IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE S&Q SHACK, LLC, and RAVING BRANDS, INC.,	)	
	)	**CIVIL ACTION**
Appellants,	)	**NO. 1:10-CV-03223-ODE**
	)	
v.	)	**On appeal from:**
	)	
BV RETAIL, LLC,	)	***In re The S&Q Shack, LLC***
	)	**Bankr. Case No. 09-67151-JEM**
Appellee.	)	
	)	***In re Raving Brands, Inc.***
	)	**Bankr. Case No. 09-68410-JEM**
	)	

BRIEF OF APPELLEE BV RETAIL, LLC

Mark I. Duedall
Georgia Bar Number 231770
mduedall@hunton.com
Charlotte M. Ritz
Georgia Bar Number 195201
critz@hunton.com

HUNTON & WILLIAMS LLP
Bank of America Plaza
600 Peachtree Street, NE
Suite 4100
Atlanta, Georgia 30308
Telephone: 404-888-4000
Facsimile: 404-602-8864

Counsel for Appellee BV Retail, LLC

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I. INTRODUCTION

Appellants The S&Q Shack, LLC ("***S&Q***") and Raving Brands, Inc. ("***Raving Brands***,") (collectively, the "***Involuntary Debtors***"), seek reversal of two final Orders. Both orders were issued by Judge Massey of the U.S. Bankruptcy Court for the N.D. Ga. (the "***Bankruptcy Court***"). Each granted an order for relief under Chapter 7 of the U.S. Bankruptcy Code (the "***Bankruptcy Code***"); one against S&Q and the other against Raving Brands. Appellee BV Retail, LLC ("***BV Retail***" or the "***Appellee***"), was sole petitioning creditor in the cases.

II. STATEMENT OF ISSUES

S&Q raised the following issues on appeal:

(1) Whether the Bankruptcy Court erred in admitting into evidence at trial documents not properly authenticated;

(2) Whether the Bankruptcy Court erred in granting relief sought by the petitioning creditor on the basis of the improperly admitted evidence; and

(3) Whether the Bankruptcy Court erred in ruling that S&Q had the burden of proving that it was generally paying its debts as they came due pursuant to 11 U.S.C. § 303(h)(1) once the petitioning creditor had proved that debts owed to the petitioning creditor were not generally being paid as they came due.

For Raving Brands, there is only one issue on appeal:

(1) Whether the Bankruptcy Court erred in granting the relief sought by the petitioning creditor on the basis that Raving Brands was not paying its debts as they generally came due pursuant to 11 U.S.C. § 303(h)(1).

BV Retail did not file a cross-appeal and raises no issues on appeal.

III. STANDARD OF REVIEW

The Appellants' arguments are based primarily on the Bankruptcy Court's alleged error in admitting Appellants' own exhibits into evidence. Decisions by the trial court to admit evidence are only reversed if there was an abuse of discretion. *United States v. Mateos*, 623 F.3d 1350, 1365 (11th Cir. 2010) (citation omitted).

The Bankruptcy Court ruled the Involuntary Debtors had conceded, in the Joint Pretrial Order, that their own exhibits were admissible. The Bankruptcy Court's interpretation of the Joint Pretrial Order also is reviewed for abuse of discretion. *Olmsted v. Taco Bell Corp.*, 141 F.3d 1457, 1461 (11th Cir. 1998).

As to the Bankruptcy Court's subsequent ruling on the merits, this Court should review the Bankruptcy Court's legal conclusions *de novo* but should accept the Bankruptcy Court's findings of fact unless they are clearly erroneous. Fed. R. Bank. P. 8013; *see also Englander v. Mills (In re Englander)*, 95 F.3d 1028 (11th

Cir. 1996); *Colo. W. Transp. Co. v. McMahon*, 380 B.R. 911, 915 (N.D. Ga. 2007); *In re Farris*, 365 Fed. Appx. 198, 199 (11th Cir. 2010).

IV. STATEMENT OF THE CASE

A. Facts Leading To Trial

The salient underlying facts of this case were agreed to by the parties in the "Joint Pretrial Order." *See* Joint Pretrial Order (which is S&Q Record No. 7 and Raving Brands Record No. 5[1]). BV Retail operates a shopping center in Charlotte, North Carolina. BV Retail had a lease with S&Q. Raving Brands, an affiliate of S&Q, guaranteed S&Q's obligations under the Lease. S&Q never opened a location, but paid rent from time to time through April 2008. After April 2008, S&Q ceased trying to open a location at BV Retail and also stopped paying rent. *See* Joint Pretrial Order at pp. 1-2, 9 (S&Q Record No. 7).[2]

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[1] To assist the Court, all references to record documents include "Record No.," noting the attachment number in the appellate record, which is Docket No. 1 in both appeals. As these appeals are from two different, but related cases, there are two sets of record on appeal--one for S&Q (contained in this Civil Action Number 1:10-cv-03223-ODE), and another for Raving Brands (contained in Civil Action Number 1:10-cv-03228-JEC), and so the references shall be denominated "S&Q Record No. X" or "Raving Brands Record No. Y." The order consolidating these appeals also sets forth that the appellate records are cross-designated.

[2] The Joint Pretrial Order covers both cases and is in both appellate records. For ease, all references to the Joint Pretrial Order shall list only the S&Q record.

In early 2009, as the Involuntary Debtors and BV Retail were discussing settlement, S&Q sold its assets to Petrus Brands, a private equity fund. Substantial proceeds went to insiders of the Involuntary Debtors. BV Retail learned of the sale through press reports and did not receive any sale proceeds. *See* Joint Pretrial Order at pp. 9-10 (S&Q Record No. 7); *see also* Trial Transcript at p. 27.[3]

On March 4, 2009, after BV Retail had filed suit against Raving Brands, a consent judgment was entered for $206,051.50, plus attorney's fees, costs, and continuing interest. *See* Joint Pretrial Order at p. 9 (S&Q Record No. 7). BV Retail then commenced two involuntary bankruptcy proceedings, one against S&Q on March 19, 2009, and the other against Raving Brands on April 1, 2009, to allow a Chapter 7 trustee to investigate insiders of the Involuntary Debtors, and to marshal the assets of the Involuntary Debtors for the payment of BV Retail and any other creditors. *See* Involuntary Petition Against S&Q (S&Q Record No. 1) and Involuntary Petition Against Raving Brands (Raving Brands Record No. 2).

After discovery, the parties attempted mediation in both matters, but were unable to reach a settlement. A joint trial was held on June 17, 2010.

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[3] The Trial Transcript was ordered and included in the record on appeal, but does not appear on the appellate docket. Counsel to BV Retail will contact the Clerk of this Court to determine if the Trial Transcript is in the record as indicated in the Bankruptcy Court Clerk's Submission Sheet in these appeals, and if not, will work with the Clerk to supplement the record.

B. The Joint Pretrial Order Narrows The Issues For Trial

In the Joint Pretrial Order, S&Q's only opposition to its Involuntary Petition was that BV Retail could not serve as sole petitioning creditor under 11 U.S.C. § 303(b)(1) because S&Q had more than twelve creditors. Joint Pretrial Order, p. 5, ¶ 12 (S&Q Record No. 7). Raving Brands' only opposition to its Involuntary Petition was that "Raving Brands maintains its position that it is an entity with no assets and thus that administration of an involuntary chapter 7 case would be futile." Joint Pretrial Order, p. 8, ¶ 1(S&Q Record No. 7).

The Joint Pretrial Order required the parties to list their exhibits, and their objections to admissibility. Joint Pretrial Order, pp. 10-12 (S&Q Record No. 7). The Involuntary Debtors listed exhibits 1-9 (the "***Contested Exhibits***") on their own exhibit list. BV Retail listed four exhibits, and stated "[t]he Petitioning Creditor also reserves the right to utilize any exhibits designated by the Involuntary Debtors." Joint Pretrial Order, p. 10 (S&Q Record No. 7). The Involuntary Debtors did not raise, preserve or assert any objections to admissibility (whether to BV Retail's own exhibits, or the Involuntary Debtors' exhibits that BV would use). Joint Pretrial Order, p. 12 (S&Q Record No. 7).

C. S&Q Changes Its Position At Trial

At trial, S&Q changed its long-held position that it had twelve or more

creditors, and thus that BV Retail could not be the sole petitioning creditor under Section 303(b) of the Bankruptcy Code. In fact, S&Q conceded at trial that it had fewer than twelve creditors on the petition date. *See* Trial Tr. p. 7; *see also* S&Q Order, p. 2 (S&Q Record No. 8). While this angered the Bankruptcy Court, causing it to threaten Rule 11 sanctions (*see* S&Q Order, pp. 2-3 (S&Q Record No. 8)), it did mean that the only issue at trial, for both S&Q and Raving Brands, was whether they were generally paying their debts as they became due under Section 303(h)(1) of the Bankruptcy Code.

D. The Bankruptcy Court Grants the Raving Brands Involuntary Petition

On July 22, 2010, BV Retail submitted a post-trial brief. *See* Raving Brands Record No. 7. Raving Brands made no post-trial submissions. On August 20, the Bankruptcy Court entered its final order granting the Raving Brands Petition. The Bankruptcy Court made the following factual findings: (a) Raving Brands conceded it had no creditor other than BV Retail, (b) BV Retail held a consent judgment against Raving Brands for over $200,000, (c) BV Retail had demanded payment from Raving Brands, but had not been paid, (d) Raving Brands made numerous transfers prior to the Petition Date, giving rise to potential voidable preference claims, and (e) Raving Brands was not paying its debts as they came due. Raving Brands Order for Relief, pp. 2-3 (Raving Brands Record No. 9).

The Bankruptcy Court also made the following conclusions of law: (a) the presence of one creditor (*i.e.*, BV Retail) satisfied 11 U.S.C. § 303(b) because "[h]ad Congress intended that one creditor was not eligible to file an involuntary against a debtor having no other creditor, it presumably would have provided that one creditor may file an involuntary petition when the debtor has fewer than twelve but more than one creditor," and (b) "the possibility that some of Raving Brands' creditors may have received voidable preferences shows that there is a legitimate bankruptcy purpose to be served in permitting this case to go forward." *Id.* at pp. 3-4 (Raving Brands Record No. 9).

E. The Bankruptcy Court Grants the S&Q Involuntary Petition

On August 27, 2010, the Bankruptcy Court entered a final order granting the S&Q Petition. The Bankruptcy Court made the following factual findings: (a) S&Q conceded it had fewer than twelve creditors, so only one petitioning creditor was required under Section 303(b) of the Bankruptcy Code, and (b) BV Retail held claims in excess of $75,000 for unpaid rent, which claims were unpaid and past due when the petition was filed. S&Q Order for Relief, p. 3 (S&Q Record No. 15).

The Bankruptcy Court also made the following conclusions of law: (a) because at trial S&Q changed its position on the number of creditors it had, but offered no evidence that it had any creditor other than BV Retail, the burden

shifted to S&Q to show that it was generally paying its debts as they came due, and (ii) S&Q did not show that it was paying BV Retail or any other creditor as their debts came due. *Id.* at p. 3 (S&Q Record No. 15). **Alternatively**, the Bankruptcy Court held the evidence at trial showed that if S&Q truly had other creditors, they also were not generally being paid by S&Q as their debts came due. *Id.* at pp. 3-4 (S&Q Record No. 15). Thus, regardless of whose burden it was to prove that S&Q generally was (or was not) paying its debts as they came due, the evidence was in BV Retail's favor. These appeals followed.

V. ARGUMENT

A. The Bankruptcy Court Did Not Abuse Its Discretion, In Admitting At Trial, Documents That Were The Involuntary Debtors' Own Exhibits.

Each and every one of the Contested Exhibits were listed by S&Q on its own list of exhibits in the Joint Pretrial Order. Joint Pretrial Order, p. 11-12 (S&Q Record No. 7). The Joint Pretrial Order specifically provides that both BV Retail and the Involuntary Debtors "reserve the right to utilize any exhibits designated by the" opposing party. *Id.* at pp. 10, 12. Moreover, the Joint Pretrial Order lists "none" under the category of evidentiary objections remaining for trial. It is therefore astounding that the Involuntary Debtors thereafter objected to BV Retail's request to admit the Involuntary Debtors' own exhibits. *See Hamilton and Kus v. Water Whole Int'l Corp. d/b/a Floran Technologies*, 2007 U.S. Dist. LEXIS

46009, at *17 (W.D. Okla. 2007) (holding that court did not err in admitting documents into evidence that the objecting parties had listed as their own exhibits in the pretrial order); *see also BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 489 F.3d 1129, 1139 n. 22 (11th Cir. 2007) (approving of district court's finding that party had waived objections to a document at trial by agreeing in a pretrial stipulation that the document would be admitted into evidence without objection).

Had the Involuntary Debtors listed no exhibits in the Joint Pretrial Order. BV Retail could have listed the Contested Exhibits as its own, and figured out how to admit them over potential objections. But this is a purely hypothetical scenario. What actually happened is that the Involuntary Debtors listed the Contested Exhibits in the Joint Pretrial Order as their own. Under cases such as *Water Whole Int'l Corp.*, and *Int'l Yacht Council*, the Involuntary Debtors could not thereafter object to the admissibility of exhibits they themselves identified and were prepared to admit into evidence.

Thus, the Bankruptcy Court properly admitted the Contested Exhibits, ruling that BV Retail's reservation of the right to use any of the Involuntary Debtors' exhibits in the Joint Pretrial Order constituted "a concession that those [the Contested Exhibits] are admissible." See Trial Tr. 41.

The basis for the rule requiring parties to stand by their pre-trial exhibit lists is clear: "Parties are not to be subjected to signal changes in the middle of the play." *Thrash v. O'Donnell*, 448 F.2d 886, 889 n. 7 (5th Cir. 1971) (affirming trial court's refusal to allow a litigant which had stipulated to the admissibility of certain evidence in the pretrial order to change its position in the middle of trial). As held by the Fifth Circuit over fifty years ago:

> Pretrial is a marvelous instrument in the search for justice. As it narrows issues, as it reduces the field of fact controversy for resolution by court or jury, as it simplifies the mechanics of the offer and receipt of evidence, it is serving a function of high value. Its aim though is to assure justice with a maximum of efficiency in time and expense of court, of counsel, and of litigants.

Laird v. Air Carrier Engine Service, 263 F.2d 948, 953 (5th Cir. 1959). There is no purpose for a detailed pretrial order, in which parties must come clean as to their arguments, contentions, and potential evidentiary objections, if parties can change those positions at will during trial, or lie in wait for when the other side seeks to use exhibits as to which no objection was raised in the pretrial order, as took place here. "Stipulations reached and statements made at pre-trial conferences are binding unless modified." *United States v. Tampa Bay Garden Apartments, Inc.*, 294 F.2d 598, 606 (5th Cir. 1961).[4]

[4] The Involuntary Debtors' position is also inconsistent with Federal Rule of Bankruptcy Procedure 7026, the parties must disclose, prior to trial, various

B. The Bankruptcy Court Did Not Abuse Its Discretion In Interpreting Its Own Joint Pretrial Order To Find That The Involuntary Debtors Had Conceded That Their Own Exhibits Were Admissible.

Not only is Judge Massey's ruling on admissibility of the Contested Exhibits reviewed for an abuse of discretion, but his interpretation of the Joint Pretrial Order that the Involuntary Defendants had conceded the admissibility of their own exhibits is also reviewed using the abuse of discretion standard. *Pulliam v. Tallapoosa County Jail*, 185 F.3d 1182, 1185 (11th Cir. 1999) (noting that trial court's interpretation of pretrial order is reviewed for abuse of discretion); *see also Olmsted v. Taco Bell Corp.*, 141 F.3d 1457, 1461 (11th Cir. 1998); *Hall v. State Farm Fire & Casualty Co.*, 937 F.2d 210, 213 (5th Cir. 1991) ("A trial court has great discretion in interpreting a pretrial order.") (citing cases); *Risher v. United States*, 465 F.2d 1, 5 (5th Cir. 1972) ("We are not inclined to disturb the district court's interpretation of a stipulation agreed upon by the parties during pretrial proceedings and approved by the court.").

Notably, the Appellants never address how Judge Massey abused his discretion in interpreting the Joint Pretrial Order. Judge Massey reviewed the Joint

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exhibits. Fed. R. Civ. P. 26(a)(3)(A). The other side then has fourteen days to preserve objections, and if those objections are not preserved, they are waived. Fed. R. Civ. P. 26(a)(3)(B). The Involuntary Debtors never preserved any objection to BV Retail's reservation of the right to use the Involuntary Debtors' own exhibits, and under Rule 26, waived their authentication objection.

Pretrial Order, and found that (i) BV Retail had plainly reserved the right to utilize the Involuntary Debtors' exhibits, and (ii) the Involuntary Debtors had listed their own exhibits without any reservation, and so (iii) the Involuntary Debtors had conceded that the Contested Exhibits were admissible. The Involuntary Debtors disagree, but a disagreement does not show an abuse of discretion.

Judge Massey was in the best position to understand the parties' pre-trial actions and the import of their written statements in the Joint Pretrial Order. He was also in the best position to evaluate, at trial, the prejudice BV Retail would have suffered had he allowed the Involuntary Debtors' untimely objection to their own exhibits. As explained at trial, had BV Retail's counsel known that the Involuntary Debtors did not intend to bring to trial a certain witness, who could authenticate the Contested Exhibits, BV Retail would have subpoenaed that witness. Trial Tr. 34-35. After S&Q objected to the admissibility of the Contested Exhibits, BV Retail even offered to take a break and subpoena that witness, which the Involuntary Debtors had previously said would be in attendance. Trial Tr. 34-35. The Bankruptcy Court weighed the prejudice that would have resulted to BV Retail, and interpreted the Joint Pretrial Order accordingly.

"In the interest of justice and sound judicial administration, an amendment of a pretrial order should be permitted where no substantial injury will be

occasioned to the opposing party, the refusal to allow the amendment might result in injustice to the movant, and the inconvenience to the court is slight." *Sherman v. United States*, 462 F.2d 577, 579 (5th Cir. 1972). Judge Massey evaluated whether the new authentication objection that the Involuntary Debtors raised would result in injury or injustice, and ruled accordingly. This Court should defer to Judge Massey's discretion in not allowing the Involuntary Debtors to change course in the middle of trial, and raise a new evidentiary objection that was not in the Joint Pretrial Order.

C. The Bankruptcy Court Did Not Err In Ruling That S&Q Had The Burden Of Proving That It Was Generally Paying Its Debts As They Came Due Once BV Retail Had Proved That Its Debt Was Not Being Paid by S&Q.

First, it is important to note that the burden-shifting imposed by the Bankruptcy Court was alternative relief. If the Contested Exhibits were properly admitted, then burden shifting does not matter, for the Contested Exhibits establish conclusively that S&Q was generally not paying its debts as they came due. For instance, the Involuntary Debtors' Trial Exhibit 9 is an accounts payable report. It contains a listing of open invoices for various parties, **and, critically, the "Due Date" for each invoice**. A review of this document reveals that the vast majority of the Involuntary Debtor's accounts payable were listed as at least ninety-one days **past due**. In fact, **only one invoice was current** -- in the amount of $83.

Every other account payable was past due, and in virtually all circumstances, well past due. This is sufficient to support the Bankruptcy Court's ruling, even without the burden shifting. *See also* BV Retail Post-Trial Brief (S&Q Record No. 14).

But the burden shifting was appropriate. At trial, and for the first time, S&Q admitted it had less than twelve creditors, and so BV Retail could be sole petitioning creditor. But S&Q was coy--it stated it had less than twelve, but didn't state whether it had 2, or 4, or 6, or 8 other creditors, or **which** of the creditors on the accounts payable aging summary listed above **actually were** creditors. The Bankruptcy Court viewed this as worthy of potential sanctions, in light of S&Q adamant position for the past fifteen months that it had more than twelve creditors. *See* S&Q Order, pp. 2-3 (S&Q Record No. 8). Instead of sanctioning S&Q however, it reached a more generous result--if S&Q would not say whether it had any other creditors, then the burden would shift to S&Q to show it had another creditor, or creditors. If it could, then BV Retail would respond accordingly to attempt to prove up Section 303(h). S&Q didn't, or couldn't, disclose who its other creditors were, and so an order for relief was entered. This was appropriate; by changing its position at trial, but not stating who its creditors were, S&Q also deserved the burden of proof. The Bankruptcy Court merely "plac[ed] the burden of coming forward with evidence on the party with superior access to the

affirmative information." *Sissoko v. Rocha*, 440 F.3d 1145, 1162 (9th Cir. 2006); *see also* Fed. R. Bank. P. 7056(e) (nonmoving party must oppose summary judgment based on affidavits to support its burden; it cannot simply say "no" when moving party has established grounds for summary judgment). The Bankruptcy Court's burden shifting, even as alternative relief, was appropriate.

D. Even If The Contested Exhibits Were Improperly Admitted, And Burden Shifting Was Also Not Warranted, The Bankruptcy Court Did Not Err In Granting The Order For Relief Against S&Q.

Even if the Contested Exhibits were improperly admitted, and the Bankruptcy Court should not have shifted the burden, it was harmless error. S&Q did not dispute BV Retail's substantial claim. Nor did it assert at trial that it actually had any other creditors. On this evidence, the Bankruptcy Court could have found that S&Q was generally not paying its debts as they came due. *See In re Smith*, 243 B.R. 169 (Bankr. N.D. Ga. 1999) (debtor was current on day-to-day expenses, but was months past due with large creditors; held that the debtor was not paying its debts as they came due). Thus, even under *Smith*, if S&Q was current with all other day-to-day expenses (and nothing of the sort is in the record), the Bankruptcy Court still could have found that the size of BV Retail's claim and the fact that it was outstanding for months before filing could support a finding that BV Retail had satisfied Section 303(h) of the Bankruptcy Code.

E. The Bankruptcy Court Did Not Err In Ruling That Raving Brands Was Not Generally Paying Its Debts As They Came Due.

Section 303 of the Bankruptcy Code sets forth a very clear, non-discretionary test for involuntary petitions filed by a single creditor. It requires that "the court ***shall*** order relief against the debtor in an involuntary case… 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…." 11 U.S.C. § 303(h)(1) (emphasis added). The word "shall" does not provide the Bankruptcy Court with any discretion to deny an involuntary petition when the debtor is generally not paying its debtor's debts as they become due. If there was a bona fide dispute it would be another matter, but here Raving Brands did not contest the BV Retail claim.

Whether a debtor is generally paying its debts as they come due is a question of fact, and findings may only be overturned if clearly erroneous. *Concrete Pumping Serv., Inc. v. King Construction Co., Inc. (In re Concrete Pumping Serv., Inc.)*, 943 F.2d 627, 690 (6th Cir. 1991). The Appellants cannot satisfy this burden.

1. The Bankruptcy Code Sets Forth A Very Clear, Non-Discretionary Test For Involuntary Petitions Filed By A Single Creditor

Section 303 of the Bankruptcy Code provides a clear mechanism for allowing an involuntary petition to be filed by one creditor:

> (i) the petitioning claimholder's claim is not contingent as to liability or subject to a bona fide dispute as to liability or amount, (ii) the petitioning claimholder is undersecured by at least $12,300, (iii) there are fewer than twelve claimholders (not counting insiders, employees, transferees of voidable transfers, and holders of contingent or disputed claims), and (iv) the alleged debtor is generally not paying its debts as they come due.

In re Euro-American Lodging Corp., 357 B.R. 700, 712 (Bankr. S.D.N.Y. 2007) (citation omitted); *In re Aurora Capital, Inc.*, 414 B.R. 822, 825 (Bankr. S. D. Fla. 2009) (using same test). Here, items (i)-(iii) of this test were not disputed by Raving Brands, leaving only item (iv) at issue.

Where the petitioning creditor is the only creditor, it could reveal that the bankruptcy system is being used to resolve "essentially a two-party dispute." *Wechsler v. Macke Int'l Trade, Inc. (In re Macke Int'l Trade, Inc.)*, 370 B.R. 236, 247 (9th Cir. BAP 2007). Thus, some earlier Bankruptcy Code cases created an "almost *per se* rule." As noted (and then rejected) by the Sixth Circuit:

> The bankruptcy (and some district) courts seem to have developed almost a *per se* rule against granting a petition for involuntary bankruptcy where there is only a single creditor. *See, e.g.*, *In re Smith*, 123 Bankr. 423, 425 (Bankr. M.D. Fla. 1990) ("The general rule is that the failure of a debtor to meet the liability of a single creditor does not warrant the granting of an Order for Relief."); *In re Gold Bond Corp.*, 98 Bankr. 128, 129 (Bankr. D.R.I. 1989) (The burden on the creditor is "particularly difficult where there is only one creditor involved, since the general rule is that 'if a debtor is not paying a single debt then the case should be dismissed since a creditor cannot prove the debtor is generally not paying "its debts" as they become due.'" (citations omitted)); *In re Central Hobron Associates*, 41 Bankr. 444, 448-49 (D. Hawaii, 1984) ("In the absence of

> exceptional circumstances, a debtor must neglect more than one debt for the nonpayment to be 'general'.").

Concrete Plumbing, 943 F.2d at 629-30.

As the law developed, however, courts have roundly rejected the "almost *per se* rule," and have ruled that a single involuntary petitioner can obtain relief under Section 303 without resort to any of the discretionary factors set forth above. In *Concrete Pumping*, the Sixth Circuit noted that "the Bankruptcy Code specifically allows a single claimholder to initiate involuntary bankruptcy proceedings where there are fewer than twelve claims against a debtor. 11 U.S.C. § 303(b)(2). This provision clearly contemplates the possibility of a single creditor initiating proceedings." *Concrete Pumping*, 943 F.2d at 630. The District Court for the Southern District of Florida agreed, holding that "[h]ad Congress wanted to provide that the 'generally not paying' standard could not be met in single/sole creditor cases, it could have (and would have) said so expressly. I therefore reject the 'almost *per se* rule' articulated in the cases cited by the bankruptcy court." *Federal Fin. Corp. v. DeKaron Corp.*, 261 B.R. 61, 64 (S.D. Fla. 2001); *see also Crown Heights Jewish Cmty. Council, Inc. v. Fischer (In re Fischer)*, 202 B.R. 341, 347-48 (E.D.N.Y. 1996).

In rejecting the "almost *per se* rule," courts have directed that when a debtor only has one creditor and is generally not paying the debts it owes to that creditor

as they come due, then a bankruptcy court has no discretion to deny an involuntary petition where such a creditor with an undisputed claim of requisite size has filed the action. *See Concrete Pumping*, 943 F.2d at 628, 630 ("as a matter of law, [the bankruptcy court] could only have found that Concrete Pumping was not generally paying its debts as they came due. Concrete Pumping was in default on 100% of its outstanding debt to 100% of its creditors [a single creditor]. It is impossible to get any more general than that."); *In re Kreidler Import Corp.*, 4 B.R. 256, 262 (Bankr. D. Md. 1980) (holding that since the involuntary debtor neglected to pay a debt constituting over ninety-seven percent of its total obligations, "the Court is bound by Section 303 to enter an order for relief against [the involuntary debtor]").

2. The Word "Shall" Has A Very Clear Meaning And Import Under The Bankruptcy Code

11 U.S.C. § 303(h) sets forth that if the petitioning creditor proves the involuntary debtor is "generally not paying such debtor's debts as they come due," then the court "***shall*** order relief against the debtor in an involuntary case under the chapter under which the petition was filed." 11 U.S.C. § 303(h) (emphasis added). Other provisions of the Bankruptcy Code clearly indicate that a bankruptcy court is without discretion to modify statutory directives or disregard the word "shall."

For instance, the modifications to Section 362 of the Bankruptcy Code enacted through the Bankruptcy Abuse Prevention and Consumer Protection Act of

2005 provide for the automatic termination of the stay if the debtor was the subject of a case filed within the preceding year which was dismissed. *See* 11 U.S.C. § 362(c)(3)(A) ("if a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed . . . (A) the stay under subsection (a) . . . ***shall*** terminate with respect to the debtor on the 30th day after the filing of the later case) (emphasis added). Thus, in *In re Reed*, 370 B.R. 414 (Bankr. N.D. Ga. 2006), the Bankruptcy Court took as a given that the stay terminated in the case of a serial filer exactly 30 days after the filing of the debtor's subsequent petition. The Court did consider what procedural mechanism may allow for a re-imposition of the stay thereafter under a separate Code section, but the mandatory language of Section 362(c)(3)(A) required a finding that the stay had been terminated in the meantime. *See also* 11 U.S.C. § 362(c)(4)(A)(i), (ii) (directing that the automatic stay shall not even go into effect in the case of multiple serial filings by an individual, and directing that the bankruptcy court shall enter a confirming order to that effect upon request); 11 U.S.C. § 366(c)(1)(B) ("[f]or purposes of this subsection an administrative expense priority ***shall not*** constitute an assurance of payment," and so Section 366 mandates protection a debtor must provide to receive post-petition utility services).

There is no basis to distinguish between the use of the word "shall" in these Bankruptcy Code sections and the use of the word "shall" in Section 303(h). If Congress had intended other considerations to be relevant to Section § 303(h), or had intended the bankruptcy court to exercise discretion based on other standards not listed in 11 U.S.C. § 303(h), it would have said so.

In its Order, the Bankruptcy Court agreed with this line of reasoning and rejected the "almost *per se* rule," concluding that "[t]he fact that Raving Brands had no creditor other than BV Retail when this involuntary case was filed does not disqualify BV Retail as a petitioning creditor." Raving Brands Order for Relief, p. 3 (Raving Brands Record No. 9). The Bankruptcy Court found that BV Retail's earlier lawsuit against Raving Brands constituted a demand for payment, and, thus, "Raving Brands was not paying BV Retail the debts it owed BV Retail when due." *Id.* The Bankruptcy Court's ruling complies with the language of the Bankruptcy Code, adopting those cases that do not allow for a further, discretionary inquiry that Congress did not include in Section 303 of the Bankruptcy Code. Under the cases cited above, this Court should do so as well.

The Bankruptcy Court analyzed this single-creditor involuntary petition in the same fashion as it would a multi-creditor involuntary petition. In so doing, the Bankruptcy Court made a finding of fact that "from at least as early as the date on

which Raving Brands was served with the lawsuit in the U.S. District Court to April 27, 2009, Raving Brands was not paying BV Retail the debts it owed BV Retail when due." Raving Brands Order for Relief, p. 3 (Raving Brands Record No. 9). Thus, Raving Brands "was not paying its debts as they came due within the meaning of section 303(h)" as of April 27, 2009, because Raving Brands was not paying the debts it owed BV Retail, its only creditor. *Id.* After finding that the requirements of Section 303 were met, the Bankruptcy Court could only arrive at one possible conclusion: that BV Retail could initiate involuntary bankruptcy proceedings under section 303 of the Bankruptcy Code. *Id.* at 4. The Bankruptcy Court's factual finding that Raving Brands was generally not paying its debts as they came due ultimately decided the case and can only be overturned if this Court finds it to be clearly erroneous. *See Englander*, 95 F.3d at 1028. A finding is "clearly erroneous" only if after an examination of the issues, this Court is left with the firm conviction that a mistake was made. *Farris*, 365 Fed. Appx. 198, 199 (11th Cir. Ga. 2010). Here, the Bankruptcy Court's finding that Raving Brands was generally not paying its debts as they come due is not clearly erroneous. In fact, "[t]here is substantial authority for the proposition that even though an alleged debtor may owe only one debt, or very few debts, an order for relief may be

granted where such debt or debts are sufficiently substantial to establish the generality of the alleged debtor's default." *Fischer*, 202 B.R. at 350-51.

Raving Brands never disputed that BV Retail was its only creditor on the Petition Date. BV Retail holds a consent judgment against Raving Brands in the amount of $206,051.50, entered on March 4, 2009 and which has yet to be repaid. As BV Retail is Raving Brands' only creditor, the Bankruptcy Court concluded that Raving Brands was generally not paying its debts as they came due. This finding is not clearly erroneous, and the Bankruptcy Court should be affirmed.

3. Alternatively, Even If The "Almost *Per Se* Rule" or "Totality of the Circumstances Rule" Should Be Applied, The Bankruptcy Court Found Substantial Evidence To Support A Bankruptcy Case For Raving Brands

Alternatively, the Bankruptcy Court found evidence of potentially preferential transfers. Involuntary Debtors' Exhibit 8 indicated over 20 transfers to and from "Raving Brands" prior to and after the petition date. *See* Involuntary Debtors' Exhibit 8, at pp. 1-4. The final page of that exhibit indicates a flurry of additional transfers to "Raving Brands" post-petition. *See* Involuntary Debtors' Exhibit 8, at p. 6. This evidence is consistent with testimony at trial of Mr. Robert Bruner, the principal of BV Retail, who testified that Raving Brands admitted to providing proceeds from the S&Q sale to insiders. Trial Tr. p. 27. This testimony was not disputed by Raving Brands.

Even if this Court adopted the "almost *per se* rule" or totality of circumstances test, evidence of insider transfers and avoidance claims are sufficient here. The cases requiring "something more" than what Section 303 sets forth still allow an involuntary petition to be granted by a single creditor (even if it is the sole creditor) if (i) it is an exceptional case, where the sole creditor would not have an adequate remedy at law, or (ii) where there is "a showing of special circumstances amounting to fraud, trick, artifice or scam." *See generally The Society of Lloyd v. Harmsen (In re Harmsen)*, 320 B.R. 188, 200-01 (10th Cir. BAP 2005); *In re Norris*, 183 B.R. 437, 460 (Bankr W.D. La. 1995).

This is a low standard, and it is satisfied here. *In re Norris* relied on, *inter alia*, the fact that there may be avoidance actions, *In re Norris*, 183 B.R. at 462, and evidence that the debtor had dissipated its assets, both of which are indicated by Involuntary Debtors' Exhibit 8. *See also In re B.D. Int'l Discount Corp.*, 13 B.R. 635, 638-39 (Bankr. S.D.N.Y. 1981) (funds suspiciously shifted between related corporate entities supported entry of an order for relief).

VI. CONCLUSION

Judge Massey's decisions as to admissibility and interpretation of the Joint Pretrial Order were not an abuse of discretion. His rulings as to S&Q and Raving

Brands were consistent with the language of Section 303 of the Bankruptcy Code; his factual findings were not clearly erroneous and this Court should affirm.

Respectfully submitted this 3rd day of January, 2011.

s/ Charlotte M. Ritz
Mark I. Duedall
Georgia Bar Number 231770
mduedall@hunton.com
Charlotte M. Ritz
Georgia Bar Number 195201
critz@hunton.com
HUNTON & WILLIAMS LLP
600 Peachtree St., NE #4100
Atlanta, GA 30308
Telephone: 404-888-4000
Facsimile: 404-888-4190

Counsel for Appellee BV Retail, LLC

CERTIFICATE OF COMPLIANCE PURSUANT TO L.R. 7.1D

The undersigned counsel hereby certifies that the foregoing has been prepared using one of the font and point selections approved in LR NDGa 5.1.

This 3rd day of January, 2011.

s/ Charlotte M. Ritz
Charlotte M. Ritz

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and correct copy of the foregoing **BRIEF OF APPELLEE BV RETAIL, LLC** with the Court's CM/ECF system, which will effect service on all counsel of record.

This 3rd day of January, 2011.

s/ Charlotte M. Ritz
Charlotte M. Ritz