Case No. 2:13-cv-01324-JAD

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Appeal From:

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA

MONTANA DEPARTMENT OF REVENUE, Appellant, v. TIMOTHY L. BLIXSETH, Appellee.	Bankr. Case No. 11-15010-MKN *In re Timothy L. Blixseth* Involuntary Chapter 7
TIMOTHY L. BLIXSETH, Cross-Appellant, v. MONTANA DEPARTMENT OF REVENUE, Cross-Appellee.	**REPLY BRIEF OF CROSS-APPELLANT TIMOTHY L. BLIXSETH**

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Cross-Appellant Timothy L. Blixseth ("Mr. Blixseth") hereby submits his brief (the "Blixseth Reply Brief") in reply to (1) the *Opposition to Appeal of Cross-Appellant Timothy L. Blixseth* [Doc. #67] (the "Opposition Brief") filed by the Yellowstone Club Liquidating Trust (the "YCLT"), and (2) the *Opposition Brief of Cross-Appellee* [Doc. #69] (the "Reply Brief") filed by the Montana Department of Revenue ("MDOR").

I. INTRODUCTION

This appeal presents the rare situation where the right facts make for good law.

The facts here are unusual—the involuntary case against Mr. Blixseth was filed by taxing authorities for three sovereign states, led by MDOR. MDOR filed the involuntary petition in the midst of a disputed multi-year audit wherein it sought an assessment of over $45 million against Mr. Blixseth. MDOR became impatient with the audit, and pursued a strategy to isolate a single $219,000 line item from one year's tax return to serve as the purportedly undisputed claim needed to support the involuntary petition.

MDOR initially recruited the Idaho Commission and the California FTB to serve as the other two petitioning creditors needed to satisfy the three creditor requirement of section 303(b)(2). MDOR also attempted to recruit the YCLT, which was pursuing hundreds of millions of dollars in claims against Mr. Blixseth in the Montana Bankruptcy Court. However, the YCLT would not sign on to the original involuntary petition. Instead, the YCLT made a very early appearance in the involuntary case to oppose dismissal, and then waited over two years before filing a joinder on the eve of a two-day hearing on Mr. Blixseth's renewed motion to dismiss.

There is no question that MDOR and the YCLT have used the involuntary bankruptcy as a coercive, strategic mechanism to further their own particular agendas against Mr. Blixseth. There is no question that through the prosecution of the involuntary bankruptcy, MDOR and the

YCLT have successfully impeded Mr. Blixseth's efforts to defend himself against MDOR's $45 million contested audit assessment and the YCLT's $280 million contested claim (which has repeatedly been limited to no more than a fraction of that amount). And there is no question that this is not the purpose of involuntary bankruptcy that Congress intended.

Fortunately, section 303 of the Bankruptcy Code, as informed by its legislative history and well-established case law, provides clear and fundamental protections to prevent the improper use of involuntary bankruptcy. Two of those protections are squarely at issue in connection with Mr. Blixseth's cross-appeal—the effect of a valid joinder under section 303(c) and the *bona fide* dispute requirement under section 303(b). Section 303(c) plainly provides that a creditor who satisfies the requirements for valid joinder is treated as if it had been an original petitioning creditor for purposes of section 303(b)—no better and no worse. Section 303(b)(2) plainly requires that in order for an involuntary case to stand, there must be at least three petitioning creditors holding claims that are not subject to *bona fide* dispute as to liability or amount.

As of the involuntary petition date, the claims asserted by MDOR and the YCLT were undeniably subject to *bona fide* dispute, at least as to amount, which mandates affirmance of the dismissal called for in the Order. This is not only the clear result under the law, it is the right result under these facts. The lengths to which MDOR and the YCLT have gone in attempting to avoid this inescapable conclusion only serve to confirm that it is just and proper.

II. JURISDICTION

The YCLT argues in passing in its Opposition Brief that this Court lacks jurisdiction over Mr. Blixseth's cross-appeal because Mr. Blixseth seeks to "preserve the Order below." YCLT Opposition Brief at p. 1. However, the cases cited by the YCLT do not stand for this proposition,

but instead address the situation where a party fails to file a cross-appeal, yet is nevertheless permitted to "defend a judgment on any ground properly raised below, as long as it seeks to preserve rather than to change the judgment." *Id.* (quoting *Southern Oregon Barier Fair v. Jackson County*, 372 F.3d 1128, 1133 n.8 (9th Cir. 2004)). The YCLT does not cite any authority that would prevent Mr. Blixseth from prosecuting his arguments regarding section 303(c) by way of cross-appeal, nor does the YCLT identify any prejudice that might result. Indeed, the YCLT acknowledges that Mr. Blixseth may urge affirmance on any ground. *Id.* Therefore, the Court should disregard the YCLT's jurisdictional argument.

III. ARGUMENT

A. THE CROSS-APPELLEES CONFLATE THE THRESHOLD REQUIREMENTS FOR JOINDER UNDER 11 U.S.C. § 303(c) WITH THE SUBSTANTIVE EFFECT OF JOINDER UNDER 11 U.S.C. § 303(b).

In an attempt to leapfrog application of the *bona fide* dispute requirement to the YCLT claim, MDOR and the YCLT conflate three distinct issues: (i) the threshold procedural requirements for valid joinder under section 303(c), (ii) the threshold substantive requirements for valid joinder under section 303(c), and (iii) the substantive effect of a valid joinder under section 303(b). All of statutory provisions, legislative history and case law cited by the YCLT and MDOR relate to the first two issues. Yet as a review of the procedural history will reveal, the last issue is the only one before this Court in connection with Mr. Blixseth's cross-appeal.

1. Review of Procedural History.

On May 8, 2013, the YCLT filed its motion to join the involuntary petition pursuant to Section 303(c) (the "Joinder"). (MER 11:00049-00058.) Mr. Blixseth objected to the Joinder arguing, among other things, that the Joinder was procedurally improper because the YCLT

failed to file a motion to intervene. (MER 71:01758.)[1] Nearly two weeks later, on May 21, 2013, Judge Markell held a status conference on the Joinder. (BER 20:000166-193.) While the Court overruled the procedural challenges that Mr. Blixseth raised, Judgment Markell clearly reserved any ruling on the substantive requirements and the substantive effect of the YCLT's Joinder:

> THE COURT: Now, that being said -- and so I think the joinder is a joinder. That being said, that's not a ruling by me and not intended to be a ruling by me that they're a bona fide and appropriate joining creditor. I think that may still be open to contest, and a couple of other things.
>
> . . . to the extent you need a ruling, I would rule that they have effectively – that there are no procedural impediments to their joinder.
>
> [. . .]
>
> That is to say I reject the alleged debtor's suggestion that it has to be by intervention. I reject the alleged debtor's suggestion that they are somehow how barred by notions of estoppel or waiver or forfeiture for waiting too long.
>
> I do believe, however, it is still a live issue as to whether or not they are in the words of 303(c), quote, "A creditor holding an unsecured claim that is not contingent," close quote.
>
> [. . .]
>
> MS. MOORE: And I guess for clarification, would the hearing – or the hearings on June 13 and 14 be the forum for deciding whether [they] are a 303(b) creditor as well?
>
> THE COURT: I would think so, yes. I'm perfectly willing to allocate a maximum amount of time to the issues dealing with Yellowstone so that the rest can be heard.

(*Id.* at 000184 (lines 14-18), 186 (lines 8-18), 21:8-18; 189 (lines 12-15).)

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[1] Mr. Blixseth cited *In re Kidwell*, 158 B.R. 203, 212 (Bankr. E.D. Cal. 1993) in support of the proposition that YCLT was required to file a motion to intervene in order to properly join in the involuntary petition. The Bankruptcy Court held that *Kidwell* was inapplicable to this case. Ironically, the *Kidwell* decision is now the centerpiece of the MDOR and YCLT argument that the *bona fide* dispute requirement does not apply to the YCLT at all. As explained below, *Kidwell* is plainly inapposite to the substantive effect of the YCLT Joinder under section 303(b).

Thus, Judge Markell limited strictly limited this May 21 ruling to a determination that the YCLT had satisfied the threshold procedural requirements for valid joinder under section 303(c), and expressly preserved the other two issues regarding the threshold substantive requirements for valid joinder under section 303(c) and the substantive effect of a valid joinder under section 303(b). *See id.*

Thereafter, Judge Markell clearly ruled in the Order that the YCLT satisfied the threshold substantive requirement for valid joinder under section 303(c), stating that "since YCLT's claim is not contingent it may join the petition 'with the same effect as if such joining creditor were a petitioning creditor.'" (MER 1:00016 (at lines 6-8).) Although Judge Markell did not specify with absolute clarity that this ruling also was intended to address the substantive effect of the YCLT's joinder under section 303(b), the Order appears to imply that Judge Markell resolved this third issue by concluding that the *bona fide* dispute requirement under section 303(b) was not applicable to a joining creditor for purposes of determining whether an involuntary petition is supported by a sufficient number of petitioning creditors. (*Id.* 00015 (at lines 4-6) (although disqualification of Idaho and California means that there is an insufficient number of petitioning creditors, court will also assess the YCLT's qualifications).) Mr. Blixseth took his cross-appeal solely to challenge this aspect of the Order, which constitutes clear error to the extent it does purport to resolve the third issue regarding the substantive effect of a valid joinder under section 303(b) as indicated above.

2. The Substantive Effect of Joinder Under 11 U.S.C. § 303(b).

In his Opening Brief, Mr. Blixseth explained the nexus between section 303(b) and 303(c), which in tandem permit a noncontingent, unsecured creditor who did not sign on to the original involuntary petition to join after the fact. In effect, section 303(c) is a tolling provision that provides for "statutory relation back"—it prevents an <u>otherwise valid</u> involuntary

bankruptcy case from being dismissed solely because one or more of the otherwise eligible creditors who support the petition did not sign on until after it was originally filed. *See In re Kidwell*, 158 B.R. 203, 216 (Bankr. E.D. Cal. 1993).

As they did below, MDOR and the YCLT respond with an improper attempt to elevate the effect of the Joinder and supersede the fundamental qualification requirements of section 303(b) in direct contravention of the plain language of section 303(c) and all applicable case law. In doing so, they rely upon an absurd statutory construction and cite authorities that either support Mr. Blixseth's position or are plainly inapposite.

With respect to statutory construction, MDOR and the YCLT ignore the clear distinction in section 303(c) between the substantive requirements for valid joinder and the substantive effect of a valid joinder under section 303(b).[2] Section 303(c) plainly states that a joinder may be filed by "a creditor holding an unsecured claim that is not contingent, other than a creditor filing [a petition under section 303(b)]." 11 U.S.C. § 303(c). In addition, Bankruptcy Rule 1003(a) precludes an entity that has transferred or acquired a claim for the purpose of commencing an involuntary case from serving as a "qualified" petitioner. Fed. R. Bankr. P. 1003(a).

Section 303(c) further states that the effect of a valid joinder is the same "as if such joining creditor were a petitioning creditor" under section 303(b). *Id.* This provision has two clear purposes: (a) to relate the joinder back to the filing of the petition, and (b) to subject a valid joining creditor to the same qualification requirements under section 303(b) (and Bankruptcy

[2] Section 303(c) does not specify the procedural requirements for valid joinder, other than that it must be filed after the filing of the involuntary petition but before the case is dismissed or relief is ordered. In any event, Judge Markell resolved any issues regarding the procedural requirements for the Joinder at the May 21 status conference, and these issues are not before the Court in connection with this appeal. *See* § 1, *supra*.

Rule 1003(a)) that govern whether the involuntary cases has been properly commenced. Section 303(c) merely grants a valid joining creditor the same status as a petitioning creditor—i.e. a party that signed the involuntary petition seeking to commence the involuntary case. Nothing more and nothing less. *Accord In re Kidwell*, 158 B.R.at 217. ("[A]ny petitioning creditor in an involuntary case whether signing the initial petition or later joining as a petitioner under section 303(c), should expect to pay the debtor's attorney's fees and costs if the petition is dismissed."). Or as Judge Markell's father might have said, "in for a dime, in for a dollar." (BER 20:000186 (lines 2-3).)

Thus, section 303(c) does nothing to obviate the key inquiry in the context of this appeal—whether there is a sufficient number of petitioning creditors who are eligible or "qualified" under the requirements of section 303(b) and Rule 1003(a), including the *bona fide* dispute requirement. *See, e.g., In the Matter of East West Associates*, 106 B.R. 767, 770 (S.D.N.Y. 1989); *In re Speer*, 522 B.R. 1, 23 (Bankr. D. Conn. 2014); *In re Taub*, 439 B.R. 261, 275 n. 3 (Bankr. E.D.N.Y. 2010). Yet that is precisely what MDOR and the YCLT urge this Court to do. They want this Court to hold that because the YCLT was permitted to join the petition under section 303(c), it automatically became an eligible or "qualified" petitioning creditor without regard to the *bona fide* dispute requirement under section 303(b).

Mr. Blixseth pointed out the absurd effect of this statutory construction in his Opening Brief. *See* Blixseth Opening Brief at § III(D), p. 47. Suppose there are three creditors who want to commence an involuntary case against a debtor, one of which holds an undisputed claim that would be "qualified" under section 303(b) and two of which would be ineligible petitioning creditors because their claims are subject to *bona fide* dispute. If all three creditors sign on to the original petition (and the debtor has twelve or more creditors under section 303(b)(2)), then the

case must be dismissed under any construction of the statute for failing to satisfy the three creditor requirement of section 303(b)(1). But under the construction of section 303(c) proffered by MDOR and the YCLT, these same creditors could make an end-run around section 303(b)(1) simply by having only the one "qualified" creditor sign the petition and the two ineligible creditors file a joinder.

Not surprisingly, no court has endorsed (or even considered) such an absurd scenario. Instead, there are numerous decisions in which courts apply the *bona fide* dispute requirement to a joining creditor for purposes of determining whether the requirements of section 303(b) have been satisfied. *See, e.g. Lubow Mach. Co. v. Bayshore Wire Prods. (In re Bayshore Wire Prods.)*, 209 F.3d 100, 105 (2d Cir. 2000); *In re Rimell*, 946 F.2d 1363, 1365-1366 (8th Cir. 1991); *In re Houston Regional Sports Network, L.P.*, 505 B.R. 468, 473-77 (Bankr. S.D. Tex. 2014). *See also Liberty Tool & Mfg. v. Vortex Fishing Sys. Inc. (In re Vortex Fishing Sys., Inc.)*, 277 F.3d 1057, 1070 (9th Cir. 2001) (referencing *bona fide* dispute requirement with respect to joining creditors).[3]

This analysis is particularly evident in *In re Houston Regional Sports Network, L.P.*, a case that the YCLT cited in its Opposition Brief. *Houston Regional* involved an involuntary petition filed against the television network for the Houston Astros. Four petitioning creditors

[3] The YCLT erroneously alleges that *Vortex* "did not involve a single joining creditor" and accuses Mr. Blixseth of misleading the Court with this citation. *See* YCLT Opposition Brief at n. 2. This is patently false. The Ninth Circuit specifically stated in its factual recital that "On March 22, 1999, Bert and Leora Vincent, Higgins' in-laws, filed a motion to join the involuntary petition, which the Court granted. . . On April 30, 1999 and May 3, 1999, respectively, two additional creditors, Telenational Marketing and Witchcraft Tape Products filed motions to join the involuntary petition." 277 F.3d. at 1063. The Ninth Circuit referenced, but did not apply, the *bona fide* dispute requirement in connection with the claims of these joining creditors, but only because their claims aggregated less than the statutory dollar threshold. *See id.* at 1070. If the *bona fide* dispute requirement did not apply to joining creditors, then the Ninth Circuit would have had no reason to reference this requirement at all. Therefore, although *Vortex* may not be binding authority on whether the requirements of section 303(b) apply to joining creditors (and Mr. Blixseth did not cite it as such), it is certainly persuasive on this point.

filed the involuntary petition; subsequently, three other creditors filed joinders. *Id.* at 472. The Houston Astros filed a motion to dismiss the involuntary proceeding. *Id.* The Court denied the motion to dismiss, ruling that five of the seven creditors "qualified" as eligible petitioning creditors under section 303(b). The Court examined the claims of the original petitioning creditors and the joining creditors alike through the lens of section 303(b) and, in particular, the *bona fide* dispute requirement, stating that "[n]o party has suggested that any dispute exists" regarding any of the joining creditors. *Id.* at 476-77. This finding was crucial—if the joining creditors had not qualified under section 303(b) then the involuntary petition would have been dismissed as two of the three creditors signing the petition held disputed claims. *Id.* at 473-77.

MDOR and the YCLT make much ado about Judge Klein's decision in *In re Kidwell,* 158 B.R. 203, 212 (Bankr. E.D. Cal. 1993). Yet *Kidwell* is not a decision about the substantive effect of a valid joinder (i.e. whether an involuntary petition should be dismissed for failing to satisfy the requirements of section 303(b)). *Kidwell* is a case about the procedural requirements for joinder, specifically the continuing vitality of the "bar-to-joinder doctrine." The bar-to-joinder doctrine arose out of early involuntary cases and essentially holds that intervening creditors should not be permitted to join an involuntary petition if the original petitioners filed in bad faith. *See, e.g., Basin Electric Power Co-Op v. Midwest Processing Co.*, 769 F.2d 483 (8th Cir. 1985), *In re Centennial Ins. Assoc., Inc.,* 119 B.R. 543 (Bankr. W.D. Mich. 1990). In *Kidwell*, the debtor argued that the bar-to-joinder doctrine precluded the court from acting on various motions to join the involuntary petition until the debtor's motion to dismiss for bad faith was resolved. Judge Klein held that section 303(c) trumped the bar-to-joinder doctrine, and that statutory joinder could not be blocked to permit a dismissal that might not occur if joinder were permitted. 158 B.R. at 219.

MDOR and YCLT attempt to elevate Judge Klein's uncontroversial statements about the procedural requirements for joinder under section 303(c) into a holding that joinder under section 303(c) automatically renders the joining creditor a "qualified" petitioning creditor without regard to section 303(b). But *Kidwell* is plainly inapposite because Judge Klein did not rule on a motion to dismiss and, thus, did not rule on whether each of the joining creditors (or the sole petitioning creditor) was a qualified petitioning creditor. Indeed, Judge Klein did not even rule on whether the joining creditors met the substantive requirements for valid joinder under section 303(c). Judge Klein's discussion of statutory joinder under section 303(c) and its minimal procedural restrictions was solely concerned with whether statutory joinder could be restricted by the bar-to-joinder doctrine. For these reasons, *Kidwell* provides no support for MDOR and the YCLT here, where it is the substantive effect of the YCLT Joinder that is at issue on appeal.

Similarly, when the distinction between the threshold requirements for valid joinder under section 303(c) and the substantive effect of a valid joinder under section 303(b) are viewed in their proper context, the legislative history and policy concerns fall smoothly in line. Congress had no need to amend the requirements for valid joinder in section 303(c) to conform to changes in section 303(b) because section 303(c) incorporates section 303(b) by reference regarding the substantive effect of a valid joinder. Thus, any change regarding the requirements of section 303(b) automatically flows through to valid joining creditors.

And the purported "inconsistency" between the substantive requirements of valid joinder under section 303(c) and the *bona fide* dispute requirement of section 303(b) makes perfect sense from a policy perspective in light of the dramatically different impact that results from merely being allowed to join in an involuntary petition versus having the joinder serve as the basis for upholding the involuntary petition. Joinder alone does not impose a significant burden on an

alleged involuntary debtor—it just authorizes an additional party to argue against dismissal. Whereas the *bona fide* dispute requirement goes to the heart of whether an alleged debtor fairly should be subjected to an involuntary bankruptcy case at all. The filing of an involuntary petition does not eliminate the coercive effect for subsequent joining creditors—the same balance must be struck between the rights of petitioning creditors and the alleged debtor regardless of whether creditors have joined in the petition.

Therefore, statutory construction, the entirety of applicable case law, legislative history and policy concerns alike all militate in favor of applying the *bona fide* dispute requirement to joining creditors for purposes of determining whether the requirements of section 303(b) have been met.

B. ARGUMENTS REGARDING THE DISPUTED NATURE OF THE YCLT CLAIM ARE NOT PROPERLY RAISED ON APPEAL BECAUSE THE BANKRUPTCY COURT DID NOT REACH THIS ISSUE.

MDOR and the YCLT improperly argue that even if this Court determines the Bankruptcy Court erred in its application of section 303(c) of the Bankruptcy Code to the YCLT claim, the YCLT should nevertheless qualify as an eligible petitioning creditor under section 303(b) because the YCLT claim was not subject to *bona fide* dispute. *See* MDOR Reply Brief at § II(D)(2)&(3); YCLT Opposition Brief at p.5, n.10. However, the Bankruptcy Court never reached the issue of whether the YCLT claim was subject to *bona fide* dispute in the first instance. (MER 1:00015 (line 7)-00016 (line 8).)

It is well-established that when a bankruptcy court does not reach a factual issue based upon a legal ruling that is subsequently reversed by the district court on appeal, the district court should not undertake an independent determination of the issue in connection with the appeal but instead should remand to the bankruptcy court for further proceedings. *See Great Western Bank v. Sierra Woods Group*, 953 F.2d 1174, 1176-1177 (9th Cir. 1992); *Columbia Gas v. JBL Constr.*

Co. (In re JBL Constr. Co.), 1995 U.S. App. LEXIS 6187, 10-11 (4th Cir. 1995); *In re Reach, McClinton & Co.*, 102 B.R. 392, 400 (D.N.J. 1989).

Thus, it would not be proper for the Court to independently determine in connection with this appeal whether the YCLT claim was subject to a *bona fide* dispute. Instead, this remains a factual issue that the Bankruptcy Court should determine in the first instance, and the Court should remand for further proceedings to the extent that it does not otherwise affirm the Order.

C. UNDISPUTED EVIDENCE IN THE RECORD DEMONSTRATES THAT THE YCLT CLAIM WAS SUBJECT TO A BONA FIDE DISPUTE AS OF THE FILING OF THE INVOLUNTARY PETITION.

Even if this Court were to take up the issue of whether the YCLT claim was subject to a *bona fide* dispute as of the filing of the involuntary petition, the undisputed evidence in the record demonstrates the existence of a *bona fide* dispute, at least as to amount, under applicable law.[4]

MDOR and the YCLT rely almost exclusively upon the Ninth Circuit's holding in *Marciano v. Chapnick (In re Marciano)*, 708 F.3d 1123 (9th Cir. 2013) ("*Marciano II*"), contending that the YCLT claim has *per se* validity under section 303(b) purportedly based upon a December 5, 2012 judgment (the "2012 Judgment") issued by the United States Bankruptcy Court for the District of Montana (the "Montana Bankruptcy Court"). *See* MDOR Reply Brief at pp. 42-43; YCLT Opposition at p.2. *See also Blixseth v. Kirschner (In re Yellowstone Mt. Club, LLC)*, 2012 Bankr. LEXIS 5614 (Bankr. D. Mont. Dec. 5, 2012) (Memorandum Opinion with respect to 2012 Judgment). However, the 2012 Judgment is irrelevant to the operative question here, which is whether the YCLT had an undisputed claim as of April 5, 2011, the date the

[4] MDOR disingenuously points to n.27 of Mr. Blixseth's Opening Brief to suggest that Mr. Blixseth did not introduce evidence of a *bona fide* dispute regarding the YCLT claim at trial. This is patently false. The reference in n.27 was to Mr. Blixseth's post-trial brief, wherein he cited to extensive evidence in the record of his *bona fide* dispute regarding the YCLT claim. (MER 16:00619-00622 (citing to various trial exhibits).) *See also* (MER 16:00587 (line 24)-00590 (line 25) (setting forth evidentiary record of objective basis to dispute YCLT claim).)

involuntary petition was filed. *See* § 1, *infra*. As of April 5, 2011, MDOR did not hold an unstayed, final judgment from a state court of competent jurisdiction, which renders *Marciano II* inapposite on its face. *See* §§ 2&3, *infra*. In addition, the fact that the YCLT took its own appeal from the damages awarded by the Montana Bankruptcy Court conclusively demonstrates a *bona fide* dispute as to the amount of the YCLT claim. *See* § 4, *infra*. Therefore, the YCLT claim does not count for purposes of determining whether the involuntary petition satisfies the requirements of section 303(b).

1. The Operative Date for Joining Creditors is the Date of the Involuntary Petition.

Recognizing the clear infirmity of the YCLT claim under section 303(b), MDOR and the YCLT attempt to re-write the statute and over a century of case law in order to argue that a joining creditor's claim should be assessed as of "just before the Court dismisses the case or enters an order for relief." MDOR Reply Brief at n. 30; p. 45. *See also* YCLT Opposition at n.10. Once again, this argument conflates (a) the procedural aspects of valid joinder under section 303(c), which permits a creditor to join in an involuntary petition "before the case is dismissed or relief is ordered," with (b) the substantive effect of a valid joinder, which is given "the same effect as if such joining creditor were a petitioning creditor" under section 303(b). 11 U.S.C. § 303(c). *See also* § A, *infra*.

For more than century, courts have held that for purposes of determining the sufficiency of an involuntary petition, all creditor's claims (whether they be original petitioning creditors or joining creditors) are to be assessed as of the date of the involuntary petition. *See Moulton v. Coburn*, 131 F. 201, 204 (1st Cir. 1904) ("But while we find in the statute an express privilege to creditors to join in a petition, we find nothing to contravene the ordinary rule of law that the allegations of a declaration, bill, or petition are to be disposed of as of the time of filing or of

beginning the suit. Thus we find in statute nothing to indicate that creditors whose debts are created after the filing of a petition are entitled to join ….”); *accord In re Johnston Hawks, Ltd.*, 49 B.R. 823, 832 (Bankr. D. Hawaii 1985) (eligibility of petitioning creditors is determined as of the petition date), *disagreement on other grounds In re Vortex Fishing Systems, Inc.*, 262 F.3d 985 (9th Cir. 2001); *In re Midwest Processing Co.*, 41 B.R. 90, 98-99 (Bankr. N.D. 1984) (same), *rev'd on other grounds Basin Elec. Power Co-op. v. Midwest Processing Co.*, 47 B.R. 903 (D. N.D. 1984); *In re Palace Oriental Rugs, Inc.*, 193 B.R. 126, 129 (Bankr. D. Conn. 1996) (“Similarly, under the creditor qualification standards of section 303(b)(1), the relevant question is whether the claims of petitioning creditors were the subject of a bona fide dispute on the petition date.); *In re Vortex Fishing Systems, Inc.*, 277 F.3d 1057, 1063 n. 1 (9th Cir. 2002) (“This fact makes no difference to the legal analysis in this case, as we look to the petition as it was originally filed.”). This comports with the broader range of case law under other provisions of section 303, which uniformly look to the date of the involuntary petition. *See, e.g., Matter of Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.*, 779 F.2d 471, 475 (9th Cir. 1985) (citing authorities); *In re Caucus Distributors, Inc.*, 106 B.R. 890, 918 (Bankr. E.D. Va. 1989) (collecting cases and concluding under 303(h) “All of the guidelines cited, while varying slightly in their emphasis, however, presume an analysis of the debtor's overall financial status on the date the petition was filed.”).

MDOR and the YCLT do not cite any authority that actually holds (or even suggests) to the contrary. The provision of section 303(c) permitting joinder at any time “before the case is dismissed or relief is ordered” is solely concerned with <u>when</u> a creditor may join, and by its plain terms has nothing to do with the <u>effect</u> of joinder under section 303(b). *See* § A, *supra*. As discussed above, *Kidwell* was concerned with the procedural aspects of joinder under section

303(c), and Judge Klein recognized that the effect of joinder must be measured as of the involuntary petition date. 158 B.R. at 211 (section 303(c) "permits any number of qualifying creditors to sign onto the petition and be treated as if they had signed the petition before it was filed"). In the *Broshear* case cited by MDOR, there was no dispute regarding a creditor's eligibility under section 303(b)—the creditor objecting to dismissal acknowledged that it was ineligible to join in the petition because its claim was subject to *bona fide* dispute. *In re Broshear,* 122 B.R. 705, 707 (Bankr. S.D. Ohio 1991). Thus, regardless of when the YCLT filed its joinder, the YCLT claim must be evaluated under section 303(b) as of the involuntary petition date.

2. Evidence Regarding the Status of the YCLT Claim as of the Involuntary Petition Date.

The YCLT claim is based upon a damages award the YCLT obtained in an adversary proceeding pending before the Montana Bankruptcy Court, Adv. Pro. No. 09-00014-RBK ("AP-14"). In February of 2010, the Montana Bankruptcy Court held a trial in AP-14 on claims asserted against Mr. Blixseth by the YCLT. *See In re Yellowstone Mountain Club, LLC*, 436 B.R. 598, 675-679 (Bankr. D. Mont. 2010). On August 16, 2010, the Montana Bankruptcy Court issued a 135-page memorandum of decision (the "2010 Decision"). *Id.* The 2010 Decision includes an extensive discussion of competing expert testimony submitted by the YCLT and by Mr. Blixseth. *See id.* at 621-30. The 2010 Decision also notes that Mr. Blixseth raised numerous substantive legal claims, objections and defenses in opposition to the claims asserted by the YCLT. *See id.* at 640-45. Nevertheless, in the 2010 Decision, the Montana Bankruptcy Court found Mr. Blixseth liable to the YCLT. *See id.* at 606, 656.

However, the Montana Bankruptcy Court refused to allow any damages the YCLT might obtain against Mr. Blixseth to benefit one of the YCLT's creditor constituents (Credit Suisse) and, as such, through application of the *in pari delicto* doctrine, ordered that Mr. Blixseth would be

liable to satisfy the claims of only specific classes of creditors, excluding the claims of Credit Suisse. *Id.* at 675-679. Following YCLT's motion to reconsider/amend, the Montana Bankruptcy Court on September 7, 2010 awarded damages in the amount of $40,067,962.43, subject to increase. *See Blixseth v. Kirschner (In re Yellowstone Mt. Club, LLC)*, 2012 Bankr. LEXIS 5614 at *3 (Bankr. D. Mont. 2012).

The YCLT immediately filed a notice of appeal of the damages award, seeking to increase the damages amount to at least $286 million for the benefit of Credit Suisse, and thereafter Mr. Blixseth filed a notice of appeal. *See id.* In the alternative to his appeal, Mr. Blixseth also moved to dismiss the appeal for lack of appellate jurisdiction because the damages award was not final due to the fact that the monetary amount was ambiguous.[5]

Before the District Court could rule on Mr. Blixseth's motion to dismiss, MDOR and the other petitioners filed the involuntary petition commencing this case and thereby staying the AP-14 appeal. The stay in this case was dissolved on May 27, 2011. On that same day, Mr. Blixseth filed a Renewed Motion to Dismiss AP-14.

On October 11, 2011, the Montana District Court dismissed the AP-14 appeals without prejudice for lack of appellate jurisdiction and remanded the matter to the bankruptcy court, holding that the damages award was "not a final judgment." *See id.* at *3. In announcing this ruling orally at the hearing, the Judge Haddon noted that "[t]he essential components of any final judgment are that the merits are all resolved, that is, all merit issues are resolved. And execution on the judgment is the only action that remains to be taken to bring the judgment to full fruition. . . I am not satisfied from this record at this point that this is, in fact, a final judgment." (BER

[5] The Montana Bankruptcy Court itself referred to the amount of its September 2010 "judgment" in AP-14 as a "moving target." *In re Yellowstone Mt. Club, LLC*, 2011 Bankr. LEXIS 663 at *76 (Bankr. D. Mont. Feb. 25, 2011).

21:000240 (lines 6-10, 17-18).)

The YCLT then filed a motion to amend the damages award wherein YCLT sought to fix the award to a sum certain in an attempt to cure the lack of finality issue presented by the original award, and to also have the Bankruptcy Court undo its *in pari delicto* ruling that prevented the YCLT from obtaining any damages against Mr. Blixseth for the benefit of Credit Suisse. *See* 2012 Bankr. LEXIS 5614 at *4-5. The Montana Bankruptcy Court held an evidentiary hearing on the YCLT's motion to amend on March 6, 2012. *See id.* at *2. On December 5, 2012, the Montana Bankruptcy Court entered the 2012 Judgment against Mr. Blixseth and in favor of the YCLT in the increased amount of $40,992,210.81. *See id.* at *5. Notably, the Montana Bankruptcy Court acknowledged the possibility that this most recent damages award still might not be a final judgment. *See id.* at n.8. Mr. Blixseth filed a motion to vacate the 2012 Judgment based on newly discovered evidence, and Mr. Blixseth also filed a notice of appeal. *See Blixseth v. Glasser (In re Yellowstone Mt. Club, LLC)*, 2014 U.S. Dist. LEXIS 47863 at *1 (D. Mont. Apr. 7, 2014). The YCLT filed a cross-appeal on December 21, 2012, once again seeking to increase the damages amount to approximately $286 million. *See id.* After Mr. Blixseth was unable to appear at oral argument, the Montana District affirmed the Montana Bankruptcy Court's judgment. *See id.* at *2, *12. Both parties took a further appeal, which is now pending before the Ninth Circuit.

3. The Holding of *Marciano II* Does not Apply.

The foregoing evidence of record in this appeal amply demonstrates that the YCLT claim is not entitled to *per se* validity under *Marciano II*.

In *Marciano II*, the Ninth Circuit very clearly stated that it would only apply a *per se* rule regarding the *bona fide* dispute requirement under section 303(b) where "the amount and validity of the claims of the Petitioning Creditors have been established by non-default state judgment and the debtor's immediate liability cannot be disputed under governing state law." 708 F. 3d at 1127

(emphasis added). The Ninth Circuit reached this conclusion based on three key principles: (a) statutory interpretation, (b) federalism, and (c) the purpose of involuntary bankruptcy laws to prevent creditors from "racing to the courthouse to dismember the debtor." *Id.* at 1126-29.

With respect to statutory interpretation, the Ninth Circuit emphasized the transformative nature of obtaining an unstayed judgment on the merits, which entitles the creditor to "immediate payment of [its] claims in the amounts set by the. . . judgment[.]" *Id.* at 1127. By providing a clear "right to payment," an unstayed judgment supersedes the creditor's underlying legal theories (such as tort claims or contract rights) and thereby becomes the "claim" that is subject to the *bona fide* dispute requirements of section 303(b). *Id.* at 1126-27 (quoting 11 U.S.C. § 101(5)(A) definition of "claim"). Absent a stay, a debtor's appeal of a valid state court judgment does not create an objective, *bona fide* basis to prevent the creditor from enforcing its right to payment (i.e. via levy or other collection remedies). *Id.*

With respect to federalism, the Ninth Circuit emphasized the "full faith and credit" that is required for state court judicial proceedings under 28 U.S.C. § 1738, particularly when considering that determinations regarding the *bona fide* dispute requirement under section 303(b) most often will be made by Article I bankruptcy courts. *Id.* at 1127-28. And with respect to the purpose of involuntary bankruptcy laws, the Ninth Circuit observed that a creditor with an unstayed state court judgment does not invite concerns about the coercive use of an involuntary bankruptcy filing because the creditor already has state law judgment collection remedies at its disposal. *Id.* at 1128. Indeed, application of the *per se* rule for unstayed state court judgments may help prevent a "race to the courthouse" by enabling judgment creditors to gain access to the bankruptcy forum more readily. *Id.*

In contrast to the facts before the Ninth Circuit in *Marciano II*, the YCLT did not hold an unstayed state court judgment establishing the "amount and validity" of the YCLT claim and imposing immediate liability on Mr. Blixseth as of the filing of the involuntary petition. As discussed in section 2, *supra*, the September 7, 2010 "judgment" issued by the Montana Bankruptcy Court provided for a monetary amount that was "a moving target." *In re Yellowstone Mt. Club, LLC*, 2011 Bankr. LEXIS 663 at *76 (Bankr. D. Mont. Feb. 25, 2011). As a result, the Montana District Court ruled on October 11, 2011 that the September 7 "judgment" was not final. *Blixseth v. Kirschner (In re Yellowstone Mt. Club, LLC)*, 2012 Bankr. LEXIS 5614 at *3 (Bankr. D. Mont. 2012). In doing so, the Montana District Court specifically recognized that "the essential components of any final judgment are that the merits are all resolved, that is, all merit issues are resolved [a]nd execution on the judgment is the only action that remains to be taken to bring the judgment to full fruition." (BER 21:000240 (lines 6-10, 17-18).) Judge Haddon's comments perfectly summarize how the non-finality of the September 7 "judgment" as of the involuntary petition filing completely undermines any argument by YCLT that it had an immediate and enforceable right to payment pursuant thereto. *See Marciano*, 703 F.3d at 1126 (acknowledging "the long-standing enforceability of unstayed final judgments") (emphasis added).

Moreover, the YCLT took an immediate appeal from the September 7 "judgment" seeking to increase the damages awarded by approximately sevenfold. Under longstanding Supreme Court and Ninth Circuit precedent, this appeal automatically stayed the YCLT from taking any enforcement actions. *See Bronson v. La Crosse & M. R. Co.*, 68 U.S. 405, 409-410 (1864) ("They having appealed from the decree, it would be against all reason and principle to permit them to proceed in the execution of it, pending the appeal."); *First Nat'l Bank v. State Nat'l Bank*, 131 F. 430, 431 (9th Cir. 1904) (citing *Bronson*). *See also Tenn. Val. Auth. V. Atlas Mach. & Iron Works,*

Inc., 803 F.2d 794, 797 (4th Cir. 1986) ("Where the prevailing party in the lower court appeals from that court's judgment, the appeal suspends the execution of the decree."). *But see, e.g. BASF Corp. v. Old World Trading Co*., 979 F.2d 615, 616 (7th Cir. 1992) (limiting application of stay depending on whether theory on appeal is inconsistent with enforcement of underlying judgment).

Regardless of whether the YCLT's appeals seeking to dramatically increase the damages awarded by the Montana Bankruptcy Court automatically impose a stay of enforcement, the YCLT did not have an immediate right to payment or enforcement as of the filing of involuntary petition. Indeed, it is indisputable that the Montana Bankruptcy Court did not even purport to enter a judgment clearly establishing the amount of the YCLT claim until the 2012 Judgment, which was entered approximately eighteen months after the involuntary petition was filed. Granting *per se* validity to a damages award that has not yet been memorialized in a final judgment, but instead is expressly subject to increase in the first instance and an appeal by the claimant seeking to increase the amount of damages sevenfold, would create the precise incentive for claimants like the YCLT to use the involuntary bankruptcy process as a means to coerce a debtor into premature payment. Thus, neither the statutory interpretation nor the purpose of involuntary bankruptcy laws relied upon by the Ninth Circuit in *Marciano II* would be served by application of the *per se* rule to the YCLT claim.

Furthermore, principles of federalism are not implicated here, where the YCLT does not rely upon a state court judgment. United States Supreme Court precedent provides a clear objective basis to treat the ruling of the Article I Montana Bankruptcy Court differently than an unstayed, non-default state court judgment. The Supreme Court's ruling in *Stern v. Marshall,* __ U.S. __, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011) operates expressly to withhold from Article I bankruptcy courts the authority to enter final judgments as to certain claims, including fraudulent

conveyances. Indeed, Mr. Blixseth has specifically challenged the Montana Bankruptcy Court's authority to enter a final judgment on the YCLT's claims.[6] *See* 2012 Bankr. LEXIS 5614 at *19.

Therefore, because the YCLT did not hold an unstayed, final state court judgment as of the involuntary petition date, none of the purposes of *Marciano II* would be served and the YCLT claim is not entitled to *per se* validity under section 303(b).[7]

4. The YCLT Claim Is *Per Se* Ineligible Under 11 U.S.C. § 303(b) for Being Disputed As to Amount.

Rather than being entitled to *per se* validity under section 303(b), the YCLT claim is *per se* ineligible for being disputed as to amount. This dispute is conclusively evidenced by the YCLT's appeal of the damages awarded by the Montana Bankruptcy Court—an appeal which was pending as of the involuntary petition date and which the YCLT continues to prosecute even after the entry of the 2012 Judgment. *See* § 2, *supra*.

In his Opening Brief, Mr. Blixseth discussed in depth how section 303(b) was amended in 2005 to clearly and unequivocally exclude from the class of eligible petitioning creditors any holder of a claim that is "the subject of bona fide dispute as to liability or amount." 11 U.S.C. § 303(b)(1) (emphasis added). *See* Blixseth Opening Brief at § III(B). Mr. Blixseth will not repeat that discussion here, but incorporates it by reference. Instead, Mr. Blixseth will amplify three

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[6] This also calls into question the "court of competent jurisdiction" aspect of the Ninth Circuit's ruling in *Marciano II*. 708 F.3d at 1127 ("it is difficult to imagine a more 'objective' measure of the validity of a claim than an unstayed judgment entered by a court of competent jurisdiction") (emphasis added).

[7] Despite having failed to mention the *per se* rule from *Marciano II* in its Opening Brief, MDOR attempts to belatedly argue in its Reply Brief that the claim asserted by the Idaho Commission also is entitled to *per se* validity (and despite the fact that the claim is based upon a default judgment). *See* Reply Brief at p. 44. By failing to raise this argument in its Opening Brief, MDOR must be deemed to have waived it. *See, e.g. Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived."); *United States v. Al-Hamdi*, 356 F.3d 564, 571 n.8 (4th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132, 1138 (10th Cir. Kan. 2003).

points for the Court.

First, any purported "national trend" in favor of MDOR's interpretation (which would ascribe zero effect to the 2005 amendment) is completely undermined by the Fifth Circuit's opinion in *Credit Union Liquidity Servs., L.L.C. v. Green Hills Dev. Co., L.L.C. (In re Green Hills Dev. Co., L.L.C.)*, 741 F.3d 651 (5th Cir. 2014). In *Green Hills*, the Fifth Circuit considered the 2005 amendment to section 303(b) and unequivocally affirmed that the statute now clearly disqualifies a claim if there is a *bona fide* dispute as to any amount:

> Under § 303(b), an involuntary petition may be brought only by the "holder of a claim . . . that is not . . . the subject of a bona fide dispute as to liability or amount." The provisions of § 303(b) were amended by Congress in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). Prior to BAPCPA, the provision did not include the phrase "as to liability or amount," and some courts, including this one, interpreted the pre-BAPCPA § 303(b) to deny standing to a creditor only when there was a bona fide dispute as to liability. A dispute as to the amount of the claim, even if as to the total amount of the claim (for example, through an offsetting counterclaim), was not considered a basis to deny standing. By adding the phrase "as to liability or amount" to § 303(b), Congress changed its meaning. Post-BAPCPA cases have recognized that a bona fide dispute as to the amount of the debt is now sufficient to deny a creditor standing to bring an involuntary petition. Thus, to the extent that our pre-BAPCPA precedent suggests to the contrary, that precedent is no longer good law.

741 F.3d at 656-57 (emphasis added). As the only Circuit level decision cited by the parties to address the effect of the 2005 amendments, *Green Hills* is the best and most persuasive authority on point.[8]

[8] One of the decisions cited by MDOR in support of its position, *In re CorrLine Int'l, LLC*, 516 B.R. 106 (Bankr. S.D. Tex. Aug. 21, 2014) cites *Green Hills* on a related point but fails to follow the Firth Circuit's binding precedent with respect to the holding quoted above. *See* 516 B.R. at 103. The other decision cited by MDOR that post-dates *Green Hills*, albeit from outside the Fifth Circuit, also fails to even acknowledge the Fifth Circuit's ruling in *Green Hills*. *See In re Speer*, 2014 WL 5846760 (Bankr. D. Conn. Nov. 11, 2014). MDOR's purported "national trend" falls short when it comes to legal research and principles of *stare decisis*.

Second, MDOR's interpretation of the 2005 amendment to section 303(b) conflates the two distinct concepts of Congressional intent and judicial interpretation of that intent. As far back as 1984, the legislative history for section 303(b) reflected the clear Congressional intent to disqualify petitioning creditors whose debts "were legitimately contested as to liability or amount." *See* S. Rep. No. 7618, 98th Cong., 2d Sess. (June 19, 1984). Despite this clear intent, between 1984 and 2005 some courts (including the Ninth Circuit) held that a partially disputed debt could qualify under section 303(b) as long as the undisputed amount exceeded the statutory threshold. *See, e.g. In re Focus Media, Inc.*, 378 F.3d 916, 926 (9th Cir. 2004). Then in 2005, Congress changed the language of section 303(b) to unequivocally require that a petitioning creditor's claim must not be subject to *bona fide* dispute as to "liability or amount." (emphasis added).

Thus, there are two plausible interpretations for the 2005 amendment t section 303(b). One is that in reaction to decisions like *Focus Media*, Congress decided to return to a more restrictive standard for involuntary bankruptcy filings. Under this interpretation, the 2005 amendment was intended to change (not clarify) the effect of section 303(b). *See* Blixseth Opening Brief at § III(B).

The second plausible interpretation is that Congress intended the 1984 amendment to change the effect of section 303(b) (to disqualify creditors whose claims were disputed as to liability or any amount). However, *Focus Media* and other courts failed to properly apply the intended change following the 1984 amendment, so Congress further amended section 303(b) in 2005 in order to clarify its prior intent (from 1984). This would explain the similarity in the legislative history from the 1984 and 2005 amendments (both disqualifying debts that are disputed as to "liability or amount") and the retroactive effect of the 2005 amendment under BAPCPA. *See See* S. Rep. No. 7618, 98th Cong., 2d Sess. (June 19, 1984); H.R. Rep. No. 109-31, Pt. 1, 109th

Cong., 1st Sess. 149 (2005); BAPCPA § 1234(b).[9]

Regardless of which of these two plausible interpretations is correct, the interpretation urged by MDOR is utterly implausible. According to MDOR, the law under section 303(b) remained the same from 1984 through and after 2005, and the 2005 amendment to section 303(b) was merely intended to clarify the application of the statute reflected in *Focus Media* and other decisions. However, MDOR offers no explanation for why Congress would feel the need to amend a statute if the Congressional intent was being properly applied. In the absence of any other explanation, the Court should presume that Congress amended section 303(b) to alter the way in which the Ninth Circuit and other courts were applying the statute prior to the 2005, which is entirely consistent with the interpretation Mr. Blixseth has urged from the outset and the conclusion recently reached by the Fifth Circuit in *Green Hills*.

Finally, the circumstances surrounding the MDOR and YCLT claims provide a perfect explanation for why Congress would want to disqualify a creditor with a partially disputed claim from filing an involuntary petition under section 303(b). MDOR is trying to use a $219,000 adjustment from a single line item on one tax return to force Mr. Blixseth into involuntary bankruptcy to facilitate MDOR's efforts to collect a purported $45 million audit assessment. The YCLT is attempting to use a $40 million damages award (that was not even a final judgment as of the involuntary petition date) to prolong the litigation regarding the involuntary bankruptcy while the YCLT prosecutes an appeal seeking to increase the award to over $280 million. The legislative history for section 303(b) clearly expresses Congressional intent to limit the coercive effects of

[9] The inclusion of the 2005 amendment to section 303(b) in the "Technical Amendments" section of BAPCPA should not be given any weight in the analysis, as this section includes amendments that are truly technical in nature as well as amendments that are clearly substantive. *See, e.g.* BAPCPA §§ 1227 (amending 11 U.S.C. § 503(b)(9) to add administrative expense priority for certain pre-bankruptcy reclamation claims), 1233 (amending 28 U.S.C. § 158 to add provisions for direction certification of bankruptcy appeals to the Circuit courts).

involuntary bankruptcy. *See* S. Rep. No. 7618, 98th Cong., 2d Sess. (June 19, 1984) (*bona fide* dispute requirement in section 303(b) is intended to prevent creditors from using involuntary bankruptcy "as a club against debtors who have bona fide questions about their liability but who would rather pay up than suffer the stigma of involuntary bankruptcy proceedings [and] is necessary to protect the rights of debtors and to prevent misuse of the bankruptcy system as a tool of coercion"). *See also Marciano II*, 708 F.3d at 1127 (central purpose of § 303(b)(1) is "to prevent creditors from using involuntary bankruptcy to coerce a debtor to satisfy a judgment even when substantial questions may remain concerning the liability of the debtor."). Having to defend against the involuntary bankruptcy has materially impacted Mr. Blixseth's ability to defend against the MDOR and YCLT claims, which indisputably remain subject to further adjudication as to amount (and otherwise). This is exactly the kind of coercion that Congress intended to prevent, and it provides a compelling policy reason for the Court to affirm Judge Markell's proper application of section 303(b).

IV. CONCLUSION

For the reasons and based on the authorities presented above, Mr. Blixseth respectfully submits that this Court should (i) reverse the Bankruptcy Court's ruling with respect to the application of the bona fide dispute requirement to the claim of a joining creditor under section 303(c), and (ii) affirm the Bankruptcy Court's ruling in all other respects.

DATED: February 27, 2015 Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that on the 27th day of February, 2015, a true and correct copy of the foregoing pleading was served via the Court's CM/ECF notification system to parties subscribing to such system.

/s/ Mitchell D. Stipp
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