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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6 In re:) BAP Nos. CC-05-1437-PaMaB
7) CC-05-1441-PaMaB
7 MACKE INTERNATIONAL TRADE, INC.,) (Cross-appeals)
8)
8 Debtor.) Bk. No. SV 05-14258-GM
9)
9 _____)
10 LAWRENCE I. WECHSLER,)
11)
11 Appellant/Cross-Appellee,)
12) O P I N I O N
12 v.)
13)
13 MACKE INTERNATIONAL TRADE, INC.,)
14)
14 Appellee/Cross-Appellant.)
14 _____)

Argued and Submitted on February 22, 2007
at Pasadena, California

Filed - June 8, 2007

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Geraldine Mund, Bankruptcy Judge, Presiding.

Before: PAPPAS, MARLAR¹ and BRANDT, Bankruptcy Judges.

¹ The Honorable James M. Marlar, United States Bankruptcy
Judge for the District of Arizona, sitting by designation.

1 PAPPAS, Bankruptcy Judge:

2

3

INTRODUCTION

4 Venturing into an area of unsettled law, we hold that a
5 bankruptcy court may, under appropriate circumstances, order a
6 petitioning creditor to pay an alleged debtor's attorney's fees
7 and costs when, upon finding that the interests of creditors and
8 debtor would be better served, it dismisses an involuntary
9 petition pursuant to § 305(a).² We reject the petitioning
10 creditor's appeal of such an award and also conclude that the
11 bankruptcy court did not err in denying the creditor's request to
12 offset the award against amounts due to the creditor under a
13 judgment against the alleged debtor.

14 Finally, in connection with the debtor's cross-appeal, we
15 also affirm the bankruptcy court's decision finding that the
16 involuntary petition was not filed in bad faith, reducing the
17 amount allowed for attorney's fees and costs by approximately one-
18 half, and rejecting the debtor's request for punitive damages
19 pursuant to § 303(i)(2).

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FACTS

21

A. The Patent Litigation

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Macke International Trade, Inc., a/k/a Malibu Pacific
Investors, Inc., f/d/b/a Petcrew ("Macke" or "alleged debtor"), a
corporation, manufactured and sold pet products.

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² Unless otherwise indicated, all Code, chapter, section and Rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date (October 17, 2005) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005).

1 In 1999, Lawrence Wechsler ("Wechsler"), a patent attorney
2 and business competitor in the pet product industry, sued Macke in
3 federal court, alleging that Macke had infringed his patent in
4 connection with Macke's sale of certain "Handi-Drink" products.
5 After protracted litigation, in February of 2005, Wechsler
6 recovered a judgment against Macke and its owner, Anthony O'Rourke
7 ("O'Rourke"), for approximately \$650,000. Macke and O'Rourke,
8 represented by the same counsel, appealed the judgment, and that
9 appeal and a cross-appeal are pending in the U.S. Court of Appeals
10 for the Federal Circuit.

11 During its six years of litigation with Wechsler, Macke
12 incurred over \$900,000 in attorney's fees, which it was unable to
13 pay.³ Macke operated at a loss and had debts of over \$1.5
14 million. Its three largest creditors were two of its former
15 litigation attorneys and Wechsler. O'Rourke decided to wind up
16 Macke's operations and assign its remaining assets for the benefit
17 of its creditors. On January 13, 2005, Macke executed a General
18 Assignment Agreement in favor of Equitable Transitions, Inc.
19 ("Assignee").

20 Assignee liquidated Macke's hard assets in a sale consummated
21 on June 17, 2005. It yielded only \$10,500 in proceeds. Wechsler,
22 although notified of the assignment process, did not file a claim
23 to participate in any distributions by Assignee.

24 Meanwhile, in the Federal Circuit appeal, Wechsler
25 threatened to move to disqualify Macke's and O'Rourke's counsel.
26 Wechsler asserted that Assignee was the real party in interest,

27 ³ Indeed, the evidence indicated that about 95 percent of
28 Macke's revenue had come from sales of the Handi-Drink products.

1 and that any continued dual representation was an unwaivable
2 conflict of interest. Macke's counsel capitulated by preparing to
3 withdraw. Macke and O'Rourke retained substitute appellate
4 counsel, O'Rourke purchased Assignee's interest in the appeal, and
5 the appeal proceeded.

6
7 **B. The Involuntary Bankruptcy Case**
8 **and the Bankruptcy Court's Decision.**

9 On June 21, 2005, Wechsler filed an involuntary chapter 11
10 petition against Macke in bankruptcy court.

11 Macke responded with both an answer and a motion to dismiss
12 the involuntary petition. The substantive grounds for dismissal
13 were stated in the alternative. Primarily, Macke alleged,
14 pursuant to § 303(i), that Wechsler was guilty of bad faith in
15 filing the petition, and contended that he was attempting to gain
16 a litigation advantage over Macke in the pending appeal by
17 increasing O'Rourke's litigation costs in bankruptcy court. Macke
18 also alleged that Wechsler had failed properly to investigate the
19 administration of Macke's assets by Assignee before filing the
20 involuntary petition, either by contacting Assignee or by
21 conducting a debtor's examination.

22 Alternatively, Macke asked the bankruptcy court to dismiss
23 the case under § 305(a) because dismissal would better serve the
24 interests of the creditors and Macke. Macke maintained that all
25 its assets had been liquidated in the wind-up of its business,
26 that there was nothing to reorganize, and that little purpose
27 could be served through a chapter 11 case.

28 Macke further sought reimbursement of its attorney's fees and

1 costs from Wechsler under § 303(i) or, alternatively, under the
2 court's inherent authority. In addition, Macke sought sanctions
3 against Wechsler's counsel for allegedly violating Rule 9011.

4 Wechsler responded to Macke's motion in written declarations.
5 He alleged that he filed the involuntary petition in order to
6 reach O'Rourke's income through a potential reconfiguration of
7 Macke's business operations. He asserted that Macke's products
8 were still being advertised for sale worldwide, that O'Rourke had
9 attended a trade show in March of 2005, and that Macke/O'Rourke
10 maintained websites on the internet for Petcrew and Handi-Drink.
11 He disputed any lack of investigation on his part, and maintained
12 that O'Rourke had been evasive in response to Wechsler's demands
13 for information. Furthermore, Wechsler maintained that he had
14 requested a list of Macke's creditors from Assignee in March of
15 2005, but Assignee had refused to comply.

16 Macke replied, denying that the company was a viable business
17 and asserting that the product advertising referenced by Wechsler
18 was designed merely to maintain the status quo pending the sale of
19 Macke's assets. O'Rourke maintained in a declaration that his
20 presence at the trade show was to help him in securing a
21 consulting position with the buyer of Macke's assets.

22 The bankruptcy court allowed both sides to file supplemental
23 briefs and declarations on the issues. Counsel for Macke, Mark
24 Campbell ("Campbell"), filed a fee application for services
25 rendered between July 6, 2005, and September 14, 2005, totaling
26 \$31,028.01 for approximately 102 hours of services. To this
27 figure, Campbell added another 18 hours for his anticipated work
28 on the supplemental brief and oral argument for the hearings.

1 Therefore, although not substantiated by an updated fee statement
2 that is part of the record on appeal, Campbell asked for an award
3 reflecting 120 hours of services at \$325/hour for total fees and
4 costs in the amount of \$39,678.

5 The bankruptcy court heard argument on all issues over two
6 days.⁴ It announced its decision at the conclusion of the hearing
7 wherein, for the most part, it adopted its findings, analysis, and
8 conclusions expressed in a tentative ruling it had issued prior to
9 the hearing (hereafter "Tentative Ruling").

10 The bankruptcy court determined that it would dismiss the
11 bankruptcy case under § 305(a) because it found to do so would be
12 in the best interests of the debtor and creditors. In particular,
13 the bankruptcy court reasoned that:

14 The court appears to have jurisdiction . . . but
15 simply believes it is in the best interest of
16 all parties not to exercise it. Although an
17 assignment [of all of Macke's assets] is pending
18 in state court, Wechsler decided not to
19 participate in the assignment and is the only
20 creditor who filed this petition. This is a
21 two-party dispute between [Macke] and a single
22 creditor with a long history of litigation.
23 [Macke] has made allegations that this petition
24 was filed by Wechsler in order to gain an
25 advantage in the pending appeal. Finally, this
26 filing appears to lack a bankruptcy purpose:
27 [Macke] was not in need of debt adjustment, does
28 not need a breathing spell from creditors, and
does not need a discharge and a fresh
start. . . . There appears to be nothing to
reorganize or even liquidate. If there is, the
Assignee had notice of the allegations made by
Wechsler regarding additional assets and can
pursue those in state court, if necessary.
However, the continuation of this case would
only lead to administrative expenses, and would
be a waste of judicial resources.

27 Tentative Ruling at 10 (Oct. 25, 2005).

28

⁴ The record reflects that the parties attempted to settle the payment of Macke's attorney's fees prior to the hearing, but could not reach an agreement.

1 Having decided to dismiss the involuntary petition under
2 § 305(a), the bankruptcy court next analyzed Macke's request for
3 an award of attorney's fees and costs. It interpreted § 303(i)(1)
4 to allow, subject to the court's discretion, an alleged debtor to
5 recover fees and costs if an involuntary petition is dismissed for
6 any reason other than with the consent of all the parties, or
7 where the putative debtor has waived its right to recovery. The
8 bankruptcy court noted the lack of a definitive decision from the
9 Ninth Circuit concerning whether a fee award under § 303(i) could
10 be made when a case was dismissed under § 305(a). It concluded
11 that, although damages were not awardable, attorney's fees and
12 costs were. It then determined that such an award was appropriate
13 in this case based on the totality of the circumstances, which the
14 court described as follows:

15 In this case, the involuntary petition meets the
16 requirements of § 303(h): there is no argument
17 that [Macke] is and was insolvent at the time of
18 filing and there is no bona fide dispute.
19 However, all of [Macke]'s assets have been sold
20 as part of the assignment for the benefit of
21 creditors and there is nothing to liquidate or
22 reorganize under chapter 11 or any other
23 chapter. . . . As to the evidence presented by
24 Wechsler that [Macke] may be doing business
25 abroad and conducting business through other
26 websites, . . . [these allegations can] be
27 addressed in another forum. . . . Wechsler is
28 the only creditor who decided not to participate
in the assignment and instead filed the
petition, more than six months after the
assignment was made. And although Wechsler was
a direct competitor of [Macke], he maintains
that he wants [Macke] to be reorganized under
the auspices of a chapter 11 trustee. This does
not make sense. On the whole, it appears to
this Court that Wechsler is looking for another
forum to pursue his claims against [Macke] and
for another fiduciary. This is forum shopping
and will not be allowed. Therefore, the
totality of the circumstances points to the fact
that this filing was unnecessary.

Tentative Ruling at 11-12 (emphasis added).

1 Next, after citing the objective test for bad faith set forth
2 in Jaffe v. Wavelength, Inc. (In re Wavelength, Inc.), 61 B.R.
3 614, 620 (9th Cir. BAP 1986), the bankruptcy court declined to
4 award compensatory or punitive damages under either § 105(a) or
5 § 303(i)(2). See Tentative Ruling at 9. Although the court's
6 tentative decision did not make an express finding as to "bad
7 faith," it did state that punitive damages were unwarranted
8 because Wechsler's behavior did not rise "to the level which could
9 be considered malicious or vengeful" Tentative Ruling at
10 11. Furthermore, at the October 25th hearing, the bankruptcy
11 court stated several times that it had found neither "bad faith"
12 nor "grounds for punitive damages." Hrg. Tr. 20:16-18; 23:12-13
13 and 22-24 (Oct. 25, 2005). Moreover, the bankruptcy court
14 determined that Rule 9011 sanctions were not warranted against
15 Wechsler's attorney.⁵

16 In calculating the amount of fees to be awarded to Macke, the
17 bankruptcy court found that this was "a ridiculously overworked
18 case on both sides," and reduced the requested fees by
19 approximately one half, ordering Wechsler to pay \$20,000 for
20 Macke's attorney's fees.

21 Finally, for public policy reasons, the bankruptcy court
22 disallowed Wechsler's request to offset the \$20,000 fee award
23 against the judgment debt owed to Wechsler by Macke and O'Rourke.

24 The bankruptcy court entered an Order on October 25, 2005,
25 which, "for reasons stated on the record and in the Court's
26

27
28 ⁵ Macke has not challenged the bankruptcy court's ruling on
the Rule 9011 sanctions in its cross-appeal, nor has it named
Wechsler's attorney, who also signed the petition, as a cross-
appellant. Therefore, any appeal of the Rule 9011 sanction issue
has been waived. See Doty v. County of Lassen, 37 F.3d 540, 548
(9th Cir. 1994) (by failing to brief an issue on appeal, the
appellant waives his right to raise that issue).

1 written tentative ruling," granted Macke's motion for dismissal of
2 the involuntary petition pursuant to § 305(a), awarded Macke
3 \$20,000 as attorney's fees and costs pursuant to
4 § 303(i)(1), to be paid in full within 30 days of entry of the
5 order, and denied Macke's request for punitive damages.

6 Wechsler filed a timely appeal and Macke timely cross-
7 appealed. The appeals were consolidated for oral argument.

8
9 **ISSUES**

- 10 1. Whether the bankruptcy court erred in awarding
11 attorney's fees and costs to Macke pursuant to
12 § 303(i)(1) when the involuntary petition was dismissed
13 pursuant to § 305(a).
- 14 2. Whether the bankruptcy court abused its discretion in
15 reducing Macke's requested fee award.
- 16 3. Whether the bankruptcy court erred when it denied
17 Weschler's request to offset the fee award against the
18 Macke judgment debt.
- 19 4. Whether the bankruptcy court erred in refusing to award
20 punitive damages to Macke for a bad faith filing
21 pursuant to § 303(i)(2).⁶

22
23
24 ⁶ Because we affirm the award of attorney's fees and costs
25 under § 303(i)(1), we need not address whether the bankruptcy
26 court should have awarded Macke's attorney's fees and costs as
27 "damages" under § 303(i)(2), or as "sanctions" under the court's
28 § 105(a) inherent powers. Section 303(i) clearly delineates
between attorney's fees and costs (subsection (1)) and damages
(subsection (2)). And the Ninth Circuit has described "damages"
as either compensatory damages, such as "items of loss of business
during and after the pendency of the case, and so on," or punitive
damages. Miles v. Okun (In re Miles), 430 F.3d 1083, 1091 (9th
Cir. 2005). Finally, Macke did not assert that it had incurred
any actual damages, or that the bankruptcy court should have
awarded it the balance of its requested attorney's fees under
either § 303(i)(2) or § 105(a). Therefore, we conclude Macke has
waived any such issues. Doty, 37 F.3d at 548.

1 under the clearly erroneous standard. Wavelength, 61 B.R. at 620.

2
3 **DISCUSSION**

4 **A. Dismissal of Involuntary Cases Under § 305(a).**

5 The vast bulk of bankruptcy cases are commenced by the filing
6 of a petition by a debtor, or the debtor and spouse, under the
7 authority granted in §§ 301 and 302, respectively. But the
8 Bankruptcy Code is not exclusively a remedy for debtors. By
9 virtue of § 303, a chapter 7 or 11 bankruptcy case may be
10 commenced against an unwilling debtor by its creditors under
11 appropriate circumstances.⁷ If the bankruptcy court orders
12 relief, creditors benefit from potent protections afforded to them
13 by the Code, including, depending upon the facts, appointment of a
14 trustee to manage or liquidate a debtor's assets, investigation of
15 the debtor's financial affairs, assertion of the avoiding powers
16 to recover transfers to benefit all creditors, and application of
17 the equitable disbursement scheme to the claims of creditors to
18 ensure that all those similarly situated share equally.

19 The rules governing the commencement and prosecution of an
20 involuntary bankruptcy case are collected in § 303. For example,
21 this section establishes the eligibility for creditors seeking to
22 file an involuntary petition, § 303(b)(1)-(4), and delineates the
23 grounds for entry of an order for relief by the bankruptcy court
24

25 ⁷ That involuntary petitions are relatively rare can be seen
26 from a review of the 2005 statistics, which show that there were
27 1,325,400 voluntary petitions filed under chapters 7 and 11, while
28 only 563 involuntary petitions were filed. Administrative Office
of the United States Courts, U.S. Bankruptcy Courts. Voluntary and
Involuntary Cases Filed by Chapter of the Bankruptcy Code,
<http://www.uscourts.gov/judicialfactsfigures/2005/Table702.pdf>
(last visited May 11, 2007).

1 if the petition is contested, § 303(h)(1)-(2).⁸

2 But being targeted by an involuntary bankruptcy petition is
3 a disruptive and, in many cases, financially traumatic event for
4 the alleged debtor. Resources, including time and money, must be
5 diverted from other commitments to defend against the petition.
6 Moreover, pending a resolution of the issues by the bankruptcy
7 court, the alleged debtor exists in a financial interstice,
8 necessarily uncertain of its future, restricted in its ability to
9 make normal business decisions and plans. The pendency of the
10 bankruptcy petition may cause suppliers, customers and investors
11 to be reluctant to deal with the debtor. And even if adjudication
12 of bankruptcy relief proves unwarranted, and the petition is
13 eventually dismissed, the debtor may suffer considerable loss or
14 damages from the process.

15 An involuntary petition that is sufficient on its face and
16 which contains the essential allegations invokes the subject
17 matter jurisdiction of the bankruptcy court. Bakonyi v. Boardroom
18 Info. Sys. (In re Quality Laser Works), 211 B.R. 936, 941 (9th
19 Cir. BAP 1997), aff'd mem., 165 F.3d 37 (9th Cir. 1998). In
20 general, if the involuntary petition is uncontested, or if it is
21 contested and the petitioner prevails after trial, the Code
22 mandates that the "bankruptcy court shall order relief against the
23 debtor." § 303(h) (emphasis added).

24 But notwithstanding a bankruptcy court's jurisdiction over an
25 involuntary case pursuant to § 303, § 305(a) provides that the
26 bankruptcy court may dismiss an involuntary case, or suspend all

27
28 ⁸ In this case, Macke has not challenged the bankruptcy
court's conclusion that Wechsler was a proper petitioner, nor that
facts sufficient for entry of an order for relief were present.

1 proceedings in that case, and thereby decline⁹ to exercise that
2 jurisdiction. See Eastman, 188 B.R. at 624 (a pending chapter 7
3 case could be dismissed under § 707(a) or § 305(a)(1)); In re
4 Williamsburg Suites, Ltd., 117 B.R. 216, 218 (Bankr. E.D. Va.
5 1990) (dismissal pursuant to § 305 was appropriate even where
6 petitioning creditors established a case for an involuntary
7 bankruptcy); D. Epstein, S. Nickles & J. White, Bankruptcy § 2-5g
8 (1992) (“[A]n involuntary petition that satisfies all of the
9 requirements of section 303 can be dismissed under section
10 305. . . .”); 2 Alan N. Resnick & Henry J. Sommer, Collier on
11 Bankruptcy ¶ 305.LH[2], at 305-12 to 305-13 (15th ed. rev. 2005)
12 (Congress intended § 305 to apply primarily as a “mechanism to
13 dismiss involuntary cases filed by dissident creditors who seek to
14 disrupt on-going negotiations between the debtor and its
15 creditors.”).

16 Here, Macke asked the bankruptcy court to dismiss the
17 involuntary petition filed by Wechsler under either § 303(i) or
18 § 305(a). This latter section provides, in pertinent part, that
19 the bankruptcy court may, after notice and a hearing, dismiss a
20 bankruptcy case at any time if it finds that “the interests of
21 creditors and the debtor would be better served by such
22 dismissal.” § 305(a)(1).

23 Because an order to dismiss under § 305(a) is not reviewable
24 by the courts of appeal (see § 305(c)), such a dismissal is an
25 “extraordinary remedy” of “narrow breadth,” which may be utilized
26

27
28 ⁹ Section 305 is entitled “Abstention,” but this is the only
reference to that term in this section. The substantive
provisions make clear that the bankruptcy court’s prerogatives
under this section are limited to dismissal of the case or
suspension of all proceedings in the case. See § 305(a)-(c).

1 "to prevent the commencement and continuation of disruptive
2 involuntary cases." 2 Collier on Bankruptcy, supra, ¶ 305.01[1],
3 at 305-3; Barnett v. Edwards (In re Edwards), 214 B.R. 613, 620
4 (9th Cir. BAP 1997) (citing Eastman, 188 B.R. at 624). An
5 examination of the legislative history of § 305(a) indicates:

6 The court may dismiss or suspend under the first
7 paragraph, for example, if an arrangement is
8 being worked out by creditors and the debtor out
9 of court, there is no prejudice to the rights of
10 creditors in that arrangement, and an
11 involuntary case has been commenced by a few
12 recalcitrant creditors to provide a basis for
13 future threats to extract full payment.

14 H.R. Rep. No. 95-595 at 325 (1977); S. Rep. No. 95-989, at 35-36
15 (1978).

16 Typical circumstances for dismissing under § 305(a) (1)
17 include the pendency of proceedings such as assignments for the
18 benefit of creditors, see In re Bailey's Beauticians Supply Co.,
19 671 F.2d 1063 (7th Cir. 1982), state court receiverships, see In
20 re Sun World Broadcasters, Inc., 5 B.R. 719 (Bankr. M.D. Fla.
21 1980), or bulk sale agreements, see In re Bioline Labs., 9 B.R.
22 1013 (Bankr. E.D.N.Y. 1981). Another consideration is where there
23 are few, if any, valuable nonexempt assets and the administrative
24 expenses would likely consume the entire estate, see In re Luftek,
25 Inc., 6 B.R. 539, 549 n.6 (Bankr. E.D.N.Y. 1980) (involuntary
26 chapter 7).

27 The analysis as to whether "the interests of creditors and
28 the debtor would be better served by such dismissal" is based on
the totality of the circumstances. Eastman, 188 B.R. at 624.
Before a court may refrain from exercising jurisdiction over an
otherwise proper case, it must make specific and substantiated

1 findings that the interests of the creditors and the debtor will
2 be better served by dismissal or suspension. See In re Spade, 258
3 B.R. 221, 225 (Bankr. D. Colo. 2001), aff'd, 269 B.R. 225 (D.
4 Colo. 2001); see generally 2 Collier on Bankruptcy, supra,
5 ¶ 305.02[2] at 305-6 to 305-9.

6 In this case, the bankruptcy court's factual findings
7 reflected its analysis of the totality of the circumstances, and
8 supported its conclusion that those circumstances justified a
9 § 305(a)(1) dismissal. Specifically, the bankruptcy court found
10 that it had jurisdiction to order relief on the involuntary
11 petition under § 303. However, it also found that this was
12 essentially a two-party dispute; there was an out-of-court
13 assignment for the benefit of creditors including a sale of
14 Macke's assets; Wechsler did not participate in the assignment
15 proceeding; there was an absence of a bankruptcy purpose or need
16 to reorganize; there was pending litigation in another forum; and
17 another forum would be more appropriate for the resolution of any
18 lingering disputes between the parties. Significantly, the court
19 also found that, in commencing the involuntary case, Wechsler was
20 forum-shopping. Importantly, these factual findings and the
21 bankruptcy court's decision to dismiss the involuntary case under
22 § 305(a)(1) have not been challenged by the parties in either the
23 appeal or cross-appeal.

24
25 **B. Section 303(i)(1) Attorney's Fees and Costs**
26 **are Available in Connection With a § 305(a) Dismissal.**

27 The primary issue raised by Wechsler's appeal is whether the
28 bankruptcy court erred in its interpretation of the interplay

1 between §§ 303 and 305(a)(1). In particular, Wechsler argues that
2 the bankruptcy court erred when it awarded Macke attorney's fees
3 and costs in connection with a "best interest" dismissal under
4 § 305(a)(1). While Wechsler focuses on an issue of unsettled law,
5 we conclude that the bankruptcy court correctly interpreted and
6 applied the provisions of the Code.

7 The bankruptcy court followed the reasoning of In re Kidwell,
8 158 B.R. 203, 216-17 & n.22 (Bankr. E.D. Cal. 1993), and awarded
9 the alleged debtor its attorney's fees and costs in a reduced
10 amount of \$20,000. Wechsler contends that it was contradictory
11 for the bankruptcy court to refrain from exercising jurisdiction
12 over the case in order to allow the parties to resolve their
13 disputes outside the bankruptcy process and yet, at the same time,
14 to award attorney's fees. See Koffman v. Osteoimplant Tech.,
15 Inc., 182 B.R. 115, 127 (D. Md. 1995) (holding that statutory
16 scheme does not allow the parties "to have it both ways;" parties
17 either resolve the issues in bankruptcy court or on their own
18 outside of court.)

19 We disagree, and for the reasons that follow, we hold that
20 the statutory scheme allows, and indeed preempts other causes of
21 action for, relief against those who inappropriately invoke the
22 involuntary bankruptcy process, whether the petition is dismissed
23 under § 303 or via § 305(a)(1).¹⁰ See Miles v. Okun (In re Miles),
24 430 F.3d 1083, 1091 (9th Cir. 2005).

25
26 ¹⁰ We note that § 305 authorizes the bankruptcy court to
27 "dismiss the case" while § 303(i)(1) operates "[i]f the court
28 dismisses a petition under this section" Obviously,
dismissal of the entire bankruptcy case effectively and
necessarily dismisses the involuntary petition. Wechsler has not
relied upon any distinction in the statutory language. In
addition, we deem any variance in the terms in these two
provisions to be without significance for purposes of our
examination of this issue.

1 Attorney's fees and costs are expressly authorized under
2 § 303(i):

3 (i) If the court dismisses a petition under
4 this section other than on consent of all
5 petitioners and the debtor, and if the
6 debtor does not waive the right to
7 judgment under this subsection, the court
8 may grant judgment-

9 (1) against the petitioners and in favor
10 of the debtor for-

11 (A) costs; or

12 (B) a reasonable attorney's fee; or

13 (2) against any petitioner that filed the
14 petition in bad faith, for-

15 (A) any damages proximately caused
16 by such filing; or

17 (B) punitive damages.

18 § 303(i).

19 Although no circuit has directly addressed the issue of
20 whether § 303(i) authorizes an award of fees upon a dismissal
21 pursuant to § 305(a), several district and bankruptcy court
22 decisions have reached conflicting conclusions regarding this
23 question. The conflict arises because of the wording of
24 § 303(i)(1). The phrase, "If the court dismisses a petition under
25 this section," has been interpreted by some courts to mean, if the
26 court dismisses a petition filed under § 303, or in other words,
27 an involuntary petition. See e.g., Kidwell, 158 B.R. at 216-17.
28 Other courts interpret the statute to apply only "if a case is
dismissed under section 303." See Lufteck, 6 B.R. at 549 n. 6.

While we do not have the benefit of a holding on this precise
issue, Ninth Circuit case law offers considerable guidance. In
interpreting § 303(i) generally, it held that "when an involuntary

1 petition is dismissed on some ground other than consent of the
2 parties and the debtor has not waived the right to recovery, an
3 involuntary debtor's motion for attorney's fees and costs under
4 § 303(i)(1) raises a rebuttable presumption that reasonable fees
5 and costs are authorized." Higgins, 379 F.3d at 707. This
6 holding makes clear that, although the Code has liberalized
7 standards for instituting involuntary cases, because of the
8 potential adverse impact on the debtor and the need to encourage
9 discretion in filing such cases, unsuccessful involuntary
10 petitioners should routinely expect to pay the debtor's legal
11 expenses arising from the involuntary filing. Id. at 706;
12 Kidwell, 158 B.R. at 217 (stating that "[t]he Congress drafted the
13 statute to make an award of costs and fees the norm" and that
14 petitioning creditors "should expect to pay the debtor's
15 attorney's fees and costs if the petition is dismissed"). In
16 addition, as a fee-shifting statute,¹¹ the court of appeals has
17 emphasized that § 303(i) is intended to be the exclusive remedy
18 for regulating abuse of the involuntary bankruptcy process.
19 Miles, 430 F.3d at 1089-91.

20 In awarding fees and costs in this case, the bankruptcy court
21 relied on the "plain meaning" of § 303 to link it to a § 305(a)

23 ¹¹ Federal courts ordinarily follow the "American Rule" under
24 which "the prevailing party may not recover attorney's fees as
25 costs or otherwise." Alyeska Pipeline Serv. Co. v. Wilderness
26 Soc'y, 421 U.S. 240, 245 (1975). Only where Congress has
27 specifically allowed fee shifting will this rule be abrogated, or
28 See, e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 45 (1991); Alyeska
Pipeline, 421 U.S. at 257-58. In addition, the Supreme Court
recently held that the American Rule can be overcome "by an
'enforceable contract' allocating attorney's fees." Traveler's
Casualty & Surety Co. of America v. Pac. Gas & Elec. Co., ___ U.S.
___, 127 S. Ct. 1199, 1204 (2007).

1 dismissal. This interpretation was discussed in Kidwell, a
2 § 303(i) case, in which the court observed that:

3 There are only two charted safe harbors from the
4 section 303(i) remedies: (1) dismissal with
5 consent of the debtor and of all petitioners and
6 (2) waiver by the debtor of the right to
7 judgment. 11 U.S.C. § 303(i). All other
8 dismissals are exposed to section 303(i)
9 remedies, including, for example, dismissal
10 pursuant to section 305 abstention based on the
11 interests of creditors and the debtor being
12 better served by dismissal.

13 Kidwell, 158 B.R. at 216; cf. In re Trina Assocs., 128 B.R. 858,
14 873 (Bankr. E.D.N.Y. 1991) (the court entertained a motion for
15 fees under § 303(i) following a § 305 abstention, then noting its
16 discretion to do so, denied such fees) and In re Kass, 114 B.R.
17 308, 309 (Bankr. S.D. Fla. 1990) (the court dismissed the
18 involuntary petition under § 305, but retained jurisdiction to
19 award the debtor fees and costs as appropriate); In re R.V.
20 Seating, Inc., 8 B.R. 663, 666 (Bankr. S.D. Fla. 1981) (the court
21 exercised its discretion to deny fees or damages, while noting
22 that § 305 does not authorize such an award).

23 In Kidwell, the sole petitioner had circumvented the three-
24 petitioner requirement by intentionally misrepresenting the total
25 number of the alleged debtor's creditors. Id. at 207. Albeit in
26 dictum, Judge Klein cogently explained that both §§ 303(i) and
27 305(a) target for dismissal the same type of "spoiler" petitioner.
28 Id. at 216 n.22. See generally I. Lacayo, After the Dismissal of
an Involuntary Bankruptcy Petition: Attorney's Fees Award to
Alleged Debtors, 27 CARDOZO L. REV. 1949, 1958-59 n.34 (2006) (citing
Kidwell and stating: "It seems the modern trend and preferred
approach does make section 303(i) awards available after a section

1 305 dismissal."). While not an issue to be decided, consistent
2 with the reasons for applying the provision in its case, the
3 Kidwell court suggested that § 303(i)(1) should also be applicable
4 after a dismissal under § 305 because:

5 The Congress drafted the statute to make an
6 award of costs and fees the norm. While the
7 better view is that such awards are
8 discretionary and not mandatory, courts exercise
9 their discretion in light of two factors.
10 First, the progenitor of section 303(i)(1) is
11 former Bankruptcy Rule 115(e), which makes such
12 awards "routine." Second, the statute makes
13 plain that bad faith is not relevant unless
14 consequential and punitive damages are under
15 consideration.

11 Kidwell, 158 B.R. at 217 (citing In re Kearney, 121 B.R. 642,
12 644-45 (Bankr. M.D. Fla. 1990); In re Anderson, 95 B.R. 703,
13 704-05 (Bankr. W.D. Mo. 1989); In re Johnston Hawks, Ltd., 72 B.R.
14 361, 365 (Bankr. D. Haw. 1987), *aff'd*, 885 F.2d 875 (9th Cir.
15 1989)).

16 In Higgins, a § 303(i) dismissal case, the Ninth Circuit
17 quoted Kidwell with approval: "Although we adopt the totality of
18 the circumstances test as the appropriate standard under
19 § 303(i)(1), we do not abandon the premise that 'any petitioning
20 creditor in an involuntary case . . . should expect to pay the
21 debtor's attorney's fees and costs if the petition is dismissed.'" Higgins,
22 379 F.3d at 707 (quoting Kidwell, 158 B.R. at 217). To
23 this end, Higgins established a rebuttable presumption that
24 reasonable fees and costs are authorized in order "to reinforce
25 the idea" that involuntary petitions "should not be lightly
26 undertaken," and "to discourage inappropriate and frivolous
27 filings." Id. (citations omitted).

28 We believe that the case law and authorities which deny

1 attorney's fees and costs for a § 305(a) dismissal generally do
2 not interpret § 303(i) correctly, are not in harmony with the
3 abstention option, or fail to distinguish between the presumptive
4 attorney's fees and costs provisions of § 303(i)(1) and the
5 damages provisions of § 303(i)(2). See Koffman, 182 B.R. at 127
6 (concluding fees and costs may not be awarded after a § 305
7 dismissal because the legislative history indicates damages are
8 not to be awarded in such an instance);¹² Lufteck, 6 B.R. at 549
9 n. 6 (concluding without analysis that fees and costs are not

11 ¹² Koffman relies on the legislative history of § 303(i),
12 which explains that this provision "permits the court to award
13 costs, reasonable attorney's fees, or damages," and delineates two
14 kinds of damages as "those that may be caused by the taking of
15 possession of the debtor's property, under certain conditions--
16 (i.e., former § 303(i)(1)(C), which was deleted by the Bankruptcy
17 Act of 1986)--or those damages proximately caused by filing a
18 petition in bad faith. H.R. Rep. No. 95-595 at 324 (1977); S.Rep.
19 No. 95-989 at 3 (1978) (emphasis supplied). The legislative
20 history further instructs that "[d]ismissal in the best interests
21 of creditors under section 305(a)(1) would not give rise to a
22 damages claim." Id. On the one hand, it can be argued that the
23 legislative intent is not apparent from this report as to whether
24 costs and attorney's fees may be recovered under § 303(i)(1) for a
25 § 305(a) dismissal. See W. Norton, Jr. & W. Norton III, Norton
26 Bankr. Law & Prac. 2d: Bankruptcy Code § 303(i), Editors' Cmt. to
27 1978 House and Senate Reports (2006-2007 ed.). But it can also be
28 argued that, by expressly indicating in the report that only
29 damages are unavailable, Congress implicitly intended that
30 attorney's fees and costs could be recovered, assuming the
31 bankruptcy court exercised its discretion to make such an award
32 under the facts presented in a specific case.

23 The Collier editors also rely upon the legislative history of
24 § 303(i) for their conclusion that "the better argument, despite
25 the possibility of some harsh results in select cases, is that
26 abstention under section 305 precludes a recovery of money under
27 section 303(i)." 2 Collier on Bankruptcy, supra ¶ 303.15[11],
28 303-127 - 303-128. However, as Collier also points out: "by
29 virtue of the wording of paragraphs (1) and (2), there is a
30 distinction between fees and costs, and damages. The distinction
31 is significant because damages can be recovered only in the
32 context of a bad faith filing." Id. at ¶ 303.15[4][a], 303-118.
33 Thus, as we note above, reliance upon the congressional statement
34 that damages are not to be awarded when a case is dismissed under
35 § 305 is misplaced, because it is not clearly indicative of
36 Congress' intent regarding attorney's fees and costs that are set
37 forth in separate paragraphs of the Code.

1 appropriately awarded unless the petition is dismissed under
2 § 303); Matter of Goldsmith, 30 B.R. 956, 959 (Bankr. E.D.N.Y.
3 1983) (concluding without analysis that attorney's fees, costs,
4 and damages are not available to the debtor if the court abstains
5 from hearing the involuntary petition); In re Sun World
6 Broadcasters, Inc., 5 B.R. 719, 723 (Bankr. M.D. Fla. 1980)
7 (summarily concluding that "[t]he court holds that the costs and
8 fees allowable under § 303(i) are not possible in a case that is
9 dismissed under § 305"); In re R.V. Seating, Inc., 8 B.R. 663, 666
10 (Bankr. S.D. Fla. 1981) (relying on In re Sun World Broadcasters
11 and Luftek to conclude "that § 305, unlike § 303, does not
12 authorize the Court to award damages, attorney's fees, or
13 costs[.]").

14 To resolve this conflict in the case law we must examine the
15 language of § 303(i). The first step in statutory interpretation
16 is "to determine whether the language at issue has a plain and
17 unambiguous meaning with regard to the particular dispute in the
18 case." Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997). When
19 statutory language is plain, "the sole function of the courts is
20 to enforce it according to its terms." United States v. Ron Pair
21 Enters., Inc., 489 U.S. 235, 241 (1989) (quoting Caminetti v.
22 United States, 242 U.S. 470, 485 (1917)). Only if there is an
23 ambiguity in the language do we look to the legislative history
24 for resolution. Barnhill v. Johnson, 503 U.S. 393, 401 (1991).
25 "Whether a statute is ambiguous is 'determined by reference to the
26 language itself, the specific context in which that language is
27 used, and the broader context of the statute as a whole.'" Hough
28 v. Fry (In re Hough), 239 B.R. 412, 414 (9th Cir. BAP 1999)

1 (quoting Robinson, 519 U.S. at 341).

2 Section 303(i) provides, in pertinent part, that attorney's
3 fees may be awarded "[i]f the court dismisses a petition under
4 this section other than on consent of all petitioners and the
5 debtor, and if the debtor does not waive the right to judgment
6 under this subsection" The phrase "other than on consent
7 of all petitioners and the debtor," modifies the antecedent phrase
8 "[i]f the court dismisses a petition under this section."
9 Importantly, the words "under this section" immediately follow the
10 word "petition," not "dismisses." All involuntary petitions are
11 filed under § 303. Therefore, we read the statute such that the
12 word "dismisses" is modified only by the words "other than on
13 consent of all petitioners and the debtor [etc]."

14 This interpretation is supported by principles of statutory
15 construction. Under the canon reddendo singula singulis, "Where a
16 sentence contains several antecedents and several consequents they
17 are to be read distributively. The words are to be applied to the
18 subjects that seem most properly related by context and
19 applicability." Hough, 239 B.R. at 415 (quoting 2A Norman J.
20 Singer, Sutherland Stat. Constr. § 47:26 (5th ed. 1992)). Also
21 known as the "doctrine of the last antecedent," this interpretive
22 aid has been described as providing that the "limited or
23 restrictive clause contained in the statute is generally construed
24 to refer to and limit and restrict [the] immediately preceding
25 clause or the last antecedent" unless "something in the subject
26 matter or dominant purpose of the statute requires a different
27 interpretation." Sutherland Stat. Constr., supra, § 47:26.

28 In addition, the doctrine of "whole statute" interpretation

1 requires that "a subsection may not be considered in a vacuum, but
2 must be considered in reference to the statute as a whole and in
3 reference to statutes dealing with the same general subject
4 matter." Id. § 46:5. In this instance, both § 303(i) and
5 § 305(a)(1) are intended to deal with involuntary petitioners who,
6 as in this case, improperly seek to impose the consequences of
7 bankruptcy on an unwilling debtor. See, e.g., Kidwell, 158 B.R.
8 at 216-17.

9 Applying these principles to § 303(i), the term "dismisses"
10 is the antecedent that is modified by the entire phrase "other
11 than on consent of all petitioners and the debtor, and if the
12 debtor does not waive the right to judgment under this
13 subsection." Moreover, it would make little sense for the phrase
14 "other than on consent of all petitioners and the debtor [etc.]"
15 to modify the entire antecedent phrase "dismisses a petition under
16 this section," because the "consent" exception is not otherwise
17 specified as a ground for dismissal under § 303. In addition,
18 "under this section" modifies "petition" making clear that the
19 provision applies only to involuntary petitions that are
20 dismissed.

21 One other point deserves mention. Section 303(i)(1) provides
22 for a discretionary award of attorney's fees and costs. The
23 bankruptcy court is not compelled to make such an award. For
24 example, in this case, an experienced bankruptcy judge carefully
25 evaluated the relevant facts, motives and conduct of the parties
26 (i.e., the "totality of circumstances") to determine if an award
27 of litigation expenses to the alleged debtor furthered the
28 purposes and policies of the Code. The bankruptcy court

1 determined that the filing of the involuntary petition was
2 motivated by the petitioning creditor's desire to find a more
3 sympathetic forum to continue its fight against the debtor. At
4 the time Wechsler filed the involuntary petition, Macke had no
5 assets, no ongoing business to reorganize, and all its creditors,
6 other than Wechsler, had elected to participate in a pre-filing
7 assignment of Macke's assets for their benefit. Even though,
8 based upon its judgment, Wechsler was qualified to file an
9 involuntary petition against Macke, see § 303(b), and Macke was,
10 obviously, "generally not paying [its] debts as such debts became
11 due," § 303(h)(1), the reality was that Macke did not belong in a
12 chapter 11 case.¹³

13 By the same token, in a closer case, where more traditional
14 grounds are presented to place a debtor in bankruptcy against its
15 will, even if the bankruptcy court declines to exercise its
16 jurisdiction, the bankruptcy judge may exercise discretion against
17 an award of attorney's fees and costs. Clearly, then, because of
18 the discretionary nature of § 303(i)(1), there is little prospect
19 that our interpretation of the attorney's fees provisions of
20 303(i) will deter creditors with a legitimate need for the
21

22
23 ¹³ To us, Wechsler's choice to file his involuntary petition
24 under chapter 11 (a reorganization), rather than chapter 7 (a
25 liquidation), casts additional doubt on his motives. See § 303(a)
26 (authorizing an involuntary petition under either chapter 7 or
27 11). A chapter 11 case generally serves to preserve the going-
28 concern value of a business while a plan to pay creditors is
formulated, usually by existing management. Under these facts,
there was no realistic prospect for a feasible plan. Management
had already implemented a plan to deal with creditors: the
assignment for the benefit of creditors followed by a liquidation
sale and distribution of the asset sale proceeds. The involuntary
petition here was too late to benefit creditors, suggesting it may
have been solely a litigation tactic.

1 protections provided by the Bankruptcy Code from pursuing an
2 involuntary petition.¹⁴

3 The Ninth Circuit indicated in Higgins that those who
4 prosecute an involuntary bankruptcy petition against a debtor
5 should expect, if unsuccessful, to compensate that debtor for the
6 costs of defending. Higgins, 279 F.3d at 707. The facts of this
7 case demonstrate why this approach is the correct one. As the
8 bankruptcy court found, this involuntary chapter 11 petition had
9 no legitimate goal, and "would only lead to administrative
10 expenses, and would be a waste of judicial resources."

11 We hold that the plain meaning of § 303(i) provides that,
12 unless an involuntary petition has been dismissed with the
13 parties' consent, and without the debtor's waiver of the right to
14 judgment under § 303(i), the bankruptcy court, based upon the
15 totality of the circumstances, may, in its discretion, award
16 attorney's fees and costs under § 303(i)(1) for a § 305(a)(1)

17
18
19 ¹⁴ In arguing that an award of attorney's fees and costs are
20 not available to Macke under these circumstances, our colleague in
21 dissent suggests that "[§]305(a)(1) is a benign dismissal
22 statute." Of course, it is only when the alleged debtor or some
23 other interested party convinces the bankruptcy judge that
24 dismissal better serves the interests of all parties that an award
25 will be available, and presumably only then when that bankruptcy
26 judge is also persuaded that such an award is warranted. If the
27 petitioning creditor's motives are pure, and prospects are good
28 for an out-of-bankruptcy solution, denying fees and costs to the
alleged debtor is appropriate. But here the bankruptcy court
found that Wechsler's intentions for filing the involuntary
petition were not benign.

26 We also disagree with the dissent's concern that allowing the
27 bankruptcy court discretion to award fees and costs in this
28 setting would "chill out-of-court workouts" or deter nonbankruptcy
answers to a debtor's financial problems. Here the award of fees
and costs is compensatory, not punitive. Moreover, we think the
prospect that an unsuccessful petitioner may be ordered to
reimburse the alleged debtor's legal expenses will promote, not
discourage, the parties to resort to nonbankruptcy solutions
(e.g., the assignment for the benefit of creditors attempted by
Macke, here).

1 dismissal of an involuntary petition.¹⁵ The bankruptcy court did
2 not abuse its discretion in awarding Macke attorney fees and costs
3 against Wechsler in this case.

4
5 **C. The Reduced Fee Award Was Not An Abuse of Discretion**

6 In the cross-appeal, Macke contends that the bankruptcy court
7 abused its discretion in determining the amount of attorney's fees
8 and costs awarded. Macke maintains that it should receive the
9 entire requested amount of \$39,678. However, this argument
10 ignores the bankruptcy court's unchallenged factual finding that a
11 reduction was appropriate because both sides had "ridiculously
12 overworked" the case.

13 The customary method for assessing the amount of reasonable
14 attorney's fees to be awarded in a bankruptcy case is the
15 "lodestar." Under this approach, "'the number of hours reasonably
16 expended' is multiplied by 'a reasonable hourly rate' for the
17 person providing the services." Eliapo, 468 F.3d at 598
18 (citations omitted). A bankruptcy court may consider the "quality
19 and efficiency of counsel's services" in order to determine the
20 appropriate lodestar rate. Dawson v. Wash. Mut. Bank, F.A. (In re
21 Dawson), 390 F.3d 1139, 1152 (9th Cir. 2004).

22
23 ¹⁵ Because we conclude the statute's plain meaning allows for
24 an award of fees and costs in this context, we need not rely upon
25 the legislative history for guidance. However, because other
26 courts have considered it, we note that both the Ninth Circuit in
27 Higgins and the legislative history support an interpretation of
28 § 303(i)(1) that the only exceptions to a potential award of fees
and costs to the alleged debtor after dismissal of the involuntary
petition is when the petition is dismissed on the consent of the
petitioning creditors and the debtor, or the debtor waives the
right to an award of fees and costs. See Higgins, 379 F.3d at
707; H.R. Rep. No. 95-595 at 324 (1977); S. Rep. No. 95-989 at 34
(1978).

Moreover, as we discuss above, supra n.12, the legislative
history does not clearly indicate that attorney's fees and costs
cannot be awarded when a dismissal comes via § 305(a).

1 Generally, a bankruptcy court has broad discretion to
2 determine the number of hours reasonably expended. “[E]ven where
3 evidence supports [that] a particular number of hours [were]
4 worked, the court may give credit for fewer hours if the time
5 claimed is ‘excessive, redundant, or otherwise unnecessary.’” Id.
6 (citation omitted).

7 Macke reminds us that the motion to dismiss was complex,
8 fact-intensive, and required declaratory evidence. In all, the
9 motion was 24 pages long, was accompanied by multiple exhibits,
10 and cited over 40 cases, statutes, rules and treatises. The
11 motion alleged that Wechsler’s response was replete with
12 inaccuracies which it felt it then had to address in a 21-page
13 reply. Macke’s supplemental brief spanned 29 pages. Macke
14 further maintains that the rejected bad faith issue was pressed by
15 Wechsler’s voluminous responses and documentary evidence and was a
16 necessary alternative defense in view of the unsettled state of
17 the law.

18 But, in reality, the complexity of the motion was occasioned
19 in large part by Macke’s reliance upon alternative theories. If
20 the bankruptcy court had not ruled under § 305, or had it not
21 determined the existence of bad faith, the stream of papers might
22 have been justified, but it did not. It was not error for the
23 bankruptcy court to evaluate Macke’s fee request based upon the
24 law it actually applied, and not based on all the possible
25 theories and issues potentially implicated by the parties’
26 arguments.

27 Furthermore, Campbell apparently did not file an updated fee
28 statement to support the additional 18 hours, or \$5,850 in fees,

1 Macke sought.

2 Finally, the fee request was based upon Campbell's charges of
3 \$325 per hour for 120 hours of work. To the Panel, it appears
4 many of the submissions could have been prepared by less
5 experienced, and less expensive, counsel. Excessive use of senior
6 partner rates in research may also justify a reduction. In re
7 Allen-Main Assocs., Ltd. P'ship, 243 B.R. 606, 609 (Bankr. D.
8 Conn. 1998).

9 The bankruptcy court was obviously familiar with the issues,
10 facts, and law in this case. We can not conclude that the
11 bankruptcy court abused its broad discretion when it awarded Macke
12 \$20,000, as opposed to a higher amount, for attorney's fees and
13 costs.

14

15 **D. Wechsler Should Not Be Allowed Setoff.**

16 Wechsler contends that the bankruptcy court abused its
17 discretion in not allowing him to offset the \$20,000 fee award
18 against the judgment debt owed to him by Macke. See § 553(a). He
19 cites In re Apache Trading Group, Inc., 229 B.R. 887 (Bankr. S.D.
20 Fla. 1999) to support his argument.

21 In Apache, the bankruptcy court looked at three reported
22 decisions concerning a petitioning creditor's right to offset an
23 award of fees, costs or damages arising from an involuntary filing
24 under § 303(i) against the claim held by the petitioning creditor
25 against the alleged debtor.

26 In In re Schiliro, 72 B.R. 147 (Bankr. E.D. Pa. 1987), the
27 bankruptcy court rejected the creditor's right of setoff for
28 strong public policy reasons. It held:

1 If the petitioning creditor could suffer no
2 other recourse except a reduction in his
3 probably-uncollectible judgment as a penalty for
4 requiring a debtor to defend an unjustified
5 case, and Congress has specifically stated
6 should result in such a penalty, the dis-
7 incentive built into the system to discourage
8 such actions would evaporate. The rule sought
9 by [the petitioning creditor] would surely be a
10 boon to creditors who seek to wear down to
11 submission small debtors such as the Debtor
12 here.

13 Id. at 149. Accord In re K.P. Enter., 135 B.R. 174, 185 (Bankr.
14 D. Me. 1992).

15 The bankruptcy court in In re Better Care, Ltd., 97 B.R. 405
16 (Bankr. N.D. Ill. 1989) disagreed with those policy reasons
17 because it believed that the § 303(i) fees and costs were purely
18 compensatory in nature and akin to damages, for which setoff
19 should be available. Id. at 414-15. The court determined that
20 setoff would be premature, however, where the merits of the
21 petitioning creditor's claim had not yet been resolved. Id. at
22 415.

23 The Apache court then held that setoff was the most practical
24 option because there the involuntary petitioner did not act in bad
25 faith. The alternative, it said, would be for the petitioner to
26 convert his liquidated claim to judgment and then proceed to
27 collect from the alleged debtor. "This would be an exercise in
28 futility," the court held. Apache, 229 B.R. at 890.

As discussed above, in the Ninth Circuit, the presumption is
that, upon dismissal of an involuntary petition, attorney's fees
and costs are to be awarded to the alleged debtor whether or not
the filing was in bad faith. Given this presumption, and the
policy implications flowing from a decision to allow a setoff, we

1 find that Schiliro yields the better result.

2 In Schiliro, the bankruptcy court analogized an award under
3 § 303(i) to statutory damages awarded a debtor for a creditor's
4 violation of the Truth in Lending Act ("TILA"). Schiliro, 72 B.R.
5 at 149-51. In Riggs v. Gov't Employees Fin. Corp., 623 F.2d 68
6 (9th Cir. 1980), the Ninth Circuit held that allowing lenders to
7 subtract TILA awards from amounts owed them by debtors would
8 eliminate any incentive to pursue TILA claims by bankruptcy
9 trustees and effectuate the statute's deterrent purpose. Id. at
10 74. TILA's enforcement provisions are both remedial and penal in
11 nature. See Yamamoto v. Bank of New York, 329 F.3d 1167, 1171
12 (9th Cir. 2003). Section 303(i) is also remedial in nature - the
13 monetary remedies make it expensive for a petitioning creditor to
14 file an invalid petition. See Miles, 430 F.3d at 1090; Higgins,
15 379 F.3d at 706-07.

16 The consensus of courts is that a setoff of this sort is
17 impermissible. 2 Collier on Bankruptcy, supra, ¶ 303.15[8], at
18 303-125. If setoff were allowed, there would be little downside
19 to a creditor's resort to an involuntary bankruptcy petition
20 against a debtor, even if its conduct did not rise to the level of
21 "bad faith."

22 Therefore, given the remedial purpose behind, and wide
23 latitude granted to the bankruptcy court by, § 303(i), we conclude
24 that the bankruptcy court did not abuse its discretion in denying
25 Wechsler's setoff request.¹⁶

27 ¹⁶ While we endorse the bankruptcy court's refusal to endorse
28 an offset for policy reasons, it is also doubtful Wechsler had a
statutory right to set off the attorney's fee award against its
prebankruptcy claim against Macke. The Code allows an offset only
as to "a mutual debt owing by such creditor to the debtor that
arose before the commencement of the case" § 553(a). Of
course, Wechsler's debt to Macke arose after the commencement of

(continued...)

1 **E. The Bankruptcy Court Did Not Err in Denying Punitive Damages**
2 **Based on Bad Faith Pursuant to § 303(i) (2).**

3 In its cross-appeal, Macke asserts that the bankruptcy court
4 erred in failing to find bad faith on Wechsler's part. Macke
5 maintains that the court incorrectly applied the legal standard,
6 and that its factual findings actually supported a finding of bad
7 faith. Thus, it contends that the bankruptcy court should have
8 granted its demand for punitive damages.

9 We affirm the bankruptcy court's denial of punitive damages
10 because we conclude that the bankruptcy court's findings of fact
11 were not challenged as being clearly erroneous and the court
12 applied the correct legal standard for bad faith.¹⁷

13 Punitive damages are awardable "against any petitioner that
14 filed the petition in bad faith." § 303(i) (2). In the Ninth
15 Circuit, the bankruptcy court can allow punitive damages without
16 having to award compensatory or actual damages, or in addition to
17 those damages. Wavelength, 61 B.R. at 621.

18 Macke maintains that the bankruptcy court's written findings
19 of fact were not clearly erroneous. Nonetheless, it contends that

20 _____
21 ¹⁶(...continued)
22 the involuntary case. Riggs v. Stovin (In re Luz Int'l), 219 B.R.
837, 843-44 (9th Cir. BAP 1998).

23 ¹⁷ For purposes of this discussion, we presume without
24 deciding that § 303(i) (2) damages are available to an alleged
25 debtor who proves a creditor filed an involuntary petition in bad
26 faith, whether that petition is dismissed for failure to establish
27 a required element under § 303, or better to serve the interests
28 of the parties under § 305(a) (1). We also note that the Supreme
Court recently held that a bankruptcy court has inherent power to
prevent dishonest parties from proceeding with a bankruptcy case
if their bad-faith prepetition conduct justifies a "forfeiture" of
their rights under the Code. See Marrama v. Citizens Bank of
Mass., ___ U.S. ___, 127 S.Ct. 1105, 1111-12 (2007) (a chapter 7
debtor does not have the absolute right to convert to chapter 13
under § 706(a) if a bad-faith dismissal is appropriate.)
Regardless of the source of its authority, our decision to affirm
the bankruptcy court's denial of punitive damages and reasons for
it would be the same.

1 the court applied the incorrect legal standard because the factual
2 findings should have yielded a determination of bad faith under
3 the objective, "reasonable person" standard set forth in
4 Wavelength, 61 B.R. at 620 (analyzing bad faith under 303(i)).
5 In particular, Macke contends that the court's findings that this
6 was a two-party dispute, the filing of the involuntary petition
7 had no legitimate bankruptcy purpose, and was forum shopping, all
8 constituted unreasonable conduct and bad faith.

9 Clearly the bankruptcy court applied the objective,
10 reasonable person standard articulated in Wavelength; indeed, it
11 cited that case in its Tentative Ruling. And while the bankruptcy
12 court did make the above findings, it also found that "the
13 evidence presented by Wechsler that Macke may be doing business
14 abroad and conducting business through other websites, . . . can .
15 . . be addressed in another forum." Tentative Ruling at 11-12.
16 At the hearing, the bankruptcy court also referred to declaration
17 evidence concerning Macke's continued product advertising and
18 possible continuing sales, post assignment: "[T]here is quite a
19 bit of evidence here that leads me to believe that something is
20 going on. And that therefore, it's not bad faith for the creditor
21 to seek a forum to have that evidence reviewed." Hrg. Tr. 21:9-
22 12. The court's order incorporated its oral and written findings.
23 These additional findings were neither clearly erroneous nor
24 inconsistent. A finding is not clearly erroneous if two
25 permissible views of the evidence are possible. Beauchamp v.
26 Hoose (In re Beauchamp), 236 B.R. 727, 729-30 (9th Cir. BAP 1999),
27 aff'd, 5 Fed. Appx. 743 (9th Cir 2001).

28 The overall facts and circumstances, particularly in light of

1 the assignment for the benefit of creditors, showed that there was
2 no legitimate reorganization potential for Macke under chapter 11,
3 and that Wechsler was forum-shopping. However, the bankruptcy
4 court also found that Wechsler might have legitimate reasons to
5 litigate pending disputes concerning Macke's ongoing activities in
6 other, more appropriate forums. Not every failed reason for
7 filing an involuntary petition amounts to "bad faith."

8 On these facts, while we might reach a different conclusion,
9 a reasonable person could conclude that Wechsler did not file the
10 involuntary petition in bad faith. The bankruptcy court announced
11 and applied the correct legal standard and did not clearly err in
12 finding an absence of bad faith on Wechsler's part. Having
13 determined that the involuntary petition was not filed in bad
14 faith, the bankruptcy court did not err in denying Macke's demand
15 for punitive damages.

16 CONCLUSION

17 The bankruptcy court's award of Macke's attorney's fees and
18 costs pursuant to § 303(i)(1), when it dismissed the involuntary
19 case under § 305(a)(1), was authorized under the plain meaning of
20 the statute and in view of the statutory scheme to prevent abusive
21 filings of involuntary petitions.

22 The bankruptcy court did not abuse its discretion in awarding
23 Macke reasonable attorney's fees of, and reducing the requested
24 attorneys' fee award to, \$20,000 based on what it determined was
25 an appropriate lodestar under the circumstances of the case and
26 its outcome. Nor did it abuse its discretion in denying
27 Wechsler's request to offset this award against the Macke
28 judgment.

1 The bankruptcy court's finding of no bad faith was based on
2 the proper legal standard and was not clearly erroneous and, thus,
3 supported its denial of punitive damages.

4 We therefore AFFIRM the bankruptcy court's October 24, 2005
5 order in its entirety.

6 **AFFIRMED.**

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9 MARLAR, Bankruptcy Judge, dissenting in part and concurring in
10 part:

11
12 I respectfully dissent from the panel's conclusion that
13 § 303(i)(1) attorney's fees and costs are allowable for a
14 § 305(a) dismissal. To my mind, to conclude otherwise illustrates
15 how a logical syllogism can be crafted to undo the clear intention
16 and meaning of a statute.

17 Section 305(a)(1) is a benign dismissal statute as plainly
18 written. Its focus encompasses any reason which is in the best
19 interests of the creditors and the debtor. Sanctions of any type
20 would, among other things, chill out-of-court workouts, be a
21 disincentive to dismiss cases not worthy of a full-blown
22 administrative procedure, or militate against dismissal of cases
23 which are proceeding efficiently in another forum.

24 It is apparent that § 303(i) provides a continuum of
25 sanctions for the unsuccessful petitioner, from a simple award of
26 attorney's fees on one end of the spectrum to compensatory and
27 punitive damages for bad-faith petitioners on the other. See
28 Miles, 430 F.3d 1083, 1090; Kidwell, 158 B.R. at 213; see also 1

1 Norton Bankr. L. & Prac. 2d, supra, § 21:16 ("The court may grant
2 any or all of the damages provided for under Code § 303(i), and
3 such damages may be alternatively or cumulatively assessed."). I
4 see no purpose in delving into the legislative history of
5 § 303(i) in order to analyze a perceived and gossamer-thin
6 "distinction" between "damages" and "fees and costs," when it
7 comes to understanding that § 305(a)(1) simply does not require
8 any judicial assistance or enlargement.

9 As I read the language of § 303(i), its remedies clearly
10 apply only to dismissals of petitions "under this section." The
11 majority has somewhere located and painstakingly applied the "last
12 antecedent rule" by ignoring the words "under this section" as
13 limiting the word "dismisses." But the doctrines of statutory
14 construction would not render any statutory terms inoperative or
15 superfluous. Sutherland Stat. Constr., supra, § 46:06. The Ninth
16 Circuit has held that "[w]hen . . . the doctrine of the last
17 antecedent is inconsistent with the plain language and the
18 legislative history of the statute, a court must adhere to a
19 logical plain reading of the statute." Am. Fed. of Gov't
20 Employees, AFL-CIO Local 2152 v. Principi, 464 F.3d 1049, 1055
21 (9th Cir. 2006).

22 Nor would the "whole statute" interpretation apply to link
23 §§ 305 and 303, because, while § 305(a)(1) is utilized to dismiss
24 involuntary as well as voluntary cases, it says nothing
25 specifically about the dismissal of involuntary petitions, nor
26 about awarding fees upon dismissal. In addition, where Congress
27 has inserted language in one statute (the remedial and fee-
28 shifting language of § 303(i)), but has excluded it in another

1 (§ 305(a)), the panel should not imply the language as being
2 included in that from which it was excluded. Sutherland Stat.
3 Constr., supra, § 46:05. Section § 303(i) clearly provides
4 compensation to an alleged debtor for dismissals of involuntary
5 petitions under § 303 ("this section"), while § 305(a) neither
6 provides for attorney's fees and costs, nor does it refer the
7 practicing bar back to § 303(i) as a guide for the assessment of
8 fees and costs in the event of a dismissal.

9 "[T]he circumstances under which attorney's fees are to be
10 awarded and the range of discretion of the courts in making those
11 awards are matters for Congress to determine. . . . Congress
12 itself presumably has the power and judgment to pick and choose
13 among its statutes and to allow attorney's fees under some, but
14 not others." Alyeska Pipeline, 421 U.S. at 262-63.

15 Logically, it seems apparent that Congress wanted to
16 encourage out-of-court cooperation and other resolution of
17 creditors' claims and thus declined to impose any monetary
18 sanctions or attorney's fees under the many iterations of a
19 § 305(a) dismissal, when that result is determined to be, simply,
20 in the best interests of both creditors and the debtor. "[T]here
21 is no need to invoke the machinery of the bankruptcy process if
22 there is an alternative means of achieving the equitable
23 distribution of assets." In re Michael S. Starbuck, Inc., 14 B.R.
24 134, 135 (Bankr. S.D.N.Y. 1981). A § 305(a)(1) dismissal is just
25 a dismissal, nothing more or less. It is neither mystical nor
26 sinister, nor does it summon forth all the awesome machinery of a
27 court's inherent equitable powers. Cases are dismissed for all
28 kinds of reasons, and § 305(a) facilitates this process. Congress

1 left this option open because it was aware that debtors and their
2 creditors might be able to resolve their financial troubles more
3 quickly and inexpensively outside of the bankruptcy court, if they
4 were left without the worry of which side had to pay fees. See
5 generally S. Block-Lieb, Why Creditors File so Few Involuntary
6 Petitions and Why the Number is Not Too Small, 57 BROOK. L. REV.
7 803 (1991).

8 The weight of authority holds that the § 303(i) attorneys'
9 fee awards are not available in § 305 dismissals. See Koffman,
10 182 B.R. at 127 (exercising jurisdiction to award fees after
11 abstaining from jurisdiction would be "paradoxical"); In re Iowa
12 Coal Mining Co., 242 B.R. 661, 673 (Bankr. S.D. Iowa 1999); R.V.
13 Seating, 8 B.R. at 666 (stating that another reason to deny
14 attorney's fees or damages was that there was no authorization in
15 § 305(a)); Sun World Broadcasters, 5 B.R. at 722; Luftek, 6 B.R. at
16 549 & n.6; 2 Collier on Bankruptcy, supra, ¶ 303.15[11], at 303-
17 127 to 303-128 ("Thus, the better argument, despite the
18 possibility of some harsh results in select cases, is that
19 abstention under section 305 precludes a recovery of money under
20 section 303(i)."); 1 Norton Bankr. L. & Prac. 2d, supra, § 21:16
21 (a court may not make such an award of costs, fees and damages
22 under § 303(i) if it dismisses an involuntary petition pursuant to
23 Code § 305)¹⁸; Hon. Alan M. Ahart, Cal. Prac. Guide: Enforcing
24 Judgments and Debts § 5:294 (2006) ("Also, unlike a nonconsensual
25 dismissal (11 USC § 303(i)), there is no provision in § 305 for
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27 ¹⁸ This appears to be a change from the Norton Editors'
28 Comment to the legislative history of former § 303(i), see supra
at n.12, which stated that the contra-indication for an award of
damages under § 305 might not encompass attorney's fees and costs.

1 assessing costs and damages against any of the petitioners."); D.
2 Epstein, S. Nickles & J. White, Bankruptcy, § 2-5g at 35 (1992).
3 But see Kidwell, 158 B.R. at 216-17.

4 In summary, I would hold that the plain language of each
5 statute governs each independently, such that § 303(i)(1) cannot
6 be engrafted onto § 305(a) for policy or equitable reasons. If
7 Congress had wanted a § 305(a)(1) dismissal to include optional
8 fee awards similar to a § 303(i) dismissal, it would have said so.
9 It did not. Moreover, Macke risked denial of its attorney's fees
10 and costs by pleading in the alternative and prevailing under the
11 more compassionate statute.

12 After careful consideration, I conclude that no attorney's
13 fees and costs are authorized for a 305(a)(1) dismissal and,
14 therefore, I would reverse the bankruptcy court's opposite ruling
15 on that issue. For that reason, I must dissent from the path
16 chosen by my colleagues on this issue only.

17 On each of the other issues discussed in the opinion, I
18 concur and join the majority.

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