IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 03-36183

P & S ENGINEERED PLASTICS, INC.

Debtor

MEMORANDUM ON CONTESTED INVOLUNTARY PETITION

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This matter is before the court on the Involuntary Petition filed on November 6, 2003, by Archie J. Smith (Petitioner) seeking the entry of an order for relief pursuant to 11 U.S.C.A. § 303(h) (West 1993) under Chapter 7 of the Bankruptcy Code against P & S Engineered Plastics, Inc. (Debtor). The Debtor filed an Answer to Involuntary Petition on November 24, 2003, requesting dismissal of the Involuntary Petition and seeking costs and damages, including attorneys' fees.

The trial on the contested Involuntary Petition was held on January 12, 2004. The record before the court consists of thirteen exhibits introduced into evidence and the testimony of Karen Hill, Nancy Smith, Andrew Pfeifer, former president of the Debtor, and the Petitioner.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (O) (West 1993).

I

The Debtor, an injection molding company of thermal plastics, was formed in 1975 by the Petitioner and Myron Sutherland Pfeifer (Myron Pfeifer) in Knoxville, Tennessee, and manufactured molded component parts and products for the automobile industry and various companies including Panasonic and Rubbermaid. The Petitioner worked for the Debtor for more than 20 years, deciding to retire in 1997. At the time of his retirement, the Petitioner was Vice President of Manufacturing and Engineering and owned 20% of the common stock, which he had held since 1985.

In connection with the Petitioner's retirement, he and the Debtor, through its president, Myron Pfeifer, executed the following documents on April 25, 1997, which were also personally guaranteed by

Myron Pfeifer and his wife: (1) a Severance Pay Agreement whereby the Debtor would pay the Petitioner $1,250.00 per month for twenty years, for a total of $300,000.00, plus 10% interest; and (2) a Stock Redemption Agreement whereby the Debtor agreed to purchase the Petitioner's stock for a redemption price of $300,000.00, in monthly installments of $2,995.14 for twenty years, together with 10½% interest. Pursuant to the terms of the Stock Redemption Agreement, the Debtor executed a $200,000.00 Promissory Note on April 25, 1997, which was also guaranteed by Myron Pfeifer and his wife, individually. Payments under these documents commenced on June 1, 1997, and continued without interruption through September 2003. The Debtor made its last payment pursuant to the Stock Redemption Agreement on September 1, 2003. In November 2003, the Debtor did not make the payment pursuant to the Severance Pay Agreement, and it has not made any further payments to the Petitioner under this Agreement.

In either April or May 2003, the Petitioner met with Myron Pfeifer and his grandson, Andrew Pfeifer, who, by that time, had become the president and 100% owner of the Debtor.[1] At this meeting, the Petitioner learned that the Debtor was having financial problems and that it was contemplating bringing in a majority stockholder.[2] The Petitioner was assured by the Pfeifers at this meeting that they would negotiate the best deal possible for payment of the debt owed to the Petitioner. Shortly thereafter, Steve Hulsey (Mr. Hulsey), while in the process of attempting to purchase the Debtor, became the Debtor's Chief Financial Officer while performing due diligence on the company. In August 2003, the Petitioner received

[1] At the time that the Petitioner's stock was re-purchased, Myron Pfeifer's son, Tom, also a 20% owner, purchased the remaining stock from Myron Pfeifer (20%), June Pfeifer (20%), and Susan Pfeifer (20%), giving him 100% ownership of the Debtor's stock. Sometime after 1998, Tom Pfeifer transferred 100% of the stock to his son, Andrew Pfeifer.

[2] The Debtor employed the services of Crown Point Consultants, paying it a broker fee of $25,000.00 to find a purchaser of the Debtor's assets.

a telephone message stating that a sale of the Debtor was imminent. He contacted his attorney, who advised him to wait until the new company contacted him with a proposal.[3] The Petitioner received a second message from Mr. Hulsey while on vacation in late August, and, after returning from vacation in early September 2003, the Petitioner returned the call and scheduled a meeting with Mr. Hulsey.

The Petitioner met with Mr. Hulsey in September 2003 and was presented with a packet including a Release and Consulting Agreement. *See* TRIAL EX. 4; TRIAL EX. 5. The Release concerned the Stock Redemption Agreement and recites that the Debtor was having "extreme financial difficulties" and was unable to make further payments under the Stock Redemption Agreement and Promissory Note. *See* TRIAL EX. 4. The Release also states that the Promissory Note is "uncollectible," that execution of the Release constitutes an adjustment of the purchase price to the amounts previously paid under the Promissory Note, and that the remainder of the indebtedness is voluntarily discharged in full. *See* TRIAL EX. 4. The Petitioner did not accept or execute the Release. Similarly, the Petitioner did not accept or execute the Consulting Agreement with PS Engineered Plastics Acquisition, Inc., which proposed to pay $1,500.00 each month to the Petitioner for a term of twenty years, with payments to commence on the first day of the month after execution of the Consulting Agreement.[4] *See* TRIAL EX. 5.

On September 30, 2003, the Debtor's assets were sold to Prostead LLC and PS Engineered Plastics Acquisition, Inc., both of which are controlled by Mr. Hulsey, for a purchase price of

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[3] The Petitioner was represented at that time by another attorney who is not presently affiliated with his current counsel.

[4] Additionally, the Petitioner testified that, according to Mr. Hulsey, all payments under the Consulting Agreement were to be made by the new company "off the books."

$1,950,000.00. *See* TRIAL EX. 8. From those proceeds, all debts of the Debtor, totaling $1,444,407.16, were paid in full, with the sole exception being the debts owed to the Petitioner under the Stock Redemption Agreement, Promissory Note, and Severance Pay Agreement. Additionally, Andrew Pfeifer testified that he personally received approximately $20,000.00 from the closing, which he believed was paid by the new owners in order to effectuate a "smooth transition" between the Debtor and the new company, which operated under the name PS Engineered Acquisition, Inc.[5] Mr. Pfeifer also testified that he currently serves as president of the new company, but his primary responsibilities are sales, marketing, and customer relations.

On November 6, 2003, the Petitioner filed an Involuntary Petition, seeking an order for relief under Chapter 7 of the Bankruptcy Code against the Debtor, by alleging that the Petitioner was eligible to file the petition pursuant to 11 U.S.C.A. § 303(b) (West 1993 & Supp. 2003) and that the Debtor was not generally paying the Petitioner's debt as it has become due. *See* 11 U.S.C.A. § 303(h)(1). Additionally, on November 6, 2003, the Petitioner filed Civil Action No. 159687-2 in the Chancery Court for Knox County, Tennessee (the State Court Lawsuit) against Myron Pfeifer and his wife, June, based upon their personal guaranty of the Promissory Note. *See* TRIAL EX. 7. The Debtor was not listed as a defendant in this lawsuit because the Petitioner had filed the involuntary bankruptcy petition against the Debtor earlier in the day, thereby bringing the automatic stay into effect.

[5] Mr. Pfeifer testified that the name of the company was changed to Prostead Engineered Plastics the day after the Involuntary Petition was filed so that the company would not appear to be associated with the bankruptcy.

The Debtor filed its Answer to Involuntary Petition on November 24, 2003, averring that the Petitioner is its only remaining creditor and that the debt serving as the subject of the involuntary bankruptcy case is actually a two-party dispute that should be resolved in the State Court Lawsuit. The Debtor also argued that it ceased to be in existence after the sale of its assets on September 30, 2003, and that the entire $1,950,000.00 purchase price was used to pay its creditors, other than the Petitioner.[6]

II

Involuntary petitions are governed by 11 U.S.C.A. § 303, which provides, in material part:

> (h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed only if—
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> > (1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute[.]

11 U.S.C.A. § 303(h). "A finding that a debtor is generally not paying its debts 'requires a more general showing of the debtor's financial condition and debt structure than merely establishing the existence of a few unpaid debts.'" *Liberty Tool & Mfg., Inc. v. Vortex Fishing Sys., Inc. (In re Vortex Fishing Sys., Inc.)*, 277 F.3d 1057, 1072 (9th Cir. 2002) (quoting *Gen. Trading Inc. v. Yale Materials Handling Corp*., 119 F.3d 1485, 1504 n. 41 (11th Cir. 1997)). Generally, in making their fact-specific determination, "[c]ourts that have undertaken this analysis have identified the following four factors as guideposts in their inquiry: (1) the number of unpaid claims; (2) the amount of such claims; (3) the

[6] All of these obligations were disbursed from the sale proceeds at closing by the settlement agent, American Fidelity Title Co., Inc. *See* TRIAL EX.. 8.

materiality of the nonpayments; and (4) the debtor's overall conduct of its financial affairs." *Crown Heights Jewish Cmty. Council, Inc. v. Fischer (In re Fischer)*, 202 B.R. 341, 350 (E.D.N.Y. 1996); *see also Perez v. Feinberg (In re Feinberg)*, 238 B.R. 781, 783 (B.A.P. 8th Cir. 1999). The burden of proof that a debtor is not generally paying its debts falls upon the petitioning creditor(s). *In re Brooklyn Res. Recovery, Inc.*, 216 B.R. 470, 482 (Bankr. E.D.N.Y. 1997).

In cases involving only one creditor, the inquiry is more complicated because "[f]ailure to pay one debt, without more, is not considered 'general' nonpayment." 2 COLLIER ON BANKRUPTCY ¶ 303.14[1][d] (Lawrence P. King ed., 15th ed. rev. 2003). When faced with single-creditor involuntary cases, courts have generally adopted an "almost per se rule," wherein single creditors may not rely upon § 303(h)(1) without evidencing "exceptional circumstances." *See Bankers Trust Co. BT Serv. Co. v. Nordbrock (In re Nordbrock)*, 772 F.2d 397, 399 (8th Cir. 1985); *Paroline v. Doling*, 116 B.R. 583, 585 (Bankr. S.D. Ohio 1990). "[E]xceptions to the general rule of denying the involuntary petition of a single creditor with the only delinquent debt have arisen where the creditor demonstrates that 1) the debtor has engaged in trick, sham, artifice or fraud; or 2) the creditor has a special need for bankruptcy relief such as where state law remedies are inadequate." *Paroline*, 116 B.R. at 585;[7] *see also In re Food Gallery of Valleybrook*, 222 B.R. 480, 487-88 (Bankr. W.D. Pa. 1998).

[7] The Sixth Circuit Court of Appeals has not expressly adopted or rejected the "almost per se rule," although it has acknowledged that bankruptcy courts within the Sixth Circuit follow the rule. *See Concrete Pumping Serv., Inc. v. King Constr. Co., Inc. (In re Concrete Pumping Serv., Inc.)*, 943 F.2d 627, 629-30 (6th Cir. 1991). The Sixth Circuit questioned the rule as being contrary to the plain language of the statute allowing a single creditor to file an involuntary petition, but it declined to actually decide the question, instead finding evidence of fraud and under "'the totality of the circumstances existing when the petition [was] filed,'" the debtor was generally not paying her debts. *Concrete Pumping Serv., Inc.*, 943 F.2d at 630 (quoting *Hayes v. Rewald (In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.)*, 779 F.2d 471, 475 (9th Cir. 1985) (discussing the "generally not paying" standard in multiple creditor cases)).

A

The court must first examine the Debtor's conduct in dealing with the Petitioner to determine whether the Debtor engaged in trickery, artifice, or fraud concerning the Petitioner. Based upon the evidence, the court finds that the Debtor did not engage in trickery, artifice, or fraud in its dealings with the Petitioner. The Debtor was started in 1975 by the Petitioner and Myron Pfeifer, who were also friends. The Petitioner was given 20% of the Debtor's stock in 1985, and when he decided to retire in 1997, he was given a generous retirement package, including severance and stock redemption. The Debtor commenced payments as required under the Severance Pay Agreement, Stock Redemption Agreement, and Promissory Note, and these payments continued without interruption for more than six years, up until the Debtor's assets were sold on September 30, 2003. Even while the Debtor was admittedly suffering severe financial difficulties between April and September 2003, and was unable to pay all of its vendors timely, the Petitioner received his monthly payments on time, and in fact, received the October 2003 monthly severance payment.

The Petitioner was notified in April or May 2003 of the Debtor's financial woes, and in fact, was alerted to the fact that the Pfeifers were attempting to sell the company. At that time, both Myron and Andrew Pfeifer told the Petitioner that they would try and negotiate the best possible deal for the Petitioner with any new owner. Presumably, as a result of the Pfeifers' negotiations with Mr. Hulsey, the Petitioner was offered the Consulting Agreement introduced into evidence as Exhibit 5. The Petitioner testified that he did not execute the Consulting Agreement, stating that it was not a fair agreement because it did not offer

him any guarantees of payment and because the new company could decide within the first thirty days, prior to the first payment, that it would terminate the agreement, whereby he would receive nothing.

The Consulting Agreement provides that the Petitioner would provide consulting services to PS Engineered Plastics Acquisition, Inc., the new company, for compensation of $1,500.00 per month for a period of twenty years. After careful review of the Consulting Agreement, the court does not agree with the Petitioner's characterizations of the agreement. The Consulting Agreement expressly provides that the only reasons for termination are either the Petitioner's death or the completion of the agreement's twenty-year term. There are no provisions under which PS Engineered Plastics Acquisition, Inc. could fail to pay the monthly fee without being in breach of the entire Consulting Agreement. Furthermore, the proposed compensation over the twenty-year period would result in payments to the Petitioner totaling $360,000.00, which is considerably more than the $203,750.00 remaining due under the Severance Agreement.

The Petitioner also received the Release entered into evidence as Exhibit 4, asking him to consider the $227,630.64 already received under the Stock Redemption Agreement and Promissory Note as satisfaction in full of that debt. As an initial matter, Andrew Pfeifer testified that he did not prepare this document, he did not offer it to the Petitioner, and, in fact, prior to this involuntary bankruptcy action, he had never seen the Release. The Petitioner testified that the Release was given to him by Mr. Hulsey, along with the Consulting Agreement. He also testified that it was Mr. Hulsey, and not anyone associated with the Debtor itself, that pushed for execution of the Release prior to the September 30, 2003 closing.

Moreover, the court does not find that this Release was unreasonable in light of the circumstances. The Petitioner acquired his stock in the Debtor, representing 20% ownership, in 1985 after completing ten years of service with the Debtor. The Petitioner did not pay any money for the stock, and he was the only non-family-member owner of the Debtor. The Stock Redemption Agreement and Promissory Note reference a principal redemption price of $300,000.00 to be paid to the Petitioner, together with interest. The Petitioner has received $227,630.64 towards that end. While the Petitioner was not required to accept the Release, it was likewise not unreasonable for Mr. Hulsey to offer it.

Finally, although the Petitioner testified at trial that he felt tricked "in a sense" because he was only notified of the sale and closing three or four days beforehand, he conceded that his feeling of unfair treatment stemmed from his not being paid. The court recognizes that the Petitioner was not advised of the actual closing date for the sale of the Debtor's assets until the week prior thereto; however, the court fails to see how this supports the allegations of fraud, trickery, or artifice. The Petitioner was contacted by Mr. Hulsey in August 2003 regarding the sale of the company, and in fact, met with Mr. Hulsey in early September 2003, at which time he was presented with the Consulting Agreement and Release. At that point, the Petitioner was on notice that the Debtor was being sold, and the Debtor's failure to invite the Petitioner to the closing is irrelevant. The Petitioner was simply a creditor of the Debtor who was presented with an option, albeit not satisfactory to the Petitioner, for payment of the Debtor's debt to the Petitioner. The Petitioner's negative feelings about not being paid, while understandable, do not support a finding that the Debtor engaged in any means of fraud, artifice, or trickery.

Likewise, the way in which the Debtor conducted its financial affairs both immediately preceding or since the September 30, 2003 sale do not support a finding that it engaged in fraud, trickery, or artifice. At trial, the Petitioner presented evidence that the Debtor was not timely paying its creditors and vendors prior to the sale of its assets on September 30, 2003, and in fact, Andrew Pfeifer admitted that the company was in dire financial trouble prior to the sale. However, from the $1,950,000.00 sale proceeds, the Debtor paid every outstanding debt owed, totaling $1,444,407.16, with the sole exception of its debt to the Petitioner.[8]

The Petitioner argues that Prostead Engineered Plastics, Inc. is simply the Debtor, in disguise, maintaining that the new company has the same employees and performs the same functions as did the Debtor. In support of these allegations, the Petitioner relies upon the testimony of Karen Hill, an employee at Rubbermaid and former employee of the Debtor.[9] Ms. Hill testified that the Debtor's account at Rubbermaid is still open under the name "P & S Engineered Plastics" and that it still uses the same tax identification number. Ms. Hill also testified that her final paycheck with the Debtor, dated October 15, 2003, was written on the Debtor's bank account. *See* TRIAL EX. 11. Additionally, the Petitioner introduced into evidence a payroll check dated January 7, 2004, and a vendor check dated November 3, 2003, both written on accounts with the Debtor's name, rather than Prostead Engineered Plastics, Inc. *See* TRIAL EX. 12; TRIAL EX. 13.

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[8] According to the Settlement Statement for the closing of this sale, none of the creditors receiving proceeds of the sale were owed an amount greater than the Petitioner's claim. The only creditors receiving amounts somewhat close to that owed to the Petitioner were (1) CIT Group, receiving a total of $410,740.50; (2) Staffing Solutions, who received $247,749.13; and (3) Rubbermaid, which received $127,507.01. *See* TRIAL EX. 8; TRIAL EX. 10.

[9] Ms. Hill is also the Petitioner's daughter.

Ms. Hill also testified that, based upon her contacts with employees in the accounting department of Rubbermaid, the $127,507.01 check paid to Rubbermaid from the September 30, 2003 closing was returned to Mr. Hulsey approximately three weeks after closing. Ms. Hill testified that the check was returned because some of the invoices referenced on the check had been previously debited, and "Rubbermaid was not going to go through the hassle of trying to figure out what had and what hadn't been [taken] and reimburse and that type of thing, so it was decided that it would just be sent back." However, Ms. Hill was unable to confirm whether Rubbermaid was actually owed money by the Debtor as of the date of closing, and she was unable to testify as to what happened to the funds from that check.

In response, Andrew Pfeifer acknowledged that the Debtor paid all of its secured creditors, trade creditors, and vendors so that the purchasing company, Prostead Engineered Plastics, Inc., could continue using the equipment, the building, and all other assets of the Debtor. Mr. Pfeifer testified that when he sold the company, his main concern was keeping everyone employed, and in fact, many of the persons employed by the Debtor have remained employed at Prostead Engineered Plastics, Inc. Mr. Pfeifer also testified that the Petitioner was the only remaining creditor of the Debtor, and that he was not paid because there simply was "not enough to go around." On the other hand, he testified that the creditors and vendors were paid because "they're important to the continued success or just operations of the company" and because some of them actually own the molds and/or tooling used by the company to produce its products. Mr. Pfeifer testified that had these vendors not been paid, they would have pulled the tools from the company.

Mr. Pfeifer also testified that he has not officially dissolved the Debtor with the State of Tennessee because he was unaware that he needed to. Along those lines, he admitted that the Debtor did not send notices of the sale to any of the Debtor's creditors asking them to state claims, nor has the Debtor sent any notices of dissolution. Nevertheless, Mr. Pfeifer testified that the Debtor has ceased doing business, and that the new company, Prostead Engineered Plastics, Inc. is not the same entity as the Debtor. Mr. Pfeifer testified that Prostead Engineered Plastics, Inc. is owned and operated by Mr. Hulsey, and that it has obtained its own tax identification number. When questioned about use of checks by the new company with the Debtor's name, Mr. Pfeifer speculated that Mr. Hulsey was simply using the Debtor's remaining checks.

The proof evidences to the court that the Debtor and Prostead Engineered Plastics, Inc. are two separate legal entities, owned and operated by different individuals. The Debtor was owned 100% by Andrew Pfeifer when its assets were sold on September 30, 2003. He was the person in charge of the Debtor, making its business decisions, and dealing with the financial struggles it faced. On the other hand, Prostead Engineered Plastics, Inc. is owned by Mr. Hulsey and has no relationship with Mr. Pfeifer other than as his employer. Mr. Pfeifer holds the title of President, but he makes no major decisions on behalf of Prostead Engineered Plastics, Inc. Additionally, he received a 10% pay decrease with Prostead Engineered Plastics, Inc, and he is facing an additional 33% decrease if sales have not reached a set amount by March 2004. Mr. Pfeifer is no longer a signatory on any bank accounts, he owns no stock in Prostead Engineered Plastics, Inc., nor does he have any promise of stock ownership.

An even greater indication of the separateness of these two companies is evidenced by the Consulting Agreement, which was prepared, proposed, and given to the Petitioner by Mr. Hulsey. The Agreement expressly states that the Petitioner shall be a consultant for PS Engineered Plastics Acquisition, Inc., the former name of Prostead Engineered Plastics, Inc. After the closing, the Petitioner met with Mr. Hulsey regarding the Consulting Agreement and payments thereunder. The Petitioner acknowledged that Andrew Pfeifer was not present at that meeting, and that all proposals to pay the Petitioner "off the books" were made by Mr. Hulsey. The fact that Mr. Hulsey and Prostead Engineered Plastics, Inc. have used the Debtor's old checks post-closing does not outweigh this evidence. Accordingly, while the court recognizes that Prostead Engineered Plastics, Inc. has assumed occupancy of the Debtor's former place of business and has continued performing the same business formerly conducted by the Debtor, it paid $1,950,000.00 for the right to do so. The companies are separate and distinct entities, and there is no evidence of fraud, scam, trickery, or artifice between the Debtor and Prostead Engineered Plastics, Inc.

B

The next factor to be considered is whether the Petitioner has any remedies under state law. Clearly, the Petitioner does have adequate remedies under Tennessee law. The Severance Pay Agreement, Stock Redemption Agreement, and Promissory Note were all executed by the parties in the State of Tennessee. When it failed to make its required payments pursuant to these documents, the Debtor breached the Agreements and Note, giving rise to a possible remedy for the Petitioner under Tennessee contract law.

Moreover, the Petitioner has a Guaranty from Myron and June Pfeifer, wherein they agreed to pay the Petitioner in the event that the Debtor did not. And, in fact, the Petitioner has filed the State Court Lawsuit, seeking to recover damages under the Guaranty. The Petitioner testified that after being served with the documents entered into evidence as Exhibit 7, he was contacted by Myron Pfeifer, who told the Petitioner that 70% of his income comes from Social Security payments and that he and his wife are using their savings to maintain their standard of living. Based upon these representations from Myron Pfeifer, the Petitioner argues that it would be unfair to rely upon the Pfeifers, as guarantors, to pay the Debtor's corporate debts. Nevertheless, the Petitioner acknowledged that he filed the State Court Lawsuit in order to "get what [he] could." While the representations allegedly made by Myron and June Pfeifer regarding their present financial situation may or may not be accurate, the fact remains that the Petitioner has an adequate remedy under state law which he has already begun exercising.[10]

After examining the proof, the court finds that there is no basis for sustaining the Involuntary Petition. The Debtor sold all of its assets to Prostead Engineered Plastics, Inc. on September 30, 2003, with the proceeds therefrom applied to the payment of all of its creditors, with the exception of the Petitioner. When the Involuntary Petition was filed on November 6, 2003, the only creditor that had not been paid was the Petitioner, who received his last payment from the Debtor on October 1, 2003. The Debtor has not engaged in fraud, artifice, or trickery concerning the Petitioner, who has remedies under state law, or when conducting its overall financial affairs. Additionally, the court questions what remedies

[10] The Debtor was not named as a defendant in the State Court Lawsuit because the automatic stay was in effect from the filing of the Involuntary Petition. Upon termination of the automatic stay, the Petitioner may wish to amend the State Court Lawsuit to add the Debtor as a party defendant and to add any necessary allegations and/or prayers for relief.

the Petitioner believes would be obtained were the Debtor in Chapter 7. Because there is no basis for entering an order for relief, the Involuntary Petition filed by the Petitioner against the Debtor shall be dismissed.

III

In addition to requesting dismissal of the Involuntary Petition, the Debtor requests its attorneys' fees and expenses associated with its defense. The Debtor's request is made pursuant to 11 U.S.C.A. § 303(i)(1), which provides as follows:

> (i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment—
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> (1) against the petitioners and in favor of the debtor for—
>
> (A) costs; or
>
> (B) a reasonable attorney's fee[.]

11 U.S.C.A. § 303(i) (West 1993). The purpose of the statute is to award the alleged debtor its costs and expenses associated with the defense of an involuntary petition. *MAG Bus. Servs. v. Whiteside (In re Whiteside)*, 240 B.R. 762, 765 (Bankr. W.D. Mo. 1999). It is wholly within the court's discretion to award fees under § 303(i)(1), and bad faith by the petitioning creditor(s) is not a prerequisite to the grant thereof. *In re Squillante*, 259 B.R. 548, 553 (Bankr. D. Conn. 2001); *Whiteside*, 240 B.R. at 765. Instead, the court will look at a totality of the circumstances, with "a presumption that costs and attorney's fees will be awarded to the alleged debtor following dismissal of an involuntary petition; and that the burden of proof is on the petitioner to justify a denial of costs and fees." *Squillante*, 259 B.R. at 553-54; *see also*

In re Schloss, 262 B.R. 111, 116 (Bankr. M.D. Fla. 2000) (finding that "the right to an award for fees and costs creates a rebuttable presumption."). An examination of the totality of the circumstances "'requires an inquiry into: (1) the merits of the involuntary petition, (2) the conduct of the debtor, (3) the reasonableness of the actions taken by the petitioning creditors, and (4) the motivations and objectives behind filing the petition.'" *Squillante*, 259 B.R. at 554 (quoting *In re Scrap Metal Buyers of Tampa, Inc.*, 253 B.R. 103, 110 (M.D. Fla. 2000)).

Because the court is required to conduct additional fact-finding, the parties are required to provide the court with additional proof, including the amount and reasonableness of the attorneys' fees incurred.[11] The court will therefore reserve its ruling on the issue of attorneys' fees and costs pending the receipt of this additional proof. To that end, the Debtor, through its attorney, will be required to file an affidavit of the costs and attorneys' fees incurred in its defense of the Involuntary Petition. The affidavit shall set forth a detailed statement of the services rendered, time expended, costs incurred, and the amounts requested. The court shall also fix a time within which the Petitioner may object to the requested costs and attorney s' fees. Any objection shall be accompanied by a supporting brief. If no objection is filed, the court will presume the Petitioner does not oppose the requested costs and fees. If an objection is filed, the Debtor shall file a responsive brief, and an evidentiary hearing will be held.

[11] Attorneys' fees under § 303(i), which are considered "damages," are not examined under the same scrutiny as compensation under 11 U.S.C.A. § 330 (West 1993 & Supp. 2003); however, the Debtor will nevertheless be required to prove that all requested attorneys' fees and expenses are reasonable and necessary. *In re Paczesny*, 282 B.R. 646, 650 (Bankr. N.D. Ill. 2002).

An order consistent with this Memorandum will be entered.

FILED: January 28, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 03-36183

P & S ENGINEERED PLASTICS, INC.

Debtor

O R D E R

For the reasons stated in the Memorandum on Contested Involuntary Petition filed this date containing findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure, made applicable to this contested matter by Rule 9014(c) of the Federal Rules of Bankruptcy Procedure, the court directs the following:

1. The Involuntary Petition filed by the Petitioner Archie Joe Smith under Chapter 7 of the Bankruptcy Code on November 6, 2003, against the Debtor P & S Engineered Plastics, Inc. is DISMISSED.

2. An evidentiary hearing on the Debtor's request for an award of costs and attorneys' fees against the Petitioner pursuant to 11 U.S.C.A. § 303(i) (West 1993) will be held on March 5, 2004, at 9:00 a.m., in Bankruptcy Courtroom 1-C, First Floor, Howard H. Baker, Jr. United States Courthouse, Knoxville, Tennessee. The parties will adhere to the following pre-hearing schedule:

A. The Debtor, through its attorney, shall, within fourteen days, file an affidavit setting forth a detailed statement of the services rendered in the Debtor's defense of the Involuntary Petition, time expended, costs incurred, and the amounts requested.

B. The Petitioner, within ten days after the filing of the affidavit required above, shall file any objection he asserts to the costs and attorneys' fees requested by the Debtor. Any objection shall be accompanied by a supporting brief. The failure of the Petitioner to object shall be deemed by the court to mean that he does not oppose the award of the requested amounts.

C. The Debtor shall file a responsive brief in opposition to any objection filed by the Petitioner at least seven days prior to the hearing fixed herein.

SO ORDERED.

ENTER: January 28, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE