CASE NO. 16-CV-226-GMS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE: TRIBUNE MEDIA COMPANY, ET AL.,

REORGANIZED DEBTORS.

KEITH YOUNGE,

APPELLANT,

V.

TRIBUNE MEDIA COMPANY, ET AL.,

APPELLEES.

APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE
BANKR. CASE NO. 08-13141-KJC

RESPONSE BRIEF OF APPELLEES TRIBUNE MEDIA COMPANY, ET AL.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 8012 of the Federal Rules of Bankruptcy Procedure, Appellees Tribune Media Company, *et al.*, make the following disclosures:

1. Tribune Media Company (f/k/a Tribune Company) ("Tribune") is the ultimate parent of those former debtors in the bankruptcy cases jointly administered under case number 08-13141 (KJC) in the United States Bankruptcy Court for the District of Delaware (the "Reorganized Debtors") that do not conduct publishing activities. As of August 4, 2014, Tribune Publishing Company became the ultimate parent of the Reorganized Debtors that conduct publishing activities.

2. Oaktree Capital Group, LLC is a publicly-held company that indirectly owns 10% or more of Tribune's stock.

3. Tribune Publishing Company is a publicly-held company that owns, either directly or indirectly, 10% or more of the stock of the Reorganized Debtors that conduct publishing activities.

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Appellees, the reorganized debtors in the above-captioned chapter 11 cases (collectively, "Appellees" or the "Reorganized Debtors"), by and through their undersigned counsel, hereby submit this brief in response and opposition to the appeal taken by Keith Younge ("Mr. Younge" or "Appellant") from the Memorandum and Order Sustaining Reorganized Debtors' Objection to Claim No. 3333 of Keith Younge, entered by the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") on March 18, 2016 [Bankr. D.I. 14220, 14221][1] (collectively, the "Opinion") and to the brief filed by Appellant on August 11, 2016 [D.I. 19] (the "Opening Brief"). In response to the Opening Brief and in support of their opposition to the appeal, Appellees respectfully state as follows:

I. PRELIMINARY STATEMENT

The Bankruptcy Court's well-reasoned opinion should be affirmed by this Court. The Bankruptcy Court thoughtfully considered a voluminous record of factual allegations made by Appellant—much of it unsworn, lacking in foundation, and unsubstantiated hearsay—and concluded that *even if* those allegations were capable of being reduced to admissible evidence and were true, and all reasonable inferences therefrom were made in Appellant's favor, he could not make out a claim for harassment or employment discrimination as a matter of law under the prevailing standards of this Circuit. Nothing in the record, briefing and oral arguments below, or in the Opening Brief, provide grounds for this Court to disturb that conclusion. Having received an adverse judgment below on the substance of his claim, Appellant raises for the first time on appeal various jurisdictional and procedural objections in a belated and misplaced effort to re-litigate his claim anew in either this Court or an alternative forum. There is no obstacle to this Court's proper exercise of jurisdiction over the Younge Claim in this appeal. This Court should

[1] The document index numbers for documents filed in the Bankruptcy Court's docket for Case No. 08-13141 are prefaced herein by "Bankr. D.I." and the document index numbers for documents filed in this Court in the instant appeal are prefaced herein by "D.I."

reject each of Appellant's arguments as having been forfeited and improperly raised for the first time on appeal, consistent with applicable Supreme Court precedent. Consequently, the Opinion of the Bankruptcy Court should be affirmed.

II. STATEMENT OF JURISDICTION

The Bankruptcy Court had jurisdiction below under 28 U.S.C. § 1334. The Claim Objection was a core proceeding concerning the "allowance or disallowance of claims against the estate or exemptions from property of the estate . . . ." 28 U.S.C. § 157(b)(2)(B). Appellant filed a notice of appeal from the Opinion [Bankr. D.I. 14226]. This is an appeal from a final order. The District Court has jurisdiction to entertain an appeal of a final order from the Bankruptcy Court pursuant to 28 U.S.C. § 158(a). Appellant's arguments to the contrary, as set forth in Part I of his Opening Brief, are addressed below.

III. STATEMENT OF THE CASE

On December 8, 2008 (the "Petition Date"), Tribune Company (n/k/a Tribune Media Company) ("Tribune") and certain of its affiliates, including Tribune Television Company ("Tribune Television") (collectively, the "Debtors"),[2] each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court. The Debtors' chapter 11 cases were consolidated for procedural purposes only and have been jointly administered pursuant to Rule 1015(b) of the Bankruptcy Rules. [Bankr. D.I. 43, 2333.]

On July 23, 2012, the Bankruptcy Court entered the Order Confirming Fourth Amended Joint Plan of Reorganization (the "Plan") for Tribune Company and Its Subsidiaries Proposed by the Debtors, the Official Committee of Unsecured Creditors, Oaktree Capital Management, L.P.,

[2] As used herein, the term "Debtors" refers to the entities that filed chapter 11 petitions on the Petition Date and "Reorganized Debtors" refers to the entities that became successors to the Debtors upon the Debtors' emergence from their chapter 11 cases. On the Effective Date, Tribune Television underwent restructuring transactions pursuant to which the business operations of WPHL were transferred to WPHL, LLC, a successor Reorganized Debtor.

Angelo, Gordon & Co., L.P., and JPMorgan Chase Bank, N.A. [Bankr. D.I. 12074]. The Plan became effective and the Debtors emerged from their chapter 11 cases on December 31, 2012 (the "Effective Date") [Bankr. D.I. 12939].

This appeal concerns the Bankruptcy Court's disallowance, pursuant to sections 502(b) and 558 of the Bankruptcy Code, of the proof of claim filed by Keith Younge against Tribune Television on June 1, 2009 (the "Younge Claim"). A copy of the Younge Claim is attached to the Claim Objection (defined below) as Exhibit A. [*See* Bankr. D.I. 13715-2.] The procedural and factual history relating to the Younge Claim leading up to this appeal are set forth in detail in (i) the Younge Claim; (ii) the Reorganized Debtors' Objection to Claim No. 3333 of Keith Younge, Pursuant to Sections 502(b) and 558 of the Bankruptcy Code and Bankruptcy Rules 3001, 3003, and 3007 [Bankr. D.I. 13715] (the "Claim Objection") at ¶¶ 1-19; and (iii) the Opinion at 1-6. For its recitation of the relevant and material facts, the Opinion relied principally on (a) Appellant's Statement of Particulars filed with the Philadelphia Commission on Human Relations ("PCHR") prior to the Petition Date [Bankr. D.I. 13715-2 at 9-10] (the "Commission Statement") and (b) the Declaration of Vincent Giannini filed in support of the Claim Objection [Bankr. D.I. 13715-3] (the "Giannini Declaration"). *See* Opinion 1-6 (recitation of material facts citing record sources). The Reorganized Debtors also submitted a Supplemental Declaration of Vincent Giannini in further support of the Claim Objection [Bankr. D.I. 13963-1] (the "Supplemental Giannini Declaration").

The Younge Claim asserts that Mr. Younge is entitled to damages because he allegedly was subjected to a hostile work environment and was discharged from his brief employment with WPHL-TV ("WPHL"), a television station then operated by Tribune Television, because of his race. Opinion at 2-3. Mr. Younge is African-American. *Id*. at 3. Mr. Younge had been hired by

WPHL as a "summer relief technician," a seasonal, part-time position. *See* Giannini Decl. ¶ 5. A summer relief technician is trained by fellow technicians to learn how to perform their job functions while the regular technicians are on vacation. *Id*. Mr. Younge had begun a 30-day probationary period and was training 3-4 days per week. Opinion at 3. On the night of May 7, 2008, on approximately the tenth day of his employment, Mr. Younge was scheduled to train with Richard (Rick) Schultz, a full-time technician. *Id*. Mr. Schultz is Caucasian. *Id*. Upon entering the room, and before training began, Mr. Younge alleges that Mr. Schultz referred to Mr. Younge as "Spike", apparently a derivative of "Spike Lee", the African-American film director. *Id*. When Mr. Younge responded that his name is "Keith," Mr. Schultz stated, "As far as [I] am concern[ed], you are Spike Lee." *Id*. Rather than walk away and report Mr. Schultz's comments, Mr. Younge admits that he walked up to Mr. Schultz – a provocative action – and said: "I told you what my name is." Bankr. D.I. 13715-2, Commission Statement ¶ 7.

This comment set off a heated altercation between Messrs. Younge and Schultz, in which both actively participated and which escalated to yelling, profanity, and disruption of the workplace. Opinion at 3-4. Importantly, Mr. Younge admits that he participated in the altercation, used profanity, and that he walked up to Mr. Schultz and "got in Mr. Schultz's face." *See* Commission Statement ¶¶ 7, 15. The Bankruptcy Court also reviewed and considered a copy of the surveillance video of the altercation and found that, "even viewing it in the light most favorable to Younge, the video shows a heated altercation between Schultz and Younge in which both parties were clearly agitated." Opinion at 17-18. The altercation drew the attention of WPHL's security guard, Mr. Rivera, who separated the two men and took Mr. Younge outside. *Id*. at 4. The Court observed that without this intervention by Mr. Rivera, "Younge and Schultz would surely have been in contact chest to chest." *Id*. at 18.

Once outside, Mr. Younge spoke on the telephone with Ed Elias, WPHL's Technician-in-Charge and a non-supervisory bargaining unit (union) employee, who advised Mr. Younge to return home and contact Human Resources in the morning. *Id*. at 4. WPHL promptly initiated an internal investigation of the altercation, which included interviews and review of the surveillance video that captured the altercation. *Id*. at 4-5; Giannini Decl. ¶¶ 8-9. After review of the video tape and other evidence, Vincent Giannini, Tribune Television's Vice President and WPHL's General Manager, advised both Mr. Schultz and Mr. Younge that their employment was being terminated for violation of the Station's Anti-Harassment Policy and Standards of Conduct and Corrective Action effective on May 15, 2008. Opinion at 4-5; Giannini Decl. ¶¶ 10; Supp. Giannini Decl. ¶ 4 ("I determined that the actions of both men, including the degree to which the yelling, profanity, and, in the case of Mr. Younge, threatening and intimidating conduct had escalated in this altercation, violated WPHL's Anti-Harassment Policy and the Standards of Conduct and Corrective Action, could not be tolerated in the workplace, and warranted both men's discharge.").

Mr. Younge filed a complaint with the PCHR on June 9, 2008. Opinion at 5. The PCHR commenced an investigation of Mr. Younge's complaint, in which WPHL participated. For example, WPHL submitted a position statement to the PCHR, responded to written questions of the investigator, provided company records as requested, and otherwise cooperated with the investigation. *See* Bankr. D.I. 13755 at 18-26, 33-44, 46-76. On December 8, 2008, while the PCHR administrative proceedings were in an investigatory phase, the Debtors commenced their chapter 11 cases and the PCHR administrative proceedings were automatically stayed by operation of section 362(a) of the Bankruptcy Code. Appellant did not file a motion for relief from the automatic stay to permit the PCHR proceedings to continue.

Appellant filed the Younge Claim in the Bankruptcy Court and Appellees sought, pursuant to the Claim Objection, to have the Younge Claim disallowed on the grounds that Tribune Television had no liability to Mr. Younge on account of his hostile work environment or wrongful termination claims. Appellees argued that the Younge Claim should be disallowed as a matter of law, because even assuming all of the material facts alleged in the Younge Claim were true, Mr. Younge could not support an actionable claim against Tribune Television for employment discrimination. *See* Bankr. D.I. 13715, Claim Obj. at 2-3, 11-22. Mr. Younge filed a response to the Claim Objection [Bankr. D.I. 13755] (the "Initial Response") comprised of five pages of argument and 75 pages of additional documentation in support of the Younge Claim. *See* Initial Response. That documentation purportedly consisted of the PCHR's entire record of Mr. Younge's complaint and its investigation, including the materials provided to it by WPHL. *See id.*, Ex. 1. The Reorganized Debtors filed a reply in support of the Claim Objection [Bankr. D.I. 13870] (the "Initial Reply"), arguing that the voluminous record submitted by Mr. Younge was insufficient to overcome the Claim Objection as a matter of law because it was unsworn, unverified, unauthenticated, and relied almost entirely on inadmissible hearsay that would not be capable of being reduced to admissible evidence. *See* Initial Reply ¶ 1. Even assuming solely for the sake of argument that all of the allegations and facts therein were true and admissible, however, the Reorganized Debtors argued that the Bankruptcy Court could decide the Claim Objection based on the papers (*i.e.*, the Younge Claim, Claim Objection, Initial Response, and Initial Reply), because, as a matter of law, Mr. Younge had not carried his burden to allege facts that would allow a reasonable fact finder to find in his favor. *Id.* ¶¶ 2-8

The Bankruptcy Court held a hearing on the Younge Claim on July 15, 2014, at which counsel for Appellees and current Delaware counsel for Appellant appeared. A copy of the

transcript from the hearing is attached hereto as Appendix A. Appellees reiterated their request that the Bankruptcy Court decide the Claim Objection on the papers as a matter of law, arguing that there were no material facts in dispute. Hr'g Tr. July 15, 2014 at 7:24-25, 8:1-12, 11:1-25, 12:1-10. After considering Appellant's opposition, the Bankruptcy Court permitted Appellant to file further submissions in support of the Younge Claim. *Id*. at 13:6-19.

Both parties then submitted supplemental briefs to the Bankruptcy Court. Appellant again chose not to submit any sworn affidavits of declarations, depositions, or other admissible evidence, but included unsworn, unsubstantiated allegations about which Appellant did not have personal knowledge, which Appellant argued could be capable of being supported by admissible evidence if he was given yet another opportunity to develop the record. *See* Bankr. D.I. 13951 (the "Supplemental Response"). Appellees filed a supplemental reply accompanied by the Supplemental Giannini Declaration. *See* Bankr. D.I. 13963 (the "Supplemental Reply"); Bankr. D.I. 13963-1 (Supp. Giannini Decl.). The Supplemental Giannini Declaration specifically refuted Appellant's unsworn conclusory assertions that Mr. Giannini knew or had reason to know that Mr. Schultz was a "bigot" prior to the altercation on May 7, 2008 or that race played any role in Mr. Younge's termination from WPHL. Supp. Giannini Decl. ¶¶ 4-5.

After considering the Supplemental Response, the Supplemental Reply, and all other submissions of the parties, the Bankruptcy Court took the Claim Objection under advisement in September 2014. The Opinion sustaining the Claim Objection was issued by the Bankruptcy Court on March 18, 2016. This appeal followed.

IV. SUMMARY OF THE ARGUMENT

The Argument below proceeds in four parts, corresponding to the arguments raised in the Opening Brief. Before addressing the substance of the Younge Claim, the Opening Brief seeks to impose various jurisdictional and procedural barriers to this Court's adjudication of the appeal.

As explained in Part A of the Argument, there is no serious question that the Bankruptcy Court properly exercised jurisdiction over the Younge Claim and the Claim Objection. Under applicable Supreme Court precedent, Appellant has forfeited any objection to the Bankruptcy Court's disallowance of the Younge Claim that he seeks to raise for the first time on appeal. Moreover, his consent may be inferred by his conduct in filing a proof of claim and actively litigating the claim to judgment before the Bankruptcy Court without raising an objection. Part B of the Argument refutes Appellant's arguments that abstention by this Court is possible or warranted. The Supreme Court has confirmed that the longstanding doctrines of forfeiture and implied litigant consent are essential to deter and prevent gamesmanship and forum shopping by litigants who are unsatisfied with adverse rulings or judgments in the bankruptcy court. This is exactly what Appellant is attempting to do here.

Part C of the Argument addresses Appellant's objections to the procedural aspects of the litigation before the Bankruptcy Court. The Bankruptcy Court properly applied the burden-shifting framework applicable to deciding objections to proofs of claim, utilizing summary judgment standards to evaluate whether Appellant had met his burden of proof as to the validity of the Younge Claim. The Bankruptcy Court provided Appellant with multiple opportunities to file additional submissions, including after it expressly notified the parties that it was considering deciding the Claim Objection as a matter of law. Apart from the Commission Statement (which was sworn), Appellant chose to rely entirely on unsubstantiated hearsay statements, documents lacking in foundation, irrelevant evidence, statements regarding which Appellant has no personal knowledge, conclusory allegations, conjecture, and improbable inferences. Despite these deficiencies, the Bankruptcy Court gave consideration to the entire factual record below and the arguments made by Appellant, and concluded that the Younge Claim failed to support a claim

for either hostile work environment or wrongful termination on the basis of race under the standards applicable in this Circuit. No Constitutional rights were violated. As this Court is amply aware, courts routinely decide claims and controversies as a matter of law without trial where the standards for doing so are met.

Appellant's substantive arguments on his hostile work environment and wrongful termination claims are addressed in Part D of the Argument. The Bankruptcy Court correctly found that Appellant's hostile work environment allegations failed as a matter of law because there was no basis upon which a finder of fact could reasonably find *respondeat superior* liability. The Bankruptcy Court found that there were no disputed or other material facts conceivably establishing that WPHL knew or should have known that Mr. Schultz would behave in such a way that would create an allegedly discriminatorily hostile work environment for Mr. Younge. This Court could also affirm on any of the additional grounds raised by Appellees in the proceedings before the Bankruptcy Court, including that Mr. Younge failed to establish that any of the conduct alleged rises to the high level of "severe or pervasive" harassment necessary to support a claim.

The Bankruptcy Court also properly concluded that Appellant's wrongful termination claim failed as a matter of law on several independent grounds. The Bankruptcy Court correctly found that Appellant failed to prove his *prima facie* case and failed to prove that WPHL's legitimate non-discriminatory reason for terminating Appellant was mere pretext. Notably, Mr. Younge does not deny that he actively participated in the altercation, but he seeks to excuse his aggressive behavior as a "normal human reaction" to Mr. Schultz's comments. As the case law makes clear, however, an employer need not tolerate either the employee that provokes or the employee that reacts in violation of the employer's workplace conduct policies. It is undisputed

that WPHL advised Mr. Younge that he was being terminated after an investigation because of his conduct during the altercation with Mr. Schultz, *i.e.*, yelling, screaming, using profanity, and disrupting the workplace. Mr. Schultz (a Caucasian) was also promptly terminated for his similar conduct toward Mr. Younge. There can be no serious dispute that these facts satisfy Appellees' burden to provide a legitimate, non-discriminatory reason for Mr. Younge's termination, which defeats the wrongful termination claim. Nothing in the record below or in the Opening Brief controverts Mr. Giannini's sworn statement that his decision to terminate Mr. Younge had nothing to do with his race. For all of these reasons, and as further discussed below and in the Claim Objection, Initial Reply, and Supplemental Reply, the Bankruptcy Court's Opinion should be affirmed.

V. STANDARD OF APPELLATE REVIEW

On appeal, the District Court "review[s] the bankruptcy court's legal determinations *de novo*, its factual findings for clear error and its exercise of discretion for abuse thereof." *Interface Group-Nev., Inc. v. Trans World Airlines, Inc.* (*In re Trans World Airlines, Inc*.), 145 F.3d 124, 131 (3d Cir. 1998) (*citing Ferrara & Hantman v. Alvarez* (*In re Engel*), 124 F.3d 567, 571 (3d Cir. 1997)). The Bankruptcy Court's application of summary judgment standards to the Claim Objection was an exercise of discretion for which the standard of review is abuse of discretion. The Bankruptcy Court's disallowance of the Claim Objection as a matter of law was a legal determination for which the standard of review is *de novo*. The Bankruptcy Court made clear that it understood that in deciding the Claim Objection under summary judgment standards, its "function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." Opinion at 6. The Bankruptcy Court accordingly made no factual findings but considered the evidence and drew reasonable inferences therefrom in the light most favorable to Appellant.

VI. ARGUMENT

A. The Bankruptcy Court's Disallowance of the Younge Claim was a Proper Exercise of its Core Jurisdiction and any Objections have been Forfeited and/or Waived

i. Appellant Forfeited Any Objection to the Bankruptcy Court's Disallowance of the Younge Claim

Appellant has no basis to "object" to these proceedings, Opening Brief at 2-3, because he forfeited any such an objection by failing to raise it in the proceedings below. Moreover, he consented, by his actions and inactions, to having the Claim Objection decided by the Bankruptcy Court. The timeline of these proceedings compels this conclusion. Mr. Younge could have, but did not, seek relief from the automatic stay to allow the PCHR proceedings to continue when the Debtors first filed their chapter 11 cases in December 2008 or thereafter. *See* 11 U.S.C. § 362(d) (providing grounds for relief from the automatic stay after motion and hearing). At no point during the pendency of the Debtors' chapter 11 cases did Mr. Younge seek any other remedies available to him, such as withdrawal of the reference or abstention, to seek to have his claim heard in an alternative forum.

Mr. Younge submitted to bankruptcy court jurisdiction by filing a proof of claim in the Bankruptcy Court in June 2009. The Supreme Court has said unequivocally that a party that files a proof of claim subjects itself to the broad equitable powers of the Bankruptcy Court. *See Langenkamp v. Culp*, 498 U.S. 42, 44 (1990) ("Respondents filed claims against the bankruptcy estate, thereby bringing themselves within the equitable jurisdiction of the Bankruptcy Court."). The Third Circuit agrees. "[W]hen a party submits a proof of claim, it triggers the process of allowance and disallowance of claims and thereby is consenting to the jurisdiction of the bankruptcy court to make a final decision as to its claim." *In re Exide Techs*. *Inc*., 544 F.3d 196, 213 n.10 (3d Cir. 2008).

Mr. Younge did not object when the Reorganized Debtors asserted in the Claim Objection that the proceedings concerning the Claim Objection were core. *See* Bankr. D.I. 13715, Claim Obj. at 4 ("The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)."). Federal law provides that "[t]he *bankruptcy judge* shall determine, on the judge's own motion or on *timely motion of a party*, whether a proceeding is a core proceeding under this subsection. . . ." 28 U.S.C. § 157(b)(3) (emphasis added). Appellant made no such motion. Rather, Appellant, through his counsel, further demonstrated his consent to Bankruptcy Court jurisdiction by litigating the Younge Claim to judgment in the Bankruptcy Court over a year-long period in 2013 to 2014, including filing two briefs in response to the Claim Objection and arguing before the Bankruptcy Court. *See* Bankr. D.I. 13755 (Initial Response), 13951 (Supplemental Response). Appellant never once objected to the Bankruptcy Court's jurisdiction. In fact, at oral argument on the question of whether the Bankruptcy Court could decide the Claim Objection as a matter of law, Appellant's counsel *insisted* that the Bankruptcy Court should hold a further hearing on the Younge Claim. *See* Appendix A, Hr'g Tr. July 15, 2014 at 7:6-10 ("There's other evidence that Your Honor needs to see that's not already on the record, that's not part of the filed claim. I think to fully evaluate this claim, it would behoove the Court to see this evidence."). In response to this argument, the Bankruptcy Court invited Appellant to make further written submissions in support of the Younge Claim, which he did by filing the Supplemental Response.

Having pursued the Younge Claim extensively in the Bankruptcy Court, Appellant and his counsel cannot properly argue on appeal for the first time that neither he nor his counsel was aware of his right to object to the Bankruptcy Court's jurisdiction.[3] If, as Appellant suggests, he

[3] This argument is particularly egregious given that Appellant's counsel below is also his Delaware counsel in this appeal. If Appellant's argument on appeal is taken at face value solely for this point, his counsel alleges that he

should have been but was not "initially advised that he had the right to make" an objection to jurisdiction, that was the job of his counsel, and not an error for which the Bankruptcy Court or Appellees have responsibility or that this Court is required to address for the first time on appeal.

ii. The Doctrines of Forfeiture and Waiver Apply to Alleged Personal Injury Claims under Sections 157(b)(2)(B) and 157(b)(5)

Appellant attempts to bypass the doctrines of forfeiture and waiver by arguing that the proceedings before the Bankruptcy Court were *coram non judice* and therefore pose no barrier to Appellant raising these objections for the first time on appeal. Opening Brief at 5. However, the Supreme Court considered and rejected a belated objection to jurisdiction much like Appellant's in *Stern v. Marshall*, 564 U.S. 462, 468-69 (2011). *Stern* held that 28 U.S.C. § 157(b)(5), which provides for personal injury tort claims to be tried in the District Court, is non-jurisdictional in nature and is therefore subject to the doctrines of forfeiture and waiver by consent. *Stern*, 564 U.S. at 468-69. Significantly, the Opening Brief does not refer this Court to *Stern's* controlling precedent.

In *Stern*, the respondent and petitioner litigated their respective claims to competing judgments on the merits in the Texas state probate court and the California bankruptcy court. *Id.* at 468. Seeking to invalidate the bankruptcy court order, which was decided against him, respondent advanced two alternative theories. The first theory—relevant here—was that the bankruptcy court did not have authority to enter final judgment on his defamation claim because it was in the nature of a "personal injury tort." *Id.* at 468-69.[4] Similarly, here, Appellant argues

represented Mr. Younge in the proceedings below without being aware that it was an improper forum or not disclosing that to Mr. Younge. It is far more likely—and consistent with the procedural history of this case—that Mr. Younge chose to litigate his claim in the Bankruptcy Court and now, with that claim having been disallowed, he believes he has nothing to lose by seeking to litigate it again somewhere else.

[4] The second theory addressed in *Stern*—not relevant here—was that the bankruptcy court did not have the authority to enter final judgment on petitioner's compulsory state law counterclaims, notwithstanding that such claims were designated core in 28 U.S.C. § 157(b)(2)(C), because the exercise of core jurisdiction over such claims violated

(for the first time on appeal), that his employment discrimination claims are in the nature of "personal injury tort" claims and that the entirety of the proceedings below should be disregarded for lack of core Bankruptcy Court jurisdiction, effectively allowing him to start the litigation over. Opening Brief at 1-2, 5.

Appellant relies on a narrow and limited exception to the Bankruptcy Court's core jurisdiction for proceedings that involve the "liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution" in a bankruptcy case. *See* 28 U.S.C. § 157(b)(2)(B); Opening Brief at 1-2. Section 157(b)(5) provides that the district court shall "order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending." 28 U.S.C. § 157(b)(5).

Like the Supreme Court in *Stern*, this Court need not reach the issue of whether Appellant's employment discrimination claim is in the nature of a "personal injury tort" that is subject to the limited exception (an issue on which the case law is split). *Stern*, 564 U.S. at 479-80 & n.4 (collecting cases illustrating split in lower court authority). In *Stern*, the Supreme Court held that, even assuming for argument's sake that respondent's defamation claim was a personal injury tort, section 157(b)(5) is not jurisdictional in nature and may be forfeited or waived "in the same way that a party may waive or forfeit an objection to the bankruptcy court finally resolving a noncore claim." *Id.* An identical argument was raised for the first time on appeal in *Falbaum v. Leslie Fay Cos.* (*In re Leslie Fay Cos.*), 222 B.R. 718, 720 (S.D.N.Y. 1998)

Article III separation of powers. *Stern*, 564 U.S. at 468-69. The Supreme Court rejected the first theory and accepted the second theory.

(Rakoff, J.). There, the District Court found that because the argument was not raised in the bankruptcy court below, "there is nothing for this Court to review." The same is true here.

It is black-letter law that arguments raised for the first time on appeal are forfeited. *See U.S. v. Olano*, 507 U.S. 725, 731 (1993) ("No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited . . . by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'"); *Wellness Int'l Network, Ltd. v. Sharif*, 135 S.Ct. 1932, 1949 (2015) (Alito, J., concurring). As articulated by the Supreme Court in *Stern*, the forfeiture rule is essential to the efficient functioning of the federal courts:

> In such cases, as here, the consequences of "a litigant . . . 'sandbagging' the court--remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor," --can be particularly severe. If [respondent] believed that the Bankruptcy Court lacked the authority to decide his claim for defamation, then he should have said so--and said so promptly.

Stern, 564 U.S. at 481-82 (internal citations omitted). Mr. Younge should have said so promptly in this matter as well.

In *Stern*, the respondent had raised an objection to the bankruptcy court's jurisdiction in the bankruptcy court proceedings below (unlike Appellant, who did not), but the Supreme Court found that the respondent had consented to the final adjudication of his claim by actively litigating for more than two years before raising the objection. By this conduct, respondent had forfeited his belated objection under section 157(b)(5). *Id*. at 479-481 (chronicling respondent's 27 months of litigation before the Bankruptcy Court over his defamation claim and finding consent to the bankruptcy court's entry of final judgment). Similarly, as discussed above, Appellant consented to the Bankruptcy Court's jurisdiction by litigating the Younge Claim to judgment and has forfeited any objections to the contrary.

Appellant's reliance on the Supreme Court's recent decision in *Wellness International* as "intervening authority" is misplaced. Opening Brief at 2-3; *see also Wellness*, 135 S.Ct. at 1941-44. *Stern*, not *Wellness*, controls the outcome of this case because the Supreme Court in *Stern* evaluated the issues of consent and forfeiture in the context of personal injury claims excepted from section 157(b)(2)(B), as Appellant now asserts he holds. Moreover, in *Wellness*, the Supreme Court applied longstanding principles of litigant consent, of which Appellant's counsel was most certainly aware. The Court observed that "[a]djudication by litigant consent has been a consistent feature of the federal court system since its inception." *Id*. at 1947. "Nothing in the Constitution requires that consent to adjudication by a bankruptcy court to be express." *Id.* As Justice Alito noted in his concurrence, "respondent forfeited any *Stern* objection by failing to present that argument properly in the courts below." *Id*. at 1949. The outcome of *Wellness* likewise defeats Appellant's argument. On remand from the Supreme Court, the Court of Appeals for the Seventh Circuit found that Sharif had waived his objection to the court's jurisdiction by failing to timely raise it. *Wellness Int'l Network, Ltd. v. Sharif*, 617 Fed. App'x 589, 591 (7th Cir. 2015). The same outcome is mandated here.

iii. The Proceedings on the Claim Objection Were Core Matters, Outside the Scope of the Limited Exception

Appellant's argument also fails because the limited exception to the Bankruptcy Court's core jurisdiction relied on by Appellant did not apply to the proceedings below. The Bankruptcy Court therefore had the power to issue a final judgment. 28 U.S.C. §§ 157(b)(1) (bankruptcy judges may preside over, and enter appropriate orders and judgments pertaining to, all cases under chapter 11 of the Bankruptcy Code and all "core proceedings" arising thereunder), 157(b)(2)(B) (core proceedings include "allowance or disallowance of claims against the estate or exemptions from property of the estate . . . ."). Generally, once a proof of claim is filed by a

claimant in the Bankruptcy Court, the claimant has consented to the Bankruptcy Court's jurisdiction over his or her claim and adjudicating the allowance thereof is "core." *See In re Exide Techs., Inc.*, 544 F.3d 196, 214 (3d Cir. 2008); *Kurz v. EMAK Worldwide, Inc*., 464 B.R. 635 (D. Del. 2001). Congress intended that exceptions to the bankruptcy courts' core jurisdiction should be narrowly construed. *S.G. Phillips Constructors, Inc. v. City of Burlington* (*In re S.G. Phillips Constructors, Inc.*), 45 F.3d 702, 705 (2d Cir. 1995) ("Congress realized that the bankruptcy court's jurisdictional reach was essential to the efficient administration of bankruptcy proceedings and intended that the "core" jurisdiction would be construed as broadly as possible subject to the constitutional limits established in *Marathon*.").

Accordingly, several courts, including this one, have held that a bankruptcy court has the authority to disallow a personal injury claim, notwithstanding the limited exception in 28 U.S.C. § 157(b)(2)(B), where the claim fails as a matter of law. *See In re Amtrol Holdings, Inc*., 384 B.R. 686 (Bankr. D. Del. 2008), *aff'd* No. 08-cv-281-GMS (D. Del. June 28, 2010) (unreported), *rev'd on other grounds*, 532 Fed. App'x 316 (3d Cir. May 23, 2013) (non-precedential); *see also U.S. Lines, Inc. v. U.S. Lines Reorganization Trust* (*In re U.S. Lines, Inc*.), 262 B.R. 223, 233-34 (S.D.N.Y. 2001) (holding that the bankruptcy court had authority to disallow a personal injury claim on statute of limitations grounds); *In re Standard Insulations, Inc.*, 138 B.R. 947, 955 (Bankr. W.D. Mo. 1992) ("If a personal injury claim is invalid as a matter of law or procedure, there is nothing for the district court to liquidate."); *In re Chateaugay Corp.*, 111 B.R. 67, 76 (Bankr. S.D.N.Y. 1990) ("[T]he bankruptcy court must have jurisdiction to make the threshold determination of whether as a matter of law, a claim exists which can be asserted against the debtor, even if that claim sounds in personal injury tort or wrongful death."). Copies of the

Amtrol Holdings bankruptcy court opinion and this Court's opinion affirming on appeal are attached hereto as Appendix B.

Even if Appellant's employment discrimination claim is considered a "personal injury" claim, this Court's prior decision in *Amtrol Holdings* makes clear that bankruptcy courts have core jurisdiction to determine the *validity* of personal injury tort claims in dispositive pretrial proceedings, but not to adjudicate the *amount* of an otherwise allowable claim at trial (unless the parties otherwise consent). If Congress intended that bankruptcy courts did not have core jurisdiction to adjudicate the "allowance or disallowance" of a personal injury claim, it would have said so; it used that phrasing at the outset of section 157(b)(2)(B), but not in the exception. *See Chateaugay*, 111 B.R. at 74 ("Had Congress meant to deny any jurisdiction whatsoever to the bankruptcy court to disallow claims based on the mantra of personal injury tort or wrongful death, it could have said so; but it did not."). Therefore, the phrase "liquidation or estimation" as found in the exception must mean something different from "allowance or disallowance." *In re G-I Holdings, Inc.*, 323 B.R. 583, 607 (Bankr. D.N.J. 2005) ("[B]ankruptcy court jurisdiction over the claims allowance process is distinct from liquidation for purposes of distribution."). The *G-I Holdings* court analyzed various courts' interpretations of the exception and concluded that the narrower approach was more persuasive and better "advances the efficient resolution of claims and avoids placing unnecessary burdens on the district court. *G-I Holdings*, 323 B.R. at 611-614 (collecting cases). As the *Standard Insulations* court observed, "from the plain language of § 157, the bankruptcy court's jurisdiction to reduce a personal injury claim to a dollar value is limited, but it does not appear that § 157(b)(2)(B) is intended to limit the authority to determine the validity of claims against the estate." *Standard Insulations*, 138 B.R. at 954.

Taken together, (i) Appellant's forfeiture of any belated objection to the Bankruptcy Court's exercise of jurisdiction under the principles articulated in *Stern*, (ii) the non-jurisdictional nature of section 157(b)(5), and (iii) the limited nature of the exception in section 157(b)(2)(B) as previously affirmed by this Court in *Amtrol* make clear that Bankruptcy Court properly exercised jurisdiction in disallowing the Younge Claim as a matter of law.

B. There is No Basis for Abstention by this Court

Appellant never raised the issue of abstention in the Bankruptcy Court. The issue is accordingly forfeited on appeal. Abstention also has no application here because the instant matter is before this Court on appeal, rather than as an entirely new proceeding. There is simply no procedural basis for Appellant to appeal this matter to the District Court, then disregard the appellate nature of the proceedings and treat these proceedings as if his claim is to be heard anew.

There is also no justification for abstention as a matter of law. There is no other proceeding for this Court to abstain in favor of, as Appellant has already prosecuted and litigated his claim to judgment in the Bankruptcy Court. Bankruptcy courts in this district have concluded that the absence of a pending proceeding in another forum defeats a request for abstention. *See In re Sportsman's Warehouse, Inc.*, 457 B.R. 372, 390 (Bankr. D. Del. 2011) ("[I]nherent in the concept of abstention is the presence of a pendant state action in favor of which the federal court must, or may, abstain.") (*quoting In re Cable & Wireless USA, Inc.*, 331 B.R. 568, 576 (Bankr. D. Del. 2005)); *but see In re Astropower Liquidating Trust*, 335 B.R. 309 (Bankr. D. Del. 2005) (absence of pending state proceeding is only one factor in discretionary abstention analysis). Appellant acknowledges none of this, instead evading the argument by asking this Court to abstain conditioned on his finding another forum in which to re-litigate his claim. He speculates that perhaps the PCHR will hear his claim as presenting "unique and compelling grounds for the

exercise of abstention in the interest of 'respect for State law'", Opening Brief at 3, but the fact that the Opening Brief cites only to Federal law belies this notion.

Appellant further argues that he could not have litigated his claim before the PCHR due to the automatic stay imposed by the Debtors' bankruptcy "unless the bankruptcy court abstained and remanded." Opening Brief at 4. Appellant could have sought relief from the automatic stay at any time during the four-year period between the Petition Date in December 2008 and the Effective Date in December 2012 when the automatic stay was in effect. He did not.

Finally, Appellant's abstention request is futile. It is not possible for Mr. Younge to reopen his prior administrative proceedings before the PCHR or to commence a new state court or federal court proceeding on account of the Younge Claim.[5] The commencement or continuation of any such litigation or proceeding by Mr. Younge against Tribune Television would be untimely as a matter of law and barred by the confirmed Plan and the discharge and injunction provisions of the Bankruptcy Code. *See* 11 U.S.C. §§ 524 (providing that discharge operates as an injunction against the commencement or continuation of any action to collect a prepetition debt as a personal liability of the debtor), 1141(d) (providing that confirmation of a plan discharges the debtor from any debt arising prior to confirmation). The automatic stay terminated on the Effective Date of the Plan, when the discharge injunction became operative.[6]

[5] The Opening Brief casts doubt on the representations made by Appellant's prior counsel to Appellees' counsel regarding the status of the PCHR proceedings. As stated in the Claim Objection, Appellees were informed by counsel that the proceedings were dismissed and a right-to-sue letter was issued to Mr. Younge in 2013. *See* Bankr. D.I. 13715, Claim Obj. at 5 n.6. Appellant, who is in the best position to know the status of the proceedings, does not offer confirmation one way or other. Regardless of whether the proceedings have or have not been dismissed, they cannot be revived because the claims have been discharged under sections 524 and 114l(d) of the Bankruptcy Code and the Younge Claim could only be asserted against Tribune Television's bankruptcy estate in the Bankruptcy Court.

[6] Under section 108(c) of the Bankruptcy Code, a claim against a debtor may only be timely commenced outside of the Bankruptcy Court by the earlier of the otherwise-applicable statute of limitations or 30 days after the termination of the automatic stay applicable to the debtor, *except as otherwise enjoined under section 524*. 11 U.S.C. § 108(c). The Younge Claim, like all other pre-bankruptcy claims against the Debtors, is enjoined by operation of the discharge injunctions in the Plan and the Confirmation Order.

All pre-confirmation claims against Tribune Television may now be asserted only against Tribune Television's chapter 11 bankruptcy estate, in the Bankruptcy Court. *See, e.g., Carter v. Safety-Kleen Corp.*, 2007 U.S. Dist. LEXIS 29484 *16 (S.D.N.Y. Mar. 14, 2007) ("That the EEOC issued a right to sue letter to Carter on August 9, 2006 – well after SKC's reorganization plan was confirmed – is irrelevant. Carter must pursue his claim before the Bankruptcy referee or not at all.") (internal citations omitted). Appellant cannot commence new litigation based on his already-litigated-to-judgment claims.

C. The Bankruptcy Court Applied the Proper Procedural and Legal Standards to the Younge Claim

Throughout the proceedings below, the Bankruptcy Court afforded Mr. Younge considerable latitude, allowing multiple rounds of briefing and supplementing the record after the Claim Objection was filed. As noted above, that process extended for approximately one year. Appellant has been afforded all requisite due process and has had his "day in court." All of Appellant's constitutional arguments are premised on a purported failure to understand, or disregard of, claims allowance and summary judgment standards that have been well known to the bar and to this Court for decades.[7]

i. The Bankruptcy Court Properly Applied Claim Objection Standards

The Third Circuit has articulated the burden-shifting framework applicable to the allowance and disallowance of claims asserted against a Chapter 11 debtor, which was followed by the Bankruptcy Court. *See In re Allegheny Int'l, Inc.*, 954 F.2d 167, 173-174 (3d Cir. 1992); Opinion at 7-8 (setting forth the burden shifting framework in *Allegheny*). A claimant must

[7] The allegation that "Pennsylvania was deprived of its sovereign immunity" in this matter is both unsupported and makes no sense on its face. Opening Brief at 5. Mr. Younge has no standing to assert sovereign immunity on behalf of Pennsylvania. Pennsylvania has no claim or interest here, otherwise it would have had to file a proof of claim and prosecute it in the Bankruptcy Court's claims process, just as Mr. Younge did. As Mr. Younge notes, Pennsylvania did not do that.

initially allege facts sufficient to support a claim. Opinion at 7-8 (*citing Allegheny*). In the Claim Objection, Appellees requested the Bankruptcy Court to find that they were entitled to judgment as a matter of law because there was no genuine dispute as to material fact after taking all of Appellant's well-pleaded allegations in the Commission Statement as true. *See* Bankr. D.I. 13715, Claim Obj. at ¶ 7 (stating that the objection "adopted the facts regarding the altercation as they were stated by Mr. Younge to the PCHR in his Statement of Particulars, which is appended to the Younge Claim."). Appellees offered the Giannini Declaration to refute the allegation that Mr. Younge's termination was racially motivated and to provide evidence that WPHL had a legitimate, non-pretextual reason for terminating his employment.

Under *Allegheny*, the burden then reverted to Appellant "to prove the validity of the claim by a preponderance of the evidence." *Allegheny*, 954 F.2d at 173-74. Appellant did not offer admissible evidence in the Initial Response or the Supplemental Response. Appellant admits as much, but claims that he could, if given additional opportunity, introduce evidence capable of being admissible at trial. *Id*. at 6-8. For example, Appellant speculates that he might have been able to develop testimony from a laundry list of potential witnesses that "would have proven the presence of disputed material facts" that would, presumably, then have supported unidentified elements of his claim. *Id.* at 7. Speculation of this sort does not satisfy Appellant's burden. As the Bankruptcy Court observed below, "[b]rash conjecture coupled with the earnest hope that something concrete will materialize, is insufficient to block summary judgment." Opinion at 7. Appellant had every chance to submit one or more affidavits or declarations (including his own) to further support his claim, but elected not to do so. Appellees, by contrast, submitted the Supplemental Giannini Declaration specifically to refute several instances of unsworn allegations and conjecture in the Supplemental Response that WPHL knew or should

have known that Mr. Schultz would harass Mr. Younge. *See* Bankr. D.I. 13963-1, Supp. Giannini Decl. ¶¶ 5-10. Appellant did not carry his burden to prove his claim by a preponderance of the evidence, and this Court should affirm on that basis. *See In re Landsource Cmtys. Dev. LLC*, 485 B.R. 310, 314 (Bankr. D. Del. 2012) (KJC) ("When the non-moving party bears the burden of persuasion at trial, the moving party may meet its burden . . . by showing that the nonmoving party's evidence is insufficient to carry that burden.'").

ii. The Bankruptcy Court Properly Applied Summary Judgment Standards

Courts frequently evaluate the legal sufficiency of an objection to a proof of claim under summary judgment standards without a formal motion, particularly where, as here, the claimant was on notice. "[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." *Anderson v. Wachovia Mortgage Corp.*, 621 F.3d 261, 280 (3d Cir. 2010) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986)). "[N]otice is satisfied if the targeted party had reason to believe the court might reach the issue and received a fair opportunity to put its best foot forward." *Id*. (*citing Gibson v. Mayor & Council of City of Wilmington*, 355 F.3d 215, 224 (3d Cir. 2004)).

Appellant was on notice that Appellees sought judgment as a matter of law since the Claim Objection was first filed. Then, at the July 15, 2014 hearing, the Bankruptcy Court expressly put Appellant on notice that it would make a determination whether to decide the Claim Objection as a matter of law, based on whether the submissions of the parties had raised a material issue of disputed fact. *See* Appendix A, Hr'g Tr. July 15, 2014. Appellant thereafter further supplemented the record with the Bankruptcy Court's permission. Appellant thus had an opportunity to present evidence three times: in the Younge Claim itself, in the Initial Response, and in the Supplemental Response. The Bankruptcy Court did not abuse its discretion in

concluding that it could decide the Younge Claim as a matter of law after Appellant had three opportunities to present evidence in support of his claim.

The Bankruptcy Court also properly applied the summary judgment standards to the Claim Objection. In the Opinion, the Bankruptcy Court made clear that it understood that its "function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." Opinion at 6. The Bankruptcy Court viewed the facts in the light most favorable to Mr. Younge, as it is required to do in the context of summary judgment. Appellant's assertion that "there was no factual record", Opening Brief at 6, is wrong. Appellant submitted a voluminous factual record, and indeed the Opening Brief is replete with references to the factual record. What the Bankruptcy Court did not do, appropriately, is make findings of fact based on that record.

It is true that Appellant's allegations are largely based on hearsay, and it is true that the Reorganized Debtors pointed this out in the briefing below. *See* Opening Brief at 7. However, Appellant omits that in the next sentence after the one he quotes, the Reorganized Debtors "assum[ed] solely for the sake of argument that those submissions were admissible and factually accurate". Initial Reply ¶ 1. Appellant raises no argument that the Bankruptcy Court proceeded any differently. Appellant's citation to *Petruzzi*, which provides that hearsay statements may be considered on a motion for summary judgment if they are capable of being admissible at trial, is irrelevant because Appellant's factual averments and documents were taken at face value by the Bankruptcy Court in accordance with *Petruzzi*. *Compare* Opening Brief at 7-8 (*citing Petruzzi v. IGA Supermarkets v. Darling-Del. Co.*, 998 F.2d 1224, 1235 n.9 (3d Cir. 1993)); *with* Opinion at 10 (considering second and third-hand hearsay); 11-12 (considering unauthenticated documents), 19-20 (same). *Petruzzi* is also distinguishable because the non-moving party in *Petruzzi* had

submitted sworn testimony from written statements and depositions, which the Third Circuit found were capable of being reduced to admissible evidence. *Petruzzi*, 998 F.2d at 1233-35. Appellant's only sworn statement is the Commission Statement. None of his other submissions are authenticated or admissible. As explained by the Bankruptcy Court in *In re Barber*,

> Unauthenticated documents, once challenged, cannot be considered by a court in determining a summary judgment motion. In order for documents not yet part of the court record to be considered by a court in support of or in opposition to a summary judgment motion they must meet a two-prong test: (1) the document must be attached to and authenticated by an affidavit which conforms to Rule 56(e); and (2) the affiant must be a competent witness through whom the document can be received into evidence at trial . . . . Documentary evidence for which a proper foundation has not been laid cannot support a summary judgment motion, even if the document in question are highly probative of a central and essential issue in the case.

Barber v. Fairbanks Capital Corp. (*In re Barber*), 2003 Bankr. LEXIS 2359 at *11-13 (Bankr. E.D. Pa. June 3, 2003) (Carey, J.) (*citing* 11-56 James Wm. Moore et al., *Moore's Federal Practice - Civil*, § 56.10[4][c][i] and § 56.14[2][c]).

Nevertheless, despite the deficiencies in Appellant's submissions, the Bankruptcy Court correctly concluded that even taking a broader view of Appellant's allegations, Appellant could not make out a claim against WPHL for hostile work environment or discriminatory termination, as a matter of law. Appellant received the benefit of the presumptions he was entitled to on summary judgment and more.

D. The Bankruptcy Court Correctly Concluded that the Younge Claim Fails as a Matter of Law

Appellant claims that he was subjected to a hostile work environment and terminated because of his race and/or color. Opinion at 8. The Bankruptcy Court properly considered each of these claims under applicable case law, and concluded that they failed as a matter of law even after viewing all facts and reasonable inferences in the light most favorable to Appellant. For the

reasons stated below and for all of the reasons stated by the Reorganized Debtors in the Claim Objection, Initial Reply, and Supplemental Reply, which arguments are expressly incorporated herein by reference, this Court should affirm.

i. The Bankruptcy Court Correctly Decided the Hostile Work Environment Claim

The Bankruptcy Court properly considered and granted summary judgment on Appellant's hostile work environment claim under the five-part test set forth in *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 167 (3d Cir. 2013). *See* Opinion at 9. The Reorganized Debtors argued that, even construing all admissible evidence in Appellant's favor, no reasonable fact finder could hold the Reorganized Debtors liable because: (a) the conduct alleged by Appellant was not sufficiently severe or pervasive[8] to constitute actionable harassment, and, in any event (b) there was no factual or legal basis for imposing *respondeat superior* liability on WPHL for any alleged harassment by Mr. Younge's co-worker, Richard Schultz. These points constitute independent bases for affirming the Bankruptcy Court's Opinion.

(a) The Conduct Alleged Was Not Sufficiently "Severe or Pervasive" to Constitute Actionable Harassment, Even if it was Offensive and Inappropriate

The Bankruptcy Court found that it did not have to decide whether the conduct alleged by Appellant was severe or pervasive enough to support a harassment claim because the undisputed record failed to support his *respondeat superior* contention. Opinion at 10. Nevertheless, Appellant's failure as a matter of law to provide evidence of severe or pervasive harassment provides an independent basis for affirming the Bankruptcy Court's Opinion. *See, e.g.*, *Colautti v. Franklin*, 439 U.S. 379, 397 n.16 (1979) ("Appellees, as the prevailing parties, may of course

[8] The Reorganized Debtors inadvertently used the phrase "severe *and* pervasive" (emphasis added) in two places in their Supplemental Reply. *See* Bankr. D.I. 13963, Supplemental Reply at ¶¶ 7-8. This oversight is immaterial, and Appellees agree the Bankruptcy Court applied the correct "severe or pervasive" standard. *See* Opinion at 9-10.

assert any ground in support of that judgment, 'whether or not that ground was relied upon or even considered by the trial court.'") (*quoting Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970)); *Lucas v. Gulf & Western Indus., Inc*., 666 F. 2d 800 (3d Cir. 1981) ("[A] prevailing party may present any argument for affirming his judgment, 'whether it was ignored by the court below or flatly rejected.'") (*quoting* 9 Moore's Fed. Practice § 204.11[3] (1980)) . Even taking Mr. Younge's assertions as true – that his coworker Mr. Schultz called him "homie," "Spike Lee" and similar comments on May 7, 2008, and that the two got into a heated non-physical argument that evening – those allegations fail to meet the stringent standard for hostile work environment harassment.

As detailed in the Claim Objection, Initial Reply, and Supplemental Reply, the Supreme Court and lower courts recognize that even offensive remarks, indignities, and similar workplace conduct are not (and must not be) actionable, unless they are so "severe or pervasive" as to create a hostile environment. This is a high standard, which is necessary to avoid a flood of litigation. As such, conduct and statements far more egregious than those alleged by Appellant have been held *not* to meet this standard, as the Bankruptcy Court itself acknowledged. *See* Opinion at 10 n.44 (citing cases); *see also* Bankr. D.I. 13963, Supp. Reply at 6 n.9 (citing cases). As a matter of law, the conduct alleged by Mr. Younge, while offensive and taken seriously by WPHL, simply does not rise to an actionable level. Nor can Mr. Younge properly claim harassment based on an altercation that he himself materially contributed to and escalated by his own admission.

(b) The Undisputed Record Refutes Any Claim of *Respondeat Superior* Liability

Separately, the Bankruptcy Court properly rejected *respondeat superior* liability as a matter of law: "I conclude that the facts do not support Younge's hostile work environment

claim because there are no facts to demonstrate that the Station knew or should have known that Schultz would harass Younge with racial slurs in May 2008." Opinion at 11-12. It is undisputed that Mr. Schultz was not Mr. Younge's supervisor, and thus WPHL cannot be held strictly liable for his alleged actions. *See* Opinion at 11 (*citing Vance v. Ball State Univ.*, 133 S.Ct. 2434, 2443 (2013); *Huston v. Procter & Gamble Paper Prods. Co.*, 568 F.3d 100, 104 (3d Cir. 2009)); Opening Brief at 8 ("Indisputably, Schultz did not have respondeat superior liability over Mr. Younge.").

Appellant argues for the first time on appeal that Messrs. Hort and Elias were both "supervisors" who took a "tangible employment action" of scheduling Mr. Younge to train with Mr. Schultz, and thus that WPHL effectively should be held strictly liable for the resulting harassment. Opening Brief at 8-9. First, this argument was waived by not being asserted below. *See supra* at 15. Second, there has been no allegation made as to who scheduled Mr. Younge to train with Mr. Schultz. Third, the undisputed facts show that Mr. Elias was a *bargaining unit* (unionized) employee with a lead worker title, not a supervisor, and thus his alleged actions cannot be imputed to WPHL. *See* Bankr. D.I. 13715, Claim Obj. ¶ 17 (noting Mr. Elias was the Technician-in-Charge); Bankr. D.I. 13755 at 28 (Letter from WPHL to PCHR referring to Mr. Elias as "fellow bargaining unit employee and Technician-in-Charge"). Finally, and in any event, Mr. Younge offers no case support for his argument that liability for co-worker harassment may be imputed to the employer solely because a supervisor (who engaged in no harassing conduct himself) scheduled the co-workers to work together. The law is to the contrary. Supreme Court precedent holds that a "tangible employment action" means "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in

benefits." *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1998). Routine training assignments do not fall within this scope and Appellant has offered no such authority. As demonstrated below, the Bankruptcy Court applied the appropriate legal standard and correctly held that WPHL was not negligent in connection with Mr. Schultz's alleged harassment of Mr. Younge.

Furthermore, the Bankruptcy Court found that the evidence, even construed in Mr. Younge's favor, did not support *respondeat superior* liability because a reasonable fact finder could not conclude that WPHL's management was negligent in permitting the alleged harassment to occur, or that it failed to take appropriate remedial action. "[E]mployer liability for co-worker harassment exists *only* if the employer failed to provide a reasonable avenue for complaint or, alternatively, if the employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action." *Huston*, 568 F.3d at 104 (emphasis added). "[U]nder negligence principles, prompt and effective action by the employer will relieve it of liability." *Bouton v. BMW of N. Am.*, 29 F.3d 103, 107 (3d Cir. 1994).

Here, the undisputed record establishes that WPHL *both* provided a reasonable avenue of complaint *and* took prompt and appropriate remedial action. For example, Mr. Younge admits that WPHL had an Anti-Harassment Policy (*see* Bankr. D.I. 13715-4) and Standards of Conduct and Corrective Action (*see id*. Bankr. D.I. 13715-5) in effect to deter and remedy harassing conduct; that a security guard promptly broke up the altercation between Mr. Younge and Mr. Schultz on May 7, 2008, effectively ending the alleged harassment shortly after it began; that Mr. Younge was assisted in reporting his complaint by phone minutes later; that his complaint was promptly reported to and investigated by Human Resources; and that Mr. Giannini applied the Standards of Conduct and Corrective Action to both Mr. Schultz and Mr. Younge, and terminated their employment for their mutual involvement in serious violations of WPHL policy.

"There are few employer actions that can be considered more prompt or more calculated to prevent further harassment than immediate discharge of the alleged harasser." *Velazquez v. Valu-Plus-Store #4*, 2003 U.S. Dist. LEXIS 7960 (E.D. Pa. Apr. 25, 2003). These undisputed facts are fatal to Mr. Younge's *respondeat superior* claim.

Mr. Younge tries to obscure these dispositive admissions by boldly declaring that Mr. Schultz was a known "bigot," a "racist" and an "Archie Bunker," such that WPHL should be held negligent simply by continuing to employ him and assigning him to train Mr. Younge. Again, however, Mr. Younge's sweeping accusations lack record support.

Mr. Younge's sworn Commission Statement alleges only three statements in support of his *respondeat superior* claim. All were noted by the Bankruptcy Court, and none reasonably put WPHL management on notice of alleged racist conduct by Mr. Schultz prior to May 7, 2008 – much less on notice that Mr. Schultz specifically would engage in racial harassment on that night. Opinion at 3-4, 10-12. First, Mr. Younge claims that a *non-supervisory* coworker, Sandy Kerr, told him that if he "ran into any trouble tonight [May 7]" with Mr. Schultz, he should call him the next morning. Second, Mr. Younge claims that he asked another *non-supervisory* coworker, Steve Leff, what Mr. Kerr meant by his comment, that Mr. Leff responded that Mr. Schultz "has a problem," that Mr. Younge asked him "with me?" and that Mr. Leff replied, "no he just has a problem." Both statements are inadmissible as hearsay and unduly vague; neither makes any reference to race or involved a supervisor; and Mr. Leff's alleged comment – that Mr. Schultz *did not* have a problem specifically with Mr. Younge but rather just had some unspecified "problem" generally – is inconsistent with discriminatory intent. Third, Mr. Younge alleges that an unspecified individual, possibly his direct supervisor Michael Hort, told him the day after the altercation that "you should have never had to deal with that – we have had

problems with Schultz before." Again, this vague statement (even if made by his supervisor) is devoid of any reference to racist conduct or statements.

None of these alleged statements, viewed individually or together, supports the profound leaps in logic and speculation necessary to conclude that: (a) the non-specific "problems" referenced necessarily involved racist conduct, as opposed to general antisocial behavior by a generally unpleasant or irascible person, (b) management knew of all such alleged statements and their purported racist content, and (c) such statements were sufficiently recent, pronounced and pervasive that management should have known that Mr. Schultz necessarily would harass Mr. Younge on May 7, 2008. *In re Landsource Cmtys.*, 485 B.R. 310, 314 (Bankr. D. Del. 2012) (KJC) ("Summary judgment cannot be avoided by introducing only a mere scintilla of evidence, or by relying on conclusory allegations, improbable inferences and unsupported speculation."); *id*. at 320 (non-movant on summary judgment is entitled only to reasonable inferences in his or her favor, and "conclusory inferences" that "raise no more than 'metaphysical doubt'" about a fact are insufficient to avoid summary judgment). Nor can Mr. Younge rely on alleged statements by Mr. Schultz to third parties *after* the night of May 7, 2008 (for example, during WPHL's internal investigation), which by definition were not made *to Mr. Younge* or probative of what WPHL's management knew or did not know *before* May 7.[9]

[9] Again, Appellant tries to resurrect his claim by improperly relying on vague, unsworn, inadmissible statements in the written record, about which he has no personal knowledge. *See Barber*, 2003 Bankr. LEXIS 2359 at *12 (evidence lacking in foundation cannot support a summary judgment motion, even if probative). He claims, for example, that coworker Steve Leff told supervisor Michael Hort (and fellow union employee Ed Elias) on May 6, 2008 that Mr. Schultz had asked him (Mr. Leff) "why are you training a hoop who doesn't know anything." For this alleged statement, Appellant cites to unsworn, unauthenticated, non-verbatim file notes that his counsel submitted en masse into the record with the entire PCHR file. The alleged speaker is not identified. No such evidence is admissible. Even Appellant himself effectively concedes that such "evidence" is rank double or triple hearsay, Opening Brief at 7, and his belated attempts to argue for admissibility are waived and groundless. *See supra* at 22-23. In any event, even if made, an alleged reference to Mr. Younge out of his presence as a "hoop" – a term which Mr. Younge himself admitted he did not even understand when he heard it – would fail to put WPHL on notice that Mr. Schultz generally harbored racist sentiments *and* would act on those sentiments when required to train Mr. Younge on one evening. *See, e.g.*, Bankr. D.I. 13963-1, Supp. Giannini Decl. ¶ 5 ("I had no knowledge, or reason to

Appellant's effort to rely on three alleged incidents reflected in Mr. Schultz's personnel record – two of which occurred 35 and 15 years prior, respectively (in 1973 and 1993) – fares no better. The Bankruptcy Court correctly concluded that no reasonable inferences of racial animus could be drawn because two such incidents (from 1973 and 2002) had no racial content whatsoever (indeed one actually complimented Mr. Schultz on "work[ing] out relationships with people well"), and that the third (from 1993) involved unproven allegations of bias that were 15 years old and were disputed even at that time. *See* Opinion at 11-12. The 1993 letter was written to WPHL's management by Mr. Schultz himself and expressly disclaims that Mr. Schultz harbored racial animus. Bankr. D.I. 13755 at 66-67. At most, the letter suggests that a security guard yelled at Mr. Schultz for inadvertently tripping an alarm, Mr. Schultz felt disrespected and argued back (not using any racial terminology), the guard apparently claimed that Mr. Schultz yelled at him because of his race, and Mr. Schultz strongly disagreed with the accusation. *Id.* Appellant's argument is equally fanciful that management purportedly "swept under the rug" and failed to document Mr. Schultz's conduct. This is pure conjecture, *see Landsource Cmtys.*, 485 B.R. at 314, 320, and the various notes in Mr. Schultz's personnel file in fact refute it.

Essentially, Appellant argues that WHPL should have terminated Mr. Schultz or isolated him from Mr. Younge before the two men had met or spoken to each other, and that by failing to do so, it is *per se* negligent and liable for anything that Mr. Schultz did. This is simply not the law. Rather, to borrow Appellant's analogy, the Third Circuit has made clear that "Title VII does not require that an employer fire all 'Archie Bunkers' in its employ." *Andrews v. Phila.*, 895 F.2d 1469, 1486 (3d Cir. 1990). Furthermore, Mr. Giannini, Vice President of Tribune Television and General Manager of WPHL, expressly stated under oath that he had no

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know, of any remarks made by Mr. Schultz to or about Mr. Younge prior to their altercation on the night of May 7, 2008, including any remarks that were racially biased in nature.").

knowledge of Mr. Schultz being a "bigot" or having "used racial slurs, hostility, and disparaging comments" to WPHL's African-American employees. *See* Bankr. D.I. 13963-1, Supp. Giannini Decl. ¶ 5. When such behavior did occur, far from countenancing it, Mr. Giannini promptly terminated Mr. Schultz in accordance with WPHL's Anti-Harassment Policy and Standards of Conduct and Corrective Action.

In sum, on the undisputed record and making all reasonable inferences in Mr. Younge's favor, no reasonable fact finder could dispute the Bankruptcy Court's conclusion "that the facts do not support Younge's hostile work environment claim because there are no facts to demonstrate that the Station knew or should have know that Schultz would harass Younge with racial slurs in May 2008." Opinion at 12.

ii. The Bankruptcy Court Correctly Decided the Wrongful Termination Claim

The Bankruptcy Court also properly applied the prevailing legal standards to Appellant's wrongful termination claim and correctly concluded that it failed on several independent grounds. Opinion at 12-20; *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (providing framework for evaluating Title VII discrimination claims); *Smith v. Walgreen Co.*, 964 F. Supp. 2d 338, 343 (D. Del. 2013) (same). Again, Mr. Younge glosses over, but does not dispute, several critical facts, including that he actively participated in and escalated a profanity-laden confrontation with Mr. Schultz and had to be physically guided away from the scene by a security guard – all as captured on videotape reviewed by the Bankruptcy Court.

(a) Appellant Failed to State a Prima Facie Case for Discrimination

The Bankruptcy Court correctly held that Mr. Younge did not make out a *prima facie* case for discriminatory treatment under the Supreme Court's *McDonnell Douglas* standard because he failed to show that his termination "occurred under circumstances that support an inference of unlawful discrimination." Opinion at 13. Mr. Giannini, WPHL's General Manager

and decisionmaker, treated Mr. Younge and Mr. Schultz equally and equitably, terminating both of them for their clear violation of WPHL policy. No evidence suggests any unlawful intent by Mr. Giannini or anyone else in that decision, and Mr. Younge's bald argument and conjecture to the contrary cannot survive summary judgment.

The Bankruptcy Court also properly found that the sole fact that Mr. Younge – as a seasonal, part-time employee 10 days into his employment with WPHL – allegedly was "replaced" three weeks later by another temporary fill-in worker outside of the protected class did not give rise to an inference of discrimination when all circumstances of the termination and subsequent hiring were taken into account. *Id*. at 14. As the Bankruptcy Court correctly noted, replacement with an employee outside the protected class does not automatically support an inference of discrimination. *Id*. Rather, a plaintiff must "establish some causal nexus between his membership in a protected class and [an adverse employment action]." *Sarullo v. U.S. Postal Serv.*, 352 F.3d 789, 798 (3d Cir. 2003). Appellant fails to do so. He was not immediately replaced by anyone, regardless of race, and there is no basis in the facts presented by Appellant to conclude that WPHL's later hiring of a Caucasian replacement summer relief technician for a few weeks was causally related to Appellant's race or to his termination. Appellant's transparent conjecture cannot support an inference in his favor. *Landsource Cmtys.*, 485 B.R. at 314, 320 (only reasonable inferences permitted).

(b) Appellant Failed to Overcome Appellees' Legitimate, Non-Discriminatory Reason for Terminating Him

The Bankruptcy Court further held that, even if Mr. Younge had succeeded in making out a *prima facie* case, his claim still failed because WPHL had met its "relatively light burden" of proffering a legitimate, non-discriminatory reason for Mr. Younge's termination. Opinion at 16; *Walgreen*, 964 F. Supp. 2d at 345; *see also McDonnell Douglas*, 411 U.S. at 802 (stating that

once plaintiff establishes a *prima facie* case of discrimination, the burden shifts to the employer to provide a legitimate, non-discriminatory reason for its actions). This too was a correct application of the law. Mr. Younge does not, and cannot, dispute that his participation in, and escalation of, the altercation with Mr. Schultz, including engaging in yelling, screaming, profanity, and disruption of the workplace, violated of WPHL's Standards of Conduct.[10] As the Supreme Court has observed, "exposed to a fellow employee's harassment, one can walk away or tell the offender to 'buzz off.'" *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2456 (2013). The undisputed record demonstrates that Mr. Younge had several opportunities to do just that, but chose not to. He cannot now challenge WPHL's evenhanded application of its workplace conduct policies simply because he disagrees with its business decision and judgments. *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 332 (3d Cir. 1995) (courts do not "sit as a super-personnel department that reexamines an entity's business decisions. . . . [O]ur role is to determine whether a factfinder could reasonably find that the employer's stated reason [for terminating the employee] is unworthy of credence."); Opinion at 15-16.

Finally, the Bankruptcy Court correctly held that Appellant failed to produce any evidence from which a fact finder could conclude that WPHL's explanation was a pretext for underlying race discrimination – a holding to which Appellant tellingly gives only scant attention in the Opening Brief. First, given the foregoing undisputed facts including the videotape

[10] As detailed above, Mr. Younge admitted, for example, that he "walked over to Schultz" after the argument had begun; that there was "a lot of yelling and screaming by both parties"; and that he used profanity towards Mr. Schultz during the altercation. *See* Bankr. D.I. 13951 at ¶ 42; Younge Claim at 8-9, Commission Statement ¶¶ 7, 15. Mr. Younge further admitted to WPHL, in connection with the company's investigation immediately following the altercation, that he yelled at Mr. Schultz, "got in his face," and used profanity toward Mr. Schultz. *See* Bankr. D.I. 13755 at 38 ("Keith stated that at this point, '*all hell broke loose*', he stated [sic] yelling at Rick [Schultz], and Rick started yelling back Keith stated that he "got in Rick's face."); *id*. at 43 ("*Keith stated that he was "in [Schultz's] face*". I asked Keith if he could remember the curse words he used and he stated that he could not remember *and that he may have used them all*.") (emphasis added). WPHL reasonably concluded that, after Mr. Younge by his own admission had yelled and screamed at Mr. Schultz, walked up to him and "got in his face," and used profane language, he had committed a terminable offense.

documenting Mr. Younge's misconduct, he failed to prove that WPHL's decision was "so plainly wrong that it could not have been the employer's real reason." *Id*. at 18 (*citing Fuentes v. Perskie*, 32 F.3d 759 (3d Cir. 1994)).

Second, and for the same reasons, Appellant failed to show that a discriminatory reason was more likely than not a motivating cause of the employer's action. *Id*. at 16-17 (*citing Walgreen*, 964 F. Supp. 2d at 345-47). There is simply no evidence to support Mr. Younge's baseless charge that Mr. Giannini (or any other alleged decisionmaker) was motivated by racial animus towards Mr. Younge. Mr. Younge's argument that he somehow was treated more harshly than Mr. Schultz because he was provoked is unavailing. As stated, it is irrelevant whether Mr. Younge's admitted misconduct was a "natural human reaction," as he claims. He made the choice to engage with Mr. Schultz, rather than disengage and report. The critical fact is that both he and Mr. Schultz committed serious violations of WPHL policy, and both were terminated consistent with that policy.

The Bankruptcy Court also correctly concluded that Mr. Schultz's and another employee's warnings in 2002 for using profanity in an argument were not comparable and did not reflect disparate treatment for sufficiently similar conduct: "[T]here is no evidence that the [2002] acts were of comparable seriousness" or involved the "degree of shouting, yelling, and disruptive or disorderly conduct as occurred in the 2008 altercation between Schultz and Younge"; "the incidents – occurring over five years apart – are too remote in time to be comparable"; and "[t]here is nothing in the record on which to determine whether the policies or manner in which the Station made disciplinary decisions changed over the years." Opinion at 20.

Similarly, Appellant's belated contention that Mr. Schultz purportedly received severance upon termination and Appellant did not cannot save his claim. His claim is for employment termination, not denial of severance. And there would be no evidence of discriminatory termination even if Mr. Schultz had received severance, which is yet another example of Appellant making completely unsworn, unsupported, unauthenticated assertions. Indeed, Appellant's own "record evidence" demonstrates at most that Mr. Schultz was a 35-year unionized employee of WPHL subject to a collective bargaining agreement with contractual entitlements. Mr. Younge was a hired as a non-union seasonal, part-time employee who had worked for ten days at the time of the altercation and was not party to an employment contract. His employment was scheduled to end at the end of the summer season approximately four months later, and he makes no allegation that he had any right to severance. Thus, Mr. Schultz would not be similarly situated to Mr. Younge in terms of severance eligibility even under Mr. Younge's theory, and it is an even more unreasonable leap to suggest that severance somehow is probative of alleged discriminatory animus by Mr. Giannini, the decisionmaker, in connection with Mr. Younge's and Mr. Schultz's employment terminations. No reasonable fact finder could conclude on this record that WPHL's action in terminating *both* Mr. Younge and Mr. Schultz was somehow a pretext for race discrimination against Mr. Younge. The Bankruptcy Court's Opinion therefore should be affirmed.

VII. CONCLUSION

WHEREFORE, for the foregoing reasons, Appellees respectfully request that the District Court enter an order affirming the Opinion and granting such other and further relief as the District Court deems just and proper.

Dated: Wilmington, Delaware
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Respectfully submitted,

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TYPE-VOLUME CERTIFICATION

Pursuant to Rule 8015(a)(7)(C) of the Federal Rules of Bankruptcy Procedure, this brief complies with the type-volume limitations of Rule 8015(a)(7)(B) of the Federal Rules of Bankruptcy Procedure, made applicable to this bankruptcy appeal through the Local Rule of Civil Practice and Procedure 7.1.3, as amended on August 1, 2016, as follows:

1. Exclusive of the portions exempted by Rule 8015(a)(7)(B)(iii) of the Federal Rules of Bankruptcy Procedure, the brief contains 12,564 words, according to the count of Microsoft Word.

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