

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS**

In re:

HH TECHNOLOGY CORP.,

Alleged Debtor.

Chapter 7

Case No. 22-10156-JEB

MEMORANDUM OF DECISION

This matter came before the Court on the involuntary petition (“Involuntary Petition”) filed on February 11, 2022 (“Petition Date”), against the alleged debtor, HH Technology Corp. (“HHT”) by PCC Rokita S.A. (“PCC Rokita”) as the sole petitioning creditor. Shanghai Morimatsu Chemical Equipment Co., LTD (“Shanghai Morimatsu”) joined the involuntary petition as a petitioning creditor on May 23, 2022. (Collectively, PCC Rokita and Shanghai Morimatsu will be referred to as the “Petitioning Creditors”).

On April 4, 2022, Craig R. Jalbert, as Assignee for the Benefit of Creditors of HHT, (“Assignee”) filed a motion to dismiss (“Motion”) the Involuntary Petition, together with an Affidavit of Craig R. Jalbert, setting forth 15 creditors of HHT. HHT filed a joinder (“Joinder”) to the Motion. Pursuant to the Motion and Joinder, HHT and the Assignee asserted that since HHT had 11 or more creditors, PCC Rokita, as a single petitioning creditor could not commence the Involuntary Petition.

For the reasons set forth in this Memorandum, the Court will grant the Motion, as joined by HHT, and dismiss the Involuntary Petition by separate order. As more fully set forth below, the Court finds that HHT had more than 11 eligible creditors under Section 303(b)(2) on the Petition Date, requiring that three petitioning creditors must have filed or timely joined in the Involuntary Petition.

Background

HHT was a specialty engineering company involved in projects around the world. Richard Malone and Urs Geser founded HHT in 2004 and remained the owners of HHT. The company had an office in Beverly, Massachusetts (“Beverly Office”) and an office near The Woodlands, Texas (“Woodlands Office”).

Mr. Malone worked from the Beverly Office and handled administrative matters, including the payment of bills. Although HHT had accounting software, it was not used to maintain accounts payable. Mr. Malone managed the bills and payments manually, keeping track of what invoices were due and paying by check. Creditors were directed to send invoices to the Beverly Office. Typically, Mr. Malone would have 12 to 15 bills to pay on a monthly basis, including bills for utilities, landlords, and company credit cards.

Mr. Geser worked in the Woodlands Office, where many of the engineers also worked. Mr. Geser frequently traveled to oversee the company’s projects around the world, including in China and Europe. Because of his involvement in the ongoing projects, Mr. Geser sometimes received bills from vendors related to the projects. Mr. Geser would forward vendor bills to Mr. Malone for payment.

HHT began experiencing financial difficulties in 2020, when the COVID-19 pandemic began. The shutdowns due to the pandemic affected many of HHT’s projects. In addition, Mr. Geser and other employees were unable to travel overseas to work on projects. As a result, HHT experienced a decline in revenue.

HHT also was involved in litigation with PCC Rokita both in Poland and in the United States District Court for the District of Massachusetts during this period. PCC Rokita had obtained a default judgment in a Polish court in 2010. In 2018, PCC Rokita commenced

litigation in the District Court to enforce the judgment. The District Court stayed the litigation while HHT pursued remedies in the Polish courts to set aside the judgment. In July 2021, HHT lost its final efforts in the Polish courts to set aside the Polish judgment. On July 26, 2021, the District Court entered an order lifting the stay and allowing the litigation to proceed. The District Court held a hearing in November 2021 on the issue of whether the Polish judgment was enforceable. On December 13, 2021, the District Court entered an order allowing PCC Rokita's motion for judgment on the pleadings in part. The District Court found that that PCC Rokita had a valid enforceable judgment of at least \$1,016,500 but denied the motion as to the remaining portion of the Polish judgment without prejudice. The District Court set a deadline for the parties to submit further responses on the remaining issues.

On December 31, 2021, HHT executed a Trust Agreement and Assignment for the Benefit of Creditors ("Assignment") which the Assignee accepted. Pursuant to the Assignment, HHT transferred its assets to the Assignee, and agreed to cooperate with the Assignee in the winddown of its business and collection of assets. The Assignee agreed to undertake actions on behalf of the creditors who assented to the Assignment, including to collect the assets and make pro rata distributions. In connection with the Assignment, Mr. Malone sent the Assignee a list of creditors as of December 31, 2021, which contained 10 creditors. The Assignee subsequently began the process of collecting the assets and notifying creditors.

On February 11, 2022, PCC Rokita filed the Involuntary Petition as the sole petitioning creditor. On April 4, 2022, the Assignee and HHT filed the Motion and Joinder. The Court held a status conference on April 21, 2022, at which the Court set a deadline for any response by PCC Rokita to the Motion and Joinder. In addition, by separate order, the Court set May 23, 2022, as the deadline for creditors to join the Involuntary Petition. Shanghai Morimatsu joined the petition

on May 23, 2022.

The Court held a hearing on the Motion and Joinder on May 26, 2022. The Court set an evidentiary hearing for July 27, 2022, and issued a pretrial order requiring an expedited discovery schedule, with discovery to conclude by July 7, 2022.

In the Motion and Joinder, the Assignee and HHT also argued that it was in the best interests of creditors to permit the Assignment to continue instead of a bankruptcy. The Court set a deadline for the Assignee and HHT to file a motion to abstain under Section 305. On June 29, 2022, after a hearing, the Court denied the request to abstain.

On Saturday, July 16, 2022, DFT Properties, LLC (“DFT”) filed a motion to join the Involuntary Petition, despite having received notice of the May 23, 2022, deadline to join. On July 18, 2022, the Court denied the motion by DFT. The Bankruptcy Appellate Panel subsequently dismissed the appeal of the order as interlocutory.

The Court held a final pretrial conference on July 20, 2022. The Court also held a hearing on the motion of the Petitioning Creditors filed on July 15, 2022, to exclude evidence of four creditors. The Petitioning Creditors asserted that the four creditors should be excluded from any determination of eligible creditors under Section 303(b)(2), since the invoices were not produced until July 5, 2022. After reviewing the motion and opposition, the Court denied the motion finding that (i) the Petitioning Creditors had an opportunity to conduct discovery on the creditors in depositions scheduled for July 6, 2022, and July 7, 2022, (ii) the Petitioning Creditors waited ten days after the invoices were produced to raise the issue, and (iii) the Petitioning Creditors had not sought an extension of discovery, or a discovery conference prior to the conclusion of discovery. The Court ordered that notice be given to the four creditors and set August 22, 2022, as the deadline for the four additional creditors to join the Involuntary Petition. None of the

additional creditors moved to join the Involuntary Petition.

The Court held a two-day evidentiary hearing on the Motion and Joinder on July 27, 2022, and August 31, 2022.

Analysis

Under the Code, creditors may commence an involuntary bankruptcy against a corporation or individual under Chapter 7 or Chapter 11 if they meet certain requirements. An involuntary bankruptcy is an “extreme remedy” that can create significant disruption for an alleged debtor. *In re Brooklyn Res. Recovery, Inc.*, 216 B.R. 470, 486 (Bankr. E.D.N.Y. 1997). It is intended to benefit the entire creditor body, not simply serve as another collection tool for an individual creditor. *In re Tichy Elec. Co. Inc.*, 332 B.R. 364, 376-77 (Bankr. N.D. Iowa 2005).

To balance the risk to the alleged debtor and the rights of creditors, the Code sets specific parameters regarding which creditors can bring an involuntary case and how many creditors are required. For most cases, Section 303 requires that three qualified creditors are required to join in an involuntary petition. 11 U.S.C. §303(b)(1). To qualify, the creditors must hold claims that are not contingent or the subject of a bona fide dispute, which are in a minimum aggregate amount in excess of the value of any liens held by the creditors. *Id.* For this case, which was commenced prior to April 1, 2022, the petitioning creditors must hold claims that aggregate at least \$16,750 in excess of the value of any liens held by the creditors.

Where the alleged debtor has few creditors, there is an exception to the requirement for three petitioning creditors. A single petitioning creditor is permitted to commence an involuntary bankruptcy if the alleged debtor has less than 12 eligible creditors. 11 U.S.C. §303(b)(2). Section 303(b)(2) is specific as to which creditors are excluded from the calculation of eligible creditors. The eligible creditors must meet the requirements to file a petition under Section 303(b)(1),

holding claims that are not contingent or the subject of a bona fide dispute. *Id.* Employees, insiders, and transferees of transfers that are voidable under the strong-arm powers of the Code are excluded from the count of eligible creditors. *Id.*

If an involuntary petition is filed by only one creditor, an alleged debtor may contest the petition on the basis that there are 12 or more eligible creditors. If contesting the number of eligible creditors, the alleged debtor must file a list of the creditors with their addresses, the nature of their claims, and the amounts of their claims. Fed. R. Bankr. P. 1003(b). Once an alleged debtor asserts that it has more than 11 eligible creditors, the burden shifts to the petitioning creditors. *In re Reyes-Colon*, 922 F.3d 13, 19-21 (1st Cir. 2019). As a result, the petitioning creditors bear the burden of proof to show the ineligibility of any listed creditors and to demonstrate that there are fewer than 12 eligible creditors. *Id.*

The Court finds that the Petitioning Creditors failed to meet their burden of proof to show that there were fewer than 12 eligible creditors. As more fully discussed below, the Court finds that HHT had 15 creditors who were eligible under Section 303(b)(2) of the Code. Before addressing the specific objections to individual creditors, the Court will address the objections raised by the Petitioning Creditors that are common to several creditors.

Creditors Appearing on Subsequent Lists

After filing the initial list of creditors, HHT and the Assignee identified additional creditors and filed amended lists. The Court finds that HHT and the Assignee met their burden by providing the initial list of creditors, rejecting the argument of the Petitioning Creditors that any additional creditors should not be considered.

The Assignee and HHT provided evidence that creditors were added to the list as additional information came to light. Craig R. Jalbert, the Assignee, testified regarding his

extensive experience serving as an assignee or a liquidating trustee. Mr. Jalbert testified credibly that it was common to find that additional creditors were identified after the initial review. He testified that he made changes to the list of creditors as he learned additional information from reviewing documents, including the mail, and obtaining additional information.

Mr. Malone and Mr. Geser also testified as to the business practices of HHT, the reasons changes were made to the lists, and why creditors were identified late. Mr. Malone testified that he was responsible for administrative matters including paying the bills. He testified that he used a manual system, not computer software, to identify accounts payable. In doing so, he relied on bills that were received at the Beverly Office, or bills forwarded by Mr. Geser. Both Mr. Malone and Mr. Geser testified that Mr. Geser was involved with the projects and would sometimes receive project-related invoices. Both testified that he did not handle day-to-day administrative matters.

Mr. Malone and Mr. Geser both testified credibly to the stress of dealing with the company's declining financial situation and the forced winddown of a company they established and ran for 17 years. Mr. Malone testified that he took on the many tasks required by the winddown, including working with Mr. Jalbert and providing him information and records. Mr. Geser testified that after the company closed in December 2021, he was focused on his own personal situation, not the business.

The Petitioning Creditors challenged the credibility of Mr. Malone and Mr. Geser, alleging that they face potential personal liability for claims by a bankruptcy trustee. But the Court finds that any potential bias was not sufficient to taint their testimony. The testimony by Mr. Malone and Mr. Geser was consistent with Mr. Jalbert's testimony and experience; it was also consistent with the roles each played in HHT. Based on the Court's experience, the late

identification of invoices or creditors is also consistent with the disruptions that arise when a closely held business faces financial difficulty.

Small and Recurring Debts

Contrary to the Petitioning Creditors' assertion, creditors are not excluded from the calculation of eligible creditors under Section 303(b)(2) if they hold claims that are small in amount or represent recurring charges. The Code identifies the creditors to be counted under Section 303(b)(2), expressly excluding employees, insiders, and the transferees of voidable transfers. The Code does not exclude creditors for the amount of their claims, as long as the aggregate minimum amount for all petitioning creditors has been met. *In re Rassi*, 701 F.2d 627, 632 & n.9 (7th Cir. 1983). The inclusion of creditors with small claims or recurring charges is consistent with the consideration of such creditors under the Bankruptcy Act, the predecessor statute to the Code. Under the Bankruptcy Act, courts held that creditors with small or recurring claims were to be included in the calculation of eligible creditors. *In re Okamoto*, 491 F.2d 496, 498 (9th Cir. 1974). Despite making other changes to the requirements for involuntary petitions, Congress did not exclude creditors with small or recurring claims when it enacted the Bankruptcy Code.

The position of the Petitioning Creditors is also inconsistent with the policy considerations for involuntary petitions. As discussed above, the requirement of three petitioning creditors and other restrictions are intended to avoid a single creditor from using an involuntary petition as a collection tool. Excluding legitimate creditors because of the dollar amount or frequency of their charges, would only increase the ability of a single creditor to abuse the system.

Section 547 Defenses Must Be Considered

The burden is on the Petitioning Creditors to show that creditors were ineligible because they were transferees of voidable transfers, after having taken into account any applicable defenses. To meet their burden, the Petitioning Creditors were required to provide evidence that the elements necessary to avoid a transfer under the applicable statute have been met. In considering whether a transfer is avoidable as a preference, the defenses under Section 547 must also be considered. *Williams v. Roos*, No. 6:19-CV-01674, 2021 WL 234498, at *3 (W.D. La. Jan. 22, 2021).

Contrary to the Petitioning Creditors' assertion, the Assignee and HHT were not required to plead defenses to alleged transfers as affirmative defenses in the Motion or in the pretrial memorandum. The Assignee and HHT in the Motion and Joinder raised the defense that there were more than 11 eligible creditors, shifting the burden to the Petitioning Creditors to prove otherwise. The Petitioning Creditors cannot shift that burden back by requiring the Assignee and HHT to plead and prove potential defenses to alleged transfers.

Requiring the consideration of defenses under Section 547(c) is also consistent with Section 547. In 2019, Congress amended Section 547(b) to expressly require that a transfer could be avoided only "based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses." 11 U.S.C. §547(b). If a trustee must consider such defenses before even seeking avoidance, similarly, the Court should not lightly eliminate creditors from consideration under Section 303(b)(2) unless it has considered any known or reasonably knowable defenses to the alleged transfers.¹

¹ Because the Court concluded that other defenses could be applicable to the alleged voidable transfers, the Court did not reach the issue of whether Section 547(c)(9) applies in this involuntary case.

Ordinary Course Defense

The Petitioning Creditors argue that the ordinary course defense under Section 547(c)(2) cannot be used with respect to transfers in the fall of 2021 because HHT had ceased operations and was winding down. But the evidence fails to demonstrate that HHT ceased operations in the fall of 2021. In addition, the cases and the policies underlying Section 547 fail to support the argument that the ordinary course defense is unavailable if a business is winding down.

When considering the evidence as a whole, it does not show that HHT had ceased operations in the fall of 2021, as the Petitioning Creditors assert. To the contrary, the evidence reflects that HHT continued to employ personnel, and continued to work on projects through December 31, 2021. The Petitioning Creditors appear to focus on November 2021, when the District Court held the hearing to determine whether the Polish judgment was enforceable. They consider that point to be a bright line for the cessation of the business, relying, at least in part, on Mr. Jalbert's testimony. But Mr. Jalbert indicated uncertainty in his recollection of the timeline. The evidence provided through the testimony of Mr. Malone and Mr. Geser, and the records of payments and receipts of the business, does not show that operations had then ceased. Nor does the docket or orders of the District Court suggest that the hearing was determinative. The District Court did not enter the order on PCC Rokita's motion until December 13, 2021. In addition, the District Court granted PCC Rokita's motion only in part and set a deadline for the parties to provide further responses on the remaining issues. No judgment was entered at that time. Although the litigation did result in the decision by HHT to enter into the Assignment, the evidence does not support a finding that HHT ceased operations prior to December 31, 2021. In addition, HHT continued to take actions consistent with winding down its affairs through at least January 2022.

The position of the Petitioning Creditors is also inconsistent with the purposes and policies behind the ordinary course defense. The defense is intended to permit creditors to continue to do business with a debtor in the normal course even when the debtor may have financial difficulty. Without the defense, “creditors would be reluctant to conduct business with a struggling enterprise for fear that any payments made by the debtor could later be avoided.” *O’Neill v. Nestle Libbys P.R., Inc.*, 729 F.2d 35, 37 (1st Cir. 1984). As long as the transactions are consistent with prior practice, or practice in the industry, creditors are generally permitted to continue to deal with a business that may be struggling financially or winding down, without the risk of those transactions being undone. To conclude otherwise would undermine the purposes of the defense.

Debts Subject to Bona Fide Disputes

The Petitioning Creditors bear the burden of proof to show that creditors are not eligible because their claims are subject to bona fide disputes. To do so under Section 303, the opponent must do more than deny liability. *In re Dilley*, 339 B.R. 1, 6 (B.A.P. 1st Cir. 2006). It must show that there are “substantial factual or legal questions” regarding the amount or liability. *Id.* The Petitioning Creditors must do more than merely speculate that a claim is disputed, they must provide evidence of substantial factual or legal disputes. They have failed to do so.

The Petitioning Creditors assert that certain claims are subject to a bona fide dispute since, among other reasons, they arose after the execution of the Assignment. But the execution of the Assignment did not release HHT from any liabilities, including liabilities under current contracts or for ongoing services. Nor did it unilaterally result in a termination of any contract. Although the Assignee agreed to pay for certain expenses incurred after the Assignment, HHT was not released from its direct obligations to creditors under leases or service contracts. Such

claims are neither contingent nor subject to a bona fide dispute solely because they arose after the date of the Assignment.

The Eligible Creditors

The Court finds that HHT had 15 eligible creditors under Section 303(b)(2) as of the Petition Date:

1. PCC Rokita

PCC Rokita was an eligible creditor of HHT as of the Petition Date as stipulated by the parties.

2. Shanghai Morimatsu

Shanghai Morimatsu was an eligible creditor of HHT as of the Petition Date as stipulated by the parties.

3. iCorps Technologies, Inc.

iCorps Technologies, Inc was an eligible creditor of HHT as of the Petition Date as stipulated by the parties.

4. Comcast

Comcast Corporation, also known as Comcast Business, (“Comcast”) was an eligible creditor of HHT as of the Petition Date, with a claim of at least \$1,427.33. Comcast provided internet services to the Beverly Office and the Woodlands Office. Comcast was listed twice on the creditor list, once for each of the separate locations. In their posttrial brief, the Assignee and HHT waived the argument that there were two separate creditors.

The Court finds that the lists submitted by the Assignee and HHT were sufficient to include Comcast as a creditor. Although Comcast Corporation was listed with a service name of Comcast or Comcast Business, the list included the amount due, the billing addresses and the

nature of the claim. The information was sufficient to provide Comcast notice of the proceedings. It also was sufficient to provide the Petitioning Creditors with information to contact the creditor, as demonstrated by the documents submitted in evidence that resulted from a subpoena on Comcast. The Petitioning Creditors cite no support for their suggestion that an alleged debtor must include the exact corporate name for a creditor to be considered.

The Petitioning Creditors also contend that Comcast received voidable preferential transfers from HHT in late 2021, but they have failed to meet their burden of proof. Based on the evidence, avoidability of the payments that HHT made to Comcast in November 2021 and December 2021 would be subject to the ordinary course defense. Mr. Malone testified credibly regarding his practice of paying bills on a regular basis. The evidence showed that Comcast received payments on a regular monthly basis. The payments made to Comcast in November and December were consistent with this practice.

In addition, Comcast could assert contemporaneous exchange for new value and new value as defenses to the avoidability of the November and December payments. As reflected on the invoices, Comcast billed for its services in advance. The payments made in November and December were in advance of or contemporaneous with services through January 3, 2022. The invoices show that Comcast continued to provide services through December 2021 for the Woodlands Office and through January 2022 for the Beverly Office. As discussed above, the evidence demonstrated that HHT continued to conduct business at the offices and employ personnel through December 2021. In addition, Mr. Malone testified that he continued to work with the Assignee at the Beverly Office through January 2022. HHT remained liable for such expenses and the use of the services despite the Assignment.

