IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

In re:	Bankruptcy Number: 03-33637
STEPHEN M. HARMSEN,	Involuntary Chapter 7
Involuntary Debtor.	

MEMORANDUM DECISION

The Society of Lloyd's (the "Petitioner") filed an involuntary Chapter 7 petition against Stephen M. Harmsen (Harmsen) seeking Harmsen's adjudication in an attempt to collect upon a £235,084.48 judgment. Harmsen answered, asserting that he had more than eleven holders of claims and therefore an involuntary petition filed by a single petitioner was improper. The Petitioner challenged whether Harmsen's listed holders of claims were eligible, asserting some entities could not be counted because they were insiders or were subject to voidable transfers under 11 U.S.C. §§ 547, 548, or 549.[1] Regardless of the number of petitioning creditors required, Harmsen asserts the Petitioner cannot prove that he was not generally paying his debts as such debts became due and further asserts that the Petitioner's debt is in bona fide dispute.

[1] Future references are to Title 11 of the United States Code unless otherwise noted.

Trial was held upon the involuntary petition and the matter taken under advisement. The Court has now considered the credibility of the witnesses, the evidence presented, the arguments of counsel, and has made an independent review of applicable case law. Based thereon, the Court hereby enters its Memorandum Decision containing findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052(a).

I. FACTS

A. Harmsen's Sources of Revenue.

Harmsen is the manager of several businesses including, among others, S. R. C. Corporation, d.b.a. Steve Regan Co. (SRC); West American Finance Corporation (WAFCO); Mud Creek Hydro Corporation; HH Land and Cattle Company; H.K. Hydro Inc.; and H.F.L.P., L.C. Two of the entities, SRC and WAFCO, occupy most of Harmsen's time and provide income to him. SRC, a Subchapter S agricultural supply company valued between $1 million to $1.5 million, was owned until June of 2003 by Harmsen and his wife. SRC compensates Harmsen for his management services by paying him $36,000 per year. Assuming the company is profitable, additional compensation is paid by SRC to Harmsen so that he receives between $125,000 to $150,000 per year. SRC uses several of Harmsen's credit cards to purchase items needed by the business, and also pays for personal purchases made by Harmsen on those same credit cards. At the end of the year, the personal charges made by Harmsen on the credits cards, or other personal expenses paid by SRC, are offset against the remainder of the compensation to which he is entitled.

A similar arrangement exists between Harmsen and WAFCO, a holding company that owns various notes and real estate interests and is valued between $1 million and $1.5 million.

Until June of 2003, WAFCO was owned 50% by Harmsen's brother Randall Harmsen and 50% by H.F.L.P., L.C. In turn, H.F.L.P., L.C. was owned 70% by Harmsen's children and 30% by Harmsen's wife. Harmsen provides management services to WAFCO for which he is paid $75 per hour and all unreimbursed medical, insurance, and dental expenses of Harmsen or his family. As of August 9, 2003, approximately $30,000 had been earned by Harmsen but unpaid by WAFCO. As with SRC, on occasion WAFCO pays Harmsen's personal bills and it is the practice of the parties to settle their accounts at year end.

B. Harmsen's Debts.

1. WAFCO.

In 1992, Harmsen and a partner owned equal interests in a company that sought to develop a hydro-electric plant in Twin Falls, Idaho. Harmsen personally guaranteed a development loan from Jamaica Water and Power and pledged all assets that he owned at the time to secure the loan. Permits for the plant could not be obtained and the project failed. Jamaica Water and Power called the loan. In 1995, other guarantors on the loan made demand upon Harmsen for payment. Harmsen in turn explained to Randall Harmsen that the failure of the project put Harmsen's assets in jeopardy. Randall Harmsen then caused WAFCO to purchase the loan from the guarantor so that Harmsen now owed WAFCO rather than Jamaica Water and Power or other guarantors.

In 1996, Harmsen and other defendants entered into an agreement with WAFCO that judgment would be entered against Harmsen and others in favor of WAFCO in the amount of $2,215,907.11 plus interest (the "WAFCO Judgment"). In connection with the entry of judgment, the parties agreed to forbear enforcement of the judgment upon condition that

WAFCO receive an interest in the same collateral that originally secured the Jamaica Water and Power obligation, but the balance of the obligation was due September 1, 2000. The forbearance agreement was executed by Randall Harmsen, as president of WAFCO; and Harmsen, as president of Cogeneration Intermountain, Inc., Cogeneration, Inc., and S.R.C.; Harmsen individually; and on behalf of Kelly Harmsen, Harmsen's wife. Harmsen agreed to cooperate in the orderly liquidation of the pledged collateral and certain assets were transferred to WAFCO in partial payment. Harmsen leased back one of the transferred assets, his residence, from WAFCO upon condition that he pay rent in the amount of the underlying mortgage, insurance, property taxes, utilities, and all repairs and maintenance.

Harmsen failed to pay WAFCO the amount owed by the September 1, 2000 date in the forbearance agreement. WAFCO executed upon the WAFCO Judgment and a constable sale was held June 17, 2003. Title to or control of the assets was transferred pursuant to the constable's sale and a partial satisfaction of judgment was filed January 20, 2004 indicating that, after credits from the sale, a balance of $865,227.50 plus interest remained. WAFCO has taken no further action to collect the balance of the WAFCO Judgment.

2. The Petitioner.

Harmsen participated in certain insurance commitments by assuming a portion of a syndicate's risks in the English insurance market regulated by the Petitioner. In November 1996, the Petitioner sued Harmsen in England, which resulted in judgment being entered against him on March 11, 1998 in the amount of £208,344.57 plus 8% interest per annum (the "English Judgment"). The Petitioner sued Harmsen and others to enforce the money judgment in the United States District Court for the District of Utah. The District Court granted the Petitioner's

motion for summary judgment, and judgment against Harmsen was signed March 17, 2003 for the principal amount of the English judgment, plus interest which totaled £235,084.48 as of December 8, 2002 (the "District Court Judgment"). Harmsen appealed the judgment and the appeal is currently pending at the Tenth Circuit Court of Appeals. There is no evidence that Harmsen has paid any amount on the District Court Judgment.[2] The Petitioner filed the within involuntary petition on August 9, 2003 (the "Petition Date"). As of the date of filing, the amount Harmsen owed on the District Court Judgment was $390,983.57[3].

3. Other Debts.

Harmsen has the following debts in addition to those owing to WAFCO and the Petitioner.

a. Real Property Obligations. Harmsen has several obligations secured by real property owned by other entities as follows: i) an obligation to Washington Mutual Bank secured by real property owned by WAFCO that Harmsen rents from WAFCO for his residence; ii) an obligation to California National Bank aka Fidelity Federal Bank secured by apartments located in California owned by WAFCO; iii) an obligation owed to Washington Mutual Bank secured by real property in California owned by H.F.L.P,. L.C.; and iv) an obligation to Western Farm Credit Bank secured by property in Nevada owned by HH Land and Cattle Company.

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[2] A Partial Satisfaction of Judgment was filed with the District Court March 24, 2003 indicating a credit against the principal amount of the English Judgment was made August 19, 1998. After the credits, Harmsen owed £163,858.44 plus £71,226.04 in accrued interest from March 11, 1998 - December 8, 2002 and £35.91 per day in interest accruing on the principal after December 8, 2002. R. at Cr. Ex. 10.

[3] R. at Cr. Ex. 20.

b. Lines of Credit. Harmsen has lines of credit or credit cards with American Express Delta Sky Miles; Bank of America Flight Fund Visa; Capital One; MBNA America; Salt Lake City Credit Union Visa; and G.M.

c. Utility Services. Harmsen uses utility or other services at his residence as follows: Comcast; Newspaper Agency Corporation; Questar; Salt Lake City Department of Public Utilities; and Utah Power. He also has utility services in his name with San Diego Gas & Electric and Time Warner Cable associated with rental property in California.

d. Professional Services. Harmsen uses the services of the following professionals: N. Branson Call, M.D.; Thomas R. Liddell, DDS; Gerald S. Summerhays, DDS; HJ & Associates, LLC, accountants; Steven H. Lybbert, attorney; Steven A. Wuthrich, attorney; and Melenaite Vi for gardening services.

e. Margin Loans. Two brokerage houses have extended margin loans to Harmsen: Quick & Riley and Zions Investment Securities.

f. Miscellaneous. Harmsen has made personal property purchases from F. Weixler Company; has tax obligations to the Internal Revenue Service and the Utah State Tax Commission; and has or had an ongoing relationship with the Names Legal Committee, Inc. and with the Alta Club.

A good deal of evidence was presented at trial as to whether the entities listed in the foregoing paragraphs qualified to be counted under § 303(b)(2), or whether they should be excluded as insiders, recipients of voidable transfers under §§ 547, 548, or 549, or should be excluded for other reasons. A review of such evidence is warranted for a determination as to whether the Petitioner, as a single creditor, may bring this involuntary petition, but such a review

is not necessary to a determination of whether Harmsen is generally paying his debts as such debts become due. Therefore, the Court will first determine whether the Petitioner has presented facts sufficient to support its burden under § 303(h)(1).

C. Section 303(h)(1) Determination.

1. Payment history.

The evidence indicates that Harmsen has caused payments to be made to his creditors in the following manner:

a. WAFCO. Since the execution sale on June 17, 2003, there is no evidence that Harmsen has made direct payments on the balance of the WAFCO Judgment, with the exception of making rental payments to WAFCO for occupying Harmsen's residence.

b. The Petitioner. Harmsen has appealed the District Court Judgment to the Tenth Circuit Court of Appeals and has made no payments to the Petitioner after the credit indicated in the Partial Satisfaction of Judgment.

c. Real Property Obligations. Harmsen is obligated to pay monthly residential rental payments of $7,257.42[4] to WAFCO. The payments represent the Washington Mutual Bank debt service upon which Harmsen is liable that has a balance of approximately $977,920.[5] Harmsen is and has been current on this monthly payment. Harmsen has caused payments on his obligation to California National Bank aka Fidelity Federal Bank in the original amount of $1,275,000[6] secured by apartments located in California to be made by WAFCO. He

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[4] R. at Ex. AA-5.

[5] R. at Ex. AA-5.

[6] R. at Ex. D-1.

has also caused payments on his obligation to Washington Mutual Bank with an approximate balance in August 2003 of $755,171[7] secured by real property located in California to be made by H.F.L.P. L.C. Harmsen has also caused payments on his obligation to Western Farm Credit Bank in the approximate amount of $123,869[8] secured by real property located in Nevada to be made by HH Land and Cattle Company. While the amounts are varied, there is no evidence that any of the these payments are delinquent.

d. Lines of Credit. Either Harmsen personally, SRC, or WAFCO makes monthly payments on the credit obligations listed below. When SRC or WAFCO makes payments on the obligations that represent Harmsen's personal purchases, the payments are offset at the end of the year against Harmsen's income from each entity. All payments on the lines of credit or credit cards have been charged and paid on a monthly basis as follows:

(1) American Express Billing Statements:[9]

(a) May 19, 2003: prior balance of $1,634.91, payment of $1,634.91, new balance of $5,039.34;

(b) June 18, 2003: prior balance $5,039.34, payment of $5,039.34, new balance of $3,164.45;

(c) July 18, 2003: prior balance of $3,164.45, payment of $3,164.45, new balance of $3,879.33; and

(d) August 19, 2003: prior balance of $3,879.33, payment $3,879.33 (August 7, 2003 payment prior to Petition Date), new balance of $217.18.

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[7] R. at Ex. AA-3.

[8] R. at Ex. BB-3.

[9] R. at Exs. B-1 - B-4.

(2) Bank of America Flight Fund Visa Billing Statements:[10]

(a) June 9, 2003: prior balance $22,232.56, payment of $22,232.56, new balance of $2,483.66;

(b) July 9, 2003: prior balance of $2,483.66, payment of $2,483.66, new balance of $3,339.30; and

(c) August 9, 2003: prior balance of $3,339.30, payment of $3,339.30 (July 31, 2003 payment prior to Petition Date), new balance of $7,972.32.

(3) Capital One Billing Statements:[11]

(a) April 7 - May 6, 2003: prior balance $2,113.25, payment of $2,196.51, new balance of $1,957.31;

(b) May 7 - June 6, 2003: prior balance of $1,957.31, payment and credits of $2,427.31, new balance of $4,050.31;

(c) June 7 - July 6, 2003: prior balance of $4,050.31, payment of $4,050.31, new balance of $3,524.39; and

(d) August 7 - September 6, 2003: prior balance of $3,809.86, payment was made postpetition.

(4) MBNA Billing Statements:[12]

(a) June 3, 2003: prior balance of $541.42, payment of $541.42, new balance of $710.55;

(b) July 2, 2003: prior balance of $710.55, payment of $710.55, new balance of $8,508.38; and

(c) August 2, 2003: prior balance of $8,508.38, payment of $8,508.38, new balance of $1,248.50.

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10 R. at Exs. C-1 - C-3.

11 R. at Exs. F-1 - F-4.

12 R. at Exs. M-1 - M-3.

(5) Salt Lake Credit Union Visa Billing Statements:[13]

(a) April 2003: prior balance $802.37, no payments, new balance of $3,442.51;

(b) May 2003: prior balance $3,442.51, payment of $2,878.96, new balance of $2,132.72;

(c) June 2003: prior balance $2,132.72, payment of $2,132.72, new balance of $1,737.23; and

(d) July 2003: prior balance $1,737.23, payment of $1,737.23, new balance of $1,744.72.

When the Petitioner filed this involuntary, Harmsen became concerned that some of the lines of credit or credit cards may terminate services to him as a result of the filing. Harmsen is dependent upon the lines of credit or credit cards are sometimes used for business purchases by SRC. To forestall any adverse action by the providers, Harmsen caused SRC to make additional payments to Bank of America of $500; to Capital One of $1,500; and to MBNA of $2,000, so that the accounts were not only paid as they became due, but also reflected a credit balance.

e. Utility Services. Harmsen has utility services for the California property from San Diego Gas & Electric and Time Warner Cable. He also personally utilizes the following: Comcast, Newspaper Agency Corporation, Questar, Salt Lake City Department of Public Utilities, and Utah Power which all bill monthly and are paid monthly, as follows:

(1) San Diego Gas & Electric Bill: Several accounts were in Harmsen's name for four rental units and a common area owned by H.F.L.P., L.C. Harmsen testified that each of these was billed and paid monthly.

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[13] R. at Exs. S-1 - S-4.

(2) Time Warner Cable Bills:[14]

(a) May 13, 2003: prior balance $11.76, payment of $11.76, new balance of $11.77;

(b) June 13, 2003: prior balance $11.77, payment of $11.77, new balance of $11.77;

(c) July 13, 2003: prior balance of $11.77, payment of $11.77, new balance of $11.77; and

(d) August 13, 2003: prior balance of $11.77, payment of $11.77, new balance of $11.77.[15]

(3) Comcast Billing Statements:[16]

(a) June 8, 2003: prior balance $86.86, payment of $86.86, new balance of $86.86;

(b) July 8, 2003: prior balance $86.86, payment of $86.86, new balance of $90.76 (due July 28, 2003); and

(c) August 11, 2003: prior balance $90.76, prepetition payment of $90.76, new balance of $89.40.

(4) Newspaper Agency Corporation: Harmsen testified that he owed his monthly bill as of the Petition Date, and $22.00 was paid postpetition.

(5) Questar Billing History:[17]

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[14] R. at Exs. W-1 - W-3.

[15] While there is no evidence as to what date the prior balance of $11.77 was paid, the payment due date was August 2, 2003. Therefore, based on the evidence of prior timely, regular payments on this account and the fact that the Petitioner did not submit evidence of any checks or similar payments on this account postpetition for the August bill, the Court determines that the July balance was paid prepetition and can be considered for the purpose of whether Harmsen was generally paying his debts as they became due.

[16] R. at Exs. G-1 - G-3.

[17] R. at Ex. Q-2.

(a) March 13, 2003: billed $227.85, paid $227.85 March 28, 2003;

(b) April 11, 2003: billed $183.63, paid $183.63 April 24, 2003;

(c) May 13, 2003: billed $134.33, paid $134.33 May 28, 2003;

(d) June 12, 2003: billed $57.53, paid $57.53 June 30, 2003; and

(e) July 14, 2003: billed $100.15, paid $100.15 July 25, 2003.

(6) Salt Lake City Department of Public Utilities Billing History:[18]

(a) March 7 - April 4, 2003: billed $36.15, paid $36.15;

(b) April 5 - May 2, 2003: billed $38.34, paid $36.15;

(c) May 3 - June 2, 2003: billed $98.06, paid $38.34;

(d) June 3 - July 2, 2003: billed $211.97, paid $98.06; and

(e) July 3 - August 4, 2003: billed $274.52, paid $211.97.

(7) Utah Power:[19]

(a) April 21, 2003: beginning balance $344.60, payment of $333.25, new charges $241.31;

(b) May 20, 2003: beginning balance $241.31, payment of $241.31, new charges $310.74;

(c) June 19, 2003: beginning balance $310.74, payment of $310.74, new charges $229.39;

(d) July 21, 2003: beginning balance $229.39, payment of $229.39, new charges $399.34; and

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[18] R. at Ex. T-1.

[19] R. at Exs. Y-1 - Y-5.

(e) August 20, 2003: beginning balance $399.34, prepetition payment (July 31, 2003) $399.34.

f. Professional Services. Harmsen uses the services of the following professionals:

(1) N. Branson Call, M.D. is an eye doctor used by Harmsen's wife. The August 31, 2003 statement carried a balance due from June 5, 2003 of $15.00. Harmsen testified that he was waiting to see if insurance covered that portion of the bill so he had not yet paid it as of the Petition Date.

(2) Thomas R. Liddell, DDS is a dentist who performed services for Harmsen and his family. The following is a history of the billing statements and payments made by Harmsen prior to the Petition Date:[20]

(a) January 6, 2003: statement sent with $169 balance due and two payments made: February 3, 2003 in the amount of $73 and February 13, 2003 for $245;

(b) March 25, 2003: statement sent with $158 balance due and two payments followed on April 8, 2003, one for $73 and one for $85;

(c) April 24, 2003: statement sent with $1,905 balance due, balance paid in full May 5, 2003;

(d) May 27, 2003: statement sent with $1,917 balance due, no payment made;

(e) June 26, 2003: statement sent with $1,917 balance due, balance paid in full July 16, 2003; and

(f) July 29, 2003: statement sent with $103 balance due, balance paid off postpetition.

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[20] R. at Ex. K-1.

(3) Gerald S. Summerhays, DDS provided dental services for Harmsen's wife. The billing history statement admitted into evidence does not list the billing date, only the charges, payments, and a running balance.[21] Prior to 2003, there is a clear history of charges incurred and the balance is either paid off in full or paid over time; or, in one instance, a clear overage amount was paid and the services were incurred later. As of the Petition Date, $146 was due for services performed July 1, 2003. From the billing history it appears Harmsen could have been awaiting a determination of insurance coverage before making payment, however, no testimony was offered on this point. From the evidence, Harmsen was paying this debt as it became due.

(4) HJ & Associates, LLC, is the accounting firm Harmsen uses to prepare various tax returns for several of the entities he manages. The charges for all of the firm's services for the various entities appear on one monthly statement in Harmsen's name. Although the monthly statements carried a balance due for several months, testimony revealed that the account was not actually due and owing because Harmsen and the accountants had an agreement that a discount would be granted on his personal bill because the accountants had prepared returns for so many other entities. As of the Petition Date, the amount of the discount had not yet been resolved so Harmsen had not settled this bill. As of the July 31, 2003 statement,[22] the account carried a balance of $6,472.75, of which $4,977.21 was over 120 days late, $863.68 was late between 91 - 120 days, $341.71 was between 61 - 90 days late, $155.46 was 31 - 60 days late and $134.69 was under 30 days late. However, due to the testimony of the

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[21] R. at Ex. V-2.

[22] R. at Ex. I-4.

ongoing relationship and the delay in HJ & Associates and Harmsen reaching an agreement on the amount due, the Court will not consider this debt as being "due" for purposes of determining whether Harmsen is paying his debts as they become due since an agreement had not been reached as to the discounted amount.

(5) Steven H. Lybbert is an attorney who does work for the various entities managed by Harmsen. The testimony and evidence presented did not indicate that Lybbert was not being paid as the debt became due. On the contrary, the July 31, 2003 billing statement[23] includes work from March 18 - July 30, 2003 with no listing of amounts past due.

(6) Steven A. Wuthrich is also an attorney. Wuthrich is handling Harmsen's litigation and appeal against the Petitioner. A summary of payments[24] made in 2003 indicates Harmsen made three prepetition payments to Wuthrich as follows: January 2003, $900; February 2003, $990; and May 2003, $500. Only one billing statement[25] is in evidence with time entries from June 9 - July 30, 2003 with a balance due of $1,150. The statement is dated August 1, 2003 and does not list any past due balance. The Court finds that Harmsen was generally paying this debt as it became due.

(7) Melenaite Vi provides landscape maintenance service to Harmsen for his residence. Ms. Vi bills sporadically. When billed prepetition, the obligation was paid. Ms. Vi did not bill for April through September 2003 services until after the Petition Date. In

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[23] R. at Ex. L-1.

[24] R. at Ex. CC-1.

[25] R. at Ex. CC-2.

accord with the parties usual course of dealing, the bill would not have been due until after the filing of this bankruptcy. Therefore, Harmsen was paying this debt as it became due.

g. Margin Loans: Neither party submitted evidence related to the repayment terms related to the margin loans with Quick & Riley and Zions Investment Securities. The evidence reveals the Quick & Riley margin loan in the approximate amount of $28,369.12[26] and the Zions Investment Securities margin loan in the approximate amount of $126,769.42[27] were fully collateralized, and accruing interest which appears to have been paid on a regular basis from the accounts. The substantial equity that existed in each account in excess of the margin loan was foreclosed by WAFCO. Since there is no evidence as to the repayment of the principle of the margin loans, and the only evidence indicates that the interest accrual was being satisfied, it appears that the obligations were being serviced as required.

h. Miscellaneous:

(1) F. Weixler Company is a furniture manufacturer from which Harmsen ordered furniture over the course of several years. The customer ledger[28] indicates a pattern of regular charges and credits on the account with a balance of only $20.40 as of the Petition Date. Although this small amount was past due, the ledger indicates the account was often charged large amounts varying between $3 - 10,000 and quickly paid off in full or carrying only a small balance. Overall, Harmsen was paying this debt as it became due as of the Petition Date.

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[26] R. at Ex. R-3.

[27] R. at Ex. DD-2.

[28] R. at Ex. H-2.

(2) Harmsen owed taxes to the Internal Revenue Service as of the Petition Date but had obtained a filing extension in April 2003 that sought an extension until October 15, 2003. Along with the IRS request for extension, Harmsen apparently paid $5,000 in anticipated tax. Therefore, this debt was paid as required.

(3) Harmsen similarly obtained an extension for state taxes owed to the Utah State Tax Commission for 2002. The tax as reflected owing on the return was paid October 4, 2003. The Court finds that this obligation was paid as required.

(4) Names Legal Committee, Inc. is a litigation organization aimed at pursuing various legal claims against the Petitioner and others for recovery of losses in England. By paying a yearly subscription fee, Harmsen can participate in the litigation as a named plaintiff and is thereby entitled to share in any recovery. There is some evidence to indicate that the yearly fee was due on January 1, but was not paid until August 20, 2003. While the evidence indicates Harmsen's 2003 subscription went unpaid until after the Petition Date, it is difficult to categorize this amount as a debt in that Harmsen has no ongoing obligation to make payment and no collection notices or actions were taken to collect any unpaid amount. Therefore, the Court determines this is not a debt for purposes of § 303(h)(1).

(5) Harmsen had a membership in his name with the Alta Club for at least ten years which was utilized for both personal and business activities. The Alta Club typically billed monthly and was generally paid monthly by WAFCO because most of the club use was business related. The last statement prior to the Petition Date was issued July 31, 2003

and indicates a balance due of $477.54 with $198.33 of the balance one month past due.[29] Harmsen testified that this obligation was customarily paid within 90 days.

2. Bona Fide Dispute

Harmsen raises the issue of a bona fide dispute existing between he and the Petitioner as evidenced by an appeal pending before the Tenth Circuit Court of Appeals. However, no further factual evidence was presented on this point at trial. Therefore, the Court finds it unnecessary to discuss whether or not a bona fide dispute exists in that the matter can be determined on other grounds.

II. ANALYSIS

The Petitioner's case focuses in large part on disqualifying Harmsen's listed creditors for the purpose of reducing the alleged debtor's qualified holders of claims to fewer than 12 and thus qualifying as a single petitioning creditor under § 303(b)(2).[30] However, it is not necessary to reach the determination of the required number of qualifying petitioners if Harmsen is paying his debts as they become due, because the involuntary petition would be dismissed regardless of the number of petitioning creditors. The Court will therefore focus its analysis on the question of whether or not Harmsen was insolvent when the involuntary petition was filed.

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[29] R. at Exs. A-5, A-9.

[30] Section 303(b)(2) allows an involuntary case to be commenced

> [I]f 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 $11,625 of such claims.

A. Insolvency.

The definition of insolvency utilized by the Code in granting relief on an involuntary petition is limited to a finding that "the debtor is generally not paying such debtor's debts as such debts become due."[31] The Code does not offer a definition, explanation, or guidance for interpreting the language of "generally not paying . . . debts." This standard is not synonymous with the Code definition of insolvency found in § 101;[32] rather, courts have interpreted it to be more of an "equitable insolvency" test as opposed to a "balance sheet" test of insolvency.[33] The standard centers around whether a debtor is paying its debts as a *general* matter. "The concept of generality is comparative; it has to do not with an absolute number of some kind of event but

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[31] § 303(h)(1).

[32] *See generally* § 101(32) for Code definition of "insolvent."

[33] *See, e.g., In re Norris*, 183 B.R. 437, 455 (Bankr. W.D. La. 1995) ("This test, which considers 'equitable insolvency' rather than 'balance sheet' insolvency was one of the most significant departures from the Bankruptcy Act."); *In re West Side Comty. Hosp., Inc.*, 112 B.R. 243, 256 (Bankr. N.D. Ill. 1990) ("This test, which looks to equitable insolvency rather than balance sheet insolvency, represents the most significant departure of the Bankruptcy Code from the Bankruptcy Act provisions dealing with involuntary bankruptcies."); *In re All Media Props., Inc.*, 5 B.R. 126, 142 n.5 (Bankr. S.D. Tex. 1980) ("This is the so called 'equity insolvency' test which focuses upon the payment of debts rather than acts of insolvency."). A completed financial statement as of March 1, 2003 listing Harmsen's and his wife's assets, real estate, receivables, securities, and other assets against their total liabilities was received into evidence. R. at Cr. Ex. 19. It appears incomplete when compared with other evidence received. However, the calculation indicated total assets of $4,070,923 and total liabilities of $2,299,497 leaving a net worth of $1,771,426 as of January 1, 2002 prior to execution on the WAFCO Judgment. The WAFCO execution sale in June 2003 depleted the assets by collecting $2,335,000. Adding the District Court Judgment to the balance sheet after the reduction in assets results in an insolvent balance sheet. However, were the Court to focus on this balance sheet, it would be engaging in the very pitfall Congress wanted to avoid in implementing § 303(h)(1). Further, such an approach fails to take into account the totality of circumstances proscribed by the Tenth Circuit. "A debtor might be insolvent under the balance sheet test, but may be paying his debts as they become due." *All Media Props.*, 5 B.R. at 142 n.5. This is exactly the case we have here.

rather with the number as a proportion of possible outcomes."[34] It follows that "generally" becomes the focus of a court's inquiry into whether or not a debtor is solvent.

Congress did not define the term "generally" "in order to avoid the result suggested by the mechanical test . . . and to give the bankruptcy courts enough leeway to be able to deal with the variety of situations that will arise."[35] In other words, Congress built flexibility into the standard. As a result, bankruptcy courts have developed varying standards and multi-factor tests to assist in this fact intensive solvency determination. The Tenth Circuit has not laid out a specific standard nor has it articulated a multi-pronged test as other jurisdictions have in analyzing solvency in this context, but it has explained in its oft-cited opinion that "the bankruptcy court should examine the *totality of the circumstances*, balancing the interests of the debtor with those of the creditors."[36] This case-by-case examination of the facts is intended to be flexible enough "to allow enough leeway for bankruptcy courts to handle a variety of situations."[37] Policy demands this flexibility and careful scrutiny in analyzing a contested involuntary petition because "such an action is extreme in nature and carries with it serious consequences for the alleged debtor, such

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[34] *Concrete Pumping Serv., Inc. v. King Constr. Co., Inc.*, 943 F.2d 627, 630 (6th Cir. 1991).

[35] *All Media Props.*, 5 B.R. at 143. *See also West Side Comty. Hosp.*, 112 B.R. at 256 ("While Congress was not explicit regarding what factors should be considered in applying the 'generally not paying' test, it is clear that the test was not intended to be applied mechanically. Instead, Congress intended the test to be applied with flexibility so as not to limit or restrict the involuntary process.").

[36] *Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540, 1546 (10th Cir. 1988) (emphasis added).

[37] *Norris*, 183 B.R. at 456.

as loss of credit standing, interference with its general business affairs, and public embarrassment."[38]

In making a determination as to how to apply this "totality of the circumstances" test, it is helpful to look to the more specific tests adopted in other jurisdictions. For example, one test the Petitioner urges this Court to employ is a four-pronged analysis composed of the following factors: 1) the number of unpaid claims; 2) the amount of such claims; 3) the materiality of the nonpayments; and 4) the debtor's overall conduct in its financial affairs.[39] Other courts have limited the "generally not paying" test to a two-step inquiry: 1) whether a debt should be included as a debt in the "generally not paying calculation;" and 2) comparing the number and amount of unpaid debts with the number and amount of paid debts.[40] To emphasize the varying application of this section of the Code it is useful to review the approximately fifteen factual factors listed in Collier's which have been used by various courts in determining whether a debtor is generally paying its debts.[41]

Regardless of which test is implemented, the burden rests upon the petitioning creditor to prove that the debtor was not paying his debts once due.[42] In addition, courts have consistently

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38 *In re Petro Fill, Inc.*, 144 B.R. 26, 29 (Bankr. W.D. Penn. 1992).

39 *Norris*, 183 B.R. at 456.

40 *West Side Comty. Hosp.*, 112 B.R. at 256.

41 *See* 2 COLLIER, BANKRUPTCY ¶ 303.14[1][b] (15th ed. 2001) (including debtor's ability to satisfy small periodic payments, make regular payments only on small obligations, a rapid decline in the value of debtor's assets, comparison of debts versus yearly income, voluntary shutdown of operations, insider's deferred payments, payments made by insiders, bad faith, payments by third parties, liquidation of debtor's assets, etc.).

42 *Bartmann*, 853 F.2d at 1546. *See also In re Smith*, 243 B.R. 169, 189 (Bankr. N.D. Ga. 1999) (explaining that the petitioning creditor "bears the burden of demonstrating that [the debtor] was

held that the determination of whether a debtor was paying his debts once due must be made as of the date the involuntary petition was filed.[43]

"Congress has indicated that the primary issue in an involuntary proceeding is and should be whether the debtor is generally not paying his debts as they become due . . . ."[44] For this reason, the Court will comply with *Bartmann's* "totality of the circumstances" test and focus its inquiry on the nature and amount of Harmsen's debts and the general circumstances surrounding his payment or nonpayment of said debts, and then turn to the balancing test weighing the debtor's and creditors' divergent interests in proceeding in bankruptcy.

1. Totality of the Circumstances.

Harmsen's financial dealings are somewhat unique, although not unusual for someone managing closely held businesses. He uses his own personal credit to cover some of the businesses day-to-day expenses. As a result, he has a significant number of large lines of credit, utilities, and a variety of professionals to which he is obligated. His personal obligations are sometimes satisfied by the businesses as part of his agreed compensation. This intertwining of personal and professional expenses requires a careful look at Harmsen's financial affairs as of the Petition Date to determine his solvency for the purpose of § 303(h)(1).

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generally not paying his debts as they became due"); *Norris,* 183 B.R. at 455 (noting "that the burden is on the petitioning creditors to establish that the debtor was generally not paying such debts as they become due as of the date of filing").

[43] *Bartmann*, 853 F.2d at 1546. *See also West Side Comty. Hosp.,* 112 B.R. at 257 ("It is fundamental that the determination of whether the debtor is generally paying such debtor's debts as such debts become due must be made as of the date of filing the petition.").

[44] *Norris,* 183 B.R. at 459.

Not one of the five credit cards or lines of credit Harmsen uses was past due as of the Petition Date. As outlined above, Harmsen charged expenses to these accounts monthly and paid off the entire amount nearly every month. Harmsen is not the typical consumer debtor who only pays the minimum amount due each month. His balances would reach as high as $22,232 on a single card in a month and that balance would be paid off in the monthly billing cycle prior to the balance becoming due.

Likewise, Harmsen has a number of utility services listed in his name which are regularly billed and paid monthly without exception. While the dollar amount of each of these bills is not particularly significant – rarely rising above $300 a month – the number of obligations which are consistently billed and paid in a timely manner is significant to this analysis.

The billing methods and payment practices related to Harmsen's creditors providing professional services is a bit more varied but as a general matter, he was paying these debts as they became due as of the Petition Date. Dr. Call's account listed a $15 payment that was past due; however, Harmsen explained he had not paid the amount as he was awaiting a determination of insurance coverage. Dr. Liddell's account carried a $103 balance that was incurred just prior to the Petition Date and does not appear to be past due. Dr. Summerhays' account also listed a balance due of $146 as of the Petition Date. However, the billing history indicates a regular pattern of payment which likewise indicates general payment of debts. Steven Lybbert and Steven Wuthrich are attorneys for Harmsen who were regularly paid without past due amounts listed as of the Petition Date. Ms. Vi, the landscaper, and HJ & Associates are not counted in this determination because their bills are not considered due as of the Petition Date and testimony indicates these creditors were regularly paid.

The remaining creditors listed above as miscellaneous debts are likewise generally being paid as they become due. The F. Weixler Company account was owed $20.40 as of the Petition Date but was charged and paid off in large sums on a consistent basis, occasionally reaching as high as $10,000. The only other debt due as of the Petition Date in this category which the Court must consider is the Alta Club membership. The final billing statement prior to the Petition Date indicates a balance of $198.33 which was one month past due. Harmsen testified that it is normal and ordinary for business expenses to be up to 90 days past due. One factor courts consider in analyzing § 303(h)(1) solvency is the length of time the debtor was unable to pay large debts.[45] One court found the "length of time during which [the debtor] has failed to pay these two creditors is crucial to this inquiry" because the debtor had been in arrears for more than two years.[46] Harmsen was 30 days past due on his $198.33 obligation to the Alta Club and under 90 days past due on $20.40 owed to F. Weixler Company. These two small delinquencies do not defeat a finding that Harmsen was generally paying his debts as they became due because they neither reach the size nor significance of a lengthy or large delinquency in relation to those obligations Harmsen was paying as they became due.

Although Harmsen no longer owns his residence, he is still obligated to pay monthly rental payments to WAFCO for the Washington Mutual Bank debt service. Consistent with the size of Harmsen's other debt obligations, this lease payment is not insubstantial at $7,257.42 per month. Harmsen is current on this monthly payment and likewise caused payments to be consistently maintained each month to California National Bank and Washington Mutual Bank

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[45] *Smith*, 243 B.R. at 193-94.

[46] *Id.* at 194.

for the California rental properties owned by WAFCO and H.F.L.P., L.C., and to Western Farm Credit Bank on the Nevada property owned by HH Land and Cattle Company.

The District Court Judgment and the remaining balance on the WAFCO Judgment are the only remaining obligations which have not been paid. "[G]enerally not paying debts includes regularly missing a significant number of payments to creditors or regularly missing payments which are significant in amount in relation to the size of the debtor's operation."[47] Harmsen has not missed a significant number of payments on these two debts because neither appears to be a periodic payment obligation. The District Court Judgment is on appeal and Harmsen hotly contests his liability. While it is unnecessary for the purpose of this analysis to determine whether the dispute is *bona fide* as the term is used in § 303(b)(1), at least in Harmsen's mind until the appellate process has run its course, the obligation is not yet due. As to the WAFCO Judgment, it appears that Harmsen does not contest its validity, amount, or that it is due. Yet neither is WAFCO making any effort to collect the amount of the WAFCO Judgment remaining after execution on Harmsen's assets. From WAFCO's perspective, it may be counterproductive to force payment if in so doing it jeopardizes Harmsen's continued management of WAFCO and SRC.

It is undeniable that the collective amounts of the unpaid District Court Judgment and the WAFCO Judgment are in excess of $1,250,000. However, Harmsen's personal liability on the real property obligations are likewise substantial. His obligation on these properties are approximately as follows: to Washington Mutual Bank of $977,920;[48] to California National

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[47] *All Media Props.*, 5 B.R. at 143.

[48] R. at Ex. AA-5.

Bank aka Fidelity Federal Bank in the original amount of $1,275,000;[49] to Washington Mutual Bank with an approximate balance of $755,172;[50] to Western Farm Credit Bank in the approximate amount of $123,869;[51] and to Quick & Riley of $28,369[52] and Zions Investment Securities of $126,233.[53] Even though many of Harmsen's obligations are serviced and secured by assets with substantial values owned by other entities, Harmsen is still primarily liable on the obligations. Consideration of these obligations exceeding $3,280,000 which are current, are pertinent in relation to Harmsen's unpaid obligations of $1,250,000.

Taken as a whole, with the exception of the District Court Judgment and the WAFCO Judgment, Harmsen generally pays on a regular basis his monthly living expenses and causes the debt service on the obligations for which he is liable to be paid by third parties. Considering the overall conduct of Harmsen's financial affairs and in light of the totality of the circumstances, the Court finds Harmsen was generally paying his debts as they became due as of the date of the involuntary petition.

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[49] This amount is taken from the original promissory note which is the only evidence on the record related to this obligation. R. at Ex. D-1. No evidence was submitted as to the current amount owing.

[50] R. at Ex. AA-3.

[51] R. at Ex. BB-3.

[52] R. at Ex. R-4.

[53] R. at Ex. DD-2.

2. Balancing Interests.

The second level of inquiry articulated in the *Bartmann* decision is "balancing the interests of the debtor with those of the creditors."[54] This balancing of interests is not limited to the petitioning creditor's interests versus the alleged debtor's interests. Rather, the creditors' side of the balance includes the interests of all of the creditors of the estate and the effect an order of relief will have on them as balanced against the effect of a dismissal of the petition. The Petitioner's interest here is in collecting the District Court Judgment. Harmsen's interest is in avoiding an involuntary bankruptcy and the negative effect the bankruptcy would have on his credit and ability to continue operating his business affairs. The remaining creditors' interest is in being regularly paid when their debts become due. The evidence has shown that the remaining creditors' are being paid as they become due without the intervention of the bankruptcy court. Indeed, adjudication may significantly impact Harmsen's personal liability on the significant real property obligations serviced by third parties, all to their detriment. The Petitioner's attorney

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[54] 853 F.2d at 1546. *See also Norris*, 183 B.R. at 456. It should be noted that although the Code contains similar language as grounds for dismissal under § 305(a)(1) ("the interests of creditors and the debtor would be better served by such dismissal . . . .") to that found in the *Bartmann* opinion ("balancing the interests of the debtor with those of the creditors"), the analysis in this case is being conducted in relation to the standard articulated under *Bartmann*, not under § 305. The difference being one primarily of burden of proof. The application of § 305(a) is "an extraordinary remedy . . . appropriate when the interests of the creditors and the debtor are best served by dismissal or suspension." *In re Fortran Printing, Inc.*, 297 B.R. 89, 94 (Bankr. N.D. Ohio 2003). *See also In re Taylor Agency, Inc.*, 281 B.R. 354, 359 (Bankr. S.D. Ala. 2001) ("Abstention and dismissal under § 305(a)(1) is applied very narrowly and is only proper in extraordinary circumstances."). The burden of proof under § 305 is "upon the parties seeking abstension and dismissal." *Taylor Agency*, 281 B.R. at 359. However, under *Bartmann*, the creditors retain the burden of proof in meeting the requirements of § 303(h)(1) in proving it is in the best interests of both the debtor and the creditors to pursue the bankruptcy. Therefore, the restrictive interpretations of the extraordinary remedy of § 305 are not directly relevant to the balancing of interests for purposes of § 303(h)(1) analysis.

admitted some other "creditors would not be paid a dime in a Chapter 7 proceeding,"[55] thus explaining, in part, why the Petitioner was unable to solicit other creditors to join the petition. The interests of creditors other than the Petitioner is in allowing Harmsen to continue to do business and continue his pattern of regularly paying his debts as they become due and not having the obligations owed them discharged.

When only one creditor files an involuntary petition, the court must examine why the creditor needs relief in the bankruptcy court, especially where the debt is disputed by the alleged debtor.[56] Here, none of the other creditors joined the petition despite ample opportunity. Ultimately this case winds up being a two-party dispute in which the Petitioner has failed to show that it cannot obtain relief in a forum other than this Court.

One of the factors courts may consider in weighing these interests is whether the petitioning creditor is attempting to use the bankruptcy court as an alternative to proceeding with litigation which can be resolved in another forum.[57] "Creditors' interests are generally measured by whether the creditors can get adequate relief elsewhere."[58] Specifically, "[a] bankruptcy court should refuse to enter an order for relief where petitioning creditors can go into state court to satisfy a debt. . . . The petition should be dismissed if petitioning creditors have adequate

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55 Closing Argument Tr. Trans. at 9.

56 *See In re Central Hobron Assoc.*, 41 B.R. 444, 451 (D. Haw. 1984).

57 *In re Kass*, 114 B.R. 308, 309 (Bankr. S.D. Fl. 1990) (dismissing involuntary petition because "evidence provided by the parties illustrate that there is pending State Court litigation in which these creditors' claims have been raised which will entitle them the opportunity to obtain appropriate relief").

58 *Central Hobron Assoc.*, 41 B.R. at 451.

remedies under state law."[59] At least one bankruptcy court has explained that if the petitioning creditor can satisfy the debt in state court, "bankruptcy courts should *adamantly refuse* to enter an order for relief."[60] The Petitioner believes this Court should grant relief because it makes the Petitioner's collection efforts easier. However, forcing a party into bankruptcy is not to be regarded as a suitable alternative to readily available state court remedies. Simply because the Code provides for recovery of preferential transfers, or has a different definition of insider than state law, does not mean that the Petitioner does not have adequate state court remedies. At its most elemental, this proceeding simply suggests forum shopping.

The Court finds the Involuntary Petition does not meet the requirements of § 303(h)(1) in that Harmsen was paying his debts as they became due as of the Petition Date and a dismissal serves the best interests of both Harmsen and the vast majority of his creditors.[61]

B. Damages.

Having dismissed the involuntary petition, this Court may grant judgment against the Petitioner for costs and reasonable attorney fees under § 303(i)(1)(A) and (B). However, no evidence was presented of actual costs or attorney's fees to which Harmsen may be entitled under

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[59] *In re Frailey*, 144 B.R. 972, 977-78 (Bankr. W.D. Penn. 1992) (dismissing involuntary petition because it appears petitioning creditors have an adequate remedy at state law which enables them to levy and execute against the real property).

[60] *Petro Fill,* 144 B.R. at 30 (emphasis added) (dismissing involuntary petition because the "substantial interest of [the involuntary debtor] and of its prepetition creditors other than petitioning creditors in [the debtor's] continued operation free of the constraints of bankruptcy far outweigh the limited, self-serving interest of petitioning creditors in [debtor's] liquidation in bankruptcy"). *Id.* at 31.

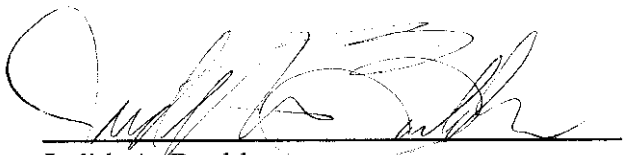
[61] The Petitioner raises a defense that Harmsen committed a fraud, artifice, or scheme which would allow the bankruptcy court to retain jurisdiction. In a single creditor case, some courts have granted relief upon such a showing. This is not a single creditor case. Even if it were, the evidence does not support a finding that Harmsen committed a fraud, artifice, or scheme in relation to the WAFCO Judgment and execution sale.

§ 303(i)(1). In addition, although Harmsen's brief made the allegation of this being a bad faith filing, no evidence was presented at trial to support such a finding in accordance with § 303(i)(2) which allows for punitive damages following a finding of bad faith by a petitioner. Therefore, no damages can be granted.

III. CONCLUSION

The Court concludes Harmsen has generally been paying his debts as they become due. It is in the best interest of both Harmsen and his many creditors to continue operating outside the control of the bankruptcy court. Therefore, a separate Order of Dismissal shall issue accordingly.

Dated this 13th day of April 2004.



Judith A. Boulden
United States Bankruptcy Judge

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SERVICE LIST

Service of the foregoing **MEMORANDUM DECISION** will be effected through the Bankruptcy Noticing Center to each party listed below.

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