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THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH

In re:

CEDAR CORNERS MANAGEMENT, LLC,

Alleged Debtor.

Bankruptcy Case 22-22580
(Chapter 7 – Involuntary Petition Pending)

Judge Kevin R. Anderson

FILED ELECTRONICALLY

**REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS INVOLUNTARY
PETITION AND FOR AN AWARD OF COSTS, FEES, AND DAMAGES**

Pursuant to 11 U.S.C. §§ 105, 303, and 305, Rules 1011, 1013, 1018, and 7012 of the Federal Rules of Bankruptcy Procedure, and the Local Rules of Practice, Cedar Corners¹ hereby files this reply memorandum in support of its *Motion to Dismiss Involuntary Petition and Motion for Judgment Against the Alleged Petitioning Creditors for a Reasonable Attorney’s Fee or Punitive Damages* [ECF No. 8] (the “Motion”) and in response to Construction Materials Management, LLC (“CM Management”) and Ralph Smith Trucking Company’s (“RST”)

¹ Unless otherwise noted herein, capitalized terms in this reply have the same meaning as those set forth in the Motion.

(collectively, the “Objecting Entities”) *Petitioning Creditors’ Objection to Motion to Dismiss* [ECF No. 10] (the “Objection”).

THRESHOLD AND PRELIMINARY MATTERS

As threshold and preliminary matters, it is important to note that neither CM Management nor RST are part of the Petitioning Creditors. *See* ECF No. 1. While CM Management’s and RST’s names are similar to those of two of the Petitioning Creditors, they are not the same.² *Id.* Thus, the Objecting Entities do not have standing to object to the relief requested in the Motion, and the Motion should be granted in all respects.

Additionally, although the opening paragraph of the Objection states that it is also brought on behalf of Jacobson Excavation, LLC (“Jacobson”), Russell S. Walker (“Mr. Walker”), the attorney filing the Objection, does not represent Jacobson.³ While Cedar Corners granted Jacobson an extension until September 2, 2022 to file any response/objection to the Motion, it did not and has consequently waived its ability to respond to the Motion. *See* Local Rule 9013-2(e) (“Failure of a party to timely file written opposition will be deemed a waiver of any opposition to granting of the Motion.”). Thus, Jacobson has acquiesced to the relief requested in the Motion and may not be heard on the Motion, and an order granting the Motion as to Jacobsen should be entered.

Lastly, despite admitting that CMC Rock did not file a mechanic’s lien against the Property (*see* Motion, at pgs. 4–5, ¶ 7), the Objection goes on to repeatedly state that the Petitioning Creditors have “liens” against the Property, which is not true. *See, e.g.*, Objection, at

² The Petitioning Creditors as identified on the involuntary petition are “Construction Materials Company, LLC” and “Ralph Smith Company.” *See* Involuntary Petition, ECF No. 1, at pg. 2.

³ Jacobson is represented by Steven R. Sumsion. As confirmed by the heading on page 1 and the signature line on page 9 of the Objection, Mr. Walker only represents CM Materials and RST.

pgs. 1, 2, and 4–8. Because not all of the Petitioning Creditors have asserted lien rights on the Property, the Objection’s continued assertion to the contrary is suspect and undermines the proffered arguments.

REPLY TO INTRODUCTION

As Cedar Corners originally noted in the Motion, this involuntary bankruptcy case should have never been commenced, and the Objection confirms it by admitting almost all of the allegations in the Motion and failing to raise any legal or factual disputes related to the main (and really only) issue before the Court—whether the Petitioning Creditors meet the requirements outlined in 11 U.S.C. § 303(b)(1) (“Section 303”) to qualify as petitioning creditors. Rather than address the main issue before the Court, the Objecting Entities assert legal conclusions without any factual support and focus on: 1) the alleged equity in the Property (which the Objecting Entities later contradictorily admit does not actually exist); 2) the alleged lien rights of the Petitioning Creditors (which the Objecting Entities contradictorily admit only exist with respect to Jacobson and Ralph Smith); and 3) the foreclosure efforts of a senior secured lender (which is irrelevant to the actual issue before the Court). The result of the Objection, therefore, is nothing more than an admission that this case was improperly commenced by alleged creditors with highly disputed claims in order to stop the foreclosure of a senior secured lender.

REPLY TO STATEMENT OF FACTS

The Objecting Entities admit all of the statements of fact set forth in the Motion, except for (arguably) statements of fact 6 and 8. But statements of fact 6 and 8 are taken directly from matters of public record (all of which are attached to the Motion as exhibits). Thus, these facts

cannot be disputed in good faith, and the Court can take judicial notice of these facts after reviewing the exhibits attached to the Motion and other matters of public record.

RESPONSE TO STATEMENT OF ADDITIONAL FACTS AND EVIDENTIARY OBJECTIONS

1. The Objecting Entities' statement of additional fact 1 is not supported by an allegation in the Involuntary Petition, nor is any evidentiary support (including any public record or other item of which the Court can take judicial notice) attached to the Objection. Thus, this statement is inadmissible and should be disregarded. Nevertheless, for purposes of the Motion only, Cedar Corners does dispute statement of additional fact 1.

2. The Objecting Entities' statement of additional fact 2 is not supported by an allegation in the Involuntary Petition, nor is any evidentiary support (including any public record or other item of which the Court can take judicial notice) attached to the Objection.⁴ Thus, this statement is inadmissible and should be disregarded. Nevertheless, for purposes of the Motion only, Cedar Corners does dispute statement of additional fact 2.

3. The Objecting Entities' statement of additional fact 3 is not supported by an allegation in the Involuntary Petition, nor is any evidentiary support (including any public record or other item of which the Court can take judicial notice) attached to the Objection.⁵ Thus, this statement is inadmissible and should be disregarded. Nevertheless, for purposes of the Motion only, Cedar Corners does dispute statement of additional fact 3.

4. Cedar Corners admits statement of additional fact 4.

5. The Objecting Entities' statement of additional fact 5 is not supported by an allegation in the Involuntary Petition, nor is any evidentiary support (including any public record

⁴ The Objection references an "Exhibit A," but no such exhibit was attached to it or filed.

⁵ The Objection references an "Exhibit B," but no such exhibit was attached to it or filed.

or other item of which the Court can take judicial notice) attached to the Objection. Thus, this statement is inadmissible and should be disregarded. Nevertheless, for purposes of the Motion only, Cedar Corners does dispute statement of additional fact 5.

6. The Objecting Entities' statement of additional fact 1 is not supported by an allegation in the Involuntary Petition, nor is any public record or other item of which the Court can take judicial notice attached to the Objection. Thus, this statement is inadmissible and must be disregarded.

REPLY TO STANDARD FOR MOTION

The Objecting Entities do not dispute the legal standard for the Motion, as set forth in the Motion. Thus, the Objecting Entities admit the legal standard for the Motion.

REPLY TO ARGUMENT

The Objecting Entities argue that they and/or the Petitioning Creditors—it is unclear which, since they are not the same—have claims against Cedar Corners and thus complied with Section 303. However, the Objecting Entities (1) are inconsistent in naming the entities who hold claims, signed the petition, and objected to the Motion, making it impossible for the Court to identify three qualifying creditors; (2) ignore the case law cited in the Motion making it clear that an in rem claim against property does not qualify an entity to file an involuntary petition; (3) provide legal conclusions instead of evidence; and (4) fail to respond to many of Cedar Corners' arguments.

As noted previously, the main issue before the Court is whether the Petitioning Creditors meet the requirements outlined Section 303 to qualify as petitioning creditors. All other issues, including those related to foreclosure efforts and costs to finish the project, are red herrings. The

real issue before the Court is whether this case was properly commenced. Specifically, in order for this case to proceed, the Petitioning Creditors must establish that each of them has a claim that is both (1) against “such person”; and (2) not the subject of a bona fide dispute as to liability or amount. 11 U.S.C. § 303. Because they cannot do this, the case should be dismissed, with fees and costs awarded to Cedar Corners.

I. There are insufficient Petitioning Creditors.

Confusingly, the Objecting Entities—on whose behalf the Objection was filed—are not the same entities as the Petitioning Creditors listed on the Involuntary Petition. In addition, at least one Petitioning Creditor (Materials Co.) does not have any demonstrable claim against Cedar Corners, as set forth in the Motion,⁶ and did not object to the Motion. Furthermore, another Petitioning Creditor (Jacobson) has failed to respond to the Motion. In short, the Court does not have before it three persons or entities who all (a) appeared on the face of the petition, (b) have a demonstrable claim against Cedar Corners, and (c) objected to the Motion. *See* 11 U.S.C. 303(b)(1) (requiring at least three creditors). Thus, on that basis alone, the Motion should be granted.

II. A “claim against such person” does not include a “claim against such person’s property.”

The Objecting Entities argue that the Court should consider the creditors’ lien claims to qualify them to file the involuntary petition because a “claim” is any right to payment. *See* Objection, at 7. However, as set forth in the Motion, the language of Section 303—a “claim against such person”—is narrower and does not encompass property of the debtor. *See In re Taberna Preferred Funding IV, Ltd.*, 594 B.R. 576, 595–96 (Bankr. S.D.N.Y. 2018). The

⁶ *See* Motion, at pg. 11.

Objecting Entities have not cited any case law to the contrary. Accordingly, to the extent that the claims against Cedar Corners are only claims against its property, they do not qualify the claim holders to file an involuntary petition.

III. The Petitioning Creditors' claims are in bona fide dispute.

Even if the Court were to assume that the Objection came from the Petitioning Creditors and that said creditors had claims (notwithstanding the failure of some respond to the Motion), the fact remains that each of the Petitioning Creditors' claims are subject to a bona fide dispute as to liability *and* amount. The Motion provides indisputable evidence and analysis establishing that the Petitioning Creditors do not have direct claims against Cedar Corners and that any such claims that have been asserted are clearly disputed—by Cedar Corners and, in some instances, the Petitioning Creditors themselves. The Motion's evidence includes: 1) Jacobson's lawsuit in state court, which makes it clear that its claim is "a direct and proximate result of RJ Construction's" conduct, not Cedar Corners (*see* Exhibit 1 to the Motion, at pg. 9, ¶¶ 54 and 66); 2) Jacobson's dispute of Materials Co.'s claims in state court (*see* Exhibit 5 to the Motion, at pgs. 6–11); 3) Jacobson's admittance that there is no contract between it and Cedar Corners; 4) the Involuntary Petition's statement that Materials Co. has a claim against Cedar Corners in the amount of \$359,250.62, but Cedar Corners is not aware of any such claim held by Materials Co.; 5) the fact that Ralph Smith has not commenced any litigation against Cedar Corners; and 6) the fact that Cedar Corners and others have asserted counterclaims against the Petitioning Creditors. The Objection fails to counter, let alone respond to, this (and other) evidence set forth in the Motion.

Instead, the Objection asserts various legal conclusions that are not supported by fact or admissible evidence and relies on *In re Gen. Aeronautics Corp.*, 594 B.R. 442, 447 (Bankr. D. Utah 2018). But the Objecting Entities' reliance on *In re General Aeronautics Corp.*'s analysis is misplaced because there is no portion of the Petitioning Creditors' alleged claims that is not in bona fide dispute as to liability and amount. The Objecting Entities have not identified any portion of the Petitioning Creditors' alleged claim that is not in bona fide dispute, nor does such a portion exist. To the contrary, as noted above and in the Motion, the entire amount of the Petitioning Creditors' alleged claims is disputed. Thus, the requirements of Section 303 have not been met.

IV. Cedar Corners Should Be Awarded Fees, Costs, and Damages Under 11 U.S.C. § 303(i).

As Cedar Corners suspected, the Petitioning Creditors have now admitted that they filed the Involuntary Petition to stop the foreclosure sale of a senior secured lender in hopes of being able to preserve their alleged lien rights and gain time to negotiate with the senior secured lender. *See* Objection, pgs. 1 and 5. Since neither Materials Co. nor CMC Rock have any lien rights, the filing of the Involuntary Petition for the purpose of stopping a foreclosure sale was wholly improper. Likewise, Jacobson's filing of the Involuntary Petition and then failing to respond to the Motion warrants fees, costs, and damages, especially since "there is a presumption that costs and attorney's fees will be awarded to the alleged debtor following dismissal of an involuntary petition[.]" *In re Mountain Dairies, Inc.*, 372 B.R. 623, 637 (Bankr. S.D.N.Y. 2007) (internal quotation omitted); *see also In re Wyo. Cnty. Builders, LLC*, 2014 WL 1801679, at *3 (10th Cir. B.A.P. 2014) ("[A] motion under § 303(i)(1) raises a rebuttable presumption that reasonable fees and costs are authorized.").

“[T]he burden of proof is on the petitioner to justify a denial of costs and fees.” *Id.* The Objection does not set forth any reason why fees and costs should not be granted. Thus, Cedar Corners should be awarded its fees, costs, and damages for having to defend the Involuntary Petition.

CONCLUSION

WHEREFORE, for the above reasons, Cedar Corners renews its request that the Court dismiss the Involuntary Petition under Rule 12(b)(6), or in the alternative, dismiss it on abstention grounds. Cedar Corners also requests that the Court award it its attorney’s fees and costs under section 305(i)(1) and, because the Involuntary Petition was filed in bad faith, damages under section 305(i)(2).

DATED this 9th day of September, 2022.

MCKAY, BURTON & THURMAN, P.C.

_____/s/ Mark C. Rose
Mark C. Rose
Attorneys for Cedar Corners Management, LLC

CERTIFICATE OF SERVICE - BY NOTICE OF ELECTRONIC FILING (CM/ECF)

I hereby certify that on September 9, 2022, I electronically filed the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS INVOLUNTARY PETITION AND FOR AN AWARD OF COSTS, FEES, AND DAMAGES** with the United States Bankruptcy Court for the District of Utah by using the CM/ECF system. I further certify that the parties of record in this case, as identified below, are registered CM/ECF users and will be served through the CM/ECF system.

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All other parties entitled to CM-ECF notice in this case

/s/ Mark C. Rose