

APR 14 2009

NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP Nos. CC-08-1190-HMoMk
) CC-08-1267-HMoMk
7 C&C JEWELRY MFG., INC., a) (Related Appeals)
California Corporation,)
8) Bk. No. LA 07-20764 SB
) Alleged Debtor.)
9)
10)
LAXMI JEWEL INC.; MILISTAR)
11)
INC.; SUBERI BROTHERS LLC;)
12)
LAXMI JEWEL PVT. LTD.;)
LAXMI DIAMOND PVT. LTD.,)
13)
) Appellants/Appellees,)
14 v.) MEMORANDUM¹
))
15 C & C JEWELRY MFG., INC., a)
California Corporation,)
16)
) Appellee/Appellant.)
)

Argued and Submitted on March 18, 2009
at Pasadena, California

Filed - April 14, 2009

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

Honorable Samuel L. Bufford, Bankruptcy Judge, Presiding.

Before: HOLLOWELL, MONTALI and MARKELL, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 C&C Jewelry Mfg., Inc. manufactures and sells jewelry ("C&C
2 California"). It bought diamonds and other materials from four
3 vendors referred to as the Laxmi Group. The Laxmi Group filed a
4 chapter 7 involuntary bankruptcy petition² against C&C
5 California, alleging C&C California owed the Laxmi Group
6 undisputed debts and was not paying its debts as they became due.
7 The bankruptcy court granted summary judgment in favor of C&C
8 California and against the Laxmi Group, on the basis that there
9 was no genuine issue of material fact as to whether the debts to
10 the Laxmi Group were in dispute as to liability or amount, which
11 disqualified the members of the Laxmi Group as petitioning
12 creditors under § 303(b).³

13 C&C California then requested compensation for attorneys'
14 fees, costs and damages incurred in defending the petition, which
15 the bankruptcy court denied. We AFFIRM the bankruptcy court's
16 ruling in favor of C&C California on summary judgment, as well as
17 the bankruptcy court's order denying C&C California its
18

19
20 ² Unless otherwise indicated, all chapter, "Code," section,
21 and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
22 1532 and to the Federal Rules of Bankruptcy Procedure, Rules
23 1001-9037.

24 ³ The bankruptcy court made a tentative ruling in which it
25 held C&C California's motion for summary judgment should be
26 granted because the petitioning creditors did not meet their
27 burden of demonstrating their claims were not subject to bona
28 fide dispute. Further, it tentatively held that C&C California
was generally paying its debts as they become due. However, at
the close of oral argument, the bankruptcy court simply granted
the summary judgment motion in C&C California's favor "on the
grounds that we don't have three creditors before the Court as
are required with undisputed debts"

1 attorneys' fees.

2 I. FACTS

3 C&C California was formed in 2001. It is run by Bob
4 Connolly ("Connolly") and Mikhail Chekhman ("Chekhman"), each 50%
5 shareholders and officers of the company. C&C California's
6 suppliers provide materials for C&C California to design and
7 manufacture into finished jewelry products. C&C California also
8 buys materials from suppliers to create jewelry products for
9 retail sale.

10 C&C California bought materials from the Laxmi Group. The
11 Laxmi Group consists of the following related companies, run by
12 related persons, Nitin Gajera and Bakul Gajera: (1) Laxmi Jewel,
13 Inc. ("Laxmi Jewel"), a New York corporation that sells or
14 consigns finished jewelry; (2) Milistar, Inc. ("Milistar"), a
15 wholesale distributor of loose polished diamonds, also a New York
16 corporation; (3) Laxmi Jewel Pvt. Ltd. ("Laxmi Private"), an
17 Indian corporation that manufactures its own finished jewelry
18 which it then sells wholesale; and, (4) Laxmi Diamond Pvt. Ltd.
19 ("Laxmi Diamond"), an Indian corporation that cuts and polishes
20 its own diamonds for wholesale.

21 In August 2003, Connolly and Chekhman founded a sister
22 company, C&C Jewelry Mfg., Inc., in Texas, as a vehicle for a
23 joint venture with the Laxmi Group ("C&C Dallas"). There were
24 discussions, proposals, and initial business set up, but the
25 parties were unable to come to any final joint venture or
26 partnership agreement. Ultimately, the business relationship
27 between C&C Dallas and the Laxmi Group unraveled. C&C Dallas
28 began winding down business in May 2005.

1 In the fall of 2005, C&C California stopped ordering
2 materials from the Laxmi Group. It also returned merchandise to
3 the Laxmi Group for credit against open invoices. C&C California
4 returned Laxmi Group materials and other merchandise to the Laxmi
5 Group, which was accepted by the Laxmi Group although often with
6 lower values attributed to the merchandise than the value
7 attributed by C&C California. The merchandise was not directly
8 returned to each Laxmi Group entity; rather, it was the parties'
9 business practice to return all merchandise to one location, a
10 New York office shared by Laxmi Jewel and Milistar, for credit on
11 each of the Laxmi Group's accounts.

12 C&C California contends many of its merchandise returns were
13 not applied to its open accounts. It further contends the Laxmi
14 Group made deductions in the credit amounts that were not agreed
15 to by C&C California. Finally, C&C California asserts the Laxmi
16 Group did not apply the credits properly, namely, the Laxmi Group
17 did not alert C&C California to which Laxmi Group account the
18 credit would apply; or, alternatively, would instead apply the
19 credit to C&C Dallas' open accounts.

20 The Laxmi Group contends all merchandise returned for credit
21 was properly applied to C&C California's open accounts, and any
22 deductions made on credits were agreed to and reflected
23 differences in value attributed to third-party merchandise. It
24 asserts it is still owed significant sums of money by C&C
25 California. On November 20, 2007 ("Petition Date"), the Laxmi
26 Group filed an involuntary chapter 7 bankruptcy petition against
27 C&C California asserting claims in the total amount of
28 \$1,065,814.79. The attorney for the Laxmi Group made a mistake

1 in filing the petition and proposed a corrected petition
2 ("Involuntary Petition"), indicating claims totaling \$378,464.06
3 and including an additional petitioning creditor, Suberi Brothers
4 LLC, which held a claim of \$1,587.00 ("Suberi") (the Laxmi Group
5 and Suberi are the "Petitioning Creditors").⁴

6 C&C California filed a Motion to Dismiss Involuntary
7 Petition Or, in the Alternative, for Abstention on January 14,
8 2008 ("Motion to Dismiss"). The Motion to Dismiss alleged the
9 Petitioning Creditors lacked standing to file the petition
10 because their claims are the subject of bona fide disputes as to
11 liability or amount; that C&C California is generally paying its
12 debts as they become due; and, that the Petitioning Creditors
13 filed the petition in bad faith as a means to pressure C&C
14 California to pay on disputed debts. Included with the Motion to
15 Dismiss were declarations and exhibits.

16 A status conference on the Motion to Dismiss was held
17 January 15, 2008. At the status conference, the Petitioning
18 Creditors argued they needed to conduct discovery to respond to
19 the declarations and exhibits included with the Motion to
20 Dismiss. The Petitioning Creditors served C&C California with
21 discovery requests on January 23, 2008. On February 6, 2008, C&C
22 California filed a supplement in support of its Motion to Dismiss
23 contending that Petitioning Creditors should not need discovery
24 regarding the nature and quality of their own claims.

25
26
27 ⁴ Apparently, the last page of the petition, listing the
28 creditors and claim amounts, was confused with the involuntary
petition filed against C&C Dallas.

1 On March 31, 2008, C&C California withdrew its Motion to
2 Dismiss and filed an Answer the same day. It then filed a motion
3 for summary judgment on June 3, 2008 ("Summary Judgment Motion")
4 asserting the debt obligations to Petitioning Creditors were
5 subject to a bona fide dispute as to liability or amount and that
6 C&C California was a viable business that paid its debts as they
7 became due.

8 The Petitioning Creditors filed a Memorandum of Points and
9 Authorities in Opposition to the Debtor's Motion for Summary
10 Judgment and in Support of the Petitioning Creditors' Request for
11 Summary Judgment on June 16, 2008 ("Cross Motion"). The
12 Petitioning Creditors also filed evidentiary objections to
13 declarations of certain vendors of C&C California submitted with
14 C&C California's Summary Judgment Motion alleging the
15 declarations lacked foundation and/or contained hearsay.
16 Further, the Petitioning Creditors filed a motion for a
17 continuance of the hearing on the Summary Judgment Motion because
18 they wanted time to depose and examine C&C California's
19 accounting expert, who had submitted with the Summary Judgment
20 Motion an opinion that C&C California was generally paying its
21 debts when due ("Motion for Continuance").

22 On June 27, 2008, C&C California filed its reply and
23 opposition to the Cross Motion. It also responded to the
24 evidentiary objections made by the Petitioning Creditors and
25 submitted its own evidentiary objections to certain declarations
26 submitted by the Petitioning Creditors. The following day, it
27 filed its opposition to the Motion for Continuance contending the
28 Petitioning Creditors failed to propose dates or times for taking

1 the deposition of the accounting expert or follow up with counsel
2 to review any documents relied on in the report that they had not
3 already had in their possession.

4 The hearing on the Motion for Continuance, the Summary
5 Judgment Motion and Cross Motion was held on July 16, 2008. At
6 the hearing, the bankruptcy court denied the Motion for
7 Continuance. The bankruptcy court also determined there were not
8 three eligible petitioning creditors with undisputed debts. It
9 did not make a specific ruling on the evidentiary objections.

10 On July 25, 2008, the bankruptcy court entered an order
11 allowing the corrected petition to be filed⁵ and entered an Order
12 Denying Petitioning Creditors' Motion for Continuance. Also on
13 that date, an order granting the Summary Judgment Motion was
14 entered and the bankruptcy court dismissed the case. The
15 Petitioning Creditors timely appealed both orders.

16 After the bankruptcy case was dismissed, on August 25, 2008,
17 C&C California filed a Motion for Attorneys' Fees, Costs and
18 Damages Pursuant to 11 U.S.C. § 303(i) ("Motion for Fees"). C&C
19 California asserted the Petitioning Creditors filed the
20 Involuntary Petition in bad faith and that it was forced to
21 endure financial strain and extensive litigation costs to defeat
22 the petition. C&C California requested \$329,888.20. This amount
23 included attorneys' fees, costs, compensatory damages and
24 \$100,000 in punitive damages. See 11 U.S.C § 303(i)(1), (2).

25
26
27 ⁵ A corrected petition was filed July 21, 2008 reflecting
28 the addition of Suberi as a petitioning creditor and listing the
total of the claims as \$378,464.06.

1 With its Motion for Fees, counsel for C&C California
2 submitted a short declaration setting out the billable rates of
3 those working on the matter, the total hours spent defending the
4 petition, as well as the total costs incurred. It supplied, as
5 evidence of its damages, an accounting of expenses incurred by
6 C&C California as a result of the Involuntary Petition, such as
7 traveling to meet with customers to reassure them of C&C
8 California's viability, and receipts and invoices for costs
9 associated with the expert witness and transcription fees.
10 However, the copies of C&C California's detailed attorney billing
11 statements were not included with the Motion for Fees.

12 The Petitioning Creditors opposed the Motion for Fees on
13 September 9, 2008. The Petitioning Creditors asserted the
14 Involuntary Petition was not filed in bad faith, but that C&C
15 California's actions prolonged discovery and dragged out the
16 case. Further, the Petitioning Creditors asserted the fees
17 requested by C&C California were unreasonable.

18 C&C California filed a reply on September 16, 2008. C&C
19 California submitted copies of its detailed attorney billing
20 records along with its reply brief.

21 A hearing on the Motion for Fees was held on September 23,
22 2008. The bankruptcy court noted that the court did not have
23 time to review the detailed billing statements because they were
24 filed only with the reply. At the close of the hearing, the
25 bankruptcy court denied C&C California's request for fees and
26 damages stating that the Petitioning Creditors had rebutted any
27 presumption of entitlement to fees under § 303(i). The
28

1 bankruptcy court made no determination of bad faith on the part
2 of the Petitioning Creditors.⁶ C&C California timely appealed.

3 **II. JURISDICTION**

4 The bankruptcy court had jurisdiction under 28 U.S.C.
5 § 157(b)(1). We have jurisdiction to hear appeals from final
6 judgments, orders, and decrees under 28 U.S.C. § 158.

7 **III. ISSUES**

- 8 1) Did the bankruptcy court err in granting C&C California's
9 Summary Judgment Motion, denying the Cross Motion, and
10 dismissing the Involuntary Petition against C&C California
11 when it found the Petitioning Creditors' claims were subject
12 to bona fide disputes as to liability or amount and that C&C
13 California was generally paying its debts as they became
14 due?
- 15 2) Did the bankruptcy court err in denying C&C California its
16 attorneys' fees and damages?

17 **IV. STANDARDS OF REVIEW**

18 The bankruptcy court's grant or denial of a motion for
19 summary judgment is reviewed de novo. Marqulis v. Ryan, 140 F.3d
20 850, 852 (9th Cir. 1998). Its findings of fact are reviewed for
21 clear error and its conclusions of law are reviewed de novo.
22 Einstein/Noah Bagel Corp. v. Smith (In re BCE West, L.P.), 319
23 F.3d 1166, 1170 (9th Cir. 2003). Mixed questions of law and fact
24

25
26 ⁶ There is some mention by the parties at oral argument on
27 the Motion for Fees that the bankruptcy court determined, in a
28 tentative ruling, there was no bad faith on the part of the
Petitioning Creditors. The tentative ruling itself was not
provided as part of the excerpts of the record.

1 are reviewed de novo. Carillo v. Su (In re Su), 290 F.3d 1140,
2 1142 (9th Cir. 2002).

3 The Ninth Circuit has held that determination of whether a
4 "bona fide dispute" exists under § 303 is essentially a factual
5 inquiry reviewed under a clearly erroneous standard. Liberty
6 Tool & Mfg. v. Vortex Fishing Sys., Inc. (In re Vortex Fishing
7 Sys., Inc.), 277 F.3d 1057, 1064 (9th Cir. 2002) ("We agree with
8 the other circuits that have held that this is essentially a
9 factual inquiry and adopt a clearly erroneous standard of
10 review.") (citing Rimell v. Mark Twain Bank (In re Rimell), 946
11 F.2d 1363, 1365 (8th Cir. 1991) (Because the determination "will
12 often depend . . . upon an assessment of witnesses' credibilities
13 and other factual considerations, the bankruptcy court's
14 determination in this regard is a factual finding that may be
15 overturned on appeal only if it is clearly erroneous.")).

16 However, when the issue of whether there is a bona fide
17 dispute is made in the context of a summary judgment analysis, it
18 is not based upon an assessment of the credibility of witnesses
19 or other facts in evidence. See, e.g., Key Mechanical Inc. v.
20 BDC 56 LLC (In re BDC 56 LLC), 330 F.3d 111, 117, 119 (2d Cir.
21 2003). Therefore, we review this issue de novo rather than
22 applying a clearly erroneous standard.

23 Summary judgment is proper when the pleadings, the discovery
24 and disclosure materials on file, and any affidavits show that
25 there is no genuine issue as to any material fact and that the
26 movant is entitled to judgment as a matter of law. Fed. R. Civ.
27 P. 56(c), applicable in bankruptcy court by Rule 7056. An issue
28 is "genuine" only if there is an evidentiary basis on which a

1 reasonable fact finder could find for the non-moving party.
2 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A
3 dispute is "material" only if it could affect the outcome of the
4 suit under governing law. Id. At the summary judgment stage,
5 the court does not weigh the evidence and determine the truth of
6 the matter, but determines whether there is a genuine issue for
7 trial. Id. at 249.

8 We review a denial of a motion for continuance of a hearing
9 and the bankruptcy court's refusal to permit further discovery
10 for an abuse of discretion. Mackey v. Pioneer Nat'l Bank, 867
11 F.2d 520, 523 (9th Cir. 1989); Higgins v. Vortex Fishing Sys.,
12 Inc., 379 F.3d 701, 705 (9th Cir. 2004). Under an abuse of
13 discretion standard, we will not reverse the bankruptcy court
14 unless we have a definite and firm conviction that it committed
15 clear error in the conclusion it reached after weighing all of
16 the relevant factors. Law Offices of David A. Boone v. Derham-
17 Burk (In re Eliapo), 468 F.3d 592, 596 (9th Cir. 2006).

18 A bankruptcy court's interpretation of the Code regarding
19 attorneys' fees is reviewed de novo. Wechsler v. Macke Int'l
20 Trade, Inc. (In re Macke Int'l Trade, Inc.), 370 B.R. 236, 245
21 (9th Cir. BAP 2007). A decision whether to award attorneys' fees
22 and costs under § 303(i) is reviewed for an abuse of discretion.
23 Higgins v. Vortex Fishing Sys., Inc., 379 F.3d at 705.

24 **V. DISCUSSION**

25 Section 303 governs involuntary bankruptcies. Section
26 303(b) provides that an involuntary case may be commenced:

27 (1) by three or more entities, each of which is either
28 a holder of a claim against such person [defined in
303(a)] that is not contingent as to liability or the

1 subject of a bona fide dispute as to liability or
2 amount, or an indenture trustee representing such a
3 holder, if such noncontingent, undisputed claims
4 aggregate at least \$13,475 more than the value of any
5 lien on property of the debtor securing such claims
6 held by the holders of such claims.

7 11 U.S.C. § 303(b) (1).

8 Thus, § 303(b) (1) "prevents two types of claims from being
9 the basis of an involuntary petition: those that are 'contingent
10 as to liability' and those that are 'the subject of a bona fide
11 dispute.'" Chicago Title Ins. Co. v. Seko Inv., Inc. (In re Seko
12 Inv., Inc.), 156 F.3d 1005, 1007 (9th Cir. 1998). The exceptions
13 are intended to prevent creditors from using the bankruptcy
14 process as a means of coercing alleged debtors to pay
15 legitimately disputed debts. Id. at 1008; Lawrence Ponoroff,
16 Involuntary Bankruptcy and the Bona Fides of a Bona Fide Dispute,
17 65 Ind. L.J. 315, 316, 333-338 (1990) (legislative history shows
18 there has always been a concern that creditors would use § 303 as
19 a means to "bludgeon a debtor into payment of dubious claims or
20 satisfaction of obligations open to legitimate question"); In re
21 Mountain Dairies, Inc., 372 B.R. 623, 634-5 (Bankr. S.D.N.Y.
22 2007) (courts are wary of encouraging parties to use the
23 bankruptcy system as a quick resolution to their money disputes);
24 In re Tobacco Road Assocs., LP, 2007 WL 966507, *6 (E.D. Pa. Mar.
25 30, 2007) (bankruptcy court is not correct venue for adjudicating
26 disputes about whether a debt is owed).

27 Section 303(b) sets the threshold for filing an involuntary
28 petition; if it is met and the alleged debtor does not contest
the petition, then the petitioning creditors are entitled to
entry of an order for relief. 11 U.S.C. § 303(h) ("If the

1 petition is not timely controverted, the court shall order relief
2 against the debtor in an involuntary case under the chapter under
3 which the petition was filed.”).

4 However, if the alleged debtor does controvert the petition,
5 then relief may only be granted if the “debtor is generally not
6 paying such debtor’s debts as such debts become due unless such
7 debts are the subject of a bona fide dispute as to liability or
8 amount.” 11 U.S.C. § 303(h) (1).

9 The Petitioning Creditors contend they are eligible to
10 commence an involuntary proceeding against C&C California because
11 their claims are not subject to any bona fide dispute as to
12 liability or amount, and there is no dispute at least as to the
13 statutory threshold amount. Further, the Petitioning Creditors
14 argue C&C California is generally not paying its debts as they
15 become due. However, C&C California asserts the opposite,
16 arguing that each of the Petitioning Creditors’ claims is the
17 subject of a long-standing disagreement as to what amount, if
18 any, is outstanding; and, that C&C California is a viable
19 business that pays its debts when due.

20 **A. Claims Subject to Bona Fide Dispute**

21 In 2005, the Bankruptcy Abuse Prevention and Consumer
22 Protection Act of 2005, Pub.L. No. 109-8, §§ 1234(a) (1) (A) and
23 (a) (12), 119 Stat. 23 (April 20, 2005) (“BAPCPA”), amended
24 § 303(b) and (h) to modify “bona fide dispute” to refer to
25 disputes “as to liability or amount.” (Emphasis added). The
26 statute previously referenced only claims not contingent or
27 subject to a bona fide dispute as to liability.

1 The pre-BAPCPA rule developed through case law in the Ninth
2 Circuit is that a dispute over the amount of a debt is not
3 considered a "bona fide dispute" under § 303(b) unless the
4 dispute arises from the same transaction and the alleged debtor's
5 counterclaims or offsets, if netted out, would take the total
6 debt below the statutory threshold. Focus Media, Inc. v. Nat'l
7 Broad. Co. Inc. (In re Focus Media, Inc.), 378 F.3d 916, 926 (9th
8 Cir. 2004); Seko, 156 F.3d at 1009-10; Mountain Dairies, 372
9 B.R. at 633-34 ("Prior to the 2005 amendments, some courts took
10 the position that a debtor's counterclaim disputing the amount of
11 a creditor's claim, and not the legitimacy or the existence of
12 such claim, did not make the creditor's claim the subject of a
13 bona fide dispute."). Therefore, if "at least a portion of the
14 debt that is the subject of the petition is undisputed, the
15 undisputed portion is sufficient to create a debt under
16 [§ 303(b)] not subject to a bona fide dispute." Focus Media, 378
17 F.3d at 926 (citations omitted).

18 Under pre-BAPCPA law:

19 This may lead to the peculiar result that a
20 counterclaim [or dispute as to amount owed to a
21 petitioning creditor] isn't a 'bona fide dispute' under
22 section 303(b), but is a 'bona fide dispute' under
23 section 303(h)(1). This result comes about not because
24 'bona fide dispute' has a different meaning in the two
25 subsections, but because it modifies different terms.
26 Compare 11 U.S.C. § 303(b) (referring to 'a claim
27 against such person that is not . . . the subject of a
28 bona fide dispute'), with id. § 303(h)(1) (allowing an
alleged debtor to avoid an involuntary filing when the
'debtor's debts . . . are the subject of a bona fide
dispute').

26 Seko, 156 F.3d at 1010 n.7.

27 The Ninth Circuit has not yet interpreted the new language
28 of § 303(b) and (h); however, other courts have held that an

1 objective legitimate dispute as to an amount owed on a
2 petitioning creditor's claim is sufficient to demonstrate a bona
3 fide dispute and forestall a petitioning creditor from
4 maintaining an involuntary petition under § 303(b). Mountain
5 Dairies, 372 B.R. at 633-34 ("Thus, after the amendments made by
6 BAPCPA, 'disputes as to amount - not just liability - are
7 sufficient to create a bona fide dispute.'"); In re Euro-Am.
8 Lodging Corp., 357 B.R. 700, 712 (Bankr. S.D.N.Y. 2007) (citing,
9 2 Alan N. Resnick & Henry J. Sommer, COLLIER ON BANKRUPTCY
10 ¶ 303.30[2][b], (15th rev. ed. 2006) (The 2005 amendment
11 presumably eliminated [the netting out of claims to below the
12 threshold] part of the test)); Req'l Anesthesia Assocs. PC v.
13 PHN Physician Serv., Inc. (In re Req'l Anesthesia Assocs. PC),
14 360 B.R. 466, 470 (Bankr. W.D. Penn. 2007); but see In re
15 DemirCo Holdings, Inc., 2006 WL 1663237, at *3 (Bankr. C.D. Ill.
16 June 9, 2006) ("Without clear legislative intent, this Court
17 cannot presume such a change in the law")

18 The Petitioning Creditors argue that "for a bona fide
19 dispute to be relevant, it must at least have the potential to
20 reduce the total of petitioner's claims to an amount below the
21 statutory threshold." See Appellant's Cross Motion. Petitioning
22 Creditors contend C&C California owes at least \$13,475 to the
23 Laxmi Group and therefore their claims are not subject to bona
24 fide dispute. We disagree. The more than 1800 pages of record
25 and evidence submitted by the parties demonstrates there are
26 numerous accounting disputes and no final figures are presented
27 that definitively demonstrate what amounts, if any, are owed to
28 the Laxmi Group entities. Thus, whether or not BAPCPA changes

1 the Ninth Circuit rule is ultimately not determinative in this
2 case because the Petitioning Creditors have not demonstrated
3 their claims are undisputed even as to a threshold amount.

4 In order for a bona fide dispute to exist, the alleged
5 debtor must do more than just disagree with the amount of the
6 claim. Rather, the court must determine there is "an objective
7 basis for either a factual or legal dispute as to the validity of
8 the debt." In re Vortex Fishing Sys., Inc., 277 F.3d 1057, 1064
9 (9th Cir. 2002) (citations omitted).

10 The majority of circuits have adopted this objective
11 standard. See In re Bimini Island Air, Inc., 370 B.R. 408, 412
12 (Bankr. S.D. Fla. 2007). Under BAPCPA, it may be more accurate
13 to articulate the standard as determining whether there is an
14 "objective basis for either a factual or legal dispute as [to]
15 the amount or the liability of the petitioning creditors'
16 claims." In re C.W. Mining Co., 2008 WL 4279635, *3 (Bankr. D.
17 Utah Sept. 17, 2008). The court need not "evaluate the potential
18 outcome of a dispute" but must "determine whether there are facts
19 that give rise to a legitimate disagreement over whether money is
20 owed, or, in certain cases, how much." Vortex, 277 F.3d at 1064.

21 Petitioning creditors bear the burden of proving all
22 statutory requirements of § 303. Id. Once met, the burden then
23 shifts to the alleged debtor to show there is a dispute as to a
24 material fact. Id.; In re A&J Quality Diamonds, Inc., 377 B.R.
25 460, 463 (Bankr. S.D.N.Y. 2007). In the context of an
26 involuntary petition, if there is a genuine issue of material
27 fact that bears upon the debtor's liability or amount of the
28 claim, then the petition must be dismissed. In re Lough, 57 B.R.

1 993, 997 (Bankr. E.D. Mich. 1986); In re Busick, 831 F.2d 745,
2 750 (7th Cir. 1987) (if there is a bona fide dispute as to either
3 the law or the facts, then the creditor does not qualify and the
4 petition must be dismissed.); Vortex, 277 F.3d at 1064. In other
5 words, in order for the Panel to reverse the bankruptcy court's
6 dismissal of the petition, it would have to find that the
7 Petitioning Creditors are entitled to summary judgment under
8 §§ 303(b) and (h).

9 **1. Laxmi Private**

10 Laxmi Private asserts it is owed \$9,203.17 on outstanding
11 accounts for goods sold. In support of its claim, Laxmi Private
12 submitted a table entitled "Accounts Receivable" ("A/R Table")
13 which itemizes invoices, dated March 30 through September 30,
14 2005; and credits, applied to the account December 30, 2005,
15 through July 6, 2006. The itemized invoices total \$2,756,102.99
16 to which \$2,746,899.82 was applied (consisting of three payments
17 and nine merchandise credits).⁷ The difference makes up its
18 asserted claim.

19 Laxmi Private contends this debt is not disputed. It argues
20 C&C California admits it owes the same amount because a summary
21 of obligations prepared by Chekhman in April 2007, and sent to
22 the Laxmi Group (the "Chekhman Email") lists the gross amount of
23 unpaid goods delivered by Laxmi Private to C&C California as
24

25 ⁷ Attached to the A/R Table are individual invoices
26 supposedly referenced on the A/R Table. However, in many
27 instances, the amount of the invoice does not match the amount of
28 the itemized entry on the A/R Table. Therefore, the total amount
of the itemized invoices shown on the A/R Table may not be
accurate.

1 \$1,845,026.13 (which constitutes the same amount of the unpaid
2 invoices, from July 25 through September 30, 2005, referenced in
3 the A/R Table).⁸

4 However, the Chekhman Email does not establish a definitive
5 amount of money owed to each entity as of the Petition Date. The
6 Chekhman Email has a figure entered for each Laxmi Group entity,
7 totaled to \$2,223,601.64. Underneath, there is a series of
8 credits, payments, and wire transfers that had yet to be applied,
9 at least according to C&C California's calculations, to the Laxmi
10 Group accounts.⁹

11 The Chekhman Email was prepared by Chekhman after a meeting
12 on April 3, 2007, with Nitin Gajera ("Gajera") concerning the
13 open accounts. Chekhman contends in his declaration that the
14 Chekhman Email was prepared after the meeting to summarize what
15 credits should be applied to C&C California's outstanding
16 invoices as part of on-going negotiations with the Laxmi Group
17 over the disagreements in accounting. However, according to
18 Chekhman, the Laxmi Group did not respond to his email and there
19 were no further negotiations. Gajera contends, in his
20 declaration, that the Chekhman Email reflected the gross amount

22 ⁸ The Chekhman Email itself does not describe what the
23 figures entered on the table represent. Nitin Gajera interpreted
24 the amounts listed for each of the Laxmi Group entities to
25 represent the gross amount of unpaid goods delivered to C&C
California (and C&C Dallas).

26 ⁹ Below the list of credits, memos, payments and wire
27 transfers is a figure of \$2,148,905.17. This figure is
28 subtracted from the total under the Laxmi Group entities
(\$2,223,601.64), indicating that they were yet to be applied to
the amounts corresponding to the Laxmi Group.

1 of unpaid goods sold and delivered by the Laxmi Group and
2 evidenced C&C California's debt obligations.

3 Gajera stated he left the April 3, 2007 meeting with
4 approximately \$300,000 in merchandise to be applied to the Laxmi
5 Group's accounts. Given that there were significant credits yet
6 to be applied to the outstanding amounts as listed on the
7 Chekhman Email, and that Gajera took additional merchandise for
8 credit at the time, the amounts listed on the Chekhman Email
9 corresponding to each of the Laxmi Group entities cannot be an
10 accurate reflection (or admission) of the outstanding balances
11 owed to each entity even as of the time it was prepared in April
12 2007. Further, the Chekhman Email does not reflect any activity
13 on the accounts during the seven-month period between the time it
14 was prepared and the Petition Date.

15 Laxmi Private also provides C&C California's Accounts
16 Payable Invoice Register ("Laxmi Private Register") to
17 demonstrate its claim is undisputed in the amount of \$9,203.17,
18 along with C&C California's Accounts Payable Aging Report as of
19 November 30, 2007 ("Aging Report"). Each of the documents shows
20 a different amount still owed to Laxmi Private.

21 The Laxmi Private Register shows an itemization of invoices
22 from August 1, 2005, through September 30, 2005, totaling
23 \$1,845,026.13 and leaving an open balance in the amount of
24 \$401,070.03. The Aging Report shows an invoice total (based on
25 entries dated September 9, 2005 through October 30, 2006) of
26 \$197,249.74. The Laxmi Private Register shows C&C California
27 made payments on invoices until September 9, 2005. However,
28 those payments are not similarly reflected on the A/R Table

1 during the same time frame.

2 Furthermore, there are no credits shown on the A/R Table
3 after July 6, 2006, even though the Aging Report shows credits
4 deducted through October 30, 2006. As a result, neither the A/R
5 Table, the Aging Report or the Checkman Email demonstrate an
6 accurate debt amount still outstanding as of the Petition Date.
7 Accordingly, there is a genuine issue of material fact as to how
8 much C&C California owes Laxmi Private.

9 **2. Milistar**

10 Milistar asserts a claim in the amount of \$307,110.64,
11 comprised of \$209,925.91 due on accounts and \$97,184.73 in
12 interest (at a rate of 2% per month).¹⁰ It supports its claim
13 with a Statement ("Milistar Statement") that itemizes certain
14 invoices (from January 13, through October 12, 2005), due dates,
15 totals, credits, interest and balance remaining. No credits are
16 recorded on the Milistar Statement.¹¹

17 Milistar contends the amount is undisputed because the
18 Chekman Email also lists \$209,925.91 corresponding to Milistar's
19 account. As noted above, the amounts corresponding to each Laxmi
20

21 ¹⁰ Milistar's invoices state, "In case the seller retains
22 account for collection of amount due under terms of this
23 agreement the buyer agrees to pay the actual attorneys' fees or
24 reasonable collection agency's fees with interest and the costs
25 of the court. Net according to terms there after 2% monthly and
26 24% annually." C&C California has not argued the accrual of
27 interest is improper.

28 ¹¹ Along with the Milistar Statement are individual copies
of invoices referenced on the Milistar Statement. Additionally,
there are individual credit slips from C&C Dallas, not C&C
California, to Laxmi Jewel.

1 Group entity on the Chekhman Email do not include the itemized
2 credits C&C California believed it was still owed, nor to which
3 account those credits would be applied. Further, the amounts
4 corresponding to each Laxmi Group entity does not reflect any of
5 the other payments or credits that may have been applied to the
6 account between April 7, 2007, and the Petition Date.

7 Milistar also submitted C&C California's Account Payable
8 Invoice Register ("Milistar Register") listing an open balance of
9 \$209,925.91. The Milistar Register does not match C&C
10 California's Aging Report, also submitted to establish Milistar's
11 claim. The Aging Report does not show any entries after July
12 2005, even though the Milistar Register and Milistar Statement
13 show entries through October 2005. None of the documents show a
14 full accounting through the Petition Date. Therefore, the
15 evidence submitted by Milistar demonstrates that there is a
16 genuine issue of material fact as to the amount outstanding on
17 Milistar's account as of the Petition Date.

18 **3. Laxmi Jewel**

19 Laxmi Jewel asserts a claim in the amount of \$30,547.40. To
20 evidence this claim, it provides a statement ("Laxmi Statement")
21 listing three outstanding invoices from November 16, 2005, to
22 April 14, 2006, totaling \$138,633.75, and individual copies of
23 the invoices along with a series of credit slips. The credit
24 slips are made out to "Milistar/Laxmi Jewel." The deduction of
25 these credits from the three asserted outstanding invoice balance
26 of \$138,633 forms the basis of Laxmi Jewel's claim.

27 Laxmi Jewel argues the amount is undisputed based upon the
28 Chekhman Email, C&C California's Aging Report, and Accounts

1 Payable Invoice Register ("Laxmi Register"). The Aging Report
2 lists the same three invoices referenced in the Laxmi Statement
3 as unpaid, but shows an outstanding balance of \$118,897.75. The
4 Laxmi Register shows there were payments made on two of the three
5 invoices referenced on the Laxmi Statement and two credits (one
6 post-petition) with a total open balance of \$20,233.91. Because
7 the Laxmi Register shows payments made on two of the three
8 invoices referenced on the Laxmi Statement, the asserted amount
9 outstanding by Laxmi Jewel may not be accurate. Furthermore, the
10 Laxmi Register shows an open balance as of March 15, 2006, as
11 \$19,468.75 (which is the third invoice amount as reflected on the
12 Laxmi Statement) and a credit recorded April 21, 2006, in the
13 amount of \$19,711.00, which would satisfy the debt.

14 This, along with the credits and payments listed on the
15 Chekhman Email and the additional merchandise C&C California sent
16 Gajera after their April 3, 2007 meeting, establishes that there
17 is an objective factual dispute as to what amounts, if any, are
18 owed by C&C California to Laxmi Jewel.

19 **4. Laxmi Diamond**

20 Laxmi Diamond submits two invoices it contends remain
21 unpaid, dated March 3, 2005, and July 17, 2005, totaling
22 \$30,015.85. This amount is reflected on C&C California's Aging
23 Report, the Chekhman Email, and the Accounts Payable Invoice
24 Register ("Diamond Register") as unpaid invoices. Based solely
25 upon Laxmi Diamond's evidence (setting aside the inaccuracies
26 inherent in the Chekhman Email), the Aging Report and Diamond
27 Register provide sufficient evidence that the debt to Laxmi
28 Diamond remained unpaid and owing as of the Petition Date.

1 **5. Suberi**

2 Suberi submits two invoices, one dated November 24, 2004,
3 and the other dated January 6, 2005. The November invoice has a
4 handwritten note on the bottom indicating a balance due of
5 \$916.40. The principal of Suberi states, in his declaration, the
6 claim is based on diamonds it provided to C&C California for use
7 in manufacturing finished jewelry, which was ultimately not
8 performed and the product not returned. This evidence
9 sufficiently demonstrates a prima facie showing that the debt
10 remains unpaid.

11 Therefore, based upon the evidence submitted by the
12 Petitioning Creditors, Laxmi Diamond and Suberi established a
13 prima facie case that their claims were not subject to a bona
14 fide dispute as to liability or amount. However, because C&C
15 California has more than twelve creditors, two Petitioning
16 Creditors is insufficient to commence an involuntary petition.
17 11 U.S.C. § 303(b) (1).

18 Furthermore, C&C California argues the claims of the
19 Petitioning Creditors are subject to a bona fide dispute as to
20 both liability and amount. Its main contention is that between
21 April 21, 2006 and November 2007, it returned goods and
22 merchandise worth about \$655,500 to the Laxmi Group (the
23 Laxmi/Milistar office in New York) that was not applied to C&C
24 California's accounts with the Laxmi Group, and which, if it had,
25 would have extinguished all outstanding debt to the Laxmi Group.

26 C&C California supports its contention by submitting five
27 credit memos addressed to Laxmi/Milistar or Laxmi:

28 7/11/06 19,118

1 9/11/06 \$47,790
2 10/30/06 \$35,576
3 2/15/07 \$143,730
4 4/4/07 \$290,893

5 All of these alleged credits were sent by C&C California and
6 received by the Laxmi Group after July 11, 2006. Thus, even if
7 these credits were properly applied to the Laxmi Group's
8 accounts,¹² they are credits dated after any the entries
9 reflected on the Laxmi Group's A/R Table, Milistar Statement, and
10 Laxmi Statement. Accordingly, there is no genuine issue of
11 material fact that the debts owed by C&C California to the Laxmi
12 Group are disputed as to amount and liability. Indeed, these
13 credits would eliminate the outstanding debts (\$378,178) asserted
14 by the Petitioning Creditors.

15 As a result, the Petitioning Creditors cannot establish
16 their eligibility to file the Involuntary Petition. However,
17 even if the Petitioning Creditors could establish that their
18 debts were not subject to a bona fide dispute to disqualify them
19

20
21 ¹² Gajera asserts the 7/11/06 credit was applied to Laxmi
22 Private in the amount of \$48,640 on September 11, 2006; the
23 7/11/06 credit and the 10/30/06 credit was applied to C&C Dallas'
24 outstanding balances to Laxmi Private in the amount of \$14,773.00
25 and \$35,576.00, respectively. Additionally, Gajera submits the
26 \$434,623 was applied against Laxmi Private on February 15, 2007,
27 as \$107,181 and April 4, 2007, as \$256,188.00. These latter
28 credits are not reflected on the A/R Table and would bring the
outstanding balance to well below Laxmi Private's asserted
\$9,203.17 outstanding balance. There would also remain a dispute
about the value of the returned merchandise; C&C California
alleges it did not agree to the deductions made on the
merchandise by the Laxmi Group.

1 from eligibility under § 303(b), summary judgment was still
2 properly granted because C&C California demonstrated there was no
3 genuine issue of material fact that it was generally paying its
4 debts as they became due.

5 **B. Generally Paying Debts When Due**

6 Claims subject to a bona fide dispute as to liability or
7 amount are not included in the calculation of whether a debtor is
8 generally paying its debts. See 11 U.S.C. § 303(h)(1); compare
9 Matter of Busick, 831 F.2d 745, 746 (7th Cir. 1987) (1984
10 amendments to § 303 demand that claims subject to a bona fide
11 dispute must be eliminated from any calculation of whether the
12 debtor is generally not paying its debts); with Semel v. Dill (In
13 re Dill), 731 F.2d 629, 632 (9th Cir. 1984) (pre-1984 amendment
14 case approving analysis of including disputed noncontingent debts
15 in the 303(h)(1) analysis); see also Seko, 156 F.3d at 1009-10.

16 In the Ninth Circuit, a flexible "totality of the
17 circumstances" test is used to determine whether a debtor is
18 generally paying its debts as they come due. Vortex, 277 F.3d at
19 1072; Focus Media, 378 F.3d at 928-29. The test is to be
20 applied as of the date of the filing of the involuntary petition.
21 In re St. Marie Dev. Corp. of Montana, Inc., 334 B.R. 663, 671
22 (Bankr. D. Mont. 2005).

23 A finding that C&C California is generally not paying its
24 debts "requires a more general showing of the debtor's financial
25 condition and debt structure than merely establishing the
26 existence of a few unpaid debts." In re Dill, 731 F.2d 629, 632
27 (9th Cir. 1984); Vortex, 277 F.3d at 1072; Focus Media, 378
28 F.3d at 929. The following factors are generally considered

1 under the totality of the circumstances: (1) the number of unpaid
2 claims; (2) the amount of such claims; (3) the materiality of the
3 nonpayments; and, (4) the debtor's overall conduct of its
4 financial affairs. Id.; In re Euro-Am. Lodging Corp., 357 B.R.
5 700, 713 (Bankr. S.D.N.Y. 2007).

6 Petitioning Creditors' Opening Brief on appeal does not
7 argue C&C California was not generally paying its debts as they
8 became due. In their Reply Brief, as in their Counter Motion,
9 Petitioning Creditors contend C&C California was not generally
10 paying its debts because C&C California's Aging Report reflected
11 47.3% of C&C California's debts were more than 120 days past due
12 as of the Petition Date. (In making this calculation, the
13 Petitioning Creditors improperly included their own debts).
14 Additionally, the Petitioning Creditors contend the Aging Report
15 lists more than 22 entities (comprised of the so-called "Diamond
16 Vendors") as having debts over 120 days past due.

17 The bulk of Petitioning Creditors' argument under § 303(h)
18 centers around their objection to the inclusion of an expert
19 report ("Expert Report") by a forensic accountant, Dominic
20 Lobuglio ("Lobuglio"), for C&C California, who opined that C&C
21 California was generally paying its debts as they became due.
22 The Petitioning Creditors argue they were not able to properly
23 examine Lobuglio or the documents upon which he relied in forming
24 the Expert Report. Furthermore, they assert the Financial
25 Reports used by Lobuglio were "tenuous," "unreliable" and
26 contained "numerous unexplained financial fluctuations."

27 The Petitioning Creditors requested a continuance of the
28 hearing on the Summary Judgment Motion and Cross Motion so that

1 they could take the deposition of Lobuglio in order to examine
2 the bases for his opinions, including his methodology and
3 reasoning. The bankruptcy court denied this request stating that
4 Petitioning Creditors seemed to have had the opportunity, but did
5 not take advantage of the opportunity by following up with
6 counsel for C&C California to schedule a deposition time.

7 According to the email exchange between counsel on the
8 issue, the Petitioning Creditors had the bulk of the documents
9 upon which Lobuglio relied as part of the discovery conducted
10 prior to the Summary Judgment Motion and Counter Motion. The
11 only documents not provided prior to the Summary Judgment Motion
12 were the payroll and sales tax returns and operations schedules
13 for C&C California's China operations. Petitioning Creditors had
14 C&C California's financial statements, bank statements, vendor
15 ledgers and aging reports and accounting records. Therefore, we
16 do not find the bankruptcy court abused its discretion in denying
17 Petitioning Creditors' Motion for Continuance in order to conduct
18 further discovery on this issue.

19 Petitioning Creditors, who bear the burden of demonstrating
20 the statutory elements of § 303, failed to present a prima facie
21 case that C&C California was not generally paying its debts as
22 they became due.

23 The figures supplied by Petitioning Creditors as to the
24 percentage of debts over 120 days old does not demonstrate that
25 C&C California is generally not paying its debts as they become
26 due. As part of a totality of circumstances analysis, the
27 bankruptcy court in Focus Media found (and the appellate court
28 agreed) that "having 80% of debts over 90 days old [on invoices

1 with 90 day terms] is not paying ones debts as they become due.”
2 378 F.3d 916, 929 (9th Cir. 2004). By Petitioning Creditors’ own
3 analysis of C&C California’s records, only 47.4% of the total
4 invoice amount, even improperly including their own claims, was
5 open longer than 120 days. Further, only approximately 50% of
6 the Diamond Vendors (again including Petitioning Creditors’
7 claims) had accounts open longer than 120 days.¹³ As a result,
8 the Petitioning Creditors did not establish that C&C California
9 was not generally paying its debts as they became due.

10 C&C California provided its cumulative general ledger
11 showing C&C California has more assets than liabilities. It
12 submitted evidence that all payroll obligations, payroll taxes,
13 and corporate tax obligations have been regularly paid in a
14 timely and consistent manner. It also submitted evidence
15 demonstrating its approximately 45 administrative creditors were
16 paid within 12 days of the due date of each invoice. Even
17 without relying on the Expert Report or the declarations
18 submitted by the Diamond Vendors, there is no evidence
19 demonstrating material nonpayments of obligations, or an overall
20 conduct of financial affairs that suggests C&C California cannot
21 meet its payment obligations. Accordingly, the evidence
22 submitted demonstrates there is no genuine issue of material fact
23 that C&C California is generally paying its debts as they become
24 due.

26 ¹³ C&C California submitted declarations from eight of its
27 Diamond Vendors asserting their accounts were generally on 120
28 day terms as is the industry standard. Laxmi Diamond’s invoices
also evidence a 120 day payment term.

1 **C. Attorneys' Fees and Damages**

2 Section 303(i) (1) permits an alleged debtor to bring a claim
3 for an award of fees and costs if: (1) the involuntary petition
4 was dismissed by the court; (2) the dismissal was not stipulated
5 to by the debtor and all the petitioning creditors; and (3) the
6 debtor did not waive its rights to judgment. 11 U.S.C.

7 § 303(i) (1) (A)-(B). Additionally, the statute provides that in
8 the event of bad faith, actual and punitive damages may be
9 awarded. 11 U.S.C. § 303(i) (2); Jaffe v. Wavelength, Inc. (In
10 re Wavelength, Inc.), 61 B.R. 614, 619 (9th Cir. BAP 1986).

11 Section 303(i) is a fee-shifting statute in which Congress
12 authorized an award of fees and costs to the prevailing party.
13 See In re Macke Int'l Trade, Inc., 370 B.R. 236, 252 (9th Cir.
14 BAP 2007). However, the statute states the bankruptcy court may
15 award fees and costs, rendering any award under § 303(i)
16 discretionary. Higgins v. Vortex Fishing Sys., Inc., 379 F.3d
17 701, 706 (9th Cir. 2004).

18 In the Ninth Circuit there is a rebuttable presumption that
19 a debtor who has successfully contested an involuntary petition
20 will be awarded fees and costs. Macke Int'l Trade, 370 B.R. at
21 250. The presumption imposes on the petitioning creditors the
22 burden of presenting evidence to meet the presumption, but it
23 does not shift the burden of proof to the petitioning creditors.
24 See Fed. R. Evid. 301. Therefore, in order to rebut the
25 presumption, the petitioning creditors need only produce some
26 evidence that attorneys' fees and costs are not warranted. The
27 burden of persuasion remains at all times on the debtor. In re
28 Scrap Metal Buyers of Tampa, Inc., 253 B.R. 103, 109 (M.D. Fla.

1 2000).

2 The petitioning creditors may overcome the presumption by
3 demonstrating an award of attorneys' fees and costs is
4 inappropriate given the totality of the circumstances. Higgins,
5 379 F.3d at 706; Sofris v. Maple-Whitworth, Inc. (Matter of
6 Maple-Whitworth, Inc.), 556 F.3d 742, 746 (9th Cir. 2009). Under
7 a totality of the circumstances analysis, the bankruptcy court
8 may consider: (1) the relative culpability among the petitioners,
9 (2) the motives or objectives of individual petitioners in
10 joining the involuntary petition, (3) the reasonableness of the
11 respective conduct of the debtors and petitioners, and (4) other
12 individualized factors. Id. The list is not exhaustive. A
13 bankruptcy court may choose to consider other material factors it
14 deems relevant. Higgins, 379 F.3d at 708.

15 At the hearing on the Motion for Fees, each party attempted
16 to cast the other in negative light. The court mentioned that
17 C&C California's detailed billing statements were not filed with
18 the Motion for Fees; and there was some discussion about whether
19 the fees were properly segregated for the work done on behalf of
20 C&C California (and not on behalf of C&C Dallas).

21 At the end of the hearing, the bankruptcy court orally ruled
22 that Petitioning Creditors rebutted the presumption of an award
23 of fees, although it did not enumerate the factors used in its
24 determination. But see id. (bankruptcy court did not need to
25 explicitly state it used the totality of the circumstances test
26 as long as it considers the factual basis for withholding fees).

27 A bankruptcy court's totality of the circumstances analysis
28 is highly discretionary. Id. at 707; see also Maple-Whitworth,

1 556 F.3d at 745-46. The bankruptcy court need only make "an
2 informed examination" of the entire situation to determine if an
3 award of litigation expenses to the alleged debtor furthers the
4 purposes and policies of the Code. Higgins, 379 F.3d at 707;
5 Macke Int'l Trade, 370 B.R. at 252. Here, the bankruptcy court
6 "evaluated all of the factors relevant to this case" and
7 determined the case was "not a case where attorneys' fees should
8 be awarded." Accordingly, we do not find the bankruptcy court
9 abused its discretion when it denied the Motion for Fees.

10 Similarly, we do not find the bankruptcy court abused its
11 discretion in denying C&C California an award for damages. The
12 bankruptcy court has the discretion to award damages caused by a
13 bad faith filing. 11 U.S.C. § 303(i)(2). The term "bad faith"
14 is not defined in the Code; therefore, courts have used different
15 approaches to determine whether a petition has been filed in bad
16 faith. See In re Diloreto, 388 B.R. 637, 645 (Bankr. E.D. Pa.
17 2008) (compiling cases adopting various tests for determining bad
18 faith). However, the bankruptcy court, at least on the record
19 before us, did not determine whether or not the petition was
20 filed in bad faith. The bankruptcy court determined that an
21 award of attorneys' fees, costs, and damages was not appropriate
22 in this case based upon its conclusion that the Petitioning
23 Creditors had rebutted the presumption entitling C&C California
24 to fees and costs. We do not find the bankruptcy court reached
25 its conclusion erroneously.

26 CONCLUSION

27 There is no genuine issue of material fact that Petitioning
28 Creditors' claims are not subject to a bona fide dispute as to

1 liability or amount, or that C&C California was paying its debts
2 as they became due. Accordingly, we AFFIRM the bankruptcy
3 court's grant of summary judgment to C&C California dismissing
4 the Involuntary Petition. Further, we do not find that the
5 bankruptcy court abused its discretion in its determination that
6 attorneys' fees were not warranted in this case and AFFIRM the
7 order denying C&C California's Motion for Fees.

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28