

NOV 16 2010

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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NOT FOR PUBLICATION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-09-1207-MkJaD  
 )  
 YUNES ABUD NABILSI, ) Bk. No. LA 08-25451-SB  
 aka Nabilsı Yunes Abud, )  
 )  
 Debtor. )  
 \_\_\_\_\_ )  
 )  
 RAM SAXENA, )  
 )  
 Appellant, )  
 )  
 v. ) **MEMORANDUM\***  
 )  
 YUNES ABUD NABILSI, )  
 aka Nabilsı Yunes Abud, )  
 )  
 Appellee. )  
 \_\_\_\_\_ )

Argued And Submitted On May 20, 2010  
at Pasadena, California

Filed: November 16, 2010

Appeal From The United States Bankruptcy Court  
for the Central District of California

Honorable Samuel Bufford, Bankruptcy Judge, Presiding

Appearances: Appellant Ram Saxena argued pro se

Before: MARKELL, JAROSLOVSKY\*\* and DUNN, Bankruptcy Judges.

\_\_\_\_\_  
\*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.

\*\*Hon. Alan Jaroslovsky, United States Bankruptcy Judge for the Northern District of California, sitting by designation.



1 the court never indicated that the merits of the involuntary  
2 petition were to be tried at the final status hearing. To the  
3 contrary, the bankruptcy court had told the parties that the sole  
4 purpose of that hearing would be to consider service and proof of  
5 service issues. The court had also stated that, if the petition  
6 survived the service issues, the court would further continue the  
7 matter for a later hearing to take evidence and consider the  
8 merits of the petition. Thus, the court's dismissal based on  
9 Saxena's failure to present evidence in support of the merits of  
10 the petition at the service issues hearing raised due process  
11 concerns.

12         These concerns, however, need not be addressed. Despite  
13 appearing and attempting to argue the merits, Nablisi failed to  
14 ever contest the petition's allegations in writing, as required  
15 by Rule 1013, and thus the court should have entered an order for  
16 the relief requested in the petition.

17         Accordingly, we must REVERSE the dismissal order and REMAND  
18 to allow the bankruptcy court to enter an order for relief  
19 against Nabilisi.

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1 **FACTS**<sup>2</sup>

2 Saxena alleges that he is a creditor of Nabils, arising  
3 from a \$50,000 loan Saxena claims he made to Nabils in  
4 connection with a joint business venture between the two parties.  
5 Saxena further claims that his wife lent Nabils an additional  
6 \$25,000. According to Saxena, Nabils has not repaid the money  
7 lent.

8 On September 19, 2008, Saxena commenced an involuntary  
9 bankruptcy against Nabils by filing an involuntary chapter 7  
10 petition pursuant to § 303(b), naming Nabils as the alleged  
11 debtor. Saxena is the only petitioning creditor on the  
12 petition.<sup>3</sup>

13 For some reason that is not apparent, the bankruptcy court  
14 did not issue a summons pursuant to Rule 1010(a) until January  
15 26, 2009. Three days later, on January 29, 2009, Saxena filed a  
16 return of service. The related proof of service suggests that  
17 Saxena personally served Nabils on January 28, 2009, 130 days  
18 after the filing of the petition.

19 \_\_\_\_\_  
20 <sup>2</sup>On December 30, 2009, a motions panel of this court issued  
21 an order waiving the requirement that Saxena as appellant file  
22 formal excerpts of record, but the BAP did require Saxena to  
23 submit copies of the transcripts from the four hearings held in  
24 the bankruptcy court on the involuntary petition. In addition to  
25 the transcripts provided, we have exercised our discretion to  
26 independently review the bankruptcy court's electronic docket,  
27 and the imaged documents attached thereto. See O'Rourke v.  
28 Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58  
(9th Cir. 1989); Atwood v. Chase Manhattan Mrtg. Co. (In re  
Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

<sup>3</sup>Saxena claims that his wife also is a petitioning creditor,  
but Saxena's wife did not sign the petition. In any event, the  
number of petitioning creditors does not change the outcome of  
this appeal.

1 On March 3, 2009, the bankruptcy court held its first  
2 hearing on the involuntary petition, and both parties appeared  
3 pro se. At first, the court apparently believed that Saxena had  
4 not filed his return of service.<sup>4</sup> However, after consulting the  
5 docket, the court located the docket entry referencing Saxena's  
6 filing of the return of service, and the court concluded that the  
7 summons and petition had been served.

8 Both parties argued at the hearing. For his part, Nabilsi  
9 admitted that he received notice of his need to appear at the  
10 March 3 hearing. Nabilsi also made statements indicating that he  
11 had received service of the summons and petition. Further,  
12 Nabilsi attempted to argue the merits. He argued that there were  
13 insufficient grounds for an involuntary bankruptcy, including  
14 noting that there was only a single petitioning creditor.  
15 Nabilsi also argued that the bankruptcy case would adversely  
16 affect his ability to repay Saxena, and that outside of  
17 bankruptcy, he was willing to repay Saxena over time.

18 The bankruptcy court fended off both Nabilsi's and Saxena's  
19 attempts to argue the merits. The bankruptcy court told Nabilsi  
20 that, if he desired to challenge the sufficiency of the petition,  
21 he needed to file a motion to dismiss, and the court told Saxena  
22 that he needed to submit in writing, in advance of the next  
23 hearing, his evidence in support of the involuntary petition, or

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25 <sup>4</sup>The parties' comments at the March 3 hearing indicate that  
26 the bankruptcy court, prior to the hearing, issued a written  
27 tentative ruling suggesting that the matter might be dismissed  
28 based on Saxena not having submitted proof of service. However,  
neither party has provided us with a copy of this tentative  
ruling, nor is it available for us to review on the bankruptcy  
court's electronic docket.

1 the petition would be dismissed. The bankruptcy court set the  
2 next hearing for April 7, 2009.

3 On April 7, 2009, Saxena was represented by counsel, but  
4 Nabilsli again appeared pro se. The main accomplishment of the  
5 April 7, 2009 hearing was its continuance to May 19, 2009,  
6 ostensibly for the purpose of enabling the parties to discuss  
7 settlement. The continuance also might have been a tacit  
8 concession to the fact that, at the time of the second hearing,  
9 neither party had filed any papers in support of their respective  
10 positions. As the April 7 hearing was concluding, Nabilsli again  
11 attempted to orally argue for dismissal of the petition on the  
12 merits. The court again told Nabilsli that any such motion needed  
13 to be filed in writing, and Nabilsli again indicated that he would  
14 do so.

15 By the time of the May 19, 2009, hearing, the matter had  
16 regressed back to the issue of service. Even though the  
17 bankruptcy court had concluded at the March 3 hearing that Saxena  
18 had filed his return of service, and had established service of  
19 the summons and the petition, the bankruptcy court apparently  
20 issued a tentative ruling in advance of the May 19 hearing  
21 suggesting that the petition might be dismissed based on a  
22 failure to timely serve the summons and petition.

23 According to the bankruptcy court:

24 The tentative ruling is to dismiss because you have not  
25 served the summons and the involuntary petition within  
26 the time limit required by the law. . . . What you have  
to do is file proof that you served it within the time  
limits.

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1 Hrg. Transcript (5/19/09) at 2:13-2:17; 3:12:14.<sup>5</sup>

2 At the May 19 hearing, even though the court and Saxena  
3 spent their time discussing the sufficiency of service, Nabils  
4 for his part again argued the merits:

5 Your Honor, he from the beginning have no grounds to  
6 even file this, and his attorney indicated to the Court  
7 the last time that we were here, indicating that they  
8 didn't think that this matter belonged here, and I  
9 really think that it shouldn't be dragged on anymore.  
10 He doesn't have anymore -- he's the only creditor, and  
11 we are not in any financial problems except in the fact  
12 that the merchandise that was purchased with the money  
13 that he loaned us is still sitting in our premises and  
14 we have not been able to sell it. As a result, I  
15 cannot pay him right this moment, but I am willing to  
16 pay him. I, respectfully, like to see that when this  
17 case is dismissed, he only has one creditor, not three,  
18 and the amount owed has no limits. Therefore, I don't  
19 -- the note does not do. I would respectfully ask you  
20 to dismiss the case today if it's possible.

21 Hrg. Transcript (5/19/09) at 5:1-5:16.

22 The court again told Nabils to put his merits arguments in  
23 writing. Meanwhile, after Saxena complained about his counsel's  
24 failure to appear, the court agreed to continue the hearing, this  
25 time to June 2, 2009. The court further specified that, if  
26 Saxena or his counsel did not file proof of timely service of the  
27 summons and petition in advance of the June 2 hearing, the  
28 petition would be dismissed. The court made clear that the  
purpose of the June 2 hearing was to resolve the issue of the

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24 <sup>5</sup>Neither party has provided us with a copy of the tentative  
25 ruling for the May 19 hearing, nor is it available for us to  
26 review on the bankruptcy court's electronic docket. The court  
27 did not identify at the hearing what particular time limit it was  
28 applying. Presumably, it was following Central District of  
California Local Bankruptcy Rule 1010-1, which apparently gives  
the bankruptcy court discretion to sua sponte dismiss if the  
summons and petition are not served within 120 days, as set forth  
in Civil Rule 4(m).

1 timeliness of service, and that if that issue was resolved in  
2 Saxena's favor, an evidentiary hearing would be set in late June  
3 or early July.

4 Neither party filed any papers after the May 19 hearing. At  
5 the June 2 hearing, Nabilsa once again argued that the petition  
6 should be dismissed on the merits:

7 You indicated the last time that I was here that he --  
8 if the case did not have any merits, that you'd be  
9 willing to dismiss it. This gentleman has only one --  
10 he's only one creditor. He wants to do an involuntary  
11 bankruptcy on a small business that is owned by a  
12 family, and it would be a great hardship for us to have  
13 him do that. I respectfully request that you dismiss  
14 the case on the ground that there's no merit to him  
15 getting an involuntary bankruptcy.

16 Hrg. Transcript (6/2/09) at 1:7-1:15.

17 After a colloquy with Saxena regarding his failure to file  
18 any papers showing timely service, the court stated that the  
19 petition would be dismissed based on Saxena having not presented  
20 evidence in support of the merits of the petition:

21 Well, there is no -- no evidence before the Court that  
22 the Debtor has fewer than 12 creditors, and this is the  
23 fourth hearing on this matter. It's time to dismiss  
24 it. The case is dismissed.

25 Hrg. Transcript (6/2/09) at 6:23-7:2. While at the precise  
26 moment of ruling the court focused on the merits of the petition,  
27 a fair reading of the entire transcript of the June 2, 2009  
28 hearing, especially when read in conjunction with the transcript  
from the May 19, 2009 hearing, leads us to construe  
the court's ruling as dismissing the petition on two independent  
grounds: (1) untimely service of process; and (2) lack of  
evidence in support of the merits of the petition.

On June 5, 2009, the bankruptcy court entered its order

1 dismissing the involuntary petition for the reasons stated on the  
2 record, and Saxena timely appealed.

3 **JURISDICTION**

4 The bankruptcy court had jurisdiction under 28 U.S.C.  
5 §§ 1334 and 157(b)(2)(A) and (O), and we have jurisdiction under  
6 28 U.S.C. § 158.

7 **ISSUES**

- 8 1. Did the bankruptcy court properly dismiss the petition based  
9 on untimely service of process?
- 10 2. Did the bankruptcy court properly consider the merits of the  
11 involuntary petition, and properly dismiss the petition  
12 based on Saxena's failure to submit evidence in support of  
13 the merits of the petition, or should it have entered an  
14 order for relief as requested in the involuntary petition?

15 **STANDARDS OF REVIEW**

16 Construction of rules of procedure and the Bankruptcy Code  
17 presents questions of law that we review de novo. Litton Loan  
18 Serv'g, LP v. Garvida (In re Garvida), 347 B.R. 697, 703 (9th  
19 Cir. BAP 2006); Ruvacalba v. Munoz (In re Munoz), 287 B.R. 546,  
20 550 (9th Cir. BAP 2002).

21 Issues regarding the sufficiency of service of process also  
22 are reviewed de novo. Rubin v. Pringle (In re Focus Media), 387  
23 F.3d 1077, 1081 (9th Cir. 2004).

24 **DISCUSSION**

25 Even reading Saxena's appeal brief in the most favorable  
26 possible light, he has not challenged on appeal either ground the  
27 bankruptcy court gave for its dismissal. To the extent his brief  
28 is comprehensible, Saxena only argues on appeal why he thinks,

1 given his perception of the merits, the order for relief should  
2 have been entered.

3 Even though Saxena did not raise on appeal any issues  
4 relating to the propriety of the dismissal, appellate courts have  
5 discretion to consider arguments not raised in appeal briefs  
6 where the issue "is purely one of law and either does not depend  
7 on the factual record developed below, or the pertinent record  
8 has been fully developed." Vasquez v. Holder, 602 F.3d 1003,  
9 1010 n.6 (9th Cir. 2010) (quoting United States v. Berger, 473  
10 F.3d 1080, 1100 n.5 (9th Cir. 2007)). Here, the propriety of the  
11 bankruptcy court's dismissal, on either of the grounds relied  
12 upon by the bankruptcy court, sufficiently meets these criteria:  
13 these are predominantly legal questions that require no further  
14 development of a factual record for their correct determination.<sup>6</sup>  
15 Accordingly, we will exercise our discretion to consider the  
16 issues discussed below.

17 **A. Dismissal based on service defects.**

18 There apparently were two defects in Saxena's service of the  
19 summons and petition. One arose from the fact that Saxena  
20 himself personally served the petition, and the other arose from  
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23 <sup>6</sup>The facts in the record regarding sufficiency of service  
24 and waiver of service are undisputed. These two issues require  
25 us to consider the undisputed facts in light of the correct legal  
26 standard. Such consideration has been held to present a mixed  
27 question of law and fact. Murray v. Bammer (In re Bammer),  
28 131 F.3d 788, 792 (9th Cir. 1997), abrogated in part on other  
grounds by, Kawaauhau v. Geiger, 523 U.S. 57 (1998). In any  
event, we believe it appropriate to exercise our discretion to  
consider these issues in light of the absence of any factual  
dispute or the need for further factual development of the  
record.

1 the fact that Saxena served the summons 130 days after he filed  
2 the petition. We must determine whether the bankruptcy court  
3 properly dismissed the petition on the basis of defective  
4 service. But before we make that determination, we must first  
5 identify the relevant procedural rules that govern the service of  
6 the summons and the involuntary petition.

7 **1. Applicable procedural rules.**

8 The procedural rules governing involuntary petitions  
9 generally mirror adversary proceeding procedures, which in turn  
10 generally mirror the Federal Rules of Civil Procedure. See Mason  
11 v. Integrity Ins. Co. (In re Mason), 709 F.2d 1313, 1318 (9th  
12 Cir. 1983). As stated in Mason:

13 The procedure on a petition for an order for  
14 relief has many of the attributes of "adversary  
15 proceedings" governed by Part VII of the Bankruptcy  
16 Rules. In turn, the rules governing adversary  
17 proceedings are derived largely from the Federal Rules  
18 of Civil Procedure. In a proceeding on an involuntary  
19 petition, the rules contemplate a procedure much like  
20 any other lawsuit: the petition for relief is treated  
21 as a complaint which must be answered by the debtor to  
22 avoid default . . . .

23 Id. (citations omitted). But the bankruptcy rules only  
24 selectively incorporate aspects of federal civil procedure.  
25 Furthermore, procedural requirements can be weakened or  
26 strengthened in the process of incorporation.

27 Rule 1010(a) directs that involuntary petitions, and their  
28 corresponding summonses, should be served "in the manner provided  
for service of a summons and complaint by Rule 7004(a) or (b)."  
In relevant part, Rule 7004(a)(1) specifies that, when the  
plaintiff elects to serve a defendant by personal service, such  
service must be made by a person at least 18 years old, who is

1 not a party to the lawsuit.

2 Rule 7004(a)(1) also makes Civil Rule 4(m) applicable in  
3 adversary proceedings. Civil Rule 4(m) provides that, if the  
4 plaintiff fails to serve a summons and complaint within 120 days  
5 of the filing of the complaint, the court either must dismiss or  
6 must order that service be made within a specified time. Rule  
7 4(m) further provides that, if the plaintiff shows good cause for  
8 the delay, the court must grant an extension of time for service.

9 However, unlike Rule 7004(a)(1), Rule 1010(a) does not on  
10 its face make Civil Rule 4(m) applicable to the service of  
11 involuntary petitions. The final sentence of Rule 1010(a)  
12 supports the notion that Civil Rule 4(m) is inapplicable to  
13 involuntary petitions. The final sentence of Rule 1010(a) states  
14 that Civil Rule 4(1) applies; it would have been easy enough for  
15 the drafters to expressly reference Civil Rule 4(m) at the same  
16 time, but they did not do so.

17 Alternately, if Rule 1010(a) had broadly incorporated Rule  
18 7004(a), by stating that Rule 7004(a) "applies" to involuntary  
19 petitions, it would have been easy for us to conclude that Civil  
20 Rule 4(m) was meant to apply to involuntary petitions, because  
21 Rule 7004(a) expressly incorporates Civil Rule 4(m). However,  
22 instead of using broad language indicating the wholesale  
23 incorporation of Rule 7004(a), Rule 1010(a) more narrowly  
24 provides that service of the summons and petition shall be served  
25 "in the manner provided for service of a summons and complaint by  
26 Rule 7004(a) or (b)." The advisory committee notes accompanying  
27 Rule 1010(a) indicate that the purpose of Rule 1010(a)'s  
28 incorporation of Rule 7004(a) and (b) was to delineate methods of

1 service. The only discussion in the advisory committee notes of  
2 the issue of timing of service is in relation to Rule 1010(a)'s  
3 express application of Rule 7004(e) - which does not include any  
4 firm deadline for service akin to that found in Civil Rule 4(m).

5 Apparently on account of the omission of Civil Rule 4(m)  
6 from the procedures made applicable to involuntary petitions, the  
7 Local Bankruptcy Rules for the Central District of California  
8 ("Local Bankruptcy Rules") provide:

9 LBR 1010-1. INVOLUNTARY PETITIONS

10 The court may dismiss an involuntary petition sua  
11 sponte if the petitioner fails to (a) serve the summons  
12 and petition within the time allowed by FRBP 7004; (b)  
13 file a proof of service of the summons and petition  
14 with the court; or (c) appear at the status conference  
15 set by the court.

16 Local Bankruptcy Rule 1010-1 is less than crystal clear, but  
17 this local rule apparently makes the 120-day service deadline  
18 from Civil Rule 4(m) applicable to involuntary petitions. While  
19 the parts of Civil Rule 4(m) permitting and/or requiring the  
20 court to extend the 120-day service deadline are not explicitly  
21 incorporated into Local Bankruptcy Rule 1010-1, the local rule on  
22 its face makes dismissal permissive rather than mandatory. In  
23 most instances, in the process of exercising its discretion under  
24 Local Bankruptcy Rule 1010-1, a bankruptcy court presumably would  
25 want to consider the propriety of extension of the 120-day  
26 deadline in the same manner that a district court would need to  
27 consider such extension under Civil Rule 4(m).<sup>7</sup>

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28 <sup>7</sup>Saxena's delay in service might not have been entirely due  
to his own inaction. The record reflects that Saxena served the  
summons and the petition two days after the bankruptcy court

(continued...)

1 As alluded to previously, Saxena contravened the service  
2 rules in two ways. First, the record establishes that Saxena  
3 himself personally served Nabilsis, in violation of Rule  
4 7004(a)(1). Second, Saxena did not serve the summons and  
5 petition within 120 days, apparently in violation of Local  
6 Bankruptcy Rule 1010-1.

7 We now turn to the issue of whether Nabilsis waived the  
8 service defects.

9 **2. Nabilsis waived the service defects.**

10 Notwithstanding the defects in Saxena's service of the  
11 summons and petition, we must determine whether Nabilsis waived  
12 the defects. Ineffective or insufficient service of process can  
13 prevent a federal court from acquiring personal jurisdiction over  
14 a defendant. See In re Focus Media, 387 F.3d at 1081. A  
15 judgment or order entered against a defendant is void where the  
16 court lacks personal jurisdiction over the defendant. Thomas P.  
17 Gonzalez Corp. v. Consejo Nacional De Produccion De Costa,  
18 614 F.2d 1247, 1255-56 (9th Cir. 1980).

19 Because of the voidness of judgments and orders entered in  
20 the absence of personal jurisdiction, defendants generally do not  
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22 <sup>7</sup>(...continued)  
23 issued the summons, and that the bankruptcy court did not issue  
24 the summons until 128 days after the petition was filed. Cf.  
25 Abdel-Latif v. Wells Fargo Guard Servs., Inc., 122 F.R.D. 169,  
26 174 (D.N.J. 1988) (stating that good cause for extending the  
27 120-day deadline may exist when there is delay in issuance of a  
28 summons due to factors beyond the plaintiff's control, and citing  
4A C. Wright & A. Miller Federal Practice & Procedure § 1086  
(1987)). However, there is no indication in the record that  
Saxena offered any evidence tending to show that the delay in  
issuance of the summons was due to factors beyond his control.

1 waive a personal jurisdiction argument if they do not take any  
2 action at all in the litigation from which the judgment or order  
3 arose. See id. (affirming order vacating default judgment, even  
4 though defendants did nothing in response to complaint, because  
5 court lacked personal jurisdiction over the defendants).

6 However, defendants can waive objections concerning the  
7 sufficiency of service when they do take action in response to a  
8 complaint. For instance, if a defendant files an answer or a  
9 responsive motion under Civil Rule 12(b) but does not raise in  
10 those papers any objections regarding the sufficiency of service,  
11 those objections are considered waived under the plain language  
12 of Civil Rule 12. See Civil Rule 12(b) and (h)(1); Peterson v.  
13 Highland Music, Inc., 140 F.3d 1313, 1318 (9th Cir. 1998); Roberts  
14 v. Erhard (In re Roberts), 331 B.R. 876, 881-82 (9th Cir. BAP  
15 2005), aff'd, 241 Fed.Appx. 420 (9th Cir. 2007); McCurdy v.  
16 American Bd. of Plastic Surgery, 157 F.3d 191, 195 (3d Cir.  
17 1998).

18 Failure to raise the service defects in either an answer or  
19 a responsive motion is not the only way to waive such objections.  
20 A defendant also may waive them "as a result of a course of  
21 conduct pursued . . . during litigation." Peterson, 140 F.3d at  
22 1318. In other words, even when Civil Rule 12(h)(1) is  
23 inapplicable because the defendants filed no answer or response  
24 to the complaint, a defendant can waive its objections and  
25 defenses concerning the adequacy of service by engaging in a  
26 course of conduct in the litigation inconsistent with a claim  
27 that the court lacks personal jurisdiction over the defendant.  
28 See Trustees of Central Laborers' Welfare Fund v. Lowery,

1 924 F.2d 731, 732-33 (7th Cir. 1991); Broadcast Music, Inc. v.  
2 MTS Enterprises, Inc., 811 F.2d 278, 281 (5th Cir. 1987). See  
3 generally In re Focus Media, 387 F.3d at 1082-84 (holding that  
4 counsel's and defendant-client's activity in underlying  
5 bankruptcy case established that counsel was "impliedly  
6 authorized" to accept service on behalf of his client, thereby  
7 defeating client's insufficient service arguments).

8 MTS Enterprises is particularly instructive. In litigation  
9 against a corporation and two of its shareholders, all three  
10 defendants were represented by the same counsel, who duly  
11 received notice of all relevant matters taking place in the  
12 litigation, but there was an issue as to whether the two  
13 shareholders had been formally served with process. Counsel  
14 attended a pretrial conference on behalf of all three defendants,  
15 participated in settlement negotiations on behalf of all three  
16 defendants, and moved to withdraw as counsel for all three  
17 defendants. The two shareholders never responded to the  
18 plaintiff's complaint, and the first time the shareholders'  
19 counsel raised the service issue was at a hearing on the  
20 plaintiff's motion for entry of default judgment. After the  
21 bankruptcy court entered the default judgment against the  
22 shareholders and denied the shareholders' motion to vacate the  
23 default judgment under Civil Rule 60(b), the shareholders  
24 appealed.

25 The MTS Enterprises court rejected the shareholders'  
26 argument on appeal regarding plaintiff's failure to properly  
27 serve them. The MTS Enterprises court acknowledged that a lack  
28 of personal jurisdiction would render the default judgment void,

1 and acknowledged that there was no waiver under Civil Rule  
2 12(h)(1) because the shareholders never filed any sort of  
3 responsive pleading. The MTS Enterprises court nonetheless  
4 concluded that the shareholders had waived the service defects:

5 The Federal Rules do not in any way suggest that a  
6 defendant may halfway appear in a case, giving  
7 plaintiff and the court the impression that he has been  
8 served, and, at the appropriate time, pull failure of  
9 service out of the hat like a rabbit in order to escape  
10 default judgment. To countenance this train of events  
11 would elevate formality over substance and would lead  
12 plaintiffs to waste time, money, and judicial resources  
13 pursuing a cause of action. Indeed, that waste would  
14 result here if we void the district court's judgment  
15 for lack of service of process. Nor is there any  
16 indication in the record that appellants, the two  
17 shareholders of the corporate defendant, were unaware  
18 of the suit against them. . . . Thus, we hold that [the  
19 shareholders] . . . through the actions of their  
20 counsel, voluntarily appeared in this case and waived  
21 the defense of insufficiency or failure of service of  
22 process.

23 Id. at 281.

24 The nature and extent of Nabilsi's conduct, here, is  
25 comparable to that of the shareholders in MTS Enterprises. By  
26 the time of the bankruptcy court's dismissal of Saxena's  
27 petition, over four months had elapsed since service of the  
28 summons and the petition, so there was ample time for Nabilsi to  
give some indication of his desire to contest the court's  
personal jurisdiction, but Nabilsi never did so. More  
importantly, Nabilsi participated in all four of the hearings  
before the bankruptcy court on the involuntary petition, and he  
gave every indication at these hearings that he considered the  
court to have personal jurisdiction over him. He repeatedly  
raised arguments at these hearings based on the merits of the  
involuntary petition.

1           Additionally, in our case, as in MTS Enterprises, the  
2 responding party had ample notice of the litigation. Here,  
3 Nabilsli admitted in open court that he received notice of the  
4 initial hearing and made further statements indicating that he  
5 received the summons and complaint notwithstanding any service  
6 defects.<sup>8</sup>

7           We recognize that we are dealing with service of a summons  
8 and an involuntary bankruptcy petition, rather than with service  
9 of a summons and complaint, and that the court here ultimately  
10 dismissed the petition based on the insufficient service of  
11 process. However, we conclude that the similarity of the conduct  
12 of the responding parties is key, and that our analogy to MTS  
13 Enterprises is apt and appropriate. The Federal Rules of  
14 Bankruptcy Procedure impose a duty on alleged debtors to  
15 expeditiously come forward with any objections and defenses they  
16 have to an involuntary petition filed against them. See  
17 § 303(h); Rules 1011, 1013. This duty is analogous to what is  
18 required of defendants in ordinary federal civil litigation.  
19 Further, there is no difference in the harm that alleged debtors  
20 can cause when they act in the litigation as if the court has

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21  
22           <sup>8</sup>In both MTS Enterprises and in the appeal before us,  
23 personal jurisdiction is not complicated by the attempted  
24 invocation of longarm jurisdiction. Both MTS Enterprises and our  
25 case only involve defective service issues. At least one circuit  
26 court has opined that, when the issue of personal jurisdiction  
27 only implicates a problem of defective service, waiver by conduct  
28 requires less of a showing. Datskow v. Teledyne, Inc., 899 F.2d  
1298, 1303 (2d Cir. 1990) (" . . . this is not a case where a  
defendant is contesting personal jurisdiction on the ground that  
longarm jurisdiction is not available. We would be slower to  
find waiver by a defendant wishing to contest whether it was  
obliged to defend in a distant court.").

1 personal jurisdiction over them, from the harm a defendant causes  
2 when it keeps arguments regarding service defects in its hip  
3 pocket while arguing the merits of the case. In both contexts,  
4 such conduct can lead to a waste of judicial resources and  
5 needless incurrence of legal costs by the parties.

6 Accordingly, we hold that, through his course of conduct in  
7 the litigation, Nabilsi waived any defects in service of the  
8 summons and the petition.

9 **3. Impact of waiver on dismissal based on service defects.**

10 In light of Nabilsi's waiver of the service defects, the  
11 bankruptcy court erred when it dismissed the petition based on  
12 those defects. Roberts and McCurdy, supra, support this  
13 conclusion. In both Roberts and McCurdy, the trial court was  
14 faced with a failure to timely serve a summons and complaint in  
15 violation of Civil Rule 4(m). On appeal, both Roberts and  
16 McCurdy concluded that the defendants' failure to raise the  
17 service defects in their first responsive pleading waived the  
18 service defects pursuant to Civil Rule 12(h)(1). In ruling that  
19 the district court erred in dismissing the complaint based on  
20 untimely service, the McCurdy court explained that the Civil Rule  
21 12(h)(1) waiver had primacy over the violation of Civil Rule  
22 4(m):

23 On its face, the language of Rule 4(m) appears to be  
24 inconsistent with Rule 12's waiver scheme. It provides  
25 that where service is not effected on a defendant  
26 within 120 days of the filing of the complaint, the  
27 court "upon motion or on its own initiative . . . shall  
28 dismiss the action without prejudice as to that  
defendant." Fed.R.Civ.P. 4(m). The district court  
here concluded that an objection to the timeliness of  
service was governed by the "clear, mandatory time  
requirements set forth in the Rule," so that Rule 4(m)  
effectively overrides the waiver provisions of Rule

1 12(h). Though an arguably plausible resolution, courts  
2 and commentators addressing the apparent tension  
3 between Rules 4(m) and 12(h) have unanimously concluded  
4 that Rule 4(m) does not trump Rule 12(h) and that an  
objection that service is untimely under Rule 4(m) is  
subject to waiver by the defendant if not made in  
compliance with Rule 12.

5 McCurdy, 157 F.3d at 194, 95 (citations omitted). Accord,  
6 Roberts, 331 B.R. at 881-82.

7 Admittedly, neither Civil Rule 4(m) nor Civil Rule 12(h)(1)  
8 are directly implicated in our appeal. Rather, we are presented  
9 here with a similar tension between violation of the deadline for  
10 service imposed by Local Bankruptcy Rule 1010-1, and the waiver  
11 of service defects by course of conduct as recognized in  
12 Peterson, Lowery and MTS Enterprises.

13 But the difference in applicable rules does not justify a  
14 different result. Indeed, the facially-binding nature of Civil  
15 Rule 4(m), which gave the McCurdy court pause, is absent here;  
16 rather, the bankruptcy court's dismissal under Local Bankruptcy  
17 Rule 1010-1 was purely discretionary. In the face of purely  
18 discretionary grounds for dismissal, the bankruptcy court should  
19 have given primacy to Nabilsi's waiver of the service defects.

20 Accordingly, the bankruptcy court erred when it dismissed  
21 the petition based on untimely service of process.

22 **B. Dismissal on the merits.**

23 Section 303(h) directs the bankruptcy court to hold trial  
24 weighing the merits of the involuntary petition only if the  
25 alleged debtor (or another interested party) has contested the  
26 petition.<sup>9</sup> See also 2 COLLIER ON BANKRUPTCY ¶ 303.20[2] (Alan N.

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27 <sup>9</sup>Section 303(h) provides in full:  
28

(continued...)

1 Resnick & Henry J. Sommer, eds., 15th ed. rev. 2010)  
2 ("Importantly, section 303(h) provides that if a petition is not  
3 timely controverted, the order for relief will be entered.").

4 The bankruptcy rules further flesh out the requirements of  
5 the statute. In relevant part, Rule 1011(b) provides: "Defenses  
6 and objections to the petition shall be presented in the manner  
7 prescribed by Rule 12 F.R.Civ.P. and shall be filed and served  
8 within 21 days after service of the summons . . . ." <sup>10</sup> Rule  
9 1013(a) reiterates the direction in § 303(h) that the bankruptcy  
10 court may consider the merits of the petition only if the  
11 petition has been timely contested.

12 Here, material issues regarding the merits of the petition  
13 are evident in the record: issues regarding both the sufficiency

14 \_\_\_\_\_  
15 <sup>9</sup>(...continued)

16 (h) If the petition is not timely controverted, the  
17 court shall order relief against the debtor in an  
18 involuntary case under the chapter under which the  
19 petition was filed. Otherwise, after trial, the court  
shall order relief against the debtor in an involuntary  
case under the chapter under which the petition was  
filed, only if--

20 (1) the debtor is generally not paying such  
21 debtor's debts as such debts become due unless  
22 such debts are the subject of a bona fide dispute  
as to liability or amount; or

23 (2) within 120 days before the date of the filing  
24 of the petition, a custodian, other than a  
25 trustee, receiver, or agent appointed or  
26 authorized to take charge of less than  
27 substantially all of the property of the debtor  
for the purpose of enforcing a lien against such  
property, was appointed or took possession.

28 <sup>10</sup>On December 1, 2009, a minor amendment to Rule 1011(b)  
took effect, which amendment changed the time to respond from  
20 days to 21 days.

1 of the allegations contained in the petition and regarding  
2 whether Saxena at trial could meet his evidentiary burden as to  
3 the alleged grounds for entry of the order for relief. For  
4 instance, the petition on its face did not contain the requisite  
5 allegation that Nabilsi was a person against whom an order for  
6 relief could be entered, as contemplated by § 303(a) and Official  
7 Form B5. Further, the parties' statements at the hearings  
8 suggested that there was a factual issue regarding the overall  
9 number of Nabilsi's creditors, which is relevant for determining  
10 whether the involuntary petition required only one petitioning  
11 creditor, or a minimum of 3 petitioning creditors. See § 303(b).

12 But the above-referenced merits issues only properly could  
13 come into play if Nabilsi timely contested the petition, by  
14 filing an answer or responsive motion. See § 303(h); Rules 1011,  
15 1013; see also In re Mason, 709 F.2d at 1314 (explaining that the  
16 defense regarding the number of petitioning creditors was not  
17 jurisdictional and was waived by alleged debtor's failure to  
18 timely file an answer raising the defense); Dahl v. Key (In re  
19 Key), 209 B.R. 737 (10th Cir. BAP 1997) (reversing bankruptcy  
20 court dismissal of petition based on alleged debtor's failure to  
21 timely contest petition).

22 In particular, Rule 1013(b) states that:

23 If no pleading or other defense to a petition is filed  
24 within the time provided by Rule 1011, the court, on  
25 the next day, or as soon thereafter as practicable,  
shall enter an order for the relief requested in the  
petition.

26 In sum, because Nabilsi never filed a written response to  
27 the petition, the bankruptcy court should not have considered the  
28 merits of the petition; rather, it should have taken steps to

1 enter the order for relief based on Nabilsi's default.  
2 Accordingly, the bankruptcy court erred when it dismissed the  
3 petition based on Saxena's failure to submit evidence in support  
4 of the merits of the petition.<sup>11</sup>

5 **CONCLUSION**

6 For the reasons set forth above, the bankruptcy court erred  
7 when it dismissed Saxena's petition. Therefore, the order of  
8 dismissal is REVERSED, and this matter is REMANDED for entry of  
9 the order for relief against Nabilsi.

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27 <sup>11</sup>Because we are reversing the dismissal order on other  
28 grounds, we need not reach the constitutional issue of whether  
Saxena's due process rights were violated. See Meinhold v. Dept.  
of Defense, 34 F.3d 1469, 1474 (9th Cir. 1994).