UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
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In re: Case No. 9:17-bk-07843-FMD
Chapter 7

Gabriel C. Murphy,

Alleged Debtor.
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ORDER DENYING MOTION TO DISMISS INVOLUNTARY BANKRUPTCY PETITION AND GRANTING ALLEGED DEBTOR'S REQUEST FOR ABSTENTION

Gabriel Murphy ("Murphy"), the alleged debtor in this involuntary Chapter 7 case, moves to dismiss the petition, for an award of attorney's fees and costs under 11 U.S.C. § 303(i)(1),[1] and an award of damages, including punitive damages, under § 303(i)(2) (the "Motion to Dismiss").[2] Alternatively, Murphy moves the Court to abstain under § 305(a).

For the reasons set forth below, the Court will deny the Motion to Dismiss but will grant Murphy's request that the Court abstain from this case.

I. PROCEDURAL HISTORY

On September 5, 2017, Digital Technology, LLC ("Digital Technology"), Investment Theory, LLC ("Investment Theory"), and Guaranty Solutions Recovery Fund I, LLC ("Guaranty Solutions") (together, "Petitioning Creditors") filed an involuntary Chapter 7 petition (the "Original Petition")[3] against Murphy. Murphy promptly filed the Motion to Dismiss.

The Motion to Dismiss alleged improper service,[4] that Digital Technology's claim is in bona fide dispute such that Digital Technology is not a qualified petitioning creditor, and that the Original Petition was filed in bad faith. During the course of the case, Murphy expanded upon the grounds for the Motion to Dismiss, including the Original Petition's failure to disclose that Investment Theory and Guaranty Solutions had acquired their claims by transfer and not for the purpose of filing the involuntary petition, and Murphy's contentions that Investment Theory is the alter ego of Digital Technology and Guaranty Solutions' claim is in bona fide dispute.[5]

On February 28, 2018, after months of discovery and related discovery disputes[6]—and just a month before the scheduled trial on the Motion to Dismiss—Petitioning Creditors filed an amended petition (the "Amended Petition").[7] The Amended Petition recalculated Digital Technology's claim and, in compliance with Federal Rule of Bankruptcy Procedure 1003, disclosed that Investment Theory and Guaranty Solutions had obtained their claims by transfer and not for the purpose of filing the involuntary case.

Murphy moved to strike the Amended Petition (the "Motion to Strike").[8] Petitioning Creditors filed a response to the Motion to Strike, and in the alternative, requested leave of Court to file the Amended Petition, *nunc pro tunc* to the date of the Amended Petition.[9]

By separate order, the Court has denied the Motion to Strike and granted Petitioning Creditors' request for leave to file the Amended Petition. Accordingly, the Court will consider the Motion to Dismiss as it applies to the Amended Petition.

On March 27, 2018, two days prior to the scheduled trial on the Motion to Dismiss, the Petitioning Creditors' attorney filed a joinder to the

[1] Unless otherwise stated, statutory references are to the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.*
[2] Doc. No. 7.
[3] Doc. No. 1.
[4] Murphy later dropped his claim of improper service. Transcript, Doc. No. 41, pp. 8-9.
[5] Doc. No. 150.
[6] *See* Doc. Nos. 46, 53, 85, 99, 121. *See also* Miscellaneous Proceeding Nos. 18-0901 and 18-0902, United States Bankruptcy Court for the Western District of Missouri.
[7] Doc. No. 120.
[8] Doc. No. 124.
[9] Doc. No. 151.

involuntary petition on behalf of William M. Scheer and Lawrence G. Scheer (the "Scheer Joinder").[10] In the Scheer Joinder, the Scheers assert a claim in the amount of $51,440.00 plus accrued interest and attorney's fees ("the Scheer Claim"). Murphy contends that the Scheer Claim is no longer enforceable and that the Scheers do not qualify as petitioning creditors.[11]

The Court conducted a five-day trial on the Motion to Dismiss in March and May 2018. Despite an extended break between the trial dates, the parties conducted no discovery on the validity of the Scheer Claim or the Scheer Joinder, and they presented no evidence on these issues at trial.[12]

On May 8, 2018, at the conclusion of Petitioning Creditors' case-in-chief, Murphy moved for directed verdict.[13] In support of his *ore tenus* motion, Murphy argued two issues raised in the Motion to Dismiss. First, Murphy argued that Petitioning Creditors failed to establish that Guaranty Solutions and Investment Theory had not acquired their claims for the purpose of commencing the bankruptcy case as required under Federal Rule of Bankruptcy 1003(a).[14] Second, Murphy argued that Petitioning Creditors failed to show that their claims are not subject to a bona fide dispute as to liability or amount as required by § 303(b).[15] Murphy also requested the Court abstain from hearing this case.[16]

The Court denied the motion for directed verdict.[17] But the Court held that Petitioning Creditors had met their initial burden to show that the claims of Guaranty Solutions and Investment Theory were not acquired for the purpose of commencing the bankruptcy case.[18] And the Court analyzed the claims of each Petitioning Creditor under § 303(b). As to Guaranty Solutions, the Court found that while Murphy might dispute the calculation of interest on Guaranty Solutions' claim, Murphy did not dispute his liability for the claim itself; therefore, Petitioning Creditors met their burden to establish that the claim was not in bona fide dispute as to liability or amount.[19] On Investment Theory's claim, the Court ruled that Petitioning Creditors put forward sufficient evidence to establish the lack of a bona fide dispute.[20] And on Digital Technology's claim, the Court determined that Petitioning Creditors met their threshold burden of proof through testimony and evidence to establish the undisputed portion of that claim.[21]

Because the Court found that Petitioning Creditors had met their initial burdens, the burden then shifted to Murphy to show that any of Petitioning Creditors' claims were acquired for the purpose of filing the involuntary petition or were in bona fide dispute. The Court did not rule on Murphy's request for abstention.

In July 2018, the parties submitted closing briefs,[22] proposed findings of fact and conclusions of law, and objections to each other's proposed findings and conclusions.[23] On December 12, 2018, the Court was provided with the trial transcripts for the May 2018 trial dates.[24]

II. PETITIONING CREDITORS' CLAIMS

Under § 303(b)(1), an involuntary case may be commenced by three or more entities each of which holds a claim that is not contingent as to liability or subject to a bona fide dispute as to liability or amount if the claims aggregate at least $15,775.00 more than the value of any lien on the debtor's property securing the claims.

[10] Doc. No. 153.
[11] Transcript, Doc. No. 165, p. 17.
[12] On May 8, 2018, Murphy's counsel advised the Court that discovery on the Scheer Joinder was deferred until the Court ruled on the Motion to Dismiss, as it might not be necessary (Transcript, Doc. No. 202, p. 73).
[13] Transcript, Doc. No. 202, pp. 30, 36. Under Federal Rule of Civil Procedure 52(c), incorporated by Federal Rule of Bankruptcy Procedure 7052, a motion for directed verdict in a non-jury trial is a motion for judgment.
[14] Transcript, Doc. No. 202, pp. 37-38.
[15] Transcript, Doc. No. 202, pp. 39-40.
[16] Transcript, Doc. No. 202, pp. 44-45.
[17] Transcript, Doc. No. 202, p. 71.
[18] Transcript, Doc. No. 202, p. 70.
[19] Transcript, Doc. No. 202, p. 70.
[20] Transcript, Doc. No. 202, p. 70.
[21] Transcript, Doc. No. 202, pp. 70-71.
[22] Doc. Nos. 194, 195.
[23] Doc. Nos. 199, 200.
[24] Transcripts, Doc. Nos. 202, 203, 204, 205, 206, 207.

If an alleged debtor asserts that a petitioning creditor's claim is in bona fide dispute, the bankruptcy court need not resolve the merits of the dispute, but simply determines whether one exists.[25] Here, the facts relating to Murphy's claim of a bona fide dispute are so convoluted and intertwined that a thorough analysis is necessary for the Court to determine whether Petitioning Creditors' claims are in bona fide dispute. The following summarizes the evidence presented at trial on Petitioning Creditors' claims.

A. Digital Technology

Digital Technology is owned by Connolly Investment Group, LLC ("CIG") (80%) and Nathan Thomas (20%).[26] CIG is owned by Michael Connolly ("Connolly").[27]

Digital Technology's claim arises from its sale of a website with the World Wide Web address[28] of "video2mp3.net" (the "Website"). The Website featured a software application that converts videos to digital "MP3" recordings.[29]

Search engines, such as Google, directed visitors to the Website. Search engine "ranking" was a critical factor in directing visitors to the Website. For example, if a person conducted a search on Google for the terms "convert video to MP3," the order in which the Website appeared in the search results affected whether the person visited the Website or another website identified in the search results. In other words, the higher the search engine "ranking," the more persons (visitors) viewed the Website.

The Website's primary purpose was to generate income from advertisements. Advertisement facilitators, including Contech, LLC, d/b/a Sonobi ("Sonobi"), sold and placed advertisements on the Website.[30] Each time an advertisement was displayed to a visitor on the Website, a small fee was charged to the advertiser. Sonobi and the other advertisement facilitators collected the fees from the advertisers and remitted them, less their own charges for the placing the advertisements, to Digital Technology as the owner of the Website. The greater the internet traffic on the Website—i.e., the more visitors—the greater the advertising revenue. In addition, by "subscribing" to the Website for a monthly fee, visitors could use the Website's software without having to watch the advertisements. These subscription fees were deposited into a PayPal account that was linked to Michael Connolly's Social Security number.[31]

In 2012, Digital Technology earned approximately $200,000.00 per month, or roughly $2.4 million for the year, from the Website.[32]Approximately 25% of the Website's revenues were generated by advertisements placed by Sonobi.[33] Connolly, the 80% owner (through CIG) of Digital Technology, also owns an interest in Sonobi; at the time of trial, Connolly owned approximately one-third of Sonobi's membership interests.[34]

The Purchase and Sale of the Website

Murphy had previously owned two Internet companies and had invested in commercial real estate. In early 2012, he decided to reenter the Internet industry and was introduced to Connolly and Digital Technology.

In February 2012, Connolly sent Murphy a term sheet, outlining the general terms of the sale of the Website.[35] Shortly thereafter, Murphy and Connolly decided to move forward with the transaction.

Over the next few months, Murphy arranged for the formation of two corporate entities to acquire the Website: Crowd Shout Holdings, Ltd. ("CS

[25] *In re Knight*, 380 B.R. 67, 74 (Bankr. M.D. Fla. 2007).
[26] Transcript, Doc. No. 204, p. 9.
[27] Transcript, Doc No. 202, p. 105.
[28] Sometimes referred to as an "URL" (Uniform Resource Locator).
[29] Transcript, Doc. No. 165, p. 23.
[30] Transcript, Doc. No. 165, pp. 24-25.
[31] Transcript, Doc. No. 166, pp. 34-35.
[32] Transcript, Doc. No. 165, pp. 53-54.
[33] Transcript, Doc. No. 165, pp. 46-47.
[34] Transcript, Doc. No. 165, p. 128.
[35] Murphy's Ex. 1, p. 186 (Ex. 1 to Connolly Deposition Transcript); the term sheet was between Aberration! Ventures, LLC (owned by Murphy), Connolly, and Digital Technology, LLC.

Holdings"), domiciled in the Republic of Malta,[36] and Crowd Shout, Ltd., ("Crowd Shout") domiciled in the Isle of Man.[37] CS Holdings is the 100% owner of Crowd Shout.[38] The ownership of CS Holdings was structured to implement the terms of the acquisition, with Murphy, through another entity he owned, GCM Holdings, Ltd. ("GCM") owning 32.5%, Digital Technology owning 30%, and Herne Holdings, Ltd. (described below) owning 37.5% of the ownership interests.[39]

In compliance with Maltese and Manx corporate laws, Murphy selected a corporate service provider, Integrated Capabilities, Ltd. ("Integrated Capabilities"), to provide corporate governance services to both CS Holdings and Crowd Shout. Integrated Capabilities staffed Crowd Shout's board of directors with three directors who reside in the Isle of Man (the "Directors").[40]

The Asset Purchase Agreement

In August 2012, Crowd Shout and Digital Technology signed an Asset Purchase Agreement.[41] Crowd Shout agreed to purchase the Website and related assets from Digital Technology for the total purchase price of $2,210,000.00, including the assumption of liabilities and the issuance to Digital Technology of 6,000 shares in CS Holdings, roughly 30% of the equity in CS Holdings.[42]

In exchange, Crowd Shout was to pay Digital Technology $900,000.00 at closing, $110,000.00 within 30 days of closing, and deferred payments of $400,000.00 (referred to as the "Holdback Amount") and $200,000.00. An additional $400,000.00 was designated as an "Earn-Out Amount." For the first twelve months after the closing date, if Crowd Shout's income equaled or exceeded $135,000.00 in any month, Digital Technology was entitled to payment of 17.54386% of the income up to a maximum payment of $33,333.33 per month. These payments were to be credited to the $400,000.00 "Earn Out Amount."[43]

The Digital Technology Notes

The $200,000.00 and $400,000.00 in deferred cash payments were memorialized in two promissory notes: the "$200,000 Note"[44] and the "$400,000 Note,"[45] (together the "DT Notes"). Payments on the $200,000 Note were to begin 13 months after closing, with payments on the $400,000 Note to begin 15 months after closing. Murphy's guaranty of both DT Notes,[46] in particular the $200,000.00 Note, is the basis of Digital Technology's claim as a Petitioning Creditor.

Under the Asset Purchase Agreement, Crowd Shout was entitled to assert indemnification claims up to 27 months after closing, with a cap of $400,000.00. Digital Technology's obligation for indemnification claims was limited to the Holdback Amount, i.e., the $400,000 Note.[47] Unlike the $400,000 Note, the $200,000 Note was not subject to any indemnification claims or offset. In fact, the Asset Purchase Agreement specifically stated:

> The parties agree that the [$200,000 Note] shall represent an unconditional obligation of Buyer, free from any right of offset, or defense to non-payment based on any breach or alleged breach by Seller hereunder.[48]

The Investor Notes

Murphy acquired his ownership interest in Crowd Shout and the Website without investing any of his own money. Instead, Murphy located investors in Kansas City (the "Investors"), who loaned Crowd Shout the $900,000.00 due at the closing of the sale. In exchange, the Investors received promissory notes from Crowd Shout with

[36] Transcript, Doc. No. 166, p. 30.
[37] Transcript, Doc. No. 166, p. 32.
[38] Transcript, Doc. No. 166, p. 30.
[39] *See* Murphy's Ex. 1, p. 318 (Ex. 25, ¶4, to Connolly Deposition Transcript (Affidavit of Catherine Baxter in Malta)).
[40] Transcript, Doc. No. 204, pp. 56-57.
[41] Petitioning Creditors' Ex. 1.
[42] *Id.*
[43] Petitioning Creditors' Ex. 1, sec. 2.3.
[44] Petitioning Creditors' Ex. 3.
[45] Petitioning Creditors' Ex. 2.
[46] Petitioning Creditors' Exs. 4, 5.
[47] Petitioning Creditors' Ex. 1, secs. 5.4 and 5.5.
[48] Petitioning Creditors' Ex. 1, sec. 2.3(C).

interest rates ranging from 15% to 35% per annum (the "Investor Notes").[49] One of the Investors, Cory Lagerstrom, held his promissory note in the name of Herne Holdings, Ltd, ("Herne Holdings").[50] Herne Holdings owned approximately one-third of the ownership interests in CS Holdings.[51]

The Distribution of Funds Agreement

The parties also signed a Distribution of Funds Agreement.[52] Under the Distribution of Funds Agreement, Crowd Shout was required to pay the Investor Notes from its free cash flow. "Free Cash Flow" was defined as the funds available to Crowd Shout after it paid its normal operating expenses (as set forth in an annual operating budget),[53] the payments to Digital Technology on the DT Notes, and dues or fees owed to Integrated Capabilities and the Board of Directors.[54] In other words, Crowd Shout was required to make monthly payments to Digital Technology on the $200,000 Note and the $400,000 Note before it made any payments whatsoever on the Investor Notes.[55]

The Advertising Management Services Agreement

In addition, Crowd Shout and Sonobi entered into an Advertising Management Services Agreement.[56] Under this agreement, Sonobi agreed to provide advertising management services to the Website and to send Crowd Shout a daily report detailing all advertising revenue earned from the placement of advertisements on the Website, whether the advertisements were placed by Sonobi or by another advertising facilitator.[57] Sonobi agreed to use its "best efforts" in performing its obligations, consistent with the efforts historically provided by Sonobi to Digital Technology.[58] In exchange, Crowd Shout agreed to pay Sonobi $5,000.00 per month.[59]

The Westmark Management Service Agreement

To facilitate Crowd Shout's management of the Website from the United States (i.e., with U.S. employees and leased office space), Crowd Shout signed a management agreement with Westmark Capital, LLC ("Westmark") (the "Westmark Management Agreement").[60] Murphy owns Westmark.[61]

Under the Westmark Management Agreement, Crowd Shout agreed to pay Westmark a sign-on bonus of $30,000.00, a capital expenditure budget for the first 90 days of $15,000.00, a base weekly payment of $10,000.00, and additional payments tied to the Website's revenues.[62] In exchange, Westmark agreed to provide services to Crowd Shout, such as website statistics, search engine optimization,[63] website management, and infrastructure evaluations.[64]

In November 2012, Westmark hired Nicholas Gaugler ("Gaugler")[65] to handle software development[66] and to facilitate the transition of the technical responsibilities needed to operate the Website from Digital Technology to Westmark.[67] Gaugler used the daily reports that Sonobi provided to Crowd Shout to prepare what was referred to as a "Daily Revenue Report."[68]

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[49] Petitioning Creditors' Ex. 12.
[50] Petitioning Creditors' Ex. 102 (Cory Lagerstrom Deposition Transcript, pp. 54-56).
[51] Petitioning Creditors' Ex. 102 (Cory Lagerstrom Deposition Transcript, p. 55).
[52] Petitioning Creditors' Ex. 11, Ex. B.
[53] For example, Crowd Shout's normal operating expenses included web hosting fees, management fees, professional services, formation fees, start-up costs, and other expenses.
[54] Petitioning Creditors' Ex. 11 , Ex. B.
[55] Transcript, Doc. No. 207, pp. 68-69.
[56] Petitioning Creditors' Ex. 8.
[57] Petitioning Creditors' Ex. 8, pp. 8-9.
[58] Petitioning Creditors' Ex. 8, sec. 2.2.
[59] Petitioning Creditors' Ex. 8, sec. 3.
[60] Petitioning Creditors' Ex. 10, secs. 1-2.
[61] Transcript, Doc. No. 204, p. 77, ll. 14-16.
[62] Petitioning Creditors' Ex. 10, sec. 5.
[63] "Search engine optimization" was crucial to the success of the Website; it determined the ranking of the Website as a search result to a person "searching" on the Internet for conversion of video to MP3 services.
[64] Petitioning Creditors' Ex. 10, p. 10.
[65] Transcript, Doc. No. 166, pp. 121-122.
[66] Petitioning Creditors' Ex. 100 (Murphy Deposition Transcript, p. 27).
[67] Transcript, Doc. No. 166, pp. 28-29.
[68] Transcript, Doc. No. 165, pp. 48-49; Petitioning Creditors' Ex. 51.

Connolly's Noncompetition, Nondisclosure, and Nonsolicitation Agreement

Finally, as required by the Asset Purchase Agreement, Connolly, individually, signed a noncompetition, nondisclosure, and nonsolicitation agreement (the "Noncompetition Agreement").[69] Connolly agreed that for three years he would not (a) engage in a business that offered free or fee-based audio conversion, (b) disclose confidential information, (c) solicit Crowd Shout's customers for business, or (d) solicit or employ Crowd Shout's employees or independent contractors. However, the Noncompetition Agreement did not restrict Connolly from participating in other businesses engaged in the purchase or sale of online advertising or from contacting any of Crowd Shout's customers that were already clients of Sonobi.[70]

The Sale Transaction Closes.

On August 10, 2012, the Directors approved Crowd Shout's acquisition of the Website and related assets. In addition, the Directors adopted and approved an operating budget for fiscal year 2012-2013 and the establishment of Crowd Shout's bank account at Barclays Bank.[71]

On August 22, 2012, the sale closed (the "Closing"), and Digital Technology was paid the initial $900,000.00 called for under the Asset Purchase Agreement. Based on the Closing date, payments to Digital Technology on the $200,000 Note were scheduled to commence in September 2013, with payments on the $400,000 Note to begin two months later.

The Decline of the Website's Revenues

Shortly after the Closing, the Website's revenues declined precipitously, from an average of $200,000.00 per month to $40,000.00 and $50,000.00 per month in early 2013.[72] The Website's search engine ranking dropped, resulting in fewer visitors to the Website. The decrease in visitors resulted in reduced advertising revenues.[73] At some point during this time, Murphy, through GCM, loaned $160,000.00 to Crowd Shout.[74]

In September 2013, the Investors wanted another entity to take over Crowd Shout's day-to-day management. They formed a new company, Voxa, LLC ("Voxa"),[75] with ownership titled in the name of Murphy's attorney.[76] Voxa then assumed responsibility for the management of the Website's day-to-day operations.[77] Murphy and the other Westmark employees became Voxa employees and performed the same duties for Crowd Shout that they had previously performed as Westmark employees.[78]

Crowd Shout Defaults on the DT Notes.

In September 2013, Crowd Shout failed to pay Digital Technology the first payment due on the $200,000 Note. Connolly contacted Murphy in an effort to resolve issues regarding the payments due on the DT Notes.[79] Starting in November 2013, Connolly and Murphy exchanged numerous email messages and Google instant messages ("G-chats") discussing the amounts owed on the DT Notes and the Website's revenues.

In emails and G-chats with Connolly, Murphy detailed the amounts due to Digital Technology, including the amounts due on the DT Notes.[80] He and Connolly also discussed the "Earn Out Amount" payments of roughly $33,000.00 that were due to Digital Technology and $20,000.00 that Connolly claimed he was owed as reimbursement for income taxes he incurred personally because the PayPal account to which the Website subscription fees were deposited was still linked to his Social Security number.[81]

[69] Petitioning Creditors' Ex. 9.
[70] Petitioning Creditors' Ex. 9, sec. 4.
[71] Petitioning Creditors' Ex. 11, pp. 1-4.
[72] Petitioning Creditors' Ex. 29.
[73] Transcript, Doc. No. 165, pp. 53-55.
[74] Transcript, Doc. No. 165, p. 139.
[75] Transcript, Doc. No. 166, p. 36.
[76] Transcript, Doc. No. 165, p. 57.
[77] Transcript, Doc. No. 165, p. 57; Transcript, Doc. No. 166, pp. 44, 109, 125.
[78] Transcript, Doc. No. 166, pp. 43-44, 125.
[79] Petitioning Creditors' Ex. 28.
[80] Petitioning Creditors' Ex. 13 and 14.
[81] Petitioning Creditors' Ex. 13.

The Restructuring Plan

In February 2014, Murphy circulated a proposed restructuring plan (the "Restructuring Plan") to Connolly and the Investors.[82] Murphy proposed that Crowd Shout, after payment of budgeted expenses, make pro rata payments on the DT Notes and on the Investor Notes. In addition, Murphy proposed to subordinate payments that he was due on his $160,000.00 loan to Crowd Shout.

In March 2014, despite the fact that Murphy's proposal contravened the Distribution of Funds Agreement (because it called for the Investor Notes to be repaid simultaneously with the DT Notes), Murphy, Connolly, and the Investors agreed to it.[83] They also agreed that Voxa would continue to manage the Website's daily operations and be paid $15,000.00 per month to cover its overhead. After that, Voxa was to pay web hosting fees and the $5,000.00 monthly fee due Sonobi under the Advertising Management Services Agreement. After payment of these approved expenses, Crowd Shout was to make payments to Digital Technology and the Investors pro rata based on the amount of their Notes.[84] For this purpose, Digital Technology agreed that the $200,000 Note and the $400,000 Note would be considered as one obligation; there was no agreement as to the allocation of payments between the two DT Notes.

The parties also agreed that Sonobi would continue to collect the advertising revenues for Crowd Shout.[85] Because Connolly was a principal of both Digital Technology and Sonobi, Sonobi was authorized to deduct Digital Technology's pro rata payment from the Website's monthly advertising revenue before sending the revenue to Voxa on behalf of Crowd Shout.[86] Gaugler sent Sonobi a monthly invoice that calculated both the gross amount due from Sonobi to Crowd Shout and the pro rata payment on the DT Notes due to Digital Technology. Gaugler would then direct Sonobi to send Digital Technology its pro rata payment and to remit the balance to Crowd Shout.[87] This practice was followed through October 2014. In the March through October 2014 time period, Digital Technology was paid $145,834.23 on account of the DT Notes.[88]

Meanwhile, unbeknownst to Murphy, by May 2014, Gaugler, although still employed by Voxa/Crowd Shout, was also providing consulting services to Sonobi.[89]

Murphy Settles with Some of the Investors.

The relationship between Connolly, Murphy, and the Investors continued to decline. Some of the Investors, including Cory Lagerstrom, entered into a settlement agreement under which Cory Lagerstrom's company, Herne Holdings, transferred its shares in CS Holdings to GCM.[90] Upon this transfer, GCM became the majority owner of CS Holdings.[91] In addition, as part of this settlement agreement, Cory Lagerstrom consented to Murphy's prosecuting an indemnification claim against Digital Technology on Crowd Shout's behalf.[92]

The Alleged Indemnification Claims

In November 2014, Murphy notified the Directors that Digital Technology and Connolly had breached the Asset Purchase Agreement, the Advertising Management Services Agreement, and the Noncompetition Agreement.[93] Murphy claimed that Sonobi had provided services to a competing website and that Sonobi had solicited and employed Gaugler.[94] Murphy also contended that Sonobi "manipulated" Website revenue on February 28, 2013, by initiating a "media buy" that increased

[82] Petitioning Creditors' Ex. 43.
[83] Transcript, Doc. No. 165, pp. 74-76; Transcript, Doc. No. 166, p. 126.
[84] Transcript, Doc. No. 166, p. 129.
[85] Transcript, Doc. No. 165, p. 70.
[86] Transcript, Doc. No. 165, pp. 75-76; Petitioning Creditors' Ex. 44.
[87] Transcript, Doc. No. 166, pp. 128-131, 134; Petitioning Creditors' Ex. 55.
[88] Transcript, Doc. No. 166, p. 215.
[89] Transcript, Doc. No. 166, p. 155.
[90] *See* Murphy's Ex. 9, pp. 456-458 (Cory Lagerstrom Deposition Transcript, Ex. 8).
[91] Murphy's Ex. 42 (February 5, 2015 Hearing Transcript, pp. 33-34).
[92] *See* Murphy's Ex. 9, pp. 456-458 (Cory Lagerstrom Deposition Transcript, Ex. 8).
[93] Transcript, Doc. No. 165, pp. 106-107.
[94] Transcript, Doc. No. 165, pp. 114-115.

Crowd Shout's revenues for February to an even $135,000.00. This triggered Crowd Shout's obligation to pay Digital Technology a $23,000.00 payment on the Earn Out Amount under the terms of the Asset Purchase Agreement.[95]

On November 13, 2014, Murphy urged the Directors to give Connolly and Digital Technology notice of Crowd Shout's claims for indemnification against them (the "Alleged Indemnification Claims").[96] On November 17, 2014, one of the Directors, Kevin Perks, responded that the Alleged Indemnification Claims were on "shaky ground."[97]

Later that same day, Mr. Perks emailed Murphy that the Directors intended to resign, effective immediately.[98] Murphy, on behalf of GCM, now the owner of two-thirds of the membership interests in CS Holdings, called and conducted an emergency shareholder meeting. Murphy voted GCM's membership interests to elect Murphy and Murphy's then-wife Regina Murphy as directors of CS Holdings, and in turn, of Crowd Shout.[99]

On November 19, 2014, Murphy, presumably in his capacity as a Crowd Shout director,[100] served Digital Technology, Connolly, and their counsel with notice of the Alleged Indemnification Claims (the "Indemnification Notice").[101] Mr. Perks was copied on the Indemnification Notice.

On December 8, 2014, the Directors sent Murphy and GCM formal notice that Integrated Capabilities—and the Directors—intended to resign, effective in 30 days.[102] Several days later, Digital Technology's attorney sent a letter to Mr. Perks, advising him of the Indemnification Notice and the possibility that the Directors could have personal liability for the claims Murphy raised on behalf of Crowd Shout against Digital Technology.[103] Integrated Capabilities and the Directors promptly rescinded their resignations.[104]

Murphy refused to recognize Integrated Capabilities and the Directors' change in position. Instead, Murphy, considering himself and his wife to be the only directors of CS Holdings and Crowd Shout, directed that revenues from Crowd Shout's advertisers be diverted from Crowd Shout's existing bank account at Barclays Bank to a bank account opened by Murphy's newly formed company, Tech-Biz Advisors, LLC, at Commerce Bank.[105]

The Crowd Shout Litigation

In response to Murphy's diversion of Crowd Shout's revenues, the Directors caused Crowd Shout to sue Murphy in the Isle of Man for conversion of corporate property.[106] The Manx court entered two preliminary injunctions restraining Murphy from interfering with Crowd Shout's business operations.[107] In January 2015, the Directors caused Crowd Shout to sue Westmark in Kansas, seeking the appointment of a receiver for Crowd Shout (the "Kansas I Litigation").[108] In April 2015, GCM, as CS Holdings' controlling shareholder, sought to intervene in the Kansas I Litigation.[109]

On May 21, 2016, while the Kansas I Litigation was pending, Crowd Shout, under the control of the Directors, shut down the Website. The Website no longer operates and generates no income.[110]

In September 2016, Murphy and his companies, Westmark, GCM, and Tech Biz Advisors, filed a second lawsuit in Kansas City, Kansas, against Connolly, Nathan Thomas, Integrated Capabilities, the Directors, the Investors, and four attorneys (the "Kansas II Litigation"). The court in the Kansas II Litigation has granted Connolly's motion to dismiss

[95] Transcript, Doc. No. 165, pp. 111-113.
[96] Petitioning Creditors' Ex. 62.
[97] Petitioning Creditors' Ex. 62.
[98] Petitioning Creditors' Ex. 63.
[99] Transcript, Doc. No. 205, pp. 188-189.
[100] Transcript, Doc. No. 205, pp. 188-189.
[101] Murphy's Ex. 35.
[102] Murphy's Ex. 123.
[103] Petitioning Creditors' Ex. 66.
[104] Transcript, Doc. No. 205, p. 193.
[105] Transcript, Doc. No. 165, p. 121; Transcript, Doc. No. 166, pp. 82-83; Petitioning Creditors' Exs. 71 and 77.
[106] Transcript, Doc. No. 165, pp. 122-123.
[107] Petitioning Creditors' Ex. 106.
[108] Transcript, Doc. No. 165, p. 125.
[109] Murphy's Ex. 125 (Case History of Kansas I Litigation, Case No. 15CV00453, docket entry for 04/29/2015).
[110] Transcript, Doc. No. 202, p. 10.

the claims against him, with leave for the plaintiffs to file an amended complaint.[111]

Digital Technology was not, and never has been, a party to the Kansas I Litigation or to the Kansas II Litigation. The DT Notes have not been placed at issue in either case.

While the Kansas I Litigation and the Kansas II Litigation were pending, and continuing up to the date that the Original Petition was filed, the parties engaged in extensive discovery, both in Kansas and the Isle of Man, spawning several discovery disputes.[112] One dispute involved Connolly's efforts to avoid being deposed by Murphy's attorney. Connolly sought a protective order from the Circuit Court for Orange County, Florida.[113] When the Circuit Court's order did not satisfy Connolly's concerns regarding the deposition, he filed an appeal with the Fifth District Court of Appeal in and for the State of Florida.[114] On August 17, 2017, the appeal was fully briefed.[115] Nineteen days later, the Original Petition was filed, staying the appeal.[116]

The Dispute as to Digital Technology's Claim

By agreement of the parties, Digital Technology's claim of $55,547.00, as stated on the Amended Petition, relates solely to Murphy's obligation on his guaranty of the $200,000 Note.[117] Murphy contends that Digital Technology's claim is in bona fide dispute. He argues that if Sonobi had remitted the full amount of the Website Revenue it owed to Crowd Shout and that amount had been credited to the $200,000 Note, Digital Technology's claim on the $200,000 Note would have been paid in full.

Expert Testimony Regarding the Calculation of Digital Technology's Claim

At trial, Timothy O'Toole testified as Petitioning Creditors' expert accountant. He testified that the DT Notes provide for interest to accrue at the applicable federal rate per annum (non-default rate of interest), which is .25% per annum,[118] and that under the Asset Purchase Agreement, there was no agreement on the allocation of payments from Crowd Shout to the DT Notes.[119] Mr. O'Toole testified that the disbursements made by Sonobi to Digital Technology as indirect payments from Crowd Shout were wired or deposited in CIG's bank account at TD Bank.

Mr. O'Toole testified that he reviewed redacted copies of the TD Bank statements. His review indicated that from January 2013 to November 2014, Digital Technology received payments from Crowd Shout of $145,000.00.[120] Mr. O'Toole opined that if these payments were applied to the $200,000 Note, a remaining balance was due on the $200,000 Note of $55,177.00, with accrued interest of $370.00, for a total unpaid balance of $55,547.00.[121] Mr. O'Toole also testified that Digital Technology was due $7,942.61 from Crowd Shout for the balance of an Earn Out Amount payment.[122]

Gerard McHale, Jr., testified as Murphy's expert accountant. He opined that Sonobi had failed to turn over to Crowd Shout the entire amount of the Website revenue that Sonobi collected on Crowd Shout's behalf. Mr. McHale testified that if Sonobi had paid Crowd Shout all that was due to Crowd Shout, Crowd Shout would have had sufficient funds to pay both the Earn-Out Amount balance of $7,942.61 and the $200,000 Note to Digital Technology in full.[123]

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[111] Transcript, Doc. No. 165, p. 126.
[112] *See* Murphy's Ex. 127 (Case History Kansas II Litigation, Case No. 16CV01123, docket entries for 01/27/2017 and 06/23/2017).
[113] Murphy's Ex. 66 (Case No. 2017-CA-000168-0).
[114] Murphy's Ex. 70 (Case No. 5D17-1172).
[115] Murphy's Ex. 126.
[116] *Id.*
[117] Transcript, Doc. No. 165, p. 120.
[118] Transcript, Doc. No. 166, p. 215.
[119] Transcript, Doc. No. 166, p. 202.
[120] Transcript, Doc. No. 166, pp. 214-215.
[121] Transcript, Doc. No. 166, p. 217.
[122] Transcript, Doc. No. 166, p. 212.
[123] Transcript, Doc. No. 207, p. 69.

Mr. McHale testified that the Daily Revenue Reports prepared by Gaugler for the two-year period from August 2012 to August 2014 reflect gross revenues collected by Sonobi and due to Crowd Shout of $626,256.00.[124] But Mr. McHale testified that Crowd Shout's Barclays Bank account reflects that Crowd Shout received payments from Sonobi of only $287,195.00.[125] Mr. McHale opined that even after subtracting the $120,000.00 paid to Sonobi ($5,000.00 per month for 24 months under the Advertising Management Services Agreement) from the $626,256.00, an additional $218,738.00 was still due to Crowd Shout from Sonobi.[126]

Mr. McHale testified if the $218,738.00 had been applied to the $200,000 Note (with accrued interest totaling $200,814.00) and to the $7,942.61 due to Digital Technology as the Earn Out Amount payment, Sonobi would still have owed Crowd Shout $17,924.00.[127] Mr. McHale opined that Sonobi had collected enough funds on Crowd Shout's behalf to enable Crowd Shout to pay the $200,000 Note in full.

B. Guaranty Solutions

In October 2012, in connection with a failed real estate transaction, Murphy consented to the entry of a judgment in favor of M&I Marshall & Ilsley Bank for $1,949,676, with interest accruing at the rate of 18% per annum from December 4, 2012, together with attorney's fees and costs of $134,892.09 49 (the "M&I Judgment").[128] The M&I Judgment has neither been stayed nor appealed; it was later assigned to M&I's successor in interest, BMO Harris Bank, N.A ("BMO Harris Bank").[129]

In late 2015 or early 2016, Guaranty Solutions acquired the M&I Judgment, along with 32 other judgments, from BMO Harris Bank.[130] The judgments were assigned to Guaranty Solutions or its subsidiaries, who agreed to collect the judgments and share the proceeds with BMO Harris Bank on a 50/50 basis.[131] Guaranty Solutions' parent entity is a debt collection agency. Its corporate representative testified at trial that filing involuntary bankruptcy petitions was not a part of Guaranty Solutions' collection practice or business model.[132]

Guaranty Solutions' claim, as stated on both the Original Petition and the Amended Petition, is in the amount of $4,451,742.92. Murphy does not contest the validity of Guaranty Solutions' judgment claim,[133] and he does not contend that he made payments that should have been applied to the claim. But Murphy disputes the calculation of the interest included in the total amount of claim. In support of his position, Murphy points to the deposition of Guaranty Solutions' corporate representative, Robert Contreras, who testified that as of December 12, 2017, the total amount of Guaranty Solutions' claim was $3,881,579.73.[134] Murphy argues that Mr. Contreras admitted at his deposition that the interest component of the claim may have been overstated. But Murphy misstates Mr. Contreras' testimony; Mr. Contreras merely testified that he had not calculated Guaranty Solutions' claim and did not know who had performed the calculation.[135]

The list of creditors filed by Murphy in this case lists Guaranty Solutions as holding an "uncontested" judgment for $4,451,742.92,[136] the identical amount stated by Guaranty Solutions on the Original Petition and the Amended Petition.

C. Investment Theory

In September 2012, in connection with a failed real estate transaction, Union Bank obtained a judgment against Murphy for $1,555,592.36 (the "Union Bank Judgment").[137] The Union Bank

[124] Transcript, Doc. No. 207, p. 63.
[125] Transcript, Doc. No. 207, p. 64; Murphy's Ex. 20, p. 54.
[126] Transcript, Doc. No. 207, p. 66.
[127] Transcript, Doc. No. 207, p. 67.
[128] Petitioning Creditors' Ex. 99 (Ex. 3 to Robert Contreras Deposition Transcript).
[129] Petitioning Creditors' Ex. 99, Ex. 3, p. 28.
[130] Petitioning Creditors' Ex. 99, p. 24.
[131] Doc. No. 120-2.
[132] Petitioning Creditors' Ex. 99 (Robert Contreras Deposition Transcript, pp. 58-59).
[133] Transcript, Doc. No. 202, pp. 24 and 42.
[134] Petitioning Creditors' Ex. 99 (Robert Contreras Deposition Transcript, pp. 43-45).
[135] Petitioning Creditors' Ex. 99 (Robert Contreras Deposition Transcript, pp. 68-69).
[136] Doc. No. 48.
[137] Petitioning Creditors' Ex. 87.

Judgment has neither been stayed nor appealed. Union Bank later assigned the Union Bank Judgment to its successor in interest, Arvest Bank ("Arvest").

In December 2016, Connolly's attorney contacted an attorney for Arvest to inquire about the possible purchase of the Union Bank Judgment. Connolly testified at trial that he wanted to acquire the Union Bank Judgment so that he could be "made whole, and the acquisition of that judgment was the most efficient way to do it."[138]

In January 2017, Connolly and Nathan Thomas, his business partner in Digital Technology, formed Investment Theory. Connolly owns 90% and Thomas owns 10% of the membership interests in Investment Theory. On January 9, 2017, Investment Theory purchased the Union Bank Judgment from Arvest.[139] Under the terms of its purchase agreement with Arvest, Investment Theory paid Arvest $50,000.00 and agreed to pay Arvest 50% of all amounts collected on the Union Bank Judgment, less up to $150,000.00 in collection costs.[140] That same day, Investment Theory recorded the assignment of the Union Bank Judgment in Missouri.[141]

On March 13, 2017, Investment Theory caused a certified copy of the judgment and supporting affidavit to be filed with the Lee County, Florida, Clerk of Court.[142] The Lee County Clerk of Court issued a notice of the recording of the foreign judgment to Murphy. The notice contained form language informing Murphy that he had 30 days to contest the judgment.[143] On April 24, 2017, 30 days after the domestication notice was issued, Investment Theory filed a complaint against Murphy to domesticate the Union Bank Judgment.[144] A writ of execution was issued on or about May 1, 2017.[145] The complaint and the writ of execution were served on Murphy on May 16, 2017.[146] Less than a month later, after an attempted levy on Murphy's assets, the writ of execution was returned unsatisfied.[147]

In early May 2017, four months after Investment Theory acquired the Union Bank Judgment, Connolly met with a bankruptcy lawyer to explore the use of a bankruptcy to collect the Union Bank Judgment.[148]

III. NO BONA FIDE DISPUTE AS TO CLAIMS OF DIGITAL TECHNOLOGY AND GUARANTY SOLUTIONS

Murphy argues that the claims of Digital Technology and Guaranty Solutions are in bona fide dispute. Under § 303(b)(1), if a bona fide dispute exists as to the liability or amount of a creditor's claim, that creditor is not qualified to file an involuntary petition. The burden is on the petitioning creditor to establish a prima facie case that there is no bona fide dispute as to liability or amount.[149] Once the creditor satisfies its burden, the burden shifts to the debtor to demonstrate that a bona fide dispute exists. In ruling on a motion to dismiss an involuntary petition on the ground that a petitioning creditor's claim is subject to a bona fide dispute, the court's role is not to resolve the dispute but to engage in a limited analysis of the claim in order to determine the presence or absence of a bona fide dispute.[150]

Although the term "bona fide dispute" is not defined by the Bankruptcy Code, many courts have held it should be interpreted under an objective standard. Under this standard, a bona fide dispute exists "if there is either a genuine issue of material

[138] Transcript, Doc. No. 165, p. 129. Connolly calculates Digital Technology's losses as including the $600,000.00 due under the DT Notes, the $900,000.00 in value allocated to the 30% interest in CS Holdings, and the majority of the $400,000.00 in "earn out" payments due Digital Technology. Suit on the DT Notes alone would not recoup that loss.
[139] Petitioning Creditors' Ex. 88.
[140] Petitioning Creditors' Ex. 88.
[141] Petitioning Creditors' Ex. 89.
[142] Petitioning Creditors' Ex. 90.
[143] Petitioning Creditors' Ex. 91.
[144] Petitioning Creditors' Ex. 85.
[145] Petitioning Creditors' Ex. 93.
[146] Petitioning Creditors' Ex. 92.
[147] Petitioning Creditors'. Ex. 92.
[148] Transcript, Doc. No. 165, pp. 133, 172-173; Transcript, Doc. No. 204, p. 22.
[149] *In re DSC, Ltd.*, 486 F.3d 940, 944 (6th Cir. 2007).
[150] *Farmers & Merchants State Bank v. Turner*, 518 B.R. 642, 649 (N.D. Fla. 2014).

fact that bears upon the debtor's liability [or amount], or a meritorious contention as to the application of law to undisputed facts."[151]

A split of authority on the issue of "bona fide dispute" evolved after the amendments to § 303(b)(1) and (h)(1) included in the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). Prior to 2005, § 303(b)(1) stated that an involuntary case could be commenced by the filing of a petition "by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute."[152] The BAPCPA amendment added the phrase "as to liability or amount" after the words "bona fide dispute."

Prior to BAPCPA, courts held that the term "bona fide dispute" applied to a dispute on the issue of liability, and that a dispute as to the amount of the claims alone did not render a petitioning creditor ineligible.[153] But after BAPCPA, some courts have held that a bona fide dispute exists if there is *any* dispute as to the amount of claim, regardless of whether the claim is partially undisputed or does not implicate the statutory threshold.[154] These courts reason that the addition of the language *as to liability or amount* codified legislative intent that a bona fide dispute as to either liability or amount would render a petitioning creditor ineligible to file an involuntary bankruptcy petition.

However, other courts take the position that for a bona fide dispute to be relevant it must "at least have the potential to reduce the total of petitioners' claims to an amount below the statutory threshold."[155] For example, in *In re DemirCo Holdings*, the alleged debtor stipulated that it owed the petitioning creditor at least the statutory threshold, which was noncontingent and not subject to dispute. However, the alleged debtor argued that after BAPCPA, any dispute as to the amount of a claim renders a petitioning creditor's claim subject to a bona fide dispute and therefore ineligible. The *In re DemirCo Holdings* court held otherwise, stating that

> With the dearth of committee comments and legislative history available to interpret BAPCPA, this Court cannot presume that Congress added the phrase "as to liability and amount" with the intent that the claims of involuntary petitioners must now be fully liquidated either by agreement or judgment so that no dispute exists as to any portion of such claims. Without clear legislative intent, this Court cannot presume such a change in the law and declines to do so.[156]

The court held that the petitioning creditor's claim was noncontingent and not subject to a bona fide dispute. Under this view, the 2005 BAPCPA amendments do not change the analysis that any bona fide dispute must relate to liability for the debt itself.

With these legal principles in mind, the Court will discuss Murphy's contention that the Digital Technology and Guaranty Solutions' claims are in bona fide dispute.

A. Digital Technology

Murphy relies on the testimony of his expert accountant, Gerard McHale, to establish that Digital Technology's claim is in bona fide dispute. However, Mr. McHale's testimony overlooks certain facts:

First, the Daily Revenue Reports were merely a listing of the advertising fees due from the placement of advertisements on the Website; they are not a record of the revenue actually collected.

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[151] *Id.* at 649 (quoting *In re Axl Indus., Inc*., 127 B.R. 482, 485 (S.D. Fla. 1991)).
[152] 11 U.S.C. § 303 (2004).
[153] *Farmers & Merchants State Bank*, 518 B.R. at 652.
[154] *In re Orlinsky*, No. 06-15417-BKC-RAM, 2007 WL 1240207, at *1 (Bankr. S.D. Fla. Apr. 24, 2007) (citing *In re Euro-American Lodging Corp.*, 357 B.R. 700, 712 (Bankr. S.D.N.Y. 2007) (As a result of the 2005 amendment to § 303(b), any dispute regarding the amount of a claim renders the claim subject to bona fide dispute).
[155] *In re DemirCo Holdings, Inc.*, No. 06-70122, 2006 WL 1663237, at *3 (Bankr. C.D. Ill. June 9, 2006).
[156] *Id.*

Second, Mr. McHale assumes that all of Crowd Shout's revenue could have been applied to retire the $200,000 Note. But this would have violated the Restructuring Plan, which required pro rata distributions to Digital Technology and to the Investors.

Third, the total of the $287,195.00 that Sonobi remitted to Voxa on behalf of Crowd Shout, the $120,000.00 Advertising Services Management Fee paid to Sonobi, and the $145,000.00 actually remitted by Sonobi to Digital Technology (and applied by Digital Technology to the $200,000 Note) is $552,195.00. Even assuming that Sonobi had collected $626,256.00 of Crowd Shout's revenues, after Sonobi disbursed $552,195.00 on Crowd Shout's behalf, Voxa would have been left with only $74,061.00 to fund Crowd Shout's operations for the two-year period between August 2012 to August 2014. And Mr. McHale ignores the fact that under the Restructuring Plan, Voxa was to be paid $15,000.00 per month for its operating expenses.

Fourth, Mr. McHale's analysis ignores the fact that it was Sonobi, an entity wholly different from Digital Technology, that was the party responsible for remitting Crowd Shout's revenue to Crowd Shout.

Fifth, there is no evidence that Sonobi failed to turn over Website revenue to Voxa for the benefit of Crowd Shout or that Crowd Shout paid more than $145,000.00 to Digital Technology.

In light of this analysis, the Court finds Mr. O'Toole's testimony to be more persuasive than Mr. McHale's.

The Court finds that the balance outstanding on the $200,000 Note is $55,547.00; that Murphy personally guaranteed the $200,000 Note: that the $200,000 Note is not subject to offset for the Alleged Indemnification Claims; and that although there is a history of extensive litigation arising from the control and management of Crowd Shout, Digital Technology is not a party to that litigation.

The Court finds that Petitioning Creditors have met their threshold burden of proof with testimony and evidence to establish that Digital Technology's claim is not subject to a bona fide dispute. Murphy has failed to rebut Petitioning Creditors' evidence. Accordingly, the Court finds that Digital Technology's claim is not contingent as to liability or amount and is not in bona fide dispute. Therefore, Digital Technology is a qualified petitioning creditor.

B. Guaranty Solutions

Many courts have held that when a petitioning creditor's claim is based on a judgment that has been neither appealed nor stayed, the claim is not subject to a bona fide dispute.[157] Courts applying this rationale reason that it would be "contrary to the basic principles respecting, and would effect a radical alteration of, the long-standing enforceability of unstayed final judgments to hold that the pendency of the debtor's appeal created a 'bona fide dispute.'"[158] For example, the court in *In re AMC Investors, LLC*, held that "the existence of a judgment by a court (other than a default judgment) that has not been stayed is, in and of itself, sufficient to establish that the claim underlying the judgment is not in bona fide dispute for purposes of determining whether a petitioning creditor is eligible to commence an involuntary case."[159]

Although Murphy does not dispute Guaranty Solutions' judgment claim, he contends the claim is in bona fide dispute because the interest on the judgment is not correctly calculated. But courts have found that "the determination of post judgment

[157] *In re Biogenetic Techs., Inc.*, 248 B.R. 852, 857 (Bankr. M.D. Fla. 1999) (citation omitted); *In re Euro-American Lodging Corp*., 357 B.R. 700 (Bankr. S.D.N.Y. 2007); *In re Huggins*, 380 B.R. 75 (Bankr. M.D. Fla. 2007). *But see In re Graber*, 319 B.R. 374, 377-78 (Bankr. E.D. Pa. 2004); *In re Tucker*, No. 5:09-bk-914, 2010 WL 4823917, at *3 (Bankr. N.D. W.Va. Nov. 22, 2010).

[158] *In re Marciano*, 708 F.3d 1123, 1126 (9th Cir. 2013) (quoting *In re AMC Investors, LLC*, 406 B.R. 478, 487 (Bankr. D. Del. 2009)).

[159] *In re AMC Investors, LLC*, 406 B.R. at 487.

interest is not subject to a bona fide dispute."[160] This is because the mathematical calculation of interest does not impact the underlying amount of the judgment and is a contract or statutory matter. For a dispute to be relevant it must have the potential to reduce a total of the petitioning creditors' claims to an amount below the statutory threshold.[161] In any event, Murphy offered no evidence to support his contention that the interest component of Guaranty Solutions' otherwise undisputed judgment claim was incorrectly calculated.

The Court agrees with this analysis and finds that Guaranty Solutions has met its burden to demonstrate that its claim is not in bona fide dispute and Murphy has not met his burden to show that a bona fide dispute exists. Therefore, the Court finds that Guaranty Solutions is a qualified petitioning creditor.

VI. INVESTMENT THEORY DID NOT ACQUIRE ITS CLAIM TO FILE THE INVOLUNTARY CASE AND IT IS NOT AN ALTER EGO OF DIGITAL TECHNOLOGY.

Murphy contends that Investment Theory is not a qualified petitioner for two reasons: first, because Investment Theory acquired the Union Bank Judgment for the purpose of commencing this involuntary case in contravention of Federal Rule of Bankruptcy Procedure 1003(a); and second, because Investment Theory is Connolly's and Digital Technology's alter ego and should not be considered as a separate petitioning creditor for purposes of § 303(b)(1).

A. Investment Theory's Claim Was Not Acquired to File this Case.

There is no evidence that Investment Theory acquired the Union Bank Judgment from Arvest in order to serve as a petitioning creditor in this case. It is clear that Investment Theory acquired the Union Bank Judgment in order to give it a leg up in its collection efforts against Murphy. But the timeline of events, from the December 2016 inquiry to Arvest's attorney regarding the potential acquisition of the Union Bank Judgment to the September 2017 filing of the Original Petition, as well as Investment Theory's actions to domesticate and collect the judgment in Florida, does not support a conclusion that Investment Theory acquired the Union Bank Judgment in order to file an involuntary petition.

B. Investment Theory is Not the Alter Ego of Digital Technology.

The Bankruptcy Code is silent as to whether, or under what circumstances, the separate identity of corporate creditors should be disregarded for § 303(b)(1) purposes. Courts that have addressed the issue have determined that ordinary principles of corporate law should be applied.[162]

A general principle of corporate law is "a corporation is a separate legal entity, distinct from the persons comprising them."[163] In Florida, a court looks through or pierces the corporate form only where "the corporation was a mere device or sham to accomplish some ulterior purpose, or is a mere instrumentality or agent of another corporation or individual owning all or most of its stock, or where the purpose is to evade some statute or to accomplish some fraud or illegal purpose."[164]

The burden of proving an improper purpose is a heavy one and Florida courts will "disregard the corporate entity in only the most extraordinary cases."[165] Accordingly, "[s]o long as proper use is made of the fiction that corporation is entity apart from stockholders, fiction will not be ignored . . . ."[166]

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[160] *In re Smith*, 437 B.R. 817, 825 (Bankr. N.D. Tex. 2010).
[161] *In re DemirCo Holdings, Inc.*, 2006 WL 1663237, at *3.
[162] *See, e.g., Subway Equipment Leasing Corp. v. Sims (In re Sims)*, 994 F.2d 210, 217 (5th Cir. 1993).
[163] *Gasparini v. Pordomingo*, 972 So. 2d 1053, 1055 (Fla. 3d DCA 2008) (citation omitted).
[164] *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1117 (Fla. 1984) (quoting *Mayer v. Eastwood-Smith & Co.*, 164 So. 684, 687 (Fla. 1935)).
[165] *In re Hillsborough Holdings Corp.*, 166 B.R. 461, 468 (Bankr. M.D. Fla. 1994).
[166] *Dania Jai-Alai Palace, Inc.*, 450 So. 2d at 1117 (citations omitted).

While case law on this issue is limited, several courts have ruled that creditors should not be consolidated for purposes of § 303(b)(1) where the creditors maintained their separate identities.[167] For instance, in *In re Sims*, the alleged debtors moved to dismiss an involuntary petition on the ground that the three petitioning creditors were the alter egos of a fourth corporation and thus counted as a single petitioning creditor for purposes of § 303(b)(1).[168] Although all four entities were equally owned by the same two individuals,[169] the Fifth Circuit Court of Appeals found no evidence that any of the entities was established for a fraudulent purpose or to subvert the numerosity requirement of § 303(b)(1). Consequently, the court reversed the district court and held that the bankruptcy court's finding that each entity was a viable, independent corporation with separate legal identities was not clearly erroneous.[170]

Similarly, the bankruptcy court in *In re Metrogate, LLC*, analyzed whether four separate trust funds, each with the same attorney-in-fact and same trustee, were separate entities sufficient to satisfy the numerosity requirement. The court stated, "[t]he crucial distinction here is whether an alleged claim is separately enforceable. If a single judgment or single note can be divided into . . . rights of payment, each held by a separate entity and separately enforceable, the numerosity requirement is met."[171] The court found that, even though the trust funds shared the same trustee and attorney-in-fact, each trust fund was a separate entity with the ability to sue separately for enforcement. The court concluded that the numerosity requirement of § 303(b)(1) was met.[172]

As in *In re Sims*, Murphy has failed to provide evidence sufficient to show that Investment Theory was created to evade a statute or commit fraud or other illegal purpose. And, similar to *In re Metrogate, LLC*, Digital Technology and Investment Theory are separate entities, each of which holds a separately enforceable claim against Murphy. Therefore, the Court finds that Digital Technology and Investment Theory are separate petitioning creditors for purposes of § 303(b)(1).

V. THIS CASE WAS NOT FILED IN BAD FAITH.

Murphy contends that bad faith may serve as an independent basis of dismissal. He argues that Petitioning Creditors filed this involuntary case for two improper purposes: first, to enable Connolly to gain an unfair advantage in the ongoing Kansas I and Kansas II Litigation in an effort to gain control of the Kansas II Litigation in order to dismiss all defendants in that case with whom Connolly is aligned; and, second, to thwart Murphy's efforts to depose Connolly in connection with the Kansas II Litigation.

In addition to contesting Murphy's factual contentions, Petitioning Creditors argue that this Court should consider bad faith only if it dismisses the case.

A. Evidence

Connolly testified at trial that he decided to pursue the involuntary bankruptcy so that Murphy would be required to disclose his assets and a third-party trustee would be responsible for liquidating those assets.[173] Connolly testified that he believed that the bankruptcy court was the best venue to reach Murphy's assets because Murphy's companies are domiciled outside the United States.[174]

Connolly also testified that he believes Murphy owns undisclosed assets. As an example, Connolly pointed to the fact that Murphy had the ability to loan $160,000.00 to Crowd Shout and that Murphy owns other entities that have provided him with income.[175]

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[167] *See In re Sims*, 994 F.2d at 210; *In re Metrogate, LLC*, No. 15-12593, 2016 WL 3150177, at *8 (Bankr. D. Del. 2016).
[168] *In re Sims*, 994 F.2d at 213.
[169] *In re Sims*, Nos. 91-2150, 90-11984, 91-2152, 1991 WL 194699, at *2 (E.D. La. Sept. 20, 1991).
[170] *In re Sims*, 994 F.2d at 220.
[171] *In re Metrogate, LLC*, 2016 WL 3150177, at *7.
[172] *Id.* at 8.
[173] Transcript, Doc. No. 165, pp. 138-139.
[174] Transcript, Doc. No. 204, p. 23.
[175] Transcript, Doc. No. 165, p. 139.

Connolly's testimony was supported by photos from Murphy's Instagram account that show him traveling to Europe, driving luxury vehicles, and dining at expensive restaurants and that were admitted into evidence.[176] Murphy testified that he posted photos on Instagram as "satire" and that the assets pictured are not his own, but belong to others.[177] He testified the trips to Europe were for court hearings in the Isle of Man,[178] that he does not own a luxury vehicle,[179] and that he does not eat expensive meals.[180] In fact, Murphy testified that in May 2016, he moved in with his mother.[181]

Other than as referenced in this ruling, no evidence was presented regarding other entities owned by Murphy. There was no evidence presented to support Connolly's assertion that Murphy owns other assets, whether in or out of the United States, or that any entity owned by Murphy provides him with an income.

Murphy contends that Connolly's bad faith in filing this case (and by extension, the bad faith of Digital Technology and Investment Theory) is shown through Murphy's testimony that Connolly threatened to "toss him into bankruptcy" in a telephone call made in May 2016.[182] Connolly disputes this testimony.[183] On this issue, the Court finds Connolly to be the more credible witness. First, although Connolly and Murphy communicated extensively through email and G-chat, there are no written communications between them that evidence such a threat. Second, Murphy's testimony was self-serving. And third, Murphy has shown that he is not the most credible witness. When Murphy was asked about his arrest for bringing a gun to the Malta airport, Murphy responded that he had a permit for the gun, but he had forgotten that it was in his suitcase. Murphy emotionally testified that this was an upsetting experience because he had never been in trouble before.[184] But Murphy's testimony that he "had never been in trouble before" was contradicted by the admission into evidence of two mug shot photos and bench warrants from Murphy's prior arrests on domestic violence claims and bench warrants issued for his arrest in a domestic dispute.[185]

B. Analysis

Although there is no statutory requirement that petitioning creditors commence an involuntary petition in good faith,[186] under § 303(i)(2), a court that dismisses an involuntary petition may award damages against any creditor "that filed the petition in bad faith." Because the term "bad faith" appears in relation to post-dismissal damages, some courts have found that a bad-faith inquiry should only be conducted if the petitioning creditors cannot satisfy the statutory requirements and the petition is dismissed.[187] Other courts disagree.[188]

In *In re Forever Green Athletic Fields, Inc.*,[189] the Third Circuit Court of Appeals examined whether bad faith may serve as a basis for dismissal even when the criteria for commencing the involuntary case are otherwise satisfied and when the debtor is admittedly not paying its debts as they become due. The court, agreeing with the Fourth and Eighth Circuit Courts of Appeals,[190] held that

[176] Petitioning Creditors' Ex. 98.
[177] Transcript, Doc. No. 205, pp. 51, 57.
[178] Transcript, Doc. No. 205, pp. 57-58.
[179] Transcript, Doc. No. 205, p. 57.
[180] Transcript, Doc. No. 205, p. 54.
[181] Transcript, Doc. No. 205, p. 58.
[182] Transcript, Doc. No. 205, p. 49.
[183] Transcript, Doc. No. 165, p. 169.
[184] Transcript, Doc. No. 205, pp. 72-73.
[185] Petitioning Creditors' Rebuttal Exs. 127 and 111.
[186] *In re Betteroads Asphalt, LLC*, 594 B.R. 516, 556 (Bankr. D.P.R. 2018).
[187] *In re Kennedy*, 504 B.R. 815, 823-24 (Bankr. S.D. Miss. 2014).
[188] *See, e.g., In re U.S. Optical, Inc.*, 991 F.2d 792, at *3 (4th Cir. 1993) (unpublished); *In re Bock Transp., Inc.*, 327 B.R. 378, 381 (B.A.P. 8th Cir. 2005); *In re Tichy Elec. Co.*, 332 B.R. 364, 373 (Bankr. N.D. Iowa 2005); *In re Alexander*, No. 05-10500, 2000 WL 33951465, at *3 (Bankr. D. Vt. Aug. 29, 2000); *In re Manhattan Indus., Inc.*, 224 B.R. 195, 201 (Bankr. M.D. Fla.1997).
[189] 804 F.3d 328, 330 (3rd Cir. 2015).
[190] *In re U.S. Optical, Inc.*, 991 F.2d 792, at *3 (4th Cir.1993) (unpublished) ("Courts are duty bound to conduct an inquiry, if requested, to determine whether an involuntary petition has been filed in good faith. Bad faith filings are to be dismissed." (citations omitted)); *In re Bock Transp., Inc.*, 327 B.R. at 381 ("A bad faith filing can also be cause for the dismissal of a[n] [involuntary] petition." (citation omitted)).

bankruptcy courts are courts of equity and that involuntary petitions under § 303 may be dismissed for bad faith.

In *In re Global Energies, LLC*,[191] the Eleventh Circuit clarified that a bankruptcy court may permit the dismissal of a case for cause "including for bad faith on the part of the filer."[192] This holding is consistent with the majority of courts that have analyzed this issue.[193] Therefore, this Court will consider the bad faith of Petitioning Creditors as an independent basis for dismissal.

Because "bad faith" is not defined in the Bankruptcy Code, courts have used a variety of approaches to determine whether an involuntary petition was filed in bad faith. The Eleventh Circuit has recognized three separate "tests" without expressly endorsing any particular one.[194] "Good faith is presumed and the debtor has the burden of proving bad faith by a preponderance of the evidence."[195]

First, under the "improper purpose test," the court may find bad faith where the filing of the petition was motivated by ill will, malice, or the purpose of embarrassing or harassing the debtor. Courts have found bad faith where the motivation for filing the involuntary petition was to frustrate the results of a state court proceeding and forestall the dissolution of a corporate debtor.[196]

Second, under the "improper use test," the court may find bad faith when a creditor's actions amount to an improper use of the Bankruptcy Code. Examples of "improper use" are when a creditor uses an involuntary bankruptcy to obtain a disproportionate advantage for that creditor's position,[197] or when the creditor's actions amount to an improper substitute for debt collection efforts.[198]

And third, under the "Rule 9011 test," the court looks objectively at the legal justification for the creditor's claim and subjectively at whether the bankruptcy proceeding was interposed for an improper purpose (such as to harass, cause delay, or increase the cost of litigation). Under this test, the court looks to whether the petitioning creditors

> . . . [m]ade reasonable inquiry of relevant facts and pertinent law before initiating [the] involuntary bankruptcy case; whether the involuntary petition's allegations were well grounded in fact; whether the request for involuntary bankruptcy relief was warranted by existing law or by a good faith argument for extension, modification or reversal of existing law; and whether the action was initiated for any improper

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[191] *See In re Global Energies, LLC*, 763 F.3d 1341, 1349 (11th Cir. 2014).

[192] *Id.* at 1350.

[193] *See, e.g., In re Forever Green Athletic Fields, Inc.*, 804 F.3d at 330 (holding that bad faith is an independent basis to dismiss an involuntary petition); *In re Bock Transp., Inc.*, 327 B.R. at 381 (a bad faith filing can be cause for dismissal of an involuntary petition); *Doane v. Friendship Airways Leasing, Inc.*, No. 11-61777-CIV, 2012 WL 94487 (S.D. Fla. Jan. 11, 2012) (affirming bankruptcy court's dismissal of involuntary petition as being filed in bad faith); *In re Alexander*, 2000 WL 33951465, at *3 ("[I]nvoluntary petitions filed in bad faith should be dismissed.").

[194] *See In re Global Energies, LLC*, 763 F.3d at 1349-50 (citing *General Trading, Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1501-02 (11th Cir. 1997)).

[195] *In re Ballato*, 252 B.R. 553, 558 (Bankr. M.D. Fla. 2000).

[196] *In re Camelot, Inc.*, 25 B.R. 861, 864 (Bankr. E.D. Tenn 1982).

[197] *In re Schloss*, 262 B.R. 111, 117 (Bankr. M.D. Fla. 2000). *See also In re F.R.P. Industries, Inc.*, 73 B.R. 309, 313 (Bankr. N.D. Fla. 1987) (finding bad faith where a petitioning creditor, who sought out the other two petitioners and was the "driving force" behind the petition, made no effort to avail himself of collection remedies but rather used the involuntary petition as an attempt at a hostile takeover).

[198] *See, e.g., In re Nordbrock*, 772 F.2d 397, 400 (8th Cir. 1985) ("A creditor does not have a special need for bankruptcy relief if it can go to state court to collect a debt."); *In re Tichy Electric Co., Inc.*, 332 B.R. at 374 ("Bad faith has been found to exist when a creditor's actions amount to an improper use of the Bankruptcy Code as a substitute for customary collection procedures."); *Doane v. Friendship Airways Leasing, Inc.*, 2012 WL 94487, *2 (where filing an involuntary petition was the petitioning creditor's "first choice, not his last," the improper use test enumerated in *General Trading* was satisfied).

> purpose, such as harassment, delay or to increase costs.[199]

Murphy argues that Connolly initiated the involuntary case in order to gain an advantage in the Kansas II Litigation and to avoid having his deposition taken in that case. First, Murphy theorizes that if the Amended Petition is granted and a trustee appointed, Connolly could negotiate with the trustee to gain control over Murphy's ownership interests in GCM and Murphy's own claims in the Kansas II Litigation. But Connolly testified that the claims against him in the Kansas II Litigation had been dismissed.[200] And the Court notes that even if a Chapter 7 trustee were to gain control of Murphy's assets, including his ownership interests in the entities who are plaintiffs in the Kansas II Litigation (GCM, Westmark, and Tech-Biz), whether the trustee would pursue the claims in the Kansas II Litigation or sell the interests in the entities is speculative.

Second, Murphy contends that the timing of the Original Petition was suspiciously linked to his efforts to depose Connolly in the Kansas II Litigation. However, even if the filing of the Original Petition operated to stay the Kansas II Litigation, Connolly's deposition, and Connolly's appeal before the Florida's Fifth District Court of Appeal under § 362, Murphy has not sought relief from the stay or taken any action in this Court to enable him to proceed with that litigation or the discovery process.[201]

The evidence before the Court is that Connolly's motivation in filing the involuntary petition was to collect the debt that Murphy owed to Digital Technology. There is no evidence Connolly was motivated by ill will, malice, for the purpose of embarrassing Murphy, or to gain an improper advantage. Although the timing of the Original Petition—while Connolly's appeal related to his deposition in the Kansas II Litigation was pending in Florida's Fifth District Court of Appeal—may have been convenient, this, by itself, is not evidence of bad faith. And had Murphy wished to pursue the appeal, or for that matter, the Kansas II Litigation, he could have taken steps before this Court to do so.

The Court concludes that Murphy has not met his burden of proof to show by a preponderance of the evidence that the involuntary petition was filed in bad faith.

VI. ABSTENTION

Courts have broad discretion in deciding whether to abstain from a matter.[202] Under § 305(a)(1), the court, after notice and hearing, may dismiss or suspend all proceedings in a case if "the interests of creditors and the debtor would be better served by such dismissal or suspension."

To determine whether the interests of creditors and the debtor would be better served by suspension, courts must consider the totality of the circumstances.[203] Most courts, including the court in *In re Mountain Dairies, Inc.*,[204] apply the following seven factors in determining whether to abstain from an involuntary proceeding:

1. economy and efficiency of administration;

2. whether another forum is available to protect the interests of both parties or there is already a pending proceeding in state court;

3. whether federal proceedings are necessary to reach a just and equitable solution;

4. whether there is an alternative means of achieving an equitable distribution of assets;

5. whether the debtor and the creditors are able to work out a less expensive out-of-court

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[199] *In re K.P. Enterprise*, 135 B.R. 174, 180 (Bankr. D. Me. 1992).

[200] Transcript, Doc. No. 165, p. 171.

[201] The Court raised the issue of Murphy seeking relief from stay in order to proceed with the Kansas II Litigation and Connolly's deposition at hearings conducted on December 20, 2017 (Transcript, Doc. No. 106, p. 19) and March 8, 2018 (Transcript, Doc. No. 136, p. 34).

[202] *In re Bos*, 561 B.R. 868, 900 (Bankr. N.D. Fla. 2016).

[203] *In re Marciano*, 446 B.R. 407, 432 (Bankr. C.D. Cal. 2010), *aff'd*, 459 B.R. 27 (B.A.P. 9th Cir. 2011), *aff'd*, 708 F.3d 1123 (9th Cir. 2013).

[204] 372 B.R. 623 (Bankr. S.D.N.Y. 2007).

arrangement which better serves all interests in the case;

6. whether a non-federal insolvency has proceeded so far that it would be costly and time consuming to start afresh with the federal bankruptcy process; and

7. the purpose for which bankruptcy jurisdiction has been sought.[205]

A number of bankruptcy courts applying these factors have opted to abstain when the involuntary case is essentially a two-party dispute and an alternative forum for resolving the dispute exists.[206]

For example, the court in *In re Mountain Dairies* found that it was compelled to abstain under § 305 because the involuntary case was essentially a two-party dispute and the parties had adequate remedies in state court. There, a single petitioning creditor filed the involuntary case alleging claims arising under a contract that obligated the alleged debtor to purchase milk and related products from the creditor. The involuntary bankruptcy was filed after a Pennsylvania state court dismissed a similar claim based on a forum selection clause that designated New York as the place of venue. The alleged debtor moved to dismiss the involuntary case on the ground that the creditor's claim was subject to a bona fide dispute. After finding that a bona fide dispute existed, the bankruptcy court further found that abstention was appropriate under § 305, relying heavily on the fact that because New York was designated as the venue for any disputes arising under the contract, there was another forum available to protect the interests of both parties.

In *In re Bos*,[207] the bankruptcy court applied the factors enunciated in *In re Mountain Dairies.* The court abstained and dismissed the involuntary Chapter 7 case under § 305(a)(1), because it was a two-party dispute and a pending state court action provided the parties with another forum to protect the interests of the petitioning creditor. Although the court found that liquidation of the alleged debtors' assets might prove valuable, it concluded that there was no evidence that liquidation would be more beneficial to the general creditor body than allowing the debtors' businesses to continue operating. In addition, the court found that the "insolvency" had not proceeded so far along that it would have been costly and time consuming to start afresh without the federal bankruptcy process.[208]

Similarly, in *In re Axl Industries, Inc.*,[209] the district court affirmed the bankruptcy court's decision to abstain from an involuntary case under § 305. The court acknowledged that bankruptcy courts generally grant motions to abstain in two-party disputes where the petitioner can obtain adequate relief in a non-bankruptcy forum. In determining that abstention was appropriate, the district court considered the motivation of the petitioning creditor, the significance of the alleged debtor's estate, and whether the alleged debtor had engaged in preferential transfers of a significant portion of its assets.

Having carefully weighed the evidence and considering the parties' arguments, the Court finds as follows:

First, despite this Court's finding that Digital Technology and Investment Theory are separate entities and not Connolly's alter ego, Connolly's testimony that Investment Theory acquired the Union Bank Judgment so that Connolly and Digital Technology could make themselves whole supports a finding that this is really a two-party dispute. Although there are two other interested creditors, Guaranty Solutions and the Scheers, they appear to be peripheral to this case. Guaranty Solutions' corporate representative, Robert Contreras, testified that filing involuntary cases against judgment debtors is not one of Guaranty Solutions' business models. And other than signing the Scheer Joinder

[205] *In re Mountain Dairies, Inc.*, 372 B.R. at 635 (citing *In re 801 South Wells Street, L.P.*, 192 B.R. 718, 723 (Bankr. N.D. Ill. 1996)).
[206] *See In re Mountain Dairies, Inc.*, 372 B.R. at 635; *In re Bos*, 561 B.R. at 898; *In re Axl Indus., Inc.* 127 B.R. 482 (S.D. Fla. 1991).
[207] 561 B.R. 868 (Bankr. N.D. Fla. 2016).
[208] *Id.* at 898-901.
[209] 127 B.R. 482 (S.D. Fla. 1991).

(which was filed by Petitioning Creditors' counsel), the Scheers have taken no action in this case.

Second, other forums are available to protect the interests of Murphy and Connolly and their related entities outside of bankruptcy: the Kansas courts in the Kansas I and II Litigation and the state courts of Florida in connection with the collection of Investment Theory's judgment.

Third, there is no evidence that Murphy has any assets, let alone that liquidation of his assets would be more advantageous to the creditor body as a whole. In light of the extensive discovery in this case, the Court surmises that had Petitioning Creditors uncovered assets, they would have presented evidence. Connolly's testimony that Murphy had been able to lend $160,000.00 to Crowd Shout—back in 2014—is not evidence of his current financial status or assets.

Fourth, Petitioning Creditors' claims do not hinge upon federal bankruptcy law; a federal bankruptcy proceeding, while possibly advantageous to Petitioning Creditors, is not necessary to reach a just and equitable solution. In fact, Guaranty Solutions' business model is to "work with defendants in hopes to come with a reasonable solution to their judgment debt."[210]

The Court concludes that Murphy has met his burden to demonstrate that abstention and dismissal benefits both himself and Petitioning Creditors.

VII. ATTORNEY'S FEES AND PUNITIVE DAMAGES

Under § 303(i)(1) there are two prerequisites for an alleged debtor to obtain a judgment against the petitioners for attorney's fees and costs: first, the bankruptcy court must have dismissed the involuntary petition other than on consent of all petitioners and the debtor; and second, the debtor must not have waived his right to recover under § 303(i). In addition, if the involuntary petition was filed in bad faith, § 303(i)(2) allows the court to award (i) "any damages" proximately caused by the filing of a petition or (ii) punitive damages.[211]

An award of attorney's fees and damages under § 303(i) is within the Court's discretion.[212] The exercise of a court's discretion "is based on the totality of the circumstances."[213] Here, the Court has not dismissed this case for the reasons put forth by Murphy, but instead finds it appropriate to abstain under § 305(a). In light of Petitioning Creditors' having established that the requirements for filing an involuntary petition under § 303(b)(1) are satisfied, and the parties' extensive discovery and litigation on the issue of whether Digital Technology's claim is in bona fide dispute, the Court will exercise its discretion and deny Murphy's request for attorney's fees. And because the Court has not found the Original Petition or the Amended Petition to have been filed in bad faith, it will not award damages or punitive damages.

VIII. CONCLUSION

For the foregoing reasons, the Court will deny the Motion to Dismiss, but finds that the facts of this case warrant its abstention.

Accordingly, it is,

ORDERED:

1. The Motion to Dismiss is **DENIED** and Petitioning Creditors' request for leave to file the Amended Petition is **GRANTED**.

2. The Court **ABSTAINS** from hearing this involuntary case under 11 U.S.C. § 305(a).

3. The Court **DENIES** Murphy's motion for attorney's fees and for sanctions.

DATED: March 19, 2019.

/s/ Caryl E. Delano
Caryl E. Delano
United States Bankruptcy Judge

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[210] Petitioning Creditors' Ex. 99 (Robert Contreras Deposition Transcript, p. 14).

[211] *In re Rosenberg*, 779 F.3d 1254, 1260 (11th Cir. 2015).

[212] *In re Trina Associates*, 128 B.R. 858, 873 (Bankr. E.D. N.Y. 1991).

[213] *In re Mountain Dairies, Inc.*, 372 B.R. at 636-637.