

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION**

IN RE: THE DISTRICT AT McALLEN, L.P., Debtor.	§ § § §	CASE NO. 14-70661 Chapter 11
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TRIAL BRIEF OF DR. ERNESTO RAMIREZ ON INVOLUNTARY PETITION

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

Comes now Dr. Ernesto Ramirez (“**Dr. Ramirez**”), a Petitioning Creditor in the above-styled and numbered involuntary proceeding and files this trial brief in support of entry of an order of relief.

1. If there are fewer than three (3) petitioning creditors that filed the involuntary petition and the involuntary debtor alleges that he or she has more than twelve creditors, then the debtor has the burden to raise this issue by filing a list pursuant to Fed. R. Bankr.P. 1013(b). *In re Colon*, 474 B.R. 330, 363 (Bankr. D.P.R. 2012). The Debtor has not filed its creditor list under Rule 1013(b), and so should be foreclosed from arguing that more than 12 creditors exist. Only if the Debtor complied with the rule would the burden shift to the petitioning creditors to prove that the alleged involuntary debtor has less than twelve (12) eligible creditors. *Id.*, at 363064, citing Alan N. Resnick & Henry J. Sommer, 2 *Collier on Bankruptcy* ¶ 303.14[9] (16th ed. 2011); *In re Euro–American Lodging Corp.*, 357 B.R. 700, 714 (Bankr.S.D.N.Y.2007); *Atlas Mach. & Iron Works, Inc. v. Bethlehem Steel Corp.*, 986 F.2d 709, 715 (4th Cir.1993); *Banco Popular de Puerto Rico v. Reyes Colon (In re Reyes Colon)*, 2008 WL 8664760, at *4, 2008 Bankr.Lexis 3960, at *10–11 (1st Cir. BAP 2008).

2. Dr. Ramirez would nevertheless show that there are only three creditors that qualify to be counted towards the existence of twelve that would prevent a single creditor from

filing this involuntary petition, as shown below and as summarized on the attached Exhibit A.

3. Code Section 303(b) states in relevant part (emphasis added):

(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 . . . , if such noncontingent, undisputed claims aggregate at least \$15,325 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 . . . , by one or more of such holders that hold in the aggregate at least \$15,325 of such claims;

4. Debtor has identified in its discovery responses a total of twenty four persons that it asserts hold claims against the Debtor. See Ramirez Trial Exhibit 13. However, counting to twelve under Code Section 303(b)(2) is about counting only claims that are—

- a. not contingent,
- b. not subject to a bona fide dispute as to liability,
- c. not subject to a bona fide dispute as to amount,
- d. at least \$15,325, and
- e. unsecured (or undersecured by more than \$15,325).

5. Any claimant that fails to satisfy any one of these requirements is not included when counting to twelve. This is a straightforward textual reading of the Code, as the modifier “such holders” in §303(b)(2) clearly refers to the qualifications set forth in §303(b)(1). “[C]ertain creditors such as secured creditors, creditors with contingent claims, creditors with claims that have been disputed, claims of insiders . . . must be excluded.” *In re Colon*, 474 B.R. 330, 362-63 (Bankr. D.P.R. 2012).

6. The Involuntary Debtor bears the burden of proving that he has more than twelve qualified creditors. *Id.* The number of petitioning creditors necessary to file an involuntary

petition is determined by the number of **eligible** creditors that hold qualified claims against the involuntary debtor. *Id.*, citing William L. Norton, Jr., *2 Norton Bankruptcy Law and Practice* 3d § 22:2. “The basic requirement under section 303(b)(1) is that if the debtor has 12 or more eligible ‘creditors’ (holding claims that are not contingent as to liability and not subject to a bona fide dispute as to liability or amount and excluding from that calculation certain specifically enumerated holders), three or more petitioning creditors are needed. If the debtor has fewer than 12 creditors (holding claims that are not contingent as to liability and not subject to a bona fide dispute as to liability or amount and excluding from that calculation certain specifically enumerated holders), one petitioning entity, under appropriate circumstances, is expressly permitted by statute to commence an involuntary petition.” Alan N. Resnick & Henry J. Sommer, *2 Collier on Bankruptcy* ¶ 303.14[1] (16th ed. 2011).¹

7. ***Ad valorem tax authorities do not count.*** Thus, fully secured claims such as those of the taxing authorities in this case cannot be counted towards the 12. This requirement of counting eliminates 5 names from the Debtor’s list.

8. ***Insiders do not count.*** Bob Peaster, one of the names on the Debtors list of creditors is an insider, as a members of his family is a limited partner in the Debtor.

9. ***De minimus claims do not count.*** In *Denham v. Shellman Grain Elevator, Inc.*, 444 F.2d 1376 (5th Cir.1971), the Fifth Circuit held that small, recurring bills, contracted to be paid monthly and on demand, such as claims for rent, groceries, and utilities are excluded from the creditor count and cannot be used by an alleged debtor to increase the number of creditors to

¹ “Courts are divided on the issue of whether those creditors who are excluded from the count of 12 creditors may still act as petitioning creditors. The weight of authority is that excluded creditors qualify as petitioning creditors.” Hon. Nancy C. Dreher & Hon. Joan N. Feeney, *Bankruptcy Law Manual*, § 14:9 (5th ed. 2011). See Alan N. Resnick & Henry J. Sommer, *2 Collier on Bankruptcy* ¶ 303.14[3] (16th ed. 2011).

greater than twelve in an effort to defeat an involuntary petition. *In re Moss*, 249 B.R. 411, (Bankr. N.D. Texas, 2000)(Houser, j.). This counting rule eliminates 5 more names from the Debtor's list.

10. ***Persons that owe more than they are owed do not count.*** Debtors discovery responses state that three of the supposed creditors are tenants whose "claims" consist of lease security deposit held by the Debtor, but the Debtor has claims against each of them that exceed the amount of their respective lease deposits. By eliminating these from the count, the Debtor has only ten creditors, and a single qualifying creditor can file an involuntary petition.

11. ***Lease deposits are "contingent" so do not count.*** Seven more "claims are held by tenants that arise fro lease security deposits. However, the Debtors obligation to repay such deposit is contingent on the tenant satisfying their lease obligation, so the claims are contingent, and so do not qualify for inclusion in the count.

Wherefore, and order of relief should be entered.

Respectfully submitted,

/s/ Nathaniel Peter Holzer

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been served electronically upon those parties registered to receive electronic notice via the Court's CM/ECF system on April 14, 2015, and via e mail to Mr. Villeda and Mr. Andrews.

/s/ Nathaniel Peter Holzer

Nathaniel Peter Holzer