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**WRITTEN DECISION–
NOT FOR PUBLICATION**
United States Bankruptcy Court, S.D. California.

IN RE: KP3 ENDEAVORS, INC., Alleged Debtor,

BANKRUPTCY NO: 18–00007–MM7
|
April 9, 2018
|
April 10, 2018
|
April 11, 2018
|
Dated: April 30, 2018

Attorneys and Law Firms

Fred Neufeld, Stradling Yocca Carlson & Rauth, Santa Monica, CA, for Alleged Debtor

Thomas B. Gorrill, San Diego, CA, for Petitioning Creditor

MEMORANDUM DECISION RE
TRIAL ON INVOLUNTARY PETITION

MARGARET M. MANN, JUDGE United States Bankruptcy Court

***1** Petitioning creditors, the Bonnie L. Pancheri Trust ("Trust") and REPS Investments, Inc. ("REPS1") filed a Chapter 7 involuntary petition against Alleged Debtor KP3 Endeavors, Inc. ("KP3") on January 2, 2018 at 5:01 p.m. JBH, Inc., dba San Diego Computer Consulting ("SDCC") joined the petition on March 2, 2018 (collectively the Petitioning Creditors are referred to as the "PCs"). KP3 contested the petition, discovery ensued, and a three-day trial on the matter was held April 9, 10, and 11, 2018.

Before trial, the court considered the PCs' trial brief, declarations, and attached exhibits from Thomas, Bonnie, Ryan, and Erik Pancheri,[1] as well as from SDCC's Vice–President Glen Jaffe. It has also considered KP3's 80–page trial brief, request for judicial notice, admitted exhibits and deposition designations, together with the declarations from Robert Karr and Adam Meislik (KP3's financial expert). The court did not consider the testimony of Fred Neufeld, KP3's state court attorney, finding it irrelevant, but took judicial notice of a complaint and an amended complaint filed in state court by Erik and Ryan attached to the Neufeld declaration. At trial, the court heard testimony from all of the parties but Bonnie, whom KP3 chose not to cross-examine.

1 All Pancheri family members will be referred to by their first names for clarity and without disrespect.

Based on its consideration of this evidence, the court makes the following findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052. A finding of fact may be considered a conclusion of law where appropriate and vice versa.

I. Credibility

The court found the testimony of Ryan, Tom, and Jaffe to be credible. Karr's and Meislik's testimony was frequently contradicted by the record or earlier testimony and was not credible in certain aspects. Erik's testimony regarding his concern that John and Karr might flee the country was also not credible. Erik was also impeached on matters pertaining to his dispute with KP3, but the court need not make credibility findings on these issues, since it is deferring the matters to state court for resolution.

The relevance of these credibility findings is discussed in regard to the specific issues.

II. Findings of Fact

A. KP3's Business

KP3 runs a wholesale ticket brokerage business that is both solvent and profitable, although its revenues declined $10 million in the fourth quarter of 2017 as compared to the third quarter. Its 2017 overall revenues exceeded $70 million, and its earnings were $10,725,184. As of the petition date, KP3 had assets in the amount of $19,404,489, no secured indebtedness, and liabilities of $11,699,724, for a net worth of approximately $8 million. All of its debt except approximately $460,000 was owed to insider entities. KP3's answer to the petition listed 71 creditors including insiders, all of which were listed as current except for the debts owed to the PCs.

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Meislik provided a different number at trial, identifying 114 individual creditors, *including* insiders and employees, with 72 creditors *excluding* insiders and employees, on the petition date. Although KP3 operates through extensive use of credit cards, its expert admitted that those transactions were not financing but constituted "a payment clearing mechanism." Some of the credit card companies are listed on the list of debts to the extent there were any unpaid bills outstanding on the petition date.

***2** KP3 had approximately fifteen employees operating from three locations in two states as of the petition date. Decl. Ryan, ¶ 4; Decl. Erik, ¶ 5. Before Erik and Ryan were terminated by KP3 on October 24, 2017, Karr worked in KP3's Orange County office and John, Ryan, and Erik worked in the San Diego office.

B. Formation of KP3

KP3 was formed effective as of January 18, 2017 out of four competing businesses owned by the insiders John, Karr, Erik and Ryan: REPS1, Premier Enterprises, Inc. ("Premier"), SD Endeavors, Inc. ("Endeavor"), and Bob K. Inc. REPS1 was formed in August 2015 by Erik and Ryan, with assistance from their (and John's) uncle, Ernest Ryder. Ryder is an attorney and advised all of KP3's principles in all their business endeavors. Ryder advised REPS1 to establish ownership through an Employee Stock Ownership Plan Trust ("ESOP"), whose beneficiaries are REPS1's current and former employees —primarily Erik and Ryan. Tom, Erik, and Ryan's father was CFO of REPS1 and gave it corporate and business advice. Decl. Ryan, ¶ 2; Decl. Erik, ¶ 3.

Before forming Premier with John Pancheri (Erik and Ryan's cousin), Karr operated the event ticket brokerages Endeavor and Bob K. Inc. Decl. Robert, ¶ 7. All of these businesses, including REPS1, began as a ticket brokerage businesses, although REPS1's focus was on selling concert and performance event tickets wholesale. Decl. Ryan, ¶ 2; Decl. Erik, ¶ 3. Premier, Endeavor, and Bob K.'s focus was on sports tickets. While Karr disputed that this was the entities' "focus" at trial, he later admitted at least 80% of Bob K. Inc.'s business was from the purchase and sale of sports event tickets.

As with REPS1, based on Ryder's advice, KP3 is 100% owned by an ESOP. KP3's ESOP is managed by two trustees (Karr's uncle and John's sister, Katie). Decl. Ryan, ¶ 8; Decl. Karr, ¶ 5. Erik and Ryan have asserted a right to a 25% interest in KP3 through the ESOP, which they claim was promised to them by John and Karr. Decl. Ryan, ¶ 35. When Erik and Ryan were terminated from KP3, they did not receive this interest.

At the time of KP3's formation, Karr, John, Ryan, and Erik were named directors. Karr, Ryan, and Erik were also appointed as officers, with Karr being appointed President and Chief Financial Officer, until Ryan assumed that role. At incorporation, KP3's board authorized KP3 to enter into the financing agreements discussed below and employment agreements with Karr, John, Ryan, and Erik effective February 1, 2017. Ex. RP–1, pgs. 10–11 ("Employment Agreements"). These employment agreements had a one-year term, terminable on 10–days' notice, and required each of the principals to devote their exclusive efforts to KP3. The Employment Agreements did not contain any other provisions preventing competition after termination, nor was there any integration clause with any other agreement. In fact ¶ 9 stated that the written terms constituted the entire agreement regarding its subject matter.

C. Financing

1. REPS1 LOC

Fourteen days after KP3 was formed, REPS1 extended KP3 a Short–Term Line of Credit Optional Advance Promissory Note ("Feb. LOC") on February 1, 2017. Under the LOC, REPS1 advanced KP3 $1,950,000 between February 2, 2017 and May 1, 2017. The Feb. LOC had a maturity date of December 1, 2017 and an acceleration clause. Decl. Ryan, ¶ 6, 9; Ex. RP–2; Ex. H. The Feb. LOC was unsigned but was authorized at KP3's first board meeting on January 18, 2017 by a general resolution signed by all of the principals. Quarterly installment payments at 5% were due under the LOC and KP3 made the first payment on May 1, 2017. KP3 simultaneously entered into a line of credit agreement with Premier, as to which $4.4 million was outstanding on the petition date.

***3** The Feb. LOC was renewed on July 10, 2017 with a Renewal Short–Term Line of Credit (Optional Advance Promissory Note) ("LOC"), which provided

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for a $500,000 principal paydown, and a $13,463.01 interest payment, leaving the unpaid principal balance at $1,450,000. Like the Feb. LOC, this document was not signed, but was authorized by a unanimous general board resolution (this one dated July 10, 2017), including Erik and Ryan as directors of KP3. Ex. P. The LOC changed the terms of the Feb. LOC by increasing the interest rate to 8% interest, requiring quarterly installments as of October 10, 2017, and extending the maturity date to April 10, 2018.

2. The Parents' Trust's Notes

The Thomas J. Pancheri Trust lent $2 million to KP3 under two notes in March 2017 (about a month after KP3's formation). One note was paid off before the petition date. A second March 1, 2017 note ("Note") provided for quarterly interest payments at 8% and a maturity date of December 31, 2017. The Note did not prevent assignability and contained an attorneys' fees clause.

As part of an equalization payment owed pursuant to his divorce from Bonnie, Tom assigned the Note to the Trust on April 5, 2017. Decl. Tom, ¶ 5; Ex. TP–2. KP3 made interest payments to Tom on both notes totaling $13,333.33 in May and June 2017. Decl. Tom, ¶ 6. Tom forwarded half of this amount to Bonnie pursuant to the assignment. Decl. Tom, ¶ 7. In June 2017, Tom sent an email to Karr asking him to make interest payments on the Note assigned to Bonnie to her. Decl. Tom, ¶ 8; Decl. Karr, ¶ 16. In apparent response to this communication, KP3's books and records began listing the owner of the Note as the Trust. For some reason, KP3 then made monthly interest payments directly to Bonnie individually. Decl. Bonnie, ¶ 7. These have continued post-petition after a short hiatus in payments, although the principal has not been paid.

3. REPS1 Purchase Agreement

As part of their effort to make KP3 a success and enable Karr, John, Ryan, and Erik to fully devote their efforts to KP3, REPS1, Premier, and Endeavor, each sold their ticket inventory to KP3 under various purchase agreements dated March 1, 2017. Under its Purchase Agreement with KP3, REPS1 transferred complete ownership rights to $3,565,882.88 worth of tickets to KP3. Purchase Agreement, ¶ 4. The Purchase Agreement, which was signed by the parties, is not integrated with any other agreement. The terms of the Purchase Agreement also preclude any parties other than the signatories from gaining any rights or remedies from its provisions. Purchase Agreement, ¶ 4, 9. Ex. RP–4, p. 2; Ex. 9. The purchase price was payable in three installments, and while the first two payments were made, the third, in the amount of $2,139,529.72 (60% of the purchase price) due November 30, 2017, was not. Ex. RP–4, pg. 2. In contrast, KP3 has paid Premier in full under that ticket purchase agreement. Decl. Ryan, ¶ 25.

KP3 sold all the tickets it acquired from REPS1 at a profit with the exception of those related to cancelled events. The cancelled events issue was only recently brought to Ryan's attention and may entitle KP3 to an unliquidated credit of perhaps $250,000.

D. The Dispute Between KP3 and Erik and Ryan

In mid–September 2017, disputes arose among KP3's principals because Erik and Ryan felt they were devoting more time and resources to KP3 than John and Karr. Decl. Ryan, ¶ 26; Decl. Erik, ¶ 11. That Erik and Ryan were hard workers is not disputed. Motivated by frustration with the endeavor, Erik and Ryan approached Karr and John about unwinding KP3. With Ryder's assistance, negotiations ensued to unwind the relationship. Erik and Ryan proposed that KP3 buy them out of the business for $1 million, or alternatively permit Erik and Ryan to buy Karr's and John's interests in KP3 from them. In either event, Erik and Ryan intended to form a new business and wind down KP3. The negotiations continued for a few weeks, but it soon became clear that a resolution would not be reached. The parties' fundamental objectives were inconsistent. Karr and John wanted to preserve the status quo and keep Erik and Ryan employed by KP3, while Erik and Ryan had determined to end their relationship with John and Karr.

***4** To prepare for what they considered to be an inevitable separation, Erik and Ryan, with Tom's and Ryder's assistance, prepared in September to form a new company. Ryan understood his actions had to be limited to only preparing to separate from Karr and John, and

that he could not actually separate until the negotiations were complete.

Despite this understanding, Erik and Ryan's preparations to leave came to involve KP3 employees and, in part, use of KP3's assets. Karr learned of these actions in early October when he searched Erik's KP3 computer. He uncovered messages exchanged on a SLACK instant messaging program among Erik and Ryan and KP3 employees Nick Totagrande, Eric Severn, and Chris Keys, and KP3's independent contractor, Scott Graves. The topics of these messages suggested anti-competitive conduct such as permitting KP3 employees to take time off, directing employees not to buy tickets, creation of vendor lists, and creation of software for their new business. Erik and Ryan also worked with Tom to establish business credit cards in the names of proposed employees for their new business. After Erik and Ryan were fired, KP3 employees, who were Erik and Ryan's close friends, contacted them for jobs because of poor conditions at KP3. Former KP3 employees are currently employed at REPS2.

Not until November 8, 2017, fifteen days they were fired by KP3, did Erik and Ryan incorporate REPS & Company, Inc. ("REPS2") which operates a ticket brokerage business. While at trial Karr testified that he found articles of incorporation for the entity TEAM REPS, Inc. in Erik's office in October 2017, a Statement of Information for the entity was not filed with the California Secretary of State until February 26, 2018. Ryan also testified that this entity was not a ticket brokerage business. REPS2's Statement of Information was also not filed with the California Secretary of State until February 6, 2018. Ex. AT. Tom is the CFO of this REPS2.

Exactly when and to what extent Erik and Ryan's new ticket brokerage business began actually competing with KP3, instead of just preparing to compete, is beyond the scope of this ruling. So too is whether Ryan and Erik's actions caused damages to KP3, or justified the decision to terminate Erik and Ryan as employees and remove them from KP3's board of directors. Importantly, neither Erik nor Ryan is a petitioning creditor, and amounts they claim are owed to them were not listed on KP3's schedule of debts.

These disputes instead will be resolved in the lawsuit KP3 filed against Erik and Ryan (the "State Court Litigation"), which alleges breaches of their fiduciary duties and unfair competition in the complaint that was later amended on November 14, 2017. Erik and Ryan have prepared a cross-claim against KP3 that has not been filed.

What is germane here is that Bonnie had no role in any of these actions and Tom's role was minimal. The parents' lack of involvement in the employment disputes is also reflected in the fact that none of the PCs are named as parties in the State Court Litigation. Although Tom assisted Erik and Ryan in setting up the businesses and in obtaining credit card and bank accounts in one of his companies' names, there is no evidence the cards were activated during Erik and Ryan's employment with KP3; that the employees were contacted regarding the cards; or that Tom contacted any employees in any manner. The employee names identified by Erik and Ryan were to be added to the cards if they were later activated. While setting up cards in employees' names is an unusual business practice in a general sense, this is apparently a normal business practice for this industry per Meislik's testimony.

E. The Defaults by KP3 on the PCs' Debts

***5** After Erik and Ryan were fired, Karr apparently decided not to pay REPS1's debts because of the pending disputes with them. KP3 did not make the October payment on the LOC. While Ryan emailed Karr and requested the $2,139,529.72 payment due under REPS1's Purchase Agreement be wired to a Wells Fargo bank account on November 28, 2017, this payment too was not made. Ex. RP–5. Instead, this payment was placed in a segregated bank account. In response, REPS1 then began consulting with a bankruptcy attorney about remedies including filing an involuntary petition against KP3.

Karr then decided not to pay the Trust either. On December 27, 2017, he established another bank account to hold funds due under the Note that was scheduled to mature on December 31, 2017. Apparently fearing that KP3 would not pay the Trust the Note on maturity, Tom consulted with Bonnie in mid–December, and she authorized Tom to file an involuntary petition with REPS1 if the Note was not timely paid. Decl. Tom, ¶ 10; Decl. Bonnie, ¶ 14. But Bonnie preferred payment and

sent wiring instructions to KP3 on December 28, 2017 to facilitate the payment. Decl. Tom, ¶ 11; Decl. Bonnie, ¶ 9; Ex. BLPT–2. She intended to re-loan the funds to her sons' new business, REPS2, as it needed financing. REPS1 and Bonnie waited until 5:01 p.m. on January 2, 2018 to file the involuntary petition. This was after the close of business the first business day after the Note became due. The wire of course had not been sent since KP3 had already deposited the funds into the segregated KP3 account established expressly to hold payment due to the Trust.

The court does not believe Karr's testimony that KP3 did not repay the Note when due because KP3 did not know who to pay until he received a formal assignment. Had that been the case, Karr could have responded to the email with a request for the formal assignment. But when he received Bonnie's December 28 email he already had plans not to pay the Trust because he had already established the segregated account for the Trust. Although KP3 did not receive the formal assignment until after the petition was filed, it had been instructed by both Tom and Bonnie of the assignment, and had been making interest payments to Bonnie, not Tom, for some time. The segregated account KP3 opened for the Note was also in the name of Trust, and the Trust was listed as the holder of the Note in KP3's books and records per Meislik's testimony. For that reason, Meislik's report listed the Trust as the holder of the Note.

The only credible explanation for KP3 not paying the Note was to prevent Erik and Ryan from competing with KP3 by starving it of resources. This conclusion is supported by Karr's deposition testimony and his January 8, 2018 letter advising that KP3 will win a court order "preventing [Erik and Ryan] from operating any business that buys and sells tickets." Ex. RP–9. Even during the bankruptcy, payment on the Note has been held hostage. While KP3 did offer to pay the Note after the bankruptcy was filed, payment was conditioned upon dismissal of the petition.

F. SDCC

SDCC is a computer consulting company located in San Diego, California. Its Vice–President is Glen Jaffe. Decl. Jaffe, ¶ 2. SDCC began providing REPS1 computer system maintenance in 2016. Decl. Jaffe, ¶ 4. In May 2017, KP3 hired SDCC to provide installation services for their Mission Valley office. Decl. Jaffe, ¶ 5. This led to SDCC providing KP3 ongoing services and maintenance in exchange for $387 per month. Decl. Jaffe, ¶ 6 and 15. This monthly fee was automatically paid by an American Express credit card Ryan had provided. Ex. AG. SDCC's credit card authorization form allowed payment by check, and required a new authorization form if the credit card provided changed any of its terms.

***6** After Ryan was fired in October 2017, Jaffe emailed Karr on November 1, 2017 regarding payment of that month's invoice. Ex. AH. Jaffe mentioned KP3 had previously paid SDCC through an auto-pay, and suggested KP3 could fill out another auto pay request or pay the invoices online. Ex. AH. Karr responded that he would call Jaffe to "go over everything." Ex. AH. On November 8, 2017, SDCC used a card number Karr had provided and KP3's November bill was paid in full.

For some reason, whether because KP3 did not return a formal authorization form, or otherwise, SDCC did not charge KP3's new card the December and January payments. Decl. Karr, ¶ 33. This left an undisputed debt of $387 due on the petition date per KP3's answer to the petition. Meislik also described the payment in his report as "Late," meaning it had not been paid when it came due. KP3 thus made a judicial admission that SDCC had a claim on the petition date, which persuaded it to withdraw its challenge to SDCC's status as a petitioning creditor at trial.

G. KP3's Payment of Debts

As of the petition date, it is undisputed that KP3 was paying all of its debts when they came due other than those debts due to PCs. The PCs' debts total $4,639,530 (Decl. Meislik, ¶ 13), or about 40% of the total KP3 debts per Meislik's balance sheet. Of the PCs' debts, only the LOC was not due in full at the petition date.

It is also undisputed that KP3 is solvent, liquid, and profitable. *See* Meislik Report pg. 3. As to solvency, KP3 has liabilities of $11,699,724 as of January 5, 2018, against assets of $19,404,489, with equity of $7,704,766. Most of its debt is insider debt owed to REPS1, the Trust, or entities owned or controlled by Karr and/or John. The only trade debt on the petition date was owed to credit

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card holders in the amount of $460,194. Of the trade debt, only seven payments were paid late in 2017. Ex. 2A, pp. 12–14.

Although these facts are undisputed, other aspects of Meislik's analysis were not credible. Meislik's inclusion of the daily credit card payments in his calculation of what debts were not being paid when due, was contradicted by his own report which described these payments as functioning as only a payment mechanism rather than actual debt payments. The court thus rejects his conclusions that upwards of 90% of the debts were paid as they become due. Meislik was also not credible when he strayed from his expertise and opined that disputed debts should be excluded from the total debts not being paid. The court's legal analysis of this issue follows.

Although KP3 still has access to cash to pay its debts, its liquidity has been adversely affected by its purchase of "commercial real estate in California for $3 million cash and a second property in South Dakota for $341,425." Ryan Decl., ¶ 37. If KP3 chooses to pay $6.6 million owed to insiders Bob K. Inc., Don Karr, Premier, and Endeavor over the unpaid debts to REPS1 and the Trust, there will not be sufficient cash to pay the PCs' claims. Decl. Ryan, ¶¶ 38 and 39.

Although KP3 was profitable on the petition date, it is also experiencing financial problems that could affect its financial condition in the future. Its income in the fourth quarter of 2017 dropped by $10,000,000 over the previous quarter. Meislik had no explanation why.

III. Legal Issues

A. The PCs' Claims Are Not Subject to a Bona Fide Dispute as to Liability or Amount

KP3 has 114 individual creditors, including insiders and employees. Decl. Meislik, ¶ 21. Because KP3 has more than twelve total creditors, three or more creditors are required to commence an involuntary petition. *See* 11 U.S.C. § 303(b)(2) (permitting one or more creditors to file an involuntary petition only where an entity has fewer than 12 claim holders).[2] To sustain the petition, all of the PCs' debts must for this reason be free of a bona fide dispute as to liability or amount. *Id.*

2 All statutory section references are to Title 11, United States Code, unless otherwise noted.

***7** Since KP3 no longer contests that SDCC's and the Trust's claims are free of a bona fide dispute, the court need only determine if REPSTs two claims are subject to bona fide dispute. The PCs bear the burden of proof on this issue. *Liberty Tool v. Vortex Fishing Sys. (In Re Vortex Fishing Sys.)*, 277 F.3d 1057, 1064–65 (9th Cir. 2002) (citing *In re Rubin,* 769 F.2d 611, 615 (9th Cir. 1985)). Considered objectively, the PCs were required to prove at trial the lack of both a "genuine issue of material fact that bears upon the debtor's liability" and the absence of a "meritorious contention as to the application of law to undisputed acts." *Id.* (citations omitted). This exercise does not require the court attempt to predict how a later court might resolve the dispute as to REPS1's claims. *Marciano v. Chapnick (In re Marciano) ("Marciano II"),* 708 F.3d 1123, 1127 (9th Cir. 2013) (state court judgment on appeal is not subject to a bona fide dispute without delving into the quality of the arguments on appeal). "A bankruptcy court is not asked to evaluate the potential outcome of a dispute, but merely to determine whether there are facts that give rise to a legitimate disagreement over whether money is owed, or, in certain cases, how much." *Vortex,* 277 F.3d at 1064.

For the reasons explained below, the court concludes that KP3 has no "legitimate disagreement over whether money is owed." *Id.* Rather, KP3 has "simply manufactured [ ] 'disputes' in order to defeat the Involuntary Petition." And its "previous recognition of [the] debt is evidence that no bona fide dispute exists." *In re CorrLine Int'l, LLC,* 516 B.R. 106, 148 (Bankr. S.D. Tex. 2014) (applying test to similar facts). Further, KP3's "self-serving testimony is insufficient to prove the existence of a bona fide dispute." *Id.*

The court need only find one of REPS1's two claims, the LOC or the Purchase Agreement, is not subject to a bona fide dispute. "When a creditor holds multiple claims, and some but not all of such claims are subject to bona fide dispute, this does not disqualify the creditor entirely. A claim of such creditor not subject to bona fide dispute may still be counted ...." *See In re Vicor Techs., Inc.,* No. 12-39329-EPK, 2013 WL 1397460, at *6 (Bankr. S.D. Fla. Apr. 5, 2013).

REPS1's prima facie claim regarding the LOC, as to which $1,450,000 was advanced by REPS1 and is outstanding,

was previously recognized by KP3 as valid, since it made payments on it and even renewed it in July. The deficiencies in the documentation do not change that, at a minimum, there is a claim in that amount for the common count of money had and received. While KP3 stopped paying the LOC when the disputes regarding Erik and Ryan arose, what is at issue is not whether Erik's and Ryan's claims were bona fide, but whether amounts KP3 owed under the LOC was a valid debt.

That the LOC had not matured on the petition date does not create a bona fide dispute. *In re Concentric Energy Corp.,* 2010 WL 5315918, at *3–4, 2010 Bankr. LEXIS 4572, at *11 (Bankr. D. Ariz. Dec. 21, 2010), reasoned that § 303(b)(i) by its terms does not require that a claim be "past due"; only that the creditor hold a claim that is not subject to a bona fide dispute as to liability or amount. And, § 101(5) defines a claim as a "right to payment, whether or not such right is ... matured, or unmatured."

REPS1's prima facie claim for the Purchase Agreement is likewise not disputed as to liability or amount. KP3's books and records, Meislik's report, and KP3's list of creditors list this claim in the amount of $2,139,529.72, which was due to REPS1 on November 30, 2017 by its contract terms. REPSI's obligations under the Purchase Agreement had been fully performed by the petition date, and KP3 had also acquired the tickets and sold them for a profit before disputes between Erik, Ryan, and KP3 arose. All that remained of that contract was KP3's obligation to make the third payment.

While KP3 asserts a right to offset based on some cancelled events, and REPS1 asserts it is owed an additional $800,000, these disputes as to amount, to the extent that they exist, do not disqualify this claim since the undisputed portions of the claim are well over the $15,775 threshold required by § 303(b)(1). "A dispute as to a *portion* of a claim does not disqualify a creditor from filing an involuntary petition." *Focus Media, Inc. v. Nat'l Broad. Co. (In re Focus Media, Inc.),* 378 F.3d 916, 926 (9th Cir. 2004); *In re 3 Man Corp.,* 2014 Bankr. LEXIS 3675, at *12 (M.D. Pa. Aug. 29, 2014).

***8** The court recognizes that there is a split in authority regarding whether the 2005 Amendments of the Bankruptcy Code overruled *Focus Media. See Mont. Dep't of Revenue v. Blixseth,* No. 2:13-cv-01324-JAD, 2013 WL 5408668, at *2, 2013 U.S. Dist. LEXIS 141898 at *6 (D.Nev. Sep. 25, 2013); *Excavation, Etc., LLC,* 2009 Bankr. LEXIS 1905, * 3–5 (Bankr. D. Or. June 24, 2009). However, this court has no authority to overrule *Focus Media,* unless it is "clearly irreconcilable" with intervening precedent, which is a high standard. *Miller v. Gammie,* 335 F.3d 889, 900 (9th Cir. 2003) (en banc); *Rosenbloom v. Pyott, 765* F.3d 1137, 1147 (9th Cir. 2014); *In re Gilman,* 887 F.3d 956, —— (9th Cir. 2018). The split in authority noted in *In re 3 Man Corp.,* 2014 Bankr. LEXIS 3675, at *12, establishes that the "clearly irreconcilable" standard cannot be met, and the potential offset or recoupment of the cancelled event tickets does not create a bona fide dispute as to amount which would disqualify RESP1's claim under § 303(b)(1).

B. KP3's Affirmative Defenses Do Not Raise a Bona Fide Dispute as to Liability or Amount

KP3 also raises a series of affirmative defenses to REPS1's two claims. As to the Purchase Agreement, KP3 asserts a bona fide dispute because the Purchase Agreement includes a binding arbitration agreement, and, under Cal. Corp. Code § 310, it was not approved by a disinterested board vote and was not "just and reasonable" to KP3. KP3 also asserts a bona fide dispute as to the Purchase Agreement and LOC because KP3 argues its disputes with Erik and Ryan create unclean hands, bad faith, frustration of purpose, and offset defenses (collectively "bad acts claims") since the Employment Agreements, the Purchase Agreement, and the LOC are part of the same transaction. If any of these affirmative defenses are bona fide, REPS1's status as a petitioning creditor could be affected. *Vortex,* 277 F.3d at 1067; *In re Honolulu Affordable Hous. Partners, LLC,* No. 15-00146, 2015 WL 2203, at *4–5, 473, 2015 Bankr. LEXIS 1558 at *11 (Bankr. D. Haw. May 7, 2015).

The court addresses these defenses below.

1. Arbitration Clause

The presence of the arbitration clause does not create a bona fide dispute as to the Purchase Agreement because bankruptcy courts have discretion not to enforce arbitration clauses. *Cont'l Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.),* 671 F.3d 1011, 1014 (9th Cir. 2012). Assessing the merits of an involuntary

petition is a core statutory bankruptcy function, which means arbitration is unnecessary. *Id.*

2. Voidability of the Purchase Agreement Under Cal. Corp. Code § 310

KP3 argues the Purchase Agreement is void or voidable under Cal. Corp. Code § 310 because Erik and Ryan had an "interest" in the transaction given their roles as directors of both REPS1 and KP3, but nevertheless voted in favor of the transaction. And, since the Purchase Agreement was not approved by a disinterested board vote, Cal. Corp. Code § 310(a)(3) requires REPS1 show the transaction was "just and reasonable" to the corporation.

There is no evidence that KP3's board did not know all material facts available at the time the Purchase Agreement was executed. The Purchase Agreement was not only approved by a unanimous vote, but KP3 also ratified the Purchase Agreement by making the first two payments. There is no evidence that the transaction was anything other than profitable which means it was "just and reasonable." There is no bona fide defense to the Purchase Agreement under Cal. Corp. Code § 310. *See Levin v. Martin C. Levin Inv. Co.,* 123 Cal. App. 2d 158, 163, 266 P.2d 552 (1954) (stockholder's acquiescence with full knowledge over a period of years that directors voted salaries to themselves operated as ratification).

3. Bad Acts Claims

a. One Transaction Rule

***9** KP3 argues REPS1's LOC and Purchase Agreement claims should be treated as part one transaction with Erik's and Ryan's Employment Agreements because they all relate to the formation of KP3 and were all devoted to the success of the enterprise by ensuring Erik and Ryan's full loyalty and attention would be devoted to KP3. KP3 relies upon *Holguin v. Dish Network, LLC,* 229 Cal. App. 4th 1310, 1320, 178 Cal.Rptr.3d 100 (2014) and Cal. Civ. Code § 1642 to contend that Tom's, Erik's, and Ryan's "bad acts" in September and October 2017 not only breached the Employment Agreements, but also the Purchase Agreement and LOC based on the one transaction rule.

The one transaction rule is codified in Cal. Civ. Code § 1642, which provides, "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." The rule is interpreted broadly, and generally requires "several papers relating to the same subject-matter and executed as parts of substantially ... be construed together as one contract." *Holguin,* 229 Cal. App. 4th at 1320, 178 Cal.Rptr.3d 100 (quoting *Symonds v. Sherman,* 219 Cal. 249, 253, 26 P.2d 293 (1933)).

The one transaction rule is easy to apply when the documents at issue expressly incorporate the others. *Harm v. Frasher,* 181 Cal. App. 2d 405, 415–16, 5 Cal.Rptr. 367 (1960) (three separate sale agreements treated as part of a single transaction under § 1642 because they not only related to the same matter—the sale of the trucking business—but two of the agreements explicitly referenced each other and the partnership sale agreement referenced the other "closing of the sales under the aforesaid separate contracts"); *Holguin,* 229 Cal. 4th at 1322 (four documents expressly incorporated and referenced one another and the last document "memorialized" the services to be provided in the transaction); *Versaci,* 127 Cal. App. 4th at 816–17, 26 Cal.Rptr.3d 92 (there was no "clear[ ] and unequivocal[ ] evidence" of the parties' intent to incorporate the documents into a single transaction despite oblique references in the documents). But there is no integration clause here. KP3 relies upon its incorporation documents, which do not describe the agreements as integrated, but merely approve the separate transactions. Paragraph 9 of the Purchase Agreement, in fact, precludes any integration with the Employment Agreements.

Even though the absence of an integration clause is not dispositive (*see Storm & Butts v. Lipscomb,* 117 Cal. App. 6, 15, 3 P.2d 567 (1931) (no express incorporation); *Cadigan v. Am. Tr. Co.,* 131 Cal. App. 2d 780, 781–82, 281 P.2d 332 (1955) (same)), even if the one transaction rule were applied KP3 would still be required "to prove (its) breach of contract claim as to each defendant." *Holguin,* 229 Cal. 4th at 1322 (different contracting parties are not "liable for every obligation contained in any of the writings"). There is no evidence here that REPS1 breached any of its obligations under the LOC and

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Purchase Agreement, both of which were fully performed by REPS1 when Erik and Ryan allegedly breached their Employment Agreements. REPS1 had lent all of the money it was obligated to lend under the LOC, which KP3 acknowledged by making a payment and renewing the LOC. As to the Purchase Agreement, KP3 had sold the tickets it acquired by REPS1 and paid two out of three payments due. The lack of any separate breaches is fatal to KP3's one transaction argument to impute the "bad acts" to REPS1.

The court has found no case where Cal. Civ. Code § 1642 is met without the separate breach requirement being satisfied. In *Cadigan,* 131 Cal. App. 2d at 781–82, 281 P.2d 332, and *Lipscomb,* 117 Cal. App. at 15, 3 P.2d 567 (where § 1642 was applied to contracts without integration clauses), the issue of whether one party's breach could be imputed to another was not addressed because the integrated contracts were part of a two party agreement designed to carry out one transaction, rather than related but discrete subparts of a multi-faceted transaction like in *Holguin,* 229 Cal. 4th at 1322. *See Cadigan,* 131 Cal. App. 2d at 781–782, 281 P.2d 332 (a deed, deed of trust, and letter between the same parties were considered part of the same contract to buy and finance the purchase of one piece of property); *Lipscomb,* 117 Cal. App. at 15, 3 P.2d 567 (a separate plan and specifications provided by parties to a subcontracting agreement were part of the subcontracting contract itself). Here, in contrast, there are different parties and different subject matter for each deal. Erik and Ryan are parties with KP3 as to their employment. KP3 and REPS1 are parties to the Purchase Agreement and LOC, which involved inventory acquisition and financing. KP3's attempt to collapse all the separate deals does not create a bona fide dispute.

b. Frustration of Purpose

***10** The same evidence which led the court to reject the one transaction defense to REPS1's claims requires rejection of the frustration of purpose defense. This defense relieves a party from performance where the "principal purpose is substantially frustrated without [ ] fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made ... unless the language or circumstances [of the contract] indicate the contrary." REST. OF CONTRACTS, 2ND, Section 265. "The doctrine operates when a not reasonably foreseeable supervening event totally or nearly totally destroys the value of counter performance in a contract or lease." *Fed. Leasing Consultants, Inc. v. Mitchell Lipsett Co.,* 85 Cal. App. 3d Supp. 44, 47, 150 Cal.Rptr. 82 (1978).

There is no evidence that the parties intended KP3 would be relieved of its obligation to pay the LOC or the Purchase Agreement if Erik and Ryan were no longer employed. Not only is there no integration clause, and separate parties and terms, the Employment Agreements did not require long term employment. In fact, the Employment Agreements were terminable on 10 days' notice and had a one-year term in any event. Simply because it fired Erik and Ryan, KP3 did not have the "the value of counter performance" either "totally or nearly totally destroy[ed]" as to the LOC and Purchase Agreement. *Fed. Leasing Consultants,* 85 Cal. App. 3d Supp. at 47, 150 Cal.Rptr. 82. KP3 in fact received everything it bargained for under the LOC and Purchase Agreement. It sold the tickets for a profit and has had the full benefit of the $1,450,000 capital investment provided for in the LOC. There is no bona fide dispute arising from frustration of purpose under these facts.

c. Unclean Hands

KP3 asserts a bona fide dispute based on the doctrine of unclean hands in the context of the "bad acts" relating to the Employment Agreements. The doctrine of unclean hands can be used to deny a plaintiff's enforcement of a contract regardless of the merits of their claim if principles of fairness dictate that the plaintiff should not recover. *Brown v. Grimes,* 192 Cal. App. 4th 265, 282, 120 Cal.Rptr.3d 893 (2011). The party requesting application of the doctrine must show the misconduct relates directly to the transaction at issue. *Id.* at 654. "Past improper conduct or prior misconduct that only indirectly affects the problem before the court does not suffice ... [t]he misconduct must prejudicially affect ... the rights of the person against whom the relief is sought so that it would be inequitable to grant such relief." *Jade Fashion & Co., Inc. v. Harkham Indus., Inc.,* 229 Cal. App. 4th 635, 654, 177 Cal.Rptr.3d 184 (2014) (citation omitted). The evidence did not show any "bad acts" or unclean hands relating to the LOC or the Purchase Agreements directly, and Erik and Ryan's conduct relating to the Employment

Agreements cannot be imputed to REPS1 in the context of these other agreements.

The court recognizes that a corporate officer's bad acts can be imputed to the corporation as set forth in *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton, LLP,* 133 Cal. App. 4th 658, 679–82, 35 Cal.Rptr.3d 31 (2005), but this imputation would require the court apply the one transaction rule which cannot be done here. *Peregrine* approved imputation of a principal's wrongful conduct to the corporation but only where the "[k]nowledge of an officer of a corporation" was acting within the scope of his duties. *Peregrine,* 133 Cal. App. 4th at 679, 35 Cal.Rptr.3d 31. As employees of KP3, Erik and Ryan were not acting as employees of REPS1 when they committed any alleged bad acts forming REPS2 so this requirement of imputation is lacking. There were no "bad acts" alleged with regard to the making of the LOC loan or selling the tickets which were profitable to KP3. Instead, this case is like *Brown,* 192 Cal. App. 4th at 282–84, 120 Cal.Rptr.3d 893, where the attorney's wrongful conduct entering into a fee sharing agreement with a non-lawyer was unrelated to the attorneys' fee sharing agreement with another attorney, despite that the fees may have overlapped.

***11** The court finds no bona fide dispute as to either of REPSTs debts relating to the unclean hands doctrine.

C. KP3 Is Paying Its Debts as They Come Due

The Ninth Circuit has "adopted a 'totality of the circumstances' test for determining whether a debtor is generally not paying its debts under 11 U.S.C. § 303(h)." *Vortex,* 277 F.3d at 1072. The "totality of the circumstances test" is not a rigid, mathematical analysis. Congress intended to provide a flexibility which is "not reducible to a simplistic formula." *In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.,* 779 F.2d 471, 475 (9th Cir. 1985). "[I]t is not possible to lay down guidelines that fit all cases .... The court must consider both the number and amount [of debts] in determining whether the inability or failure is general." *Id.*; *see also 2* Collier on Bankruptcy ¶ 303.31 (16th ed.), *cited in, Hujazi v. Recoverex Corp. (In re Hujazi),* No. NC–16–1018–FBJu, 2017 WL 3007084, at *10–11, 2017 Bankr. LEXIS 1963, at *26–27 (9th Cir. BAP 2017). As a result "courts 'compare the number of debts unpaid each month to those paid, the amount of the delinquency, the materiality of the non-payment, and the nature of the [d]ebtor's conduct of its financial affairs.' " *Vortex,* 277 F.3d at 1072 (quoting *Gen. Trading Inc. v. Yale Materials Handling Corp.,* 119 F.3d 1485, 1504 n.41 (11th Cir. 1997)); *Morabito v. JH, Inc. (In re Morabito),* No. NV-14-1593-FBD, 2016 WL 3267406, 2016 Bankr. LEXIS 2207 (B.A.P. 9th Cir. June 6, 2016) (considering the unpaid debt as a percentage of the overall debt to find the debtor was not generally paying its debts as they came due).

The "generally not paying" test is to be applied as of the date of filing of the involuntary petition. *Bishop,* 779 F.2d at 475. The test does not differentiate between insider debts and non-insider debts in this circuit. *Vortex,* 277 F.2d at 1072. Balance sheet insolvency is not a statutory requirement. Instead, courts look at "the liquidity definition of insolvency." *Marshall v. Marshall (In re Marshall),* 721 F.3d 1032, 1062 (9th Cir. 2013) ("[I]nsolvency is now a major factor in an involuntary bankruptcy case. But it is the liquidity definition of insolvency that controls, and not the balance sheet definition ....").

The Circuits are split as to whether claims subject to a bona fide dispute as to liability or amount are included in the court's calculation of whether a debtor is paying its debts as they come due. The Seventh Circuit does not exclude the debts if resolution of the dispute would require substantial litigation. *Matter of Covey,* 650 F.2d 877, 883 (7th Cir. 1981). The Ninth Circuit rejected the "Covey" rule in *In re Dill,* 731 F.2d 629, 632 (9th Cir. 1984) in favor of a more nuanced test, balancing "the interests of the creditors against those of the debtor," but determining in that case that the debt at issue was non-contingent and should be counted. *Dill,* relied upon the Second Circuit decision *In re B.D. Intern. Discount Corp.,* 701 F.2d 1071, 1076–1077 (2d Cir. 1983), which excludes the debt "when the claim is subject to serious dispute." Regardless, because the PCs' debts are not subject to a bona fide dispute, the court considers them in its analysis.

***12** The court will also consider the reasons why KP3 is not paying these debts. *In Matter of 7H Land & Cattle Co.,* 6 B.R. 29 (Bankr. D. Nev. 1980) (the court recognized that one creditor could show the debtor was not generally paying its debts as they came due if a "trick, artifice, scam of fraud" was involved). Unlike the bona fide dispute test, subjective motivations count. *Morabito v. JH, Inc. (In re*

Morabito), No. NV-14-1593-FBD, 2016 WL 3267406, at *8–9, 2016 Bankr. LEXIS 2207 at *23 (9th Cir. BAP 2016) (one factor considered was that the debtor and his partner "were paying off all other debts to isolate Appellees"). The court thus rejects KP3's claims that "there is no basis in the case law to suggest that a company should be liquidated in an involuntary chapter 7 solely because its non-payment of certain debts is supposedly motivated by ill will." Whether KP3's conduct in not paying the PCs debts was to prevent competition is thus relevant, and the court considers that KP3's failure to pay Bonnie's trust was not in good faith.

Despite this bad faith, the PCs have not met their burden of proof that KP3 was not generally paying its debts when they came due applying the applicable law. Only seven trade debt obligations were paid late in 2017. The court has included the PCs' debts in the analysis as they were free of bona fide dispute, and each was currently due since a payment on the LOC was in default when the petition was filed. The court thus finds the total of late payments during 2017 is 11.

But the court cannot find that 11 payments out of the hundreds of payments made in 2017 means that KP3 was not generally paying its debts as they came due. Even if the court were to adopt the PCs' preferred snapshot view of the generally paying debts test, the PCs' debts comprised only 40% of the outstanding debts, not a majority. *See, e.g., In re Food Gallery,* 222 B.R. 480, 487 (Bankr. W.D. Pa. 1998) (involuntary petition permitted where "the sheer size of the missed payments by the debtor in the past year with respect to Elmhurst's claim" satisfied the generally not paying debts when due); *In re Bowers,* 16 B.R. 298, 304 (Bankr. D. Conn. 1981) (payments were not made to petitioning creditors who constituted 90% of the total); *In re Int'l Teldata Corp.,* 12 B.R. 879, 883 (Bankr. D. Nev. July 24, 1981) (82% of debts not being paid). The court could find no case where as here, the number and amount of debts being paid was not a majority. Finally, even though KP3's liquidity and profitability had both declined from the third quarter of 2017, this decline was not sufficient to prevent it from generally paying its debts when they came due.

As a result of this conclusion, the petition will be dismissed.

D. The PCs' Bad Faith

There are two bad faith issues relevant to this trial.

1. Bad Faith as an Independent Ground for Dismissal

KP3 relies on *In re WLB–RSK Venture,* 296 B.R. 509, 513 (Bankr. C.D. Cal. 2003) and the Third Circuit decision *Forever Green Athletic Fields, Inc.,* 804 F.3d 328, 330, 335 & n.5 (3d Cir. 2015) to seek dismissal of the petition for bad faith. The court rejected that request at the pretrial hearing, but provides its reasoning here.

WLB–RSK, 296 B.R. at 513 relied upon § 105(a) to dismiss the involuntary petition filed in bad faith analogizing the § 303(i) sanctions authority for bad faith filings, and the "numerous cases" decided in the voluntary petition context which permit dismissal of petitions filed in bad faith. *Id. Forever Green,* 804 F.3d at 336–37 held an involuntary petition could be dismissed for bad faith notwithstanding meeting the other statutory requirements of § 303 where the creditor filed the bankruptcy to stop an arbitration proceeding against the creditor's entity and to seek payment of his debt over creditors in higher priority.

Whatever persuasive authority these cases may have, the court finds no bad faith for the reasons that follow. The court is also compelled to follow *Marciano v. Fahs (In re Marciano),* 459 B.R. 27, 44 (B.A.P. 9th Cir. 2011), which rejects bad faith as an independent basis for dismissal because § 303(i)(2) "makes plain that bad faith is not relevant unless consequential and punitive damages are under consideration."

***13** In affirming *Marciano,* although not expressly addressing the issue, the Ninth Circuit noted that: "The Bankruptcy Code does not expressly provide for dismissal of an otherwise proper involuntary petition because of the subjective 'bad faith' of the filers." *Marciano II,* 708 F.3d at 1129.

Ultimately, the petition will be dismissed on other grounds, and no bad faith can be found in any event.

2. Damages for Bad Faith Under § 303(i)

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While the PCs' subjective intent in filing the bankruptcy is irrelevant to whether or not they have met the requirements to file this petition under § 303(b), it is pertinent to KP3's request for fees and damages. Since the court has dismissed the petition over the objections of the PCs, it may award KP3 costs and reasonable attorneys' fees under § 303(i)(1), as well as "damages proximately caused" if the court determines the case to be filed in bad faith.

KP3 argues the PCs filed the petition in bad faith as a substitute for a debt collection action to achieve a number of unfair benefits: (1) allowing them to receive repayment of their debts more quickly; (2) giving Erik and Ryan an advantage in the State Court Litigation because Erik did not want to appear for a deposition; and (3) harassing or upsetting KP3 and its principals. KP3 also argues that the timing of the petition and the that fact that the PCs have no evidence of preferential payments or a dissipation of KP3's assets and "knowingly disregarded" the statutory criteria for filing the petition demonstrate that the case was filed in bad faith.

The evidence does not support KP3's claims of bad faith considered in the proper context. Rather than trying to harass or upset KP3 and its principals, the PCs wanted only to be paid. These creditors are entitled to act in their own best interest, and the PCs acted in good faith to get their money back rather than to destroy KP3. That Erik and Ryan's parents want their money back on its terms to fund the new company for their sons does not mean they wanted KP3 to fail, but that they desired for both businesses to succeed. REPS1 was entitled to be paid for the tickets KP3 sold at a profit and the money it lent. That Jaffe wanted to help the new business rather than KP3 may be selfish, but it is not bad faith. *Figter Ltd. v. Teachers Ins. & Annuity Ass'n of Am. (In re Figter Ltd.),* 118 F.3d 635, 639 (9th Cir. 1997) ("If a selfish motive were sufficient to condemn reorganization policies of interested parties, very few, if any, would pass muster. On the other hand pure malice, "strikes" and blackmail, and the purpose to destroy an enterprise in order to advance the interests of a competing business, all plainly constitute[ ] bad faith."). "A creditor who attempts 'to preserve what he reasonably perceives as his fair share of the debtor's estate does not act in bad faith.' " *U.S. Bank N.A. v. Vill. at Lakeridge, LLC (In re Vill. at Lakeridge, LLC),* 634 Fed.Appx. 619, 620–21 (9th Cir. 2016) (citing *Figter,* 118 F.3d at 639).

That state court remedies were another alternative is also not dispositive. *Marciano,* 446 B.R. at 430 (Approving involuntary petition where only the petitioning creditors debts were undisputed because filing bankruptcy is an alternative to state law remedies if state law remedies would lead to unequal treatment of creditors).

***14** The court is not persuaded that Erik's failure to appear for his deposition was the reason the petition was filed. There was an issue regarding the applicability of the automatic stay and he explained he wanted to preserve the primacy of the deposition scheduling. REPS1 is a different entity than their new entity and has its own ESOP whose beneficiaries are the shareholders. Even if Erik and Ryan breached their fiduciary duties to KP3, they attempted to defer competing until they were actually fired and took at best only minimal actions before then.

For all of these reasons, the court finds that the PCs acted in good faith and no damages will be awarded. *See Wechsler v. Macke Int'l Trade, Inc. (In re Macke Int'l Trade, Inc.),* 370 B.R. 236, 254 (B.A.P. 9th Cir. 2007) (no damages awarded where no bad faith was found on the part of the petitioning creditors).

E. Attorneys' Fees and Costs

Because the court has dismissed the involuntary bankruptcy, § 303(i) creates a presumption in favor of awarding attorneys' fees and costs to KP3. The PCs must then rebut the presumption. *Orange Blossom Ltd. P'ship v. S. Cal. Sunbelt Developers, Inc. (In re S. Cal. Sunbelt Developers, Inc.),* 608 F.3d 456, 461–2 (9th Cir. 2010); *Sofris v. Maple–Whitworth Inc.,* 559 F.3d 917 (9th Cir. 2009); *Vortex,* 379 F.3d at 707. The PCs must show that "under the totality of circumstances," there is evidence that would support disallowance of fees. *Vortex,* 379 F.3d at 707; *Orange Blossom,* 608 F.3d at 461. The following non-exhaustive factors identified in *Vortex,* 379 F.3d at 707, must be considered to overcome the presumption that fees and costs should be awarded:

1) "the merits of the involuntary petition,"

2) "the role of any improper conduct on the part of the alleged debtor,"

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3) "the reasonableness of the actions taken by the petitioning creditors," and

4) "the motivation and objectives behind filing the petition."

See also Orange Blossom, 608 F.3d at 461; *Medpoint Mgmt., Inc. v. Jensen (In re Medpoint Mgmt., LLC),* No. AZ–15–1130–KuJaJu, 2016 WL 3251581, at *5–6, 2016 Bankr. LEXIS 2197, at *15 (9th Cir. BAP 2016) (citing *Vortex,* 379 F.3d at 708) (court erred in failing to apply the totality of circumstances test and *Vortex* factors and not permitting parties to present all relevant evidence on the issue). The court also has discretion to consider other relevant factors. *Maple–Whitworth,* 556 F.3d at 746. Since evidence has already been heard, the court need not conduct a "mini-trial" because the issues have been aired. *Medpoint Mgmt.,* 2016 WL 3251581, at *, 2016 Bankr. LEXIS 2197, at *20 (citing *Vortex,* 379 F.3d at 707).

Taking these factors in turn, the court concludes:

1) The involuntary petition was substantially meritorious as the PCs' debts were not in bona fide dispute. Their share of the total debts was 40% and they knew these debts were not being paid. They also knew KP3 was acting for an anti-competitive purpose. While the court disagrees with the PCs' claim that KP3 was "generally not paying the debts when they came due," this finding was a close call.

2) KP3 acted in bad faith to keep Erik and Ryan from competing with it. KP3 had "the purpose to destroy an enterprise in order to advance the interests of a competing business .... plainly constituting bad faith." *Figter,* 118 F.3d at 639.

3) The PCs' actions were reasonable under the circumstances. The PCs, with the exception of SDCC, for whom the late payment was due to confusion, were treated in a manner that was inequitable to other creditors since they were the only ones not paid when their debts were not subject to a bona fide dispute.

***15** 4) The PCs' "motivation and objectives behind filing the petition" were proper since they did not intend to harm KP3, but merely to protect their interests.

The facts here are similar to those in *In re Clean Fuel Techs. II,* LLC, 544 B.R. 591, 602 (Bankr. W.D. Tex. 2016). There, the court applied the *Vortex* factors to rebut the presumption that the debtor was entitled to fees and costs under § 303(i)(1) where dismissal of the petition was a "close" and "technical" call, because the petition "had substantial merit" even though a bona fide dispute as to the creditor's eligibility was found. The court also found the creditors had acted reasonably in pursuing the petition to collect and liquidate the company's remaining assets and adjudicate claims asserted by all creditors in one forum. *Id.* at 603–606. The court did not find that the debtor had engaged in any improper conduct, but was an insider and had pursued a personal agenda. *Id.* at 607.

The PCs have rebutted the presumption in favor of awarding fees and costs to KP3.

IV. Conclusion

The petition will be dismissed. Both parties are to bear their own fees and costs.

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