



**IT IS ORDERED as set forth below:**

**Date: April 16, 2009**

*James E. Massey*

James E. Massey  
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

\_\_\_\_\_  
IN RE:

CASE NO. 09-67151

The S&Q Shack, LLC,

INVOLUNTARY CHAPTER 7

Debtor.  
\_\_\_\_\_

JUDGE MASSEY

ORDER DENYING MOTION TO DISMISS

BV Retail, LLC filed an involuntary petition commencing this Chapter 7 case on March 19, 2009 and served a summons and the petition on March 26. On April 13, 2009, the alleged debtor, The S&Q Shack, LLC, answered, denying that the petitioning creditor is eligible to file the petition and that it is generally not paying its debts as they become due. S&Q admitted that it is a person against whom an order for relief maybe entered under title 11 of the United States Code. S&Q also filed on April 13, 2009 a motion to dismiss on the ground that BV Retail, LLC lacks standing to be a petitioning creditor because S&Q has more than 11 creditors holding claims that are not contingent or subject to dispute.

The relevant sections of the Bankruptcy Code are sections 303(a), (b), (c) and (h), which provide in part:

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title--

(1) 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 as to liability or amount, or an indenture trustee representing such a holder, if such noncontingent, undisputed claims aggregate at least \$13,475 [FN1] more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least \$13,475 of such claims[.] . . .

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

. . .

(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--

(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 as to liability or amount[.] . . .

The motion to dismiss misconceives the legal theory on which dismissal of this case might be predicated. There is, at present at least, no explicit contention that BV Retail, LLC's claim is disputed as to liability or amount. A single petitioning creditor whose undisputed claim exceeds the statutory minimum plainly has standing to file an involuntary petition. 11 U.S.C. § 303(b)(2); *cf. In re Smith*, 243 B.R. 169, 179-180 (Bankr. N.D. Ga. 1999). The allegation in the petition that BV Retail, LLC is "eligible" to file refers to whether it may be a petitioner at all under section 303(b), not whether the requisite number of petitioners has signed the petition. If a petition requiring three claim holders is signed by only one, the involuntary case would be dismissed if two additional claim holders fail to join in the petition as explained below. Dismissal would not be for lack of standing but because too few claim holders joined in the petition. If standing were an issue, section 303(c) would be superfluous.

Thus, S&Q's assertion that it has more than 11 creditors raises a different issue than one of standing. The elements of a claim under section 303 include not only the numbered allegations in the form used for the petition here, but a fourth element, which is the number of eligible holders of undisputed claims. *See In re Euro-American Lodging Corp.*, 357 B.R. 700, 712 (Bankr. S.D.N.Y. 2007). Because section 303(b) provides for a single petitioning creditor only if a debtor has fewer than 12 eligible holders of claims and because BV Retail, LLC is the only petitioning creditor, it follows that the petition alleges by implication that S&Q has fewer than 12 eligible holders of claims. The elements of a claim for entry of an order for relief under section 303 are not jurisdictional, however, and a debtor waives an objection to an involuntary petition filed by one creditor by not timely asserting that it has more than 11 creditors. *In re Trusted Net Media Holdings, LLC*, 550 F.3d 1035 (11<sup>th</sup> Cir. 2008).

The proper pleading in which to contest an involuntary petition based on the number of eligible claim holders is the answer and not a motion to dismiss, because section 303(c) explicitly permits additional creditors to join in a petition. The procedure for dealing with the present factual situation is set out in Bankruptcy Rule 1003(b), which provides:

*If the answer to an involuntary petition filed by fewer than three creditors avers the existence of 12 or more creditors, the debtor shall file with the answer a list of all creditors with their addresses, a brief statement of the nature of their claims, and the amounts thereof. If it appears that there are 12 or more creditors as provided in § 303(b) of the Code, the court shall afford a reasonable opportunity for other creditors to join in the petition before a hearing is held thereon.*

Fed. R. Bankr. P. 1003(b) (emphasis added). The Court will afford S&Q the opportunity to amend its answer to comply with this rule.

If S&Q's timely files an amended answer showing that it has more than 11 holders of claims eligible under section 303(b), the Court will notify those holders that any of them may join in the petition and will set a deadline for doing so. If two or more eligible claim holders were to join in the petition, the exact number of eligible holders would become irrelevant. If fewer than two such holders join in the petition, and if BV Retail, LLC does not contest the assertion that S&Q has more than 11 holders of claims eligible to join in the petition, the Court will dismiss the case. In that event, there would be too few petitioners, but more to the point, BV Retail, LLC would have failed to prove an essential fact alleged by implication in its involuntary petition – that S&Q has fewer than 12 eligible claim holders. If BV Retail, LLC were to contest the number of such holders as alleged by S&Q, the Court would hold a trial on that issue, unless a party moves for summary judgment. The parties are reminded that this is a contested matter. *See* Bankruptcy Rule 9014(c) and (d).

For these reasons, S&Q's motion to dismiss is DENIED. If S&Q desires to contest the involuntary petition, it may file an amendment to its answer complying with Bankruptcy Rule 1003 no later than May 1, 2009.

\*\*\*END OF ORDER\*\*\*