

APR 10 2009

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	CC-08-1238-HMoMk
	)		
C&C JEWELRY MFG., INC., a	)	Bk. No.	LA 07-20766 SB
Texas Corporation,	)		
	)		
Debtor.	)		
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C&C JEWELRY MFG., INC., a	)		
Texas Corporation,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM<sup>1</sup></b>	
	)		
LAXMI JEWEL INC., MILISTAR	)		
INC., LAXMI JEWEL PVT. LTD.,	)		
LAXMI DIAMOND PVT. LTD.,	)		
	)		
Appellees.	)		
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Argued and Submitted on March 18, 2009  
at Pasadena, California

Filed - April 10, 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.

<sup>1</sup> 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. distributed finished jewelry for  
2 retail sale ("C&C Dallas"). It bought diamonds and other  
3 materials from Laxmi Jewel, Inc., Milistar Inc., Laxmi Jewel Pvt.  
4 Ltd., and Laxmi Diamond Pvt. Ltd. (the "Laxmi Group"). The Laxmi  
5 Group filed a chapter 7 involuntary bankruptcy petition<sup>2</sup> against  
6 C&C Dallas, alleging C&C Dallas owed the Laxmi Group undisputed  
7 debts and was not paying its debts as they became due. The  
8 bankruptcy court granted summary judgment in favor of the Laxmi  
9 Group on the basis there was at least one entity that held an  
10 undisputed claim in the statutory threshold amount and that C&C  
11 Dallas was not generally paying its debts as they became due. We  
12 REVERSE the bankruptcy court's ruling.

### 13 I. FACTS

14 On November 20, 2007, the Laxmi Group and Suberi Brothers,  
15 LLC filed an involuntary chapter 7 petition against C&C Dallas  
16 (the "Petitioning Creditors").<sup>3</sup> The involuntary petition lists  
17 the Petitioning Creditors as holding claims totaling \$378,464.06.  
18 The attorney for the Laxmi Group made a mistake in filing the  
19 petition and subsequently proposed a corrected petition  
20 ("Involuntary Petition"), reflecting claims totaling  
21 \$1,065,814.79 and removed Suberi Brothers, LLC as a Petitioning  
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23  
24 <sup>2</sup> Unless otherwise indicated, all chapter, "Code," section,  
25 and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-  
26 1532 and to the Federal Rules of Bankruptcy Procedure, Rules  
1001-9037.

27 <sup>3</sup> A mistake was made in submitting the paperwork: Suberi  
28 Brothers LLC is actually a petitioning creditor of C&C Dallas's  
affiliated entity, C&C Jewelry Mfg., Inc., a California company.

1 Creditor of C&C Dallas.<sup>4</sup>

2 The Laxmi Group is made up of: (1) Laxmi Jewel, Inc. ("Laxmi  
3 Jewel"), a New York corporation that sells or consigns finished  
4 jewelry; (2) Milistar, Inc. ("Milistar"), a wholesale distributor  
5 of loose polished diamonds, also a New York corporation; (3)  
6 Laxmi Jewel Pvt. Ltd. ("Laxmi Private"), an Indian corporation  
7 that manufactures its own finished jewelry which it then sells  
8 wholesale; and, (4) Laxmi Diamond Pvt. Ltd. ("Laxmi Diamond"), an  
9 Indian corporation that cuts and polishes its own diamonds for  
10 wholesale.

11 C&C Dallas was incorporated by Robert Connolly ("Connolly")  
12 on June 25, 2003, in Texas, for the purpose of acting as a  
13 distributor of finished jewelry. Mikhail Chekhman ("Chekhman")  
14 is Connolly's business partner and co-owner of C&C Jewelry Mfg.,  
15 Inc., a California company ("C&C California"), founded in 2001.  
16 C&C California designs and manufactures jewelry for retail sale.  
17 Through C&C California, Connolly and Chekhman had a business  
18 relationship with the Laxmi Group.

19 Connolly formed C&C Dallas with the expectation that the  
20 Laxmi Group would have some business relationship with C&C Dallas  
21 either as a possible joint venture partner or by acquiring an  
22 ownership interest in C&C Dallas. A meeting was held August 13,  
23 2003, to discuss the terms of the business arrangement.  
24 Connolly, Chekhman, Hemant Shah (a person in the jewelry  
25

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26  
27 <sup>4</sup> A proposed corrected petition was submitted with  
28 Petitioning Creditors' Motion for Summary Judgment and filed on  
July 21, 2008, after the bankruptcy court entered the order for  
relief.

1 business)<sup>5</sup>, and Nikunj Parekh (a representative of the Laxmi  
2 Group) attended the meeting. The idea for the business was that  
3 it would be a marketing vehicle for C&C California's and the  
4 Laxmi Group's merchandise.

5 Connolly and Chekhman each contributed to C&C Dallas their  
6 share as work in progress from the profits of C&C California.  
7 The Laxmi Group contributed \$234,000 (of a pledged amount of  
8 \$500,000) and another \$40,000 as work in progress.<sup>6</sup> (The Laxmi  
9 Group asserts it did not agree to contribute \$500,000.)<sup>7</sup>

10 Even though there were several meetings and discussions,  
11 proposals, and beginning steps undertaken to start up the  
12 business, the parties were ultimately unable to finalize any  
13 business proposal or come to any mutual understanding about lines  
14 of supply, manufacturing, or marketing terms. No finalized  
15 agreements were drawn and it is unclear under what oral  
16 agreements the parties operated.

17 This uncertain relationship between C&C Dallas and the Laxmi  
18 Group is the basis of C&C Dallas's assertion that the Petitioning  
19 Creditors had equity holdings in C&C Dallas and access and  
20 control over C&C Dallas's bank account and financial information.

21 It also forms the basis of C&C Dallas's argument that certain  
22 money paid to the Laxmi Group was a return of capital investment

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24 <sup>5</sup> Hemant Shah's declaration provides no information about  
25 his business affiliation. He merely states he did not attend the  
26 meeting as a representative of the Laxmi Group.

27 <sup>6</sup> In 2003, the Laxmi Group was called Cygnus.

28 <sup>7</sup> The notes taken by Shah at the meeting demonstrate Laxmi  
Group had at least at that time agreed to pledge \$500,000. The  
Laxmi Group makes no mention of the \$274,000 contribution.

1 or a share of profits that was not properly reflected in their  
2 accounting.

3 In addition to the parties' disputes about contribution  
4 amounts, by the end of 2004, C&C Dallas and the Laxmi Group were  
5 also having disagreements about the amount of money owed for  
6 goods sold. Eventually, by May or June 2005, C&C Dallas decided  
7 to shut down. C&C Dallas then began returning merchandise to the  
8 Laxmi Group for credit on its accounts as part of winding down  
9 its business. The merchandise was not directly returned to each  
10 Laxmi Group entity; rather, it was the parties' business practice  
11 to return all merchandise to one location, a New York office  
12 shared by Laxmi Jewel and Milistar.

13 In April 2007, Nitin Gajera ("Gajera") of Laxmi Jewel met  
14 with Chekhman to discuss the ongoing disagreements about the  
15 amounts paid and remaining due on invoices, and the amount and  
16 application of credits to open accounts. The discussion resulted  
17 in Chekhman producing a summary table of what he believed the  
18 obligations were at that time and a list of credits that he  
19 believed should be applied (the "Chekhman Email").

20 Seven months later, the Laxmi Group filed the involuntary  
21 petition. C&C Dallas contested the petition by filing, on  
22 January 14, 2008, a Motion to Dismiss Involuntary Petition, or in  
23 the Alternative, For Abstention ("Motion to Dismiss"). C&C  
24 Dallas alleged the Petitioning Creditors made no investigation  
25 into C&C Dallas's overall financial affairs and sought to simply  
26 pressure C&C Dallas into paying disputed debts.

27 At a status conference held on January 15, 2008, the  
28 Petitioning Creditors asserted they needed to conduct discovery

1 to controvert the exhibits and information submitted with C&C  
2 Dallas's Motion to Dismiss. On February 6, 2008, C&C Dallas  
3 filed a supplement to its Motion to Dismiss stating that  
4 Petitioning Creditors should not need to conduct discovery to be  
5 able to put forth adequate evidence of their standing to file the  
6 Involuntary Petition. However, the bankruptcy court allowed time  
7 for the parties to conduct discovery.

8 C&C Dallas withdrew its Motion to Dismiss on March 31, 2008,  
9 and filed, on the same day, an Answer denying the material  
10 allegations of the Involuntary Petition and asserting the  
11 Petitioning Creditors' claims were subject to bona fide disputes  
12 as to liability or amount.

13 On June 2, 2008, the Petitioning Creditors filed a motion  
14 for summary judgment for entry of an order for relief against C&C  
15 Dallas ("Summary Judgment Motion").

16 C&C Dallas opposed the Summary Judgment Motion on June 17,  
17 2008 ("Opposition"). At the same time, C&C Dallas also filed  
18 objections to the Petitioning Creditors' evidence submitted with  
19 the Summary Judgment Motion on the basis it was unauthenticated  
20 hearsay.

21 On June 20, 2008, the Petitioning Creditors filed a  
22 Memorandum of Points and Authorities in Reply and in Further  
23 Support of Motion for Summary Judgment; Supplemental Declarations  
24 of Nitin Gajera, Bakul Gajera and Declaration of Douglas J. Pick;  
25 and Exhibits, offering five more exhibits to support their  
26 petition against C&C Dallas.

27 Oral argument on the Summary Judgment Motion was heard by  
28 the bankruptcy court on July 8, 2008, and continued on July 16,

1 2008. Prior to the July 8, 2008 hearing, the bankruptcy court  
2 issued a tentative ruling in which it held that Petitioning  
3 Creditors insufficiently established their debts were not subject  
4 to a bona fide dispute and that C&C Dallas was generally paying  
5 its debts as they became due ("Tentative Ruling").

6 However, at the end of oral argument, the bankruptcy court  
7 stated, without providing a detailed explanation as to its  
8 reasoning, that it would grant summary judgment in favor of the  
9 Petitioning Creditors. In the Order Granting Summary Judgment on  
10 Involuntary Petition in Favor of Petitioning Creditors, entered  
11 July 25, 2008, the bankruptcy court held there was no material  
12 issue of fact in dispute, that C&C Dallas was an eligible debtor  
13 with less than twelve creditors, and that "at least one of the  
14 Petitioning Creditors" held a claim against C&C Dallas in excess  
15 of the threshold amount of \$13,475 that was "not contingent as to  
16 liability or the subject of a bona fide dispute."<sup>8</sup> Further, the  
17 bankruptcy court determined C&C Dallas was generally not paying  
18 its debts as they became due pursuant to § 303(h)(1). The Order  
19 for Relief was entered July 29, 2008.

20 C&C Dallas filed a Motion for Reconsideration ("Motion to  
21 Reconsider") on August 1, 2008, under Fed. R. Civ. P. 59(e) and  
22 60(b), applicable in bankruptcy court by Rules 9023 and 9024,  
23 contending the bankruptcy court committed clear error in granting  
24 summary judgment in favor of the Petitioning Creditors when the  
25 evidence submitted supported the Tentative Ruling, not the final  
26

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27 <sup>8</sup> The bankruptcy court did not identify which of the Laxmi  
28 Group entities was the one eligible Petitioning Creditor that  
held an undisputed claim in the amount of at least \$13,475.

1 ruling in which the bankruptcy court determined Petitioning  
2 Creditors' claims were not subject to a bona fide dispute; and  
3 seeking the correction of any mistake the court may have made in  
4 this regard. Further, C&C Dallas requested the bankruptcy court  
5 rule on its evidentiary objections.

6 The Petitioning Creditors responded on August 14, 2008,  
7 contending "there was never any bona fide dispute as to the  
8 underlying debt obligations," and that "pursuant to § 303(b)(2),  
9 one creditor holding a claim in the amount of at least \$13,475  
10 was all that was required to be demonstrated by the Petitioning  
11 Creditors."

12 C&C Dallas filed a reply on August 27, 2008, and the matter  
13 was heard by the bankruptcy court on September 2, 2008. At the  
14 hearing, the bankruptcy court clarified its decision, indicating  
15 (1) it gave no weight to the argument that any sort of joint  
16 venture was actually formed; (2) its interpretation of "dispute  
17 as to liability or amount" meant that the Petitioning Creditors  
18 needed to prove that some money was owed, not the exact amount  
19 owed; and (3) the Petitioning Creditors proved some money was  
20 owed to them by C&C Dallas which was sufficient for an  
21 involuntary petition. Moreover, the bankruptcy court clarified  
22 the constellation of factors used to find C&C Dallas was not  
23 generally paying its debts: (1) C&C Dallas was paying some  
24 creditors and not others; (2) it had shut down its business; and,  
25 (3) only a few creditors remained.

26 The bankruptcy court overruled all of C&C Dallas's  
27 evidentiary objections and entered its order denying the Motion  
28 to Reconsider on September 5, 2008. C&C Dallas timely appealed



1 the Order Granting Summary Judgment on Involuntary Petition,  
2 Judgment on Order for Summary Judgment, Order for Relief, and  
3 Order Denying Motion to Reconsider Summary Judgment.

## 4 **II. JURISDICTION**

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

## 8 **III. ISSUES**

9 Did the bankruptcy court err in granting Petitioning  
10 Creditors' Summary Judgment Motion, entering an order for relief  
11 against C&C Dallas, and denying C&C Dallas's Motion to  
12 Reconsider?

## 13 **IV. STANDARDS OF REVIEW**

14 The bankruptcy court's grant or denial of a motion for  
15 summary judgment is reviewed de novo. Marquis v. Ryan, 140 F.3d  
16 850, 852 (9th Cir. 1998). Its findings of fact are reviewed for  
17 clear error and its conclusions of law are reviewed de novo.  
18 Einstein/Noah Bagel Corp. v. Smith (In re BCE West, L.P.), 319  
19 F.3d 1166, 1170 (9th Cir. 2003). Mixed questions of law and fact  
20 are reviewed de novo. Carillo v. Su (In re Su), 290 F.3d 1140,  
21 1142 (9th Cir. 2002).

22 The Ninth Circuit has held that determination of whether a  
23 "bona fide dispute" exists under § 303 is essentially a factual  
24 inquiry reviewed under a clearly erroneous standard. Liberty  
25 Tool & Mfg. v. Vortex Fishing Sys., Inc. (In re Vortex Fishing  
26 Sys., Inc.), 277 F.3d 1057, 1064 (9th Cir. 2002) ("We agree with  
27 the other circuits that have held that this is essentially a  
28 factual inquiry and adopt a clearly erroneous standard of

1 review") (citing Rimell v. Mark Twain Bank (In re Rimell), 946  
2 F.2d 1363, 1365 (8th Cir. 1991) (Because the determination "will  
3 often depend . . . upon an assessment of witnesses' credibilities  
4 and other factual considerations, the bankruptcy court's  
5 determination in this regard is a factual finding that may be  
6 overturned on appeal only if it is clearly erroneous.")).

7       However, when the issue of whether there is a bona fide  
8 dispute is made in the context of a summary judgment analysis, it  
9 is not based upon an assessment of the credibility of witnesses  
10 or other facts in evidence. See e.g., Key Mechanical Inc. v. BDC  
11 56 LLC (In re BDC 56 LLC), 330 F.3d 111, 117, 119 (2d Cir. 2003).  
12 Therefore, we review this issue de novo rather than applying a  
13 clearly erroneous standard.

14       Summary judgment is proper when the pleadings, the discovery  
15 and disclosure materials on file, and any affidavits show that  
16 there is no genuine issue as to any material fact and that the  
17 movant is entitled to judgment as a matter of law. Fed. R. Civ.  
18 P. 56(c) applicable in bankruptcy court by Rule 7056. An issue  
19 is "genuine" only if there is an evidentiary basis on which a  
20 reasonable fact finder could find for the non-moving party.  
21 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A  
22 dispute is "material" only if it could affect the outcome of the  
23 suit under governing law. Id. At the summary judgment stage,  
24 the court does not weigh the evidence and determine the truth of  
25 the matter, but determines whether there is a genuine issue for  
26 trial. Id. at 249.

27       We review a denial of a motion for reconsideration for an  
28 abuse of discretion. Weiner v. Perry (In re Weiner), 161 F.3d

1 1216, 1218 (9th Cir. 1998). Under an abuse of discretion  
2 standard, we will not reverse the bankruptcy court unless we have  
3 a definite and firm conviction that it committed clear error in  
4 the conclusion that it reached after weighing all of the relevant  
5 factors. Law Offices of David A. Boone v. Derham-Burk (In re  
6 Eliapo), 468 F.3d 592, 596 (9th Cir. 2006).

## 7 V. DISCUSSION

### 8 A. The Commencement of an Involuntary Petition.

9 Section 303 governs involuntary bankruptcies. Section  
10 303(b) provides that an involuntary case may be commenced:

11 (1) by three or more entities, each of which is  
12 either a holder of a claim against such person  
13 [defined in 303(a)] that is not contingent as to  
14 liability or the subject of a bona fide dispute as  
15 to liability or amount, or an indenture trustee  
16 representing such a holder, if such noncontingent,  
17 undisputed claims aggregate at least \$13,475 more  
18 than the value of any lien on property of the debtor  
19 securing such claims held by the holders of such  
20 claims;

21 (2) if there are fewer than 12 such holders, . . . ,  
22 by one or more of such holders that hold in the  
23 aggregate at least \$13,475 of such claims;

24 11 U.S.C. § 303(b) (1), (2).<sup>9</sup>

25 Thus, § 303(b) "prevents two types of claims from being the  
26 basis of an involuntary petition: those that are 'contingent as  
27 to liability' and those that are 'the subject of a bona fide  
28 dispute.'" Chicago Title Ins. Co. v. Seko Inv., Inc. (In re Seko  
29 Inv., Inc.), 156 F.3d 1005, 1007 (9th Cir. 1998). The exceptions  
30 are intended to prevent creditors from using the bankruptcy  
31 process as a means of coercing alleged debtors to pay

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32 <sup>9</sup> All parties agree C&C Dallas has fewer than twelve  
33 creditors. Therefore, the applicable section for analysis is  
34 § 303(b) (2).

1 legitimately disputed debts. Id. at 1008; Lawrence Ponoroff,  
2 Involuntary Bankruptcy and the Bona Fides of a Bona Fide Dispute,  
3 65 Ind. L.J. 315, 316, 333-338 (1990) (legislative history shows  
4 there has always been a concern that creditors would use § 303 as  
5 a means to “bludgeon a debtor into payment of dubious claims or  
6 satisfaction of obligations open to legitimate question”); In re  
7 Mountain Dairies, Inc., 372 B.R. 623, 634-5 (Bankr. S.D.N.Y.  
8 2007) (courts are wary of encouraging two party disputes to use  
9 the bankruptcy system as a quick resolution to their disputes);  
10 In re Tobacco Road Assoc., LP, 2007 WL 966507, \*6 (E.D. Penn.  
11 2007) (bankruptcy court is not correct venue for adjudicating  
12 disputes about whether a debt is owed).

13 Section 303(b) sets the threshold for filing an involuntary  
14 petition; if its requirements are met and the alleged debtor does  
15 not contest the petition, then the petitioning creditors are  
16 entitled to entry of an order for relief. 11 U.S.C. § 303(h)  
17 (“If the petition is not timely controverted, the court shall  
18 order relief against the debtor in an involuntary case under the  
19 chapter under which the petition was filed.”).

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

25 The Petitioning Creditors contend they are eligible to  
26 commence an involuntary case against C&C Dallas because their  
27 claims are not subject to any bona fide dispute as to liability  
28 or amount. Further, the Petitioning Creditors allege C&C

1 California is not generally paying its debts as they become due.  
2 However, C&C Dallas asserts the opposite, arguing each of the  
3 Petitioning Creditors' claims is the subject of a long-standing  
4 disagreement as to what amount, if any, is outstanding; and that  
5 C&C Dallas was generally paying its debts when due even though it  
6 was winding down its business.

7 **B. Claims Subject to Bona Fide Dispute.**

8 In 2005, the Bankruptcy Abuse Prevention and Consumer  
9 Protection Act of 2005, Pub.L. No. 109-8, §§ 1234(a)(1)(A) and  
10 (a)(12), 119 Stat. 23 (April 20, 2005) ("BAPCPA"), amended  
11 § 303(b) and (h) to modify "bona fide dispute" to refer to  
12 disputes "as to liability or amount." (Emphasis added). The  
13 statute previously referenced only claims not contingent or  
14 subject to a bona fide dispute as to liability.

15 The pre-BAPCPA rule developed through case law in the Ninth  
16 Circuit is that a dispute over the amount of a debt is not  
17 considered a "bona fide dispute" under § 303(b) unless the  
18 dispute arises from the same transaction and the alleged debtor's  
19 counterclaims or offsets, if netted out, would take the total  
20 debt below the statutory threshold. Focus Media, Inc. v. Nat'l  
21 Broad. Co. Inc. (In re Focus Media, Inc.), 378 F.3d 916, 926 (9th  
22 Cir. 2004); In re Seko Inv., Inc., 156 F.3d 1005, 1009-10 (9th  
23 Cir. 1998); In re Mountain Dairies, Inc., 372 B.R. 623, 633-34  
24 (Bankr. S.D.N.Y. 2007) ("Prior to the 2005 amendments, some  
25 courts took the position that a debtor's counterclaim disputing  
26 the amount of a creditor's claim, and not the legitimacy or the  
27 existence of such claim, did not make the creditor's claim the  
28 subject of a bona fide dispute."). Therefore, if "at least a

1 portion of the debt that is the subject of the petition is  
2 undisputed, the undisputed portion is sufficient to create a debt  
3 under [§ 303(b)] not subject to a bona fide dispute.” Focus  
4 Media, 378 F.3d at 926 (citations omitted).

5 Under pre-BAPCPA law:

6 This may lead to the peculiar result that a  
7 counterclaim [or dispute as to amount owed to a  
8 petitioning creditor] isn’t a ‘bona fide dispute’ under  
9 section 303(b), but is a ‘bona fide dispute’ under  
10 section 303(h)(1). This result comes about not because  
11 ‘bona fide dispute’ has a different meaning in the two  
12 subsections, but because it modifies different terms.  
13 *Compare* 11 U.S.C. § 303(b) (referring to ‘a claim  
14 against such person that is not . . . the subject of a  
15 bona fide dispute’), *with id.* § 303(h)(1) (allowing an  
16 alleged debtor to avoid an involuntary filing when the  
17 ‘debtor’s debts . . . are the subject of a bona fide  
18 dispute’).

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

14 The Ninth Circuit has not yet interpreted the new language  
15 of § 303(b) and (h); however other courts have held that an  
16 objective legitimate dispute as to an amount owed on a  
17 petitioning creditor’s claim is sufficient to demonstrate a bona  
18 fide dispute and forestall a petitioning creditor from  
19 maintaining an involuntary petition under § 303(b). Mountain  
20 Dairies, 372 B.R. at 633-34 (“Thus, after the amendments made by  
21 BAPCPA, ‘disputes as to amount - not just liability - are  
22 sufficient to create a bona fide dispute.’”); In re Euro-Am.  
23 Lodging Corp., 357 B.R. 700, 712 (Bankr. S.D.N.Y. 2007) (citing,  
24 2 Alan N. Resnick & Henry J. Sommer, COLLIER ON BANKRUPTCY  
25 ¶ 303.30[2][b], (15th rev.ed. 2006) (The 2005 amendment  
26 presumably eliminated [the netting out of claims to below the  
27 threshold] part of the test)); Reg’l Anesthesia Assoc. PC v. PHN  
28 Physician Serv., Inc. (In re Reg’l Anesthesia Assoc. PC), 360

1 B.R. 466, 470 (Bankr. W.D. Penn. 2007); but see In re Demirco  
2 Holdings, Inc., 2006 WL 1663237, \*3 ("Without clear legislative  
3 intent, this Court cannot presume such a change in the law. . .  
4 .").

5       Whether or not BAPCPA changes the Ninth Circuit rule is  
6 ultimately not determinative in this case because the Petitioning  
7 Creditors have not demonstrated their claims are undisputed even  
8 as to a threshold amount. At oral argument before the Panel,  
9 counsel for the Petitioning Creditors conceded that a dispute as  
10 to the amount of a debt (if more than as to a minimal amount)  
11 would likely be a bona fide dispute under § 303(b). But, they  
12 argue, there is no dispute in this case as to the amount owed to  
13 any of the Petitioning Creditors, and at least as to Laxmi  
14 Diamond's and Milistar's claims because the Chekman Email,  
15 prepared by C&C Dallas, lists the outstanding amount to each of  
16 those entities in the same amount asserted in the Involuntary  
17 Petition.

18       We disagree. There are more than 1200 pages of record and  
19 evidence submitted by the parties, which demonstrates there are  
20 numerous accounting disputes; no final figures are presented that  
21 definitively demonstrate the amounts owing to the Laxmi Group  
22 entities.

23       In order for a bona fide dispute to exist, the alleged  
24 debtor must do more than just disagree with the amount of the  
25 claim. Rather, the court must determine there is "an objective  
26 basis for either a factual or legal dispute as to the validity of  
27 the debt." Vortex Fishing Sys., 277 F.3d at 1064 (citations  
28 omitted).

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

13 Petitioning creditors bear the burden of proving all  
14 statutory requirements of § 303. Id. Once met, the burden then  
15 shifts to the alleged debtor to show there is a dispute as to a  
16 material fact. Id.; In re A&J Quality Diamonds, Inc., 377 B.R.  
17 460, 463 (Bankr. S.D.N.Y. 2007). In the context of an  
18 involuntary bankruptcy, if there is a genuine issue of material  
19 fact that bears upon the debtor's liability or amount of the  
20 claim, then the petition must be dismissed. In re Lough, 57 B.R.  
21 993, 997 (Bankr. E.D. Mich. 1986); In re Busick, 831 F.2d 745,  
22 750 (7th Cir. 1987) (If there is a bona fide dispute as to either  
23 the law or the facts, then the creditor does not qualify and the  
24 petition must be dismissed.); Vortex Fishing Sys., 277 F.3d at  
25 1064.

26 **1. Laxmi Private**

27 Laxmi Private asserts it is owed \$8,279.85 on outstanding  
28 accounts for goods sold. In support of its claim, Laxmi Private



1 submitted a table entitled "Accounts Receivable" ("A/R Table")  
2 which itemizes fifteen invoices, dated May 11 through July 19,  
3 2005; and credits applied to the account January 4, 2005 through  
4 October 6, 2006. The itemized invoices total \$445,052.02 to  
5 which \$436,772.17 in credits was applied.<sup>10</sup> The difference makes  
6 up its asserted claim.

7 Laxmi Private contends this debt is not disputed because the  
8 summary of obligations prepared by Chekhman in April 2007, and  
9 sent to the Laxmi Group, the "Chekhman Email," lists the gross  
10 amount of unpaid goods delivered by Laxmi Private to C&C Dallas  
11 as \$445,052.02 (which constitutes the same amount as the unpaid  
12 invoices referenced in the A/R Table)<sup>11</sup>.

13 The Chekhman Email is used by the Petitioning Creditors as  
14 an admission by C&C Dallas of the outstanding debt to the Laxmi  
15 Group. However, this document does not establish a definitive  
16 amount of money owed to each entity as of the Petition Date.

17 The Chekhman Email has a figure entered for each Laxmi Group  
18 entity, totaling \$1,461,846.10. Underneath, there are three  
19 payments that had yet to be applied, at least according to C&C  
20

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21  
22 <sup>10</sup> Attached to the A/R Table are individual invoices  
23 supposedly referenced on the A/R Table. However, in many  
24 instances, the amount of the invoice does not match the amount of  
25 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.

26 <sup>11</sup> The Chekhman Email itself does not describe what the  
27 figures entered on the table represent. Gajera interpreted the  
28 amounts listed for each of the Laxmi Group entities to represent  
the gross amount of unpaid goods delivered to C&C California (and  
C&C Dallas).

1 Dallas's calculations, to the Laxmi Group accounts.<sup>12</sup>

2 The Chekhman Email was prepared by Chekhman after a meeting  
3 with Gajera on April 3, 2007, concerning the open accounts.

4 Chekhman contends, in his declaration, that the Chekhman Email  
5 was prepared after the meeting to summarize what credits should  
6 be applied to C&C Dallas's outstanding invoices as part of  
7 ongoing negotiations with the Laxmi Group over the disagreements  
8 in accounting. However, according to Chekhman, the Laxmi Group  
9 did not respond to his email and there were no further  
10 negotiations. Gajera contends, in his declaration, that the  
11 Chekhman Email reflected the gross amount of unpaid goods sold  
12 and delivered by the Laxmi Group and evidenced C&C Dallas's debt  
13 obligations.

14 Gajera stated he left the April 7, 2007 meeting with  
15 approximately \$300,000 in merchandise to be applied to the Laxmi  
16 Group's accounts. Given that there were credits yet to be  
17 applied to the outstanding amounts as listed on the Chekhman  
18 Email, and that Gajera took additional merchandise for credit at  
19 the time, the amounts listed on the Chekhman Email correlating to  
20 each of the Laxmi Group entities cannot be an accurate reflection  
21 (or admission) of the outstanding balances owed to each entity  
22 even as of the time it was prepared in April 2007. Further, the  
23 Chekhman Email does not reflect any activity on the accounts

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24  
25 <sup>12</sup> The Chekhman Email also lists figures relating to C&C  
26 California and in C&C California's column are a series of listed  
27 credits, memos, payments and wire transfers. In C&C Dallas's  
28 column, there are only three payments listed. Underneath is a  
figure of \$522,464.00. This figure is subtracted from the total  
under the Laxmi Group entities (\$1,461,846.10), indicating that  
they were yet to be applied.

1 during the seven month period between the time it was prepared  
2 and the Petition Date.

3 Furthermore, C&C Dallas submitted a Detail Vendor Ledger by  
4 Vendor Report ("Vendor Ledger") for Laxmi Private ("Laxmi Private  
5 Ledger") from June 25, 2003 through the Petition Date. The Laxmi  
6 Private Ledger has an outstanding balance reflected as  
7 \$453,729.52. It indicates C&C Dallas applied five credits and  
8 made four payments to the Laxmi Private account between June 2005  
9 and February 2006. None of those credits or payments are  
10 reflected on the A/R Table from the same time period.<sup>13</sup> The A/R  
11 Table, Chekhman Email and Laxmi Private Ledger show that there is  
12 an objective basis for a dispute as to the amount of Laxmi  
13 Private's claim. As a result, Laxmi Private is unable to  
14 establish it holds an undisputed claim in the amount of  
15 \$8,279.85.

## 16 **2. Milistar**

17 At oral argument before the Panel, Petitioning Creditors  
18 specifically offered Milistar as one of two potential Petitioning  
19 Creditors eligible to commence the Involuntary Petition because  
20 the Milistar claim amount matches C&C Dallas's records "to the  
21 penny."

22 Milistar's claim is asserted in the amount of \$276,055.58,  
23 comprised of \$171,825.68 due on accounts and \$102,214.35 in  
24 interest (at a rate of 2% per month).<sup>14</sup> It supports its claim  
25

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26 <sup>13</sup> The only credits in 2005, as reflected on the A/R Table,  
27 are dated January 4, October 6, December 29 and December 30.

28 <sup>14</sup> Milistar's invoices state, "In case the seller retains  
account for collection of amount due under terms of this  
(continued...)

1 with a table of interest accrual and a Statement ("Milistar  
2 Statement") that itemizes certain invoices (from March 16 through  
3 May 31, 2005), due dates, totals, credits, interest and balance  
4 remaining. One credit is recorded on the Milistar Statement in  
5 the amount of \$2,016.<sup>15</sup>

6 Milistar contends the amount is undisputed because the  
7 Chekhman Email also lists \$171,825.69 corresponding to Milistar's  
8 account. As noted above, the amounts corresponding to each Laxmi  
9 Group entity on the Chekhman Email do not include the three  
10 itemized credits C&C Dallas believed it was still owed, nor does  
11 it specify to which account those credits would be applied.  
12 Further, the amounts corresponding to each Laxmi Group entity do  
13 not reflect any of the other credits or payments that may have  
14 been applied to the account between April 7, 2007 and the  
15 Petition Date.

16 The Vendor Ledger for Milistar ("Milistar Ledger"),  
17 submitted by C&C Dallas, lists transactions - invoices, payments,  
18 credits - between June 23, 2004 and the Petition Date. The  
19 remaining balance is \$2,885.98. Additionally, the Milistar  
20 Ledger shows C&C Dallas paid Milistar \$200,000 on May 24, 2005.  
21 However, this payment is not recorded on the Milistar Statement  
22 for the same time period. The Milistar Statement does not record

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23  
24 <sup>14</sup> (...continued)  
25 agreement the buyer agrees to pay the actual attorneys' fees or  
26 reasonable collection agency's fees with interest and the costs  
27 of the court. Net according to terms there after 2% monthly and  
28 24% annually." C&C Dallas has not argued the accrual of interest  
is improper.

<sup>15</sup> Along with the Milistar Statement are individual copies  
of invoices referenced on the Milistar Statement.

1 any transactions, including payments or credits, after May 31,  
2 2005. This conflicts with the Milistar Ledger which shows  
3 several payments, credits, and a few invoices through the end of  
4 October 2006. As a result, Milistar is unable to establish an  
5 undisputed claim over the statutory threshold amount.

### 6 **3. Laxmi Jewel**

7 Laxmi Jewel provides a statement ("Laxmi Statement") listing  
8 unpaid invoices totaling \$707,527.36 (from February 4, 2005 to  
9 June 26, 2006) to evidence its claim against C&C Dallas. Along  
10 with the Laxmi Statement are individual copies of the invoices  
11 and memos listed on the Laxmi Statement. The Laxmi Statement  
12 lists two credits applied to the balance, one in February 2005  
13 and one in June 2006.

14 Laxmi Jewel argues the amount is undisputed based upon the  
15 Chekhman Email. The Chekhman Email has a figure of \$771,616.36  
16 corresponding to Laxmi Jewel. For the reasons stated above, this  
17 amount may not be an accurate reflection of the outstanding  
18 balance owed to Laxmi Jewel as of the Petition Date.

19 C&C Dallas provided the Vendor Ledger for Laxmi Jewel  
20 ("Laxmi Ledger"). It lists invoices, credits and payments from  
21 June 24, 2003 through the Petition Date, with an ending balance  
22 of \$302,904.70. The Laxmi Ledger records the invoices from the  
23 Laxmi Statement, but also records a series of payments and  
24 credits that are not similarly reflected on the Laxmi Statement  
25 from the same time period. During the time frame captured by the  
26 Laxmi Statement, the Laxmi Ledger shows over \$800,000 in credits  
27 and payments going toward the account. As a result, there is an  
28 objective factual dispute as to what amount, if any, is owed by

1 C&C Dallas to Laxmi Jewel. Laxmi Jewel is therefore unable to  
2 establish that it holds an undisputed claim above the statutory  
3 threshold amount.

4 **4. Laxmi Diamond**

5 Petitioning Creditors also assert that Laxmi Diamond holds  
6 an undisputed claim in the amount of \$66,880 allowing it to be  
7 the one Petitioning Creditor needed to sustain the Involuntary  
8 Petition In support of its claim, it submits two invoices, dated  
9 April 4, 2005 and August 4, 2005 totaling \$66,880. Laxmi Diamond  
10 asserts this amount is undisputed because the same amount is  
11 reflected on the Chekhman Email relating to Laxmi Diamond.

12 However, again, as we noted above, the Chekhman Email does  
13 not evidence the indebtedness as of the Petition Date.

14 Furthermore, C&C Dallas's Vendor Ledger for Laxmi Diamond shows  
15 payments and credits of over \$800,000 against the account  
16 resulting in a negative balance of \$20,432.00. As a result,  
17 there is an objective factual dispute as to what amount, if any,  
18 is owed by C&C Dallas to Laxmi Diamond. Accordingly, Laxmi  
19 Diamond has not established it holds an undisputed claim over the  
20 statutory threshold amount.

21 Based upon the evidence, it is clear that each party alleges  
22 conflicting amounts remaining on the Laxmi Group accounts. C&C  
23 Dallas further contends that the credits listed on the Chekhman  
24 Email, like many other credits, were not properly applied to C&C  
25 Dallas's accounts or to the particular Laxmi Group entity's  
26 account for which it was intended. Also, C&C Dallas alleges a  
27 \$340,000 payment to the Laxmi Group as 2004 profits was not  
28

1 applied to accounts after it was discovered the profits were  
2 overstated.

3 The Petitioning Creditors, for their part, counter that "all  
4 of the credits to which the Alleged Debtor was/is entitled were  
5 applied by the respective Petitioning Creditors and were never  
6 protested or objected to by the Alleged Debtor." To that end, it  
7 submitted supplementary declarations by Gajera and Bakul Gajera.  
8 The declarations account only for each of the credits listed on  
9 the Chekhman Email. The declarations show that the three credit  
10 entries listed for C&C Dallas on the Chekhman Email were actually  
11 applied to C&C California's accounts with the Laxmi Group.

12 The Petitioning Creditors argued, in their reply to its  
13 Summary Judgment Motion, that "even if all of the Debtor's  
14 allegations as to unapplied credits, disputed profit sharing,  
15 etc. were accepted as true, the undisputed portion of the  
16 \$707,527.36 indebtedness asserted by Laxmi Jewel Inc. (if not all  
17 of the Petitioning Creditors) would exceed the statutory  
18 threshold." The assumption is that some amount due to the  
19 Petitioning Creditors is undisputed.

20 But the Petitioning Creditors bear the burden of  
21 establishing that there is no genuine issue of material fact that  
22 bears upon the liability or amount of the claim, not merely  
23 asserting that some amount of money (more than the threshold  
24 amount) is due to them as a whole. Under § 303(b), if a bona  
25 fide dispute is evidenced by a material issue of fact about the  
26 amount and liability owed on the petitioning creditor's claim,  
27 the involuntary petition must be dismissed. See In re Lough, 57  
28

1 B.R. 993, 997 (Bankr. E.D. Mich. 1986); In re Busick, 831 F.2d  
2 745, 750 (7th Cir. 1987).

3 At oral argument before the Panel, Petitioning Creditors  
4 asserted Milistar and Laxmi Diamond could each be the one  
5 eligible Petitioning Creditor holding an undisputed claim over  
6 the threshold amount because the Chekhman Email listed the same  
7 amounts due. However, the Chekhman Email does not reflect the  
8 account transactions through the Petition Date. The Vendor  
9 Ledgers detailing the accounting invoices, payments, and credits  
10 for each Laxmi Group entity, submitted by C&C Dallas, shows that  
11 at the Petition Date less than \$3000 was owed to Milistar and a  
12 negative amount was owing to Laxmi Diamond.

13 The Laxmi Group's evidence establishing their claims, the  
14 A/R Table, Milistar Statement and Laxmi Statement, do not reflect  
15 the full accounting between the parties or include all payments  
16 and credits up until the Petition Date. Some credits were  
17 applied to C&C California rather than to C&C Dallas. It is also  
18 unclear to what accounts the approximately \$300,000 in  
19 merchandise (accepted by Gajera at the meeting with Chekhman in  
20 April 2007) was applied.

21 Given all these discrepancies, it is entirely unclear what  
22 amounts, if any, are owing on each of the Laxmi Group's accounts.  
23 Accordingly, we find the Petitioning Creditors failed to meet  
24 their burden of establishing that there was no genuine issue of  
25 material fact about what amounts C&C Dallas owed to each of the  
26 Laxmi Group entities and that they were eligible to commence an  
27 involuntary petition against C&C Dallas. Because we find that  
28 the Petitioning Creditors did not meet their burden under



1 § 303(b)(2), we must dismiss the petition. Accordingly, we do  
2 not need to reach the issue of whether or not C&C Dallas was  
3 generally paying its debts as they became due.

4 **VI. CONCLUSION**

5 There is a genuine issue of material fact as to whether  
6 Petitioning Creditors' claims are subject to a bona fide dispute  
7 as to liability or amount making Petitioning Creditors  
8 ineligible to file a petition under § 303(b). Because the  
9 Petitioning Creditors failed to demonstrate they held undisputed  
10 claims above the statutory threshold amount, we REVERSE the  
11 bankruptcy court's grant of summary judgment and its entry of an  
12 order for relief against C&C Dallas.