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INVOLUNTARY BANKRUPTCY PETITIONS

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The “bankruptcy card” may be played by a potential creditor as well as by a potential debtor. In order to threaten to play the card, the creditor must understand the mechanics and consequences of 11 U.S.C. § 303, the provision of the Title 11 of the United States Code (the “Bankruptcy Code”) dealing with involuntary petitions. This article will provide an overview of the substance and procedure of the involuntary bankruptcy petition when filed by creditors. Note that, pursuant to § 303(a) of the Bankruptcy Code, an involuntary petition can be filed only under Chapter 7 or Chapter 11, presumably because in a case commenced under Chapter 13 a debtor has an automatic right to have the case dismissed.

I. WHO AN INVOLUNTARY PETITION MAY BE FILED AGAINST

Under § 303(a) of the Bankruptcy Code, an involuntary bankruptcy case can only be commenced against a “person” eligible to be a debtor under the chapter under which the case is commenced. “Person” is defined under § 101(41) of the Bankruptcy Code and includes partnerships and corporations as well as human beings. The eligibility to be a debtor under specific chapters of the Bankruptcy Code is governed by § 109 of the Bankruptcy Code; any person that is not a railroad, domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, small business investment company, credit union, or industrial bank may be a Chapter 7 debtor pursuant to § 109(b), and § 109(d) permits these same persons to be Chapter 11 debtors unless they are stockbrokers or commodity brokers and also permits railroads and certain state member banks and multilateral clearing organizations to be Chapter 11 debtors.

Certain persons eligible to be Chapter 7 or Chapter 11 debtors are nevertheless prohibited by § 303(a) from having involuntary petitions filed against them. In particular, (a) a farmer, (b) a family farmer, and (c) “a corporation that is not a moneyed, business, or commercial corporation” cannot be subject to an involuntary petition. To fall into the last exception, it may not be enough that the corporation is a non-profit organization. One court has held that the corporation must show that it both (i) is considered an eleemosynary organization under state law, and (ii) actually conducts itself as an

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eleemosynary organization.” *In re The Centre for Management and Technology, Inc.*, 2007 Bankr. LEXIS 3734 (Bankr. D. Md. Oct. 26, 2007).

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) added an eligibility requirement for human beings to be debtors under any chapter of the Bankruptcy Code. Pursuant to § 109(h)(1), “an individual may not be a debtor under [the Bankruptcy Code] unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency . . . an individual or group briefing” Some commentators wondered after the passage of BAPCPA whether this provision would make involuntary petitions against human beings impossible, because the alleged involuntary debtor would not have received the required credit counseling. The courts, however, have interpreted the credit counseling requirement to apply only to voluntary bankruptcy filings, both because the statute refers to the filing of a petition “by such individual”, *In re Allen*, 378 B.R. 151, 153 (Bankr. N.D. Tex. 2007), and because such an interpretation would lead to the absurd result of effectively eliminating involuntary bankruptcy as a remedy that creditors could use against an individual debtor, *Id.*

II. WHO AN INVOLUNTARY PETITION MAY BE FILED BY

The requirements for creditors to file an involuntary petition are set forth in § 303(b) of the Bankruptcy Code. A creditor who files an involuntary petition against an alleged debtor must hold a claim “that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount.” Typically the involuntary petition must be filed by three such creditors whose noncontingent undisputed claims aggregate to at least \$13,475 “more than the value of any lien on property of the debtor securing such claims held by the holders of such claims” (the \$13,475 figure is adjusted for inflation every three years and was last adjusted effective April 1, 2007). If, however, the alleged debtor has fewer than 12 such creditors, excluding employees, insiders, and the recipients of voidable transfers, then only one such creditor with a claim of at least \$13,475 is sufficient. It is very important that the petitioning creditor(s) meet this test, because at least one circuit court has held that the requirements of § 303(b) confer subject matter jurisdiction on the bankruptcy court, and hence can be raised at any time as a basis for dismissal of the bankruptcy, *In re BDC 56 LLC*, 330 F.3d 111 (2d Cir. 2003). The position as to subject matter jurisdiction is a minority one, though, as recently explained in *In re Trusted Media Net Holdings, LLC*, 550 F.3d 1035 (11th Cir. 2008), and the Bankruptcy Court for the Southern District of New York has questioned whether BDC 56 LLC really means that the issue cannot be waived by the alleged debtor, *In re MarketXT Holdings Corp.*, 347 B.R. 156 (Bankr. S.D.N.Y. 2006).

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A. Required Number of Creditors

Determining whether an alleged debtor has 12 or more qualifying creditors, and thus must have three creditors file the involuntary petition, can be surprisingly tricky. A good example is found in *In re Orlinsky*, 2007 Bankr. LEXIS 1520 (Bankr. S.D. Fla. April 24, 2007). There the alleged debtor alleged it had 23 creditors. At oral argument, though, it became clear that three of the creditors (all for professional fees) did not qualify because the alleged debtor disputed some of the fees charged, making the claims disputed as to amount. Two other creditors did not qualify because they were, respectively, oversecured and an insider. Finally, the petitioning creditor alleged that twelve of the alleged debtor's credit card debts actually were held by only five entities, bringing to total number of qualifying creditors down to eleven.

An unsettled issue is whether, for an alleged debtor who has less than 12 creditors, the petitioning creditor can be an insider, employee, or recipient of voidable transfer. See *In re Green*, 2007 Bankr. LEXIS 1296 (Bankr. W.D. Tex. April 9, 2007) (insider can be petitioning creditor); cf. *In re Runaway II, Inc.*, 168 B.R. 193 (Bankr. W.D. Mo. 1994) (insider cannot be petitioning creditor). There is case law allowing a creditor to waive the security for its claim in order to become eligible to be the petitioning creditor for an alleged debtor with less than 12 creditors. *In re Allen-Main Associates Limited Partnership*, 223 B.R. 59 (BAP 2d Cir. 1998). Where the alleged debtor has 12 or more creditors, insiders, employees, and recipients of voidable transfers can be some or all of the petitioning creditors, and a secured creditor can be a petitioning creditor without even having to waive the security as long as the other two petitioning creditors have claims that aggregate to the required unsecured amount. *In re Everett*, 178 B.R. 132, 142 (Bankr. N.D. Ohio 1994).

B. Contingent or Subject to a Bona Fide Dispute

A claim is contingent as to liability if the debtor's legal duty to pay does not come into existence until triggered by the occurrence of a future event and such future occurrence was within the actual or presumed contemplation of the parties at the time the original relationship of the parties was created. *In re Sims*, 994 F.2d 210, 220 (5th Cir. 1993). Thus unpaid rent is not a contingent claim.

The Bankruptcy Code does not define "bona fide dispute." Most circuits have adopted an objective test, first formulated by the 7th Circuit in *In re Busick*, 831 F.2d 745, 750 (7th Cir. 1987), which requires the court to "determine whether there is an objective basis for either a factual or a legal dispute as to the validity of [the] debt." "Because the standard is objective, neither the debtor's subjective intent nor his subjective belief is sufficient" to show the existence of a bona fide dispute. *In re Rimell*, 946 F.2d 1363, 1365 (8th Cir. 1991). "[T]he court need not resolve any genuine issues of fact or law; it only

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must determine that such issues exist.” *In re DSC, Ltd.*, 486 F.3d 940, 945 (6th Cir. 2007). BAPCPA added the words “as to liability or amount” to § 303(b), making clear that disputes as to amount, not just liability, are sufficient to create a “bona fide dispute”. *In re Mountain Dairies, Inc.*, 372 B.R. 623, 634 (Bankr. S.D.N.Y. 2007).

Based on this test, a petition filed by creditors against an alleged personal guarantor was dismissed where there were genuine disputes about whether the language of the alleged guaranties was enforceable under governing law, *In re Aminian*, 2008 Bankr. LEXIS 903 (Bankr. S.D.N.Y. March 25, 2008) (note that there was no issue about the claim being contingent because the primary obligor had already defaulted). On the other hand, some courts have determined a claim that has been reduced to an unstayed judgment cannot be the subject of a bona fide dispute. *In re Atlantic Portfolio Analytics & Management*, 380 B.R. 266, 273 (Bankr. M.D. Fla. 2007).

III. DETERMINATION OF INVOLUNTARY PETITION

If an alleged involuntary debtor does not timely oppose the involuntary petition, then § 303(h) of the Bankruptcy Code provides that “the court shall order relief against the debtor . . . under the chapter under which the petition was filed.” Otherwise, § 303(h) requires the court to conduct a trial to determine if “(1) the debtor is generally not paying such debtor’s debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount” or (2) “within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.” The question of the appointment of a custodian can rarely be disputed, since if the appointment took place within 120 days then the order for relief can enter even if the custodian is causing the alleged debtor generally to pay its debts, *In re Pallet Reefer Co.*, 233 B.R. 687, 691-92 (Bankr. E.D. La. 1999), so the dispute in contested involuntary petitions usually turns on whether the alleged debtor is generally paying its debts as they become due.

A. Generally Not Paying Debts

The term “generally not paying such debtor’s debts” is not defined in the Bankruptcy Code, and “courts have been reluctant to adopt a mechanical test for determining whether a debtor is generally paying his or her debts as they come due.” *In re Feinberg*, 232 B.R. 164, 170 (Bankr. E.D. Mo. 1999). Most courts treat the matter as a question of fact, to be determined by an examination of “the totality of the circumstances, balancing the interests of the debtor with those of the creditors, using a flexible case-by-case approach

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allowing the bankruptcy court, as the trial court, to receive and consider all admissible evidence presented, the demeanor and creditability of the witnesses, and the argument of counsel to make its determination whether the creditor has met its burden." *In re Red Rock Rig 101, Ltd.*, 2008 Bankr. LEXIS 1423 (BAP 10th Cir. May 15, 2008). The court looks to the date that the involuntary petition was filed to make this determination. *In re Harmsen*, 320 B.R. 188 (BAP 10th Cir. 2005). Payments of a debtor's obligations by a third party, or through cash infusions from third parties, are not treated as payment by the debtor itself, *In re Food Gallery at Valleybrook*, 222 B.R. 480, 488-89 (Bankr. W.D. Pa. 1998), and a company who pays its debts by borrowing funds and creating another liability is generally not paying its debts as they come due, *In re Midwest Processing Co.*, 41 B.R. 90, 101 (Bankr. D. N.D. 1984), rev'd on other grounds, 47 B.R. 903 (D. N.D. 1984), aff'd, 769 F.2d 483 (8th Cir. 1985).

Courts have cited a number of factors in viewing a "totality of circumstances," including "(1) the number of unpaid claims; (2) the amount of such claims; (3) the materiality of the nonpayments; and (4) the debtor's overall conduct in its financial affairs. . . . Courts also compare the number and amount of paid debts and unpaid debts. Other factors could include: the debtor's ability to satisfy only small periodic payments, not long-term obligations; the debtor's making regular payments only on small, recurring obligations, not on larger debts; the rapid decline in the value of the debtor's assets resulting from assets sales rather than profit generating activity; the amount of the debtor's debts compared to the debtor's yearly income; the debtor's voluntary shutdown of operations; the insider's deferred payment on account of loans payable to them; serious allegations regarding the conduct of the debtor's business; the apparent bad faith evidenced by corporate officers taking loans despite the company's financial distress; payments made by insiders both before and after filing; payments made by third parties or a waiver of claims by a third party; the debtor's statement of a subjective desire to pay the debts; the debtor's liquidation of its assets; the fact that payments have been made by some partners individually even though the debts were those of the partnership; [and] the fact that the due and unpaid debts are made up entirely of claims of the petitioning creditors while other non-petitioning creditors are all paid." *In re Hentges*, 350 B.R. 586, 603-04 (Bankr. N.D. Okla. 2006).

Red Rock Rig 101 provides an example of the kinds of factors that in totality will lead a court to determine that an alleged debtor is generally not paying its debts as they become due. There the court found, "(1) Rig 101 only had \$822 on deposit at the bank on the date the petition was filed; (2) Rig 101 did not have any revenue producing assets; (3) Rig 101 owed \$35,583.98 to the six qualified petitioning creditors; (4) Rig 101 owed almost \$3.2 million to its related entities; (5) Rig 101's co-founder admitted that it was bankrupt if it did not receive funding from its general partners and related entities; and (6) Rig 101's related entities were paying its bills." 2008 Bankr. LEXIS 1423.

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B. Other Grounds for Dismissal of Involuntary Petition

Even it meets the tests of § 303(h), there are still reasons that a bankruptcy case may not go forward. One is the ability of a bankruptcy court, pursuant to § 305 of the Bankruptcy Code, to abstain from a matter and thereby dismiss a case. Under § 305(a)(1), a bankruptcy court "may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if – (1) the interest of creditors and the debtor would be better served by such dismissal or suspension." Courts have applied § 305 to involuntary petitions, see e.g., *Matter of Axona International Credit & Commerce Ltd.*, 924 F.2d 31 (2d Cir. 1991), finding that it can be applicable even when all the elements of § 303 have been met, *In re Williamsburg Suites, Ltd.*, 117 B.R. 216, 218 (Bankr. E.D. Va. 1990). A non-petitioning creditor can move for abstention, *In re Privada, Inc.*, 2008 Bankr. LEXIS 2717 (Bankr. W.D. Tex. Oct. 22, 2008).

"Typical circumstances for dismissing under § 305(a)(1) include the pendency of proceedings such as assignments for the benefit of creditors . . . state court receiverships . . . or bulk sale agreements. . . . Another consideration is where there are few, if any, valuable nonexempt assets and the administrative expenses would likely consume the entire estate." *In re Macke International Trade, Inc.*, 370 B.R. 236, 247 (BAP 9th Cir. 2007) (citations omitted). Abstention can also be appropriate where there is an out-of-court arrangement that is distributing assets fairly and is far less expensive than a bankruptcy case. Often, as in *Macke*, abstention occurs where there is essentially a two party dispute, such as an out-of-court assignment for the benefit of creditors that is supported by all but one recalcitrant creditor. Abstention is, however, an extraordinary remedy. *In re Fortran Printing, Inc.*, 297 B.R. 89, 94 (Bankr. N.D. Ohio 2003). *In In re Mylotte, David & Fitzpatrick*, 2007 Bankr. LEXIS 3572 (Bankr. E.D. Pa. Oct. 11, 2007), for example, the bankruptcy court refused to abstain in favor of state court proceedings, finding that the state court proceedings had not yet been consolidated nor had the state court yet appointed a receiver over the alleged debtor.

An involuntary petition can also be dismissed if it was filed in bad faith. The courts have discussed six standards for determining whether an involuntary petition is filed in bad faith: "(1) *subjective test* - based on the petitioning creditor's motivation - i.e. harassment rather than collection. (2) *improper purpose test* - why did the creditor file - i.e., to harm the debtor's business? (3) *objective test* - what would a reasonable person in the petitioning creditor's position have done? (4) *improper use* - does the creditor's action take disproportionate advantage of other creditors – i.e. to reduce an obligation on a guaranty or use the bankruptcy process as if it were the creditor's own private collection agency? (5) *combined objective and subjective* - similar to that used in Federal Rule of Bankruptcy Procedure 9011. (6) *nose test* - if it smells like bad faith, it's got to be bad faith."

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In re Mi La Sul, 380 B.R. 546, 554 (Bankr. C.D. Cal. 2007). In *Mi La Sul* the court dismissed the petition for bad faith after finding that the petitioning creditors acted solely for the purpose of obtaining an automatic stay to stop a pending foreclosure, in the hope of obtaining the property subject to foreclosure by pressuring the foreclosing creditor into accepting a lower payoff. That same scenario occurred in *In re Stern*, 268 B.R. 390 (Bankr., S.D.N.Y. 2001), where the involuntary petition was never even formally served since all the petitioning creditors wanted to do was obtain time to negotiate with the bank and convince it to take less than it was owed. In such collusive situations a bankruptcy court does not need to wait for the alleged debtor to move to dismiss but can dismiss the case *sua sponte*. *Mi La Sul*, 380 B.R. at 554-55.

IV. EMERGENCY RELIEF

Given the procedure for determination of an involuntary petition, there will be a gap in time between the filing of the involuntary petition and the determination of whether to enter an order for relief. Ordinarily during this gap, under § 303(f) of the Bankruptcy Code, “any business of the debtor may continue to operate and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced,” but only “except to the extent that the court orders otherwise.” “Unless the court orders otherwise, a debtor is free to use or dispose of his property with impunity.” *In re Dilley*, 378 B.R. 1, 8 (Bankr. D. Me. 2007). “Section 303(f) orders are extraordinary.” *Id.* at 3. “[A]n order restricting a debtor's use of property under § 303(f) is, in effect, a preliminary injunction.” *Id.* at 8. In *Dilley* a § 303(f) order entered in an involuntary case where the alleged debtor had shot and killed his estranged wife, the petitioning creditors were his wife’s estate and her minor children, and he was in custody; the order prohibited him from disposing of his property without further order of the court.

If a § 303(f) order is insufficient, the court can during the gap period order the United States Trustee to appoint an interim trustee, “if necessary to preserve the property of the estate or to prevent loss to the estate,” pursuant to § 303(g) of the Bankruptcy Code. The appointment of a trustee requires a preliminary finding that there is a reasonable likelihood or probability that the alleged debtor will eventually be found to be a proper involuntary debtor and that an order for relief will enter. *In re The Centre for Management and Technology, Inc.*, 2007 Bankr. LEXIS 3734 (Bankr. D. Md. Oct. 26, 2007). The court in *Centre for Management and Technology* did order the appointment of a trustee, based on the existence of strong uncertainty as to the reliability of the alleged debtor’s financial records and the risk of equipment being lost or moved given the pendency of motions for relief from stay by landlords as well as a criminal case pending against the alleged debtor’s principal. The party

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moving for a trustee must post a bond pursuant to Fed. R. Bankr. P. 2001(b) in order to indemnify the alleged debtor in the event the involuntary petition is dismissed. The court in *Centre for Management and Technology* held that the posting of such a bond was mandatory and could not be waived by the court.

V. OBLIGATIONS OF PETITIONING CREDITORS IN THE EVENT OF DISMISSAL

Filing an involuntary petition is a serious action. Once they file the petition, the creditors cannot withdraw it, even with the consent of the alleged debtor, without the court, pursuant to § 303(j) of the Bankruptcy Code, first giving notice to all creditors and then conducting a hearing. As a result, a filed involuntary petition cannot be a tactic for petitioning creditors to obtain preferential treatment, since any settlement with the alleged debtor would need court approval and the court would protect the interests of all creditors. *In re Key Auto Liquidation Center, Inc.*, 384 B.R. 599, 607 (Bankr. N.D. Fla. 2008).

If the alleged debtor contests the involuntary petition and the court agrees with the alleged debtor and dismisses the case, then § 303(i)(1) of the Bankruptcy Code permits the court to require the petitioning creditors to pay the alleged debtor's costs and reasonable attorney's fee. The court may order such payment even without an explicit request or separately filed motion. *In re Tobacco Road Associates, LP*, 2007 U.S. Dist. LEXIS 22990 (E.D. Pa. March 30, 2007). The court also may order such payment even if the petitioning creditors did not act in bad faith. *Id.* "The Court also has discretion, however, to deny fees and costs." *In re DSC, Ltd.*, 387 B.R. 174 (Bankr. E.D. Mich. 2008). Nevertheless, many courts have stated that "any petitioning creditor in an involuntary case . . . should expect to pay the debtor's attorney's fees and costs if the petition is dismissed," *In re Kidwell*, 158 B.R. 203, 217 (Bankr. E.D. Cal. 1993), and have found there to be a rebuttable presumption that reasonable fees and costs are authorized, *In re Scrap Metal Buyers of Tampa, Inc.*, 233 B.R. 162, 166 (Bankr. M.D. Fla. 1999), with "the burden of proof . . . on the petitioner to justify a denial of costs and fees." *In re Colon*, 2008 Bankr. LEXIS 3960 (BAP 1st Cir., Nov. 21, 2008). As amongst the petitioning creditors, the court "has discretion to hold all or some petitioners jointly or severally liable for costs and fees, to apportion liability according to petitioners' relative responsibility or culpability, or to deny an award against some or all petitioners, depending on the totality of the circumstances." *In re Maple-Whitworth, Inc.*, 556 F.3d 742, corrected, 559 F.3d 917 (9th Cir. 2009).

In deciding whether to award fees and costs, one appellate court has directed that the following factors be considered: "(1) the merits of the involuntary petition, (2) the role of any improper conduct on the part of the alleged debtor,

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(3) the reasonableness of the actions taken by the petitioning creditors, and (4) the motivation and objectives behind filing the petition." *Higgins v. Vortex Fishing Systems, Inc.*, 379 F.3d 701, 708 (9th Cir. 2004). Using these factors, the court in *In re DSC, Ltd.*, 387 B.R. 174 (Bankr. E.D. Mich. 2008), did not award fees and costs because the decision to dismiss the involuntary petition was "a close call".

While the burden of proof may be on the petitioning creditors to rebut the presumption that reasonable fees are appropriate, the evidentiary burden to establish the reasonableness of the amount to be awarded rests upon the putative debtor. *In re Diloreto*, 388 B.R. 637 (Bankr. E.D. Pa. 2008).

An award of costs and attorney's fees under § 303(i)(1) requires the dismissal to have been contested and not to have been with the consent of all petitioning creditors and the debtor. *In re Analytica Wire, Inc.*, 392 B.R. 618 (Bankr. D. Del. 2008).

If the court finds in dismissing an involuntary case that a petitioning creditor filed the petition in bad faith, then § 303(i)(2) of the Bankruptcy Code permits the court also to require that petitioning creditor to pay "any damages proximately caused by such filing" as well as punitive damages. Here the majority of courts have held that the rebuttable presumption is "that the petitioning creditors acted in good faith in filing an involuntary petition, and that the alleged debtor then has a burden of proving bad faith by a preponderance of the evidence." *In re Synergistic Technologies, Inc.*, 2007 Bankr. LEXIS 2660 (Bankr. N.D. Tex. Aug. 6, 2007). The majority of courts also hold, however, that punitive damages may be awarded even in the absence of actual damages. *Id.* These awards can be tremendous – in *In re Multiut Corp.*, 2008 U.S. Dist. LEXIS 32357 (N.D. Ill. March 31, 2008), in addition to awarding \$50,000 for attorney's fees, the court awarded \$400,000 for actual damages and \$900,000 for punitive damages. Moreover, instead of acting under § 303(i)(2), the court can choose instead to sanction the attorney for the petitioning creditors under Fed. R. Bankr. P. 9011, *Levey v. Kesser Cleaners Corp.*, 2007 U.S. Dist. LEXIS 54738 (E.D.N.Y. July 27, 2007).

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A number of different test have been used by courts in determining whether a petitioning creditor acted in bad faith. One test looks at whether there was "improper use", where a petitioning creditor used involuntary bankruptcy proceedings in an attempt to obtain a disproportionate advantage for itself. Another test looks at the subjective purpose of the filing and whether the petitioning creditor had improper motivation, such as ill will or malice, or filed the involuntary petition for the purpose of harassing the alleged debtor. Still another test looks objectively at whether or not a reasonable person would have filed the involuntary petition under the same circumstances. In *re Cannon Express Corp.*, 280 B.R. 450, 453 (Bankr. W.D. Ark. 2002).

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Pursuant to § 303(e) of the Bankruptcy Code, the court may, after notice and a hearing and for cause, “require the [petitioning creditors] to file a bond to indemnify the debtor for such amounts as the court may later allow under subsection (i).” One case used this provision as a vehicle to permit petitioning creditors to reconsider their actions; it ordered the petitioning creditors to post a \$50,000 bond, but permitted any petitioning creditor instead to “opt-out” of the bankruptcy case and not only avoid posting a bond but also avoid any later liability under § 303(i). The court took this action because of its “utter exasperation, and after observing that the case had become very expensive, contentious, and taxing on the Court’s time.” *In re Commonwealth Securities Corp.*, 2007 Bankr. LEXIS 312 (Bankr. N.D. Tex. Jan. 25, 2007). All the petitioning creditors who could opt out did so; it would seem that a finding that there is a cause to post a bond gives pretty good warning that there might ultimately be a required payment under § 303(i). And most courts do not permit a petitioning creditor to offset such § 303(i) payment against the judgment owed to the creditor, since to hold otherwise would be to weaken significantly the statutory protections for putative debtors. *In re Diloreto*, 388 B.R. 637, 655 (Bankr. E.D. Pa. 2008).

Finally, it should be noted that, while petitioning creditors may have to pay the alleged debtor’s expenses if the order for relief does not enter, petitioning creditors can receive payment of their own expenses in the event an order for relief does enter. In particular, a creditor that files an involuntary petition can seek the allowance as an administrative expense of its actual, necessary expenses pursuant to § 503(b)(3)(A) of the Bankruptcy Code and can seek the allowance as an administrative expense of its reasonable attorneys’ fees pursuant to § 503(b)(4) of the Bankruptcy Code. *See, e.g., In re Key Auto Liquidation Center, Inc.*, 384 B.R. 599 (Bankr. N.D. Fla. 2008).

If you have any questions or need legal assistance, you may contact Adam Ruttenberg at 617-951-2800 or aruttenberg@lgllp.com

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