2005, discovery-related motion and the June 21, 2006, "intervention" motion Tri-State Financial has filed.[22]

Because North Central's claim has not yet come before the Court, the Court is not conversant about what is encompassed in North Central's claim or the objections to it. Why Tri-State Financial thinks the Court should already be aware of that information, *see* ¶ 4.41 of its recusal motion, is in direct opposition to its several contentions the Court should not pre-judge matters.

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[22] Because it has a pecuniary interest in any proposed settlement of North Central's claim, Tri-State Financial has standing to object to any proposed compromise of North Central's claim, as well as to object to the claim itself. *See White v. Coors Distributing Co. (In re White)*, 260 B.R. 870, 875 (B.A.P. 8th Cir. 2001)(party with pecuniary interest may object to a claim). At times, however, it appears Tri-State Financial and its counsel do not acknowledge Trustee Lovald has the authority to compromise North Central's claim, subject to court approval, and that any proposed settlement of the claim should be considered *before* extensive discovery or litigation regarding the objections to North Central's claim. *See* 11 U.S.C. § 704; Fed.R.Bankr.P. 9019; *Martin v. Cox (In re Martin)*, 212 B.R. 316, 319 (B.A.P. 8th Cir. 1997). Were it not so, the estate would be deprived of some of the cost and time-saving benefits of a compromise. *Id.*; *ReGen Capital III, Inc. v. Official Committee of Unsecured Creditors (In re Trism, Inc.)*, 282 B.R. 662, 668 (B.A.P. 8th Cir. 2002)("A major purpose of compromise is to avoid the expense, burdens, and uncertainty associated with litigation. [Cite omitted.]").

Tri-State Financial also claimed the Court

> has appeared to favor [North Central] procedurally by such things as the scheduling a trial date to decide objections to [North Central]'s claim that make it impossible for the Trustee and [Tri-State Financial] to adequately prepare for trial and other similar actions, by unnecessarily scheduling hearings at geographically distant places, and by not ruling, at the Trustee's request, and disputes in which the Trustee and [Tri-State Financial] are adversaries.

*Motion for Recusal*, ¶ 4.42, Tri-State Financial, L.L.C. (June 29, 2006) (file doc. 1873). As noted above, the original evidentiary hearing on North Central's claim, scheduled for August 29, 2005, was set by order entered June 10, 2005. Consequently, the parties had more than two months to prepare. Further, the August 29, 2005, evidentiary hearing was put on hold at the parties' request due to their mediated settlement with Judge Simko.

As to holding hearings at "geographically distant places," the divisional courthouse for this case is in Aberdeen, South Dakota. Only one active attorney is from that area. The attorneys for the other active parties are mostly from southeastern South Dakota, one is from Omaha, Nebraska, and another is from Minneapolis, Minnesota. The most convenient place for hearings has, thus far, been Sioux Falls, South Dakota. The Court's records indicate all but four hearings have been held there. Four hearings have been held in Pierre, South Dakota -- two in 2003 and two in 2004 -- where the undersigned has his chambers and a more readily available courtroom. Accordingly, the basis for Tri-State Financial's complaints in this regard are unfounded.

Though it is not entirely clear from this portion of the recusal motion, Tri-State Financial also seems to contend the Court has delayed rulings, at Trustee Lovald's request, on matters of dispute between Trustee Lovald and Tri-State Financial. The Court does not know what those matters are, and it has not delayed any rulings at Trustee Lovald's behest.

*Basis No. 6*

Tri-State Financial's final grounds for recusal is that it believes the Court has been too involved in the parties' various settlement attempts and has become privy to the specifics of those negotiations, in large part because of North Central's November 18, 2005, letter to the Court, and the Court's statements regarding the settlement Debtor, North Central, and Tri-State Financial reported on the record June 21, 2004.

Contrary to Tri-State Financial's assertions, the Court has not taken an active role in the settlements. It has virtually no knowledge of the "offers, amounts, and the like" as Tri-State Financial believes. To the extent it could have gleaned a portion of that information by studying North Central's November 18, 2005, letter to the Court and the several attachments thereto, the Court has not done so. The letter was not appropriately sent by North

Central, a fact on which the Court has always agreed with Tri-State Financial and a fact the Court tried to convey to North Central at the telephonic hearing on November 18, 2005. Moreover, one of the attachments with which Tri-State Financial takes issue -- the transcript of the mediation settlement report -- was subsequently determined on February 9, 2006, not to be privileged, since it essentially contained only the results of the mediation, not the exchanges that lead to it.

To the extent the parties have disclosed offers and counteroffers in subsequent hearings or pleadings, the Court has not requested they do so, and any such disclosures, which have been minimal, have not been material to any of the Court's decisions to date. They will also not be material in any subsequent decision.

As to the Court's statements regarding the settlement among Debtor, Tri-State Financial, and North Central that was reported on the record June 21, 2004, the Court only reiterated on July 27, 2005, that confirmation was never stated on June 21, 2004, to be a condition of the agreement. The Court did not have a detailed understanding of the impact the agreement would have on the two creditors involved but instead focused on the impact the agreement would have on the bankruptcy estate.

Tri-State Financial has relied upon *United States v. Pfizer, Inc.*, 560 F.2d 319 (8th Cir. 1977). In *Pfizer*, the appellate court found the trial court had "participated in settlement negotiations to an extraordinary degree" and had

> continued to play an active and aggressive role in settlement negotiations, expressing strong opinions on the merits of the case and expressing his monetary evaluation of [one party]'s claims against these appellants...."

*Id.* at 322. That Tri-State Financial somehow equates this Court's actions in this case with those of the trial court in *Pfizer* is a gross exaggeration of the record. In contrast to the facts in *Pfizer*, the Court here knows only the results of settlements that have been reported on the record, including the record made before Judge Simko. The Court is not privy to the intricate legal give and take the parties have endured in their settlement attempts, nor does it want to be privy to it.

In this portion of its recusal motion, Tri-State Financial again expressed disdain for the Court's alleged lack of

> concern that [Tri-State Financial] would pay $1 million for equity in a Chapter 7 case and $1.5 million for a disputed claim. This was so even though Judge Hoyt knew on November 18, 2005, that [North Central], shortly after July 29, 2004, had filed a lawsuit against [Tri-State Financial] seeking to enforce the purported settlement but had done virtually nothing to get the case to progress to trial for two years.

*Motion for Recusal*, ¶ 4.49 (in pertinent part), by Tri-State Financial, L.L.C. (June 29, 2006) (file doc. 1873). This Court has no recollection of when it learned North Central had filed suit against Tri-State Financial in federal district court, has never seen the pleadings for that action, and, obviously, has no ability to make that suit "progress to trial." If Tri-State Financial was referring to the fact North Central's claim has not yet been considered at a bankruptcy court hearing, that delay, as discussed above, has been the product of the parties' attempted settlements, not the Court's actions.

Contrary to Tri-State Financial's assertions in paragraph 4.52 of its recusal motion, the Court does not believe it is the only bankruptcy judge who can resolve the remaining disputes in this case. The undersigned's decision to delay his retirement to finish the case only arises from a sense of duty and an awareness that a change of judge will further delay administration, not any concept that his familiarity with the parties is a necessary component of addressing the remaining disputes.

*Application of § 455(a)*

As discussed above, under § 455(a) the Court must objectively consider whether his impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case. The Court stands on the record and writings and concludes an average person would *not* question his impartiality in this case.

For an average person to comprehend all the relevant facts in this case would be a notable accomplishment. Even the Court's necessary regurgitation in this decision of what has transpired to date has been an arduous, time-consuming task. However, the Court is confident, once that comprehension existed, an average person would understand this has been a difficult case, two of the parties have been at loggerheads since before the bankruptcy case began and are still so today, and resolution of some remaining claims and related issues will not be easy. The average person would also find the Court on several occasions has been short with counsel for all parties, especially counsel for Tri-State Financial, who often rehashes issues and arguments that have previously been addressed, and who sometimes encumbers his pleadings and arguments with side issues and comments not relevant to the matter at hand. Fully cognizant of all the facts, however, the average person would share the Court's frustrations with the unnecessary roadblocks and detours in the administration of this case and, at least to some extent, would empathize with his sometimes brusk demeanor.

The average person would note nearly all, if not all, the major players in this case have had court decisions go both in their favor and against them; Tri-State Financial is no exception. The average person, cognizant of all facts, would conclude Tri-State Financial has not been singled out for abuse, nor have others been given a halo by the Court. The average person on the street, fully aware of what has happened in this case, would not question the Court's impartiality. Accordingly, the Court will not recuse itself under 28 U.S.C. § 455(a).

*Application of § 455(b)(1)*

As discussed in part II above, the undersigned should recuse himself under § 455(b)(1) if he holds an actual bias for or against one of the parties. Despite Tri-State Financial's voluminous allegations to the contrary, the Court does not hold any such bias, let alone a deep-seated and pervasive one that would dictate recusal.

After more than 30 years as a trial court judge, including over 18 years as a Bankruptcy Court judge, the undersigned has found this case to be one of the more difficult ones over which he has presided, not because of its legal complexity but due to the sheer volume of contested matters and the animosity among major parties. That difficulty also makes the case more interesting and a greater challenge to govern; it does not by necessity foster or result in any bias for or against any party or their counsel.

Obviously, due to the voluminous pleadings and numerous hearings and conferences over a handful of years, the Court has formed opinions about the parties and their counsel. Those opinions have arisen only from the record before it. The Court has no extra-judicial knowledge of the case or the litigants.

Moreover, the judicial opinions the Court has formed do not include any deep-seated or pervasive bias for or against any party. To the extent Tri-State Financial and its counsel are convinced otherwise, they are only doing themselves and the other litigants a great disfavor.

Since no actual bias exists and since the Court is confident it can continue to provide a fair tribunal, Tri-State Financial's request for recusal under § 455(b)(1) will be denied.

*Application of the Due Process Clause*

Tri-State Financial also sought recusal under the "[t]he Due Process Clause(s) of the United States Constitution in the Fifth and Fourteenth Amendments[, which] guarantee to [Tri-State Financial] the right to trial before an objective, impartial, and fair tribunal and the appearance of an objective, impartial, and fair tribunal." It claims if the undersigned were to conduct any trial on which Tri-State Financial is a party or has an interest, Tri-State Financial would be deprived of due process.

The Fourteenth Amendment provides in relevant part that no *state* "shall deprive any person of life, liberty, or property without due process of law[.]" It is textually identical to the due process clause in the Fifth Amendment, which provides, in relevant part, that a person shall not "be deprived of life, liberty, or property without due process of law[.] *Carhart v.*

*Gonzales*, 413 F.3d 791, 795 n.2 (8th Cir. 2005). While the Fourteenth Amendment applies to states, not this federal tribunal, the Fifth Amendment's Due Process Clause "has a broader reach" and applies to the federal government, *id.*, including this Court.

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' *Tumey v. State of Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13.

*In re Murchison*, 349 U.S. 133, 136 (1955).

This standard is, obviously, quite high. However, since Tri-State Financial's claim for recusal under § 455 failed to "pass muster," the claim also "cannot survive the more rigorous standards required of [such a] claim under the due process clause." *Sypolt*, 346 F.3d at 840; *Larsen*, 427 F.3d at 1095. Therefore, Tri-State Financial's request for recusal under the Fifth Amendment's Due Process Clause will be denied.

*Timeliness of the Motion for Recusal*

As to the timeliness of Tri-State Financial's recusal motion, Trustee Lovald is correct that Tri-State Financial could have brought the motion sooner, especially since Tri-State Financial first intimated on the record the undersigned was being unfair at the November 18, 2005, telephonic hearing. *See, e.g., In re Kansas Public Employees Retirement System*, 85 F.3d 1353, 1360 (8th Cir. 1996); *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983). Therefore, the motion is also denied as being untimely.

Having concluded that recusal under 28 U.S.C. §§ 455(a) or (b)(1) or the Due Process Clause of the Fifth Amendment is not warranted and that the motion was untimely, Tri-State Financial's *Motion for Recusal* will be denied. An appropriate order will be entered. The Court will enter decisions on the matters already under advisement as quickly as possible. Scheduling orders on pending contested matters will be entered soon.

Dated this 1st day of September, 2006.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

On the above date, a copy of this document was mailed or faxed to the parties shown on the Notice of Electronic Filing as not having received electronic notice and Debtor(s), if Debtor(s) did not receive electronic notice.

Linda M. LaFortune
Acting Clerk, U.S. Bankruptcy Court
District of South Dakota

NOTICE OF ENTRY
Under Fed.R.Bankr.P. 9022(a)

This order/judgment was entered on the date shown above.

Linda M. LaFortune
Acting Clerk, U.S. Bankruptcy Court
District of South Dakota