

§ 303  
Involuntary Petition  
Fed. R. Civ. P. 37

In re Tenos Moses Pete, Case. No. 01-40347-elp7; BAP. No. 1166-  
MaHRy

2/12/2003

BAP, aff'g ELP

unpublished

The BAP affirmed the bankruptcy court's entry of an order for relief in this involuntary chapter 7 case.

The BAP held that the bankruptcy court did not err in ruling that debtor had the burden of proving the existence of more than twelve creditors for purposes of determining the required number of petitioning creditors under § 303(b)(2).

The BAP held that the bankruptcy court did not abuse its discretion in imposing a discovery sanction under Fed. R. Civ. P. 37. As a sanction, the bankruptcy court precluded debtor from introducing evidence to establish the existence of debts for which debtor had repeatedly refused to produce documentary evidence. In upholding the sanction, the BAP observed that the debtor had intentionally withheld production and that the bankruptcy court had given multiple warnings prior to imposing the sanction.

The BAP also held that the bankruptcy court did not err in finding that the debtor was generally not paying his debts as they became due under § 303(h).

Finally, the BAP rejected the debtor's argument that the petitioning creditors filed the petition in bad faith, because they did not exhaust their state law collection remedies before they filed the involuntary petition.

P03-2(33)

FEB 12 2003

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

NANCY B. DICKERSON, CLERK U.S. BKCY. APP. PANEL OF THE NINTH CIRCUIT

In re: TENOS MOSES PETE, Debtor. TENOS MOSES PETE, Appellant, v. MICHAEL BATLAN, Chapter 7 Trustee; UNITED STATES TRUSTEE; ASA GEMIGNANI; GREG GEMIGNANI; BENJAMIN GOLDING; FRANCES GOLDING, Appellees.

BAP No. OR-02-1166-MaHRy Bk. No. 301-40347-elp7

MEMORANDUM

Argued by Video Conference and Submitted on November 20, 2002

Filed - February 12, 2003

Appeal from the United States Bankruptcy Court for the District of Oregon

Honorable Elizabeth L. Perris, Bankruptcy Judge, Presiding.

Before: MARLAR, HARGROVE, and RYAN, Bankruptcy Judges.

1 This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

2 Hon. John J. Hargrove, Chief Bankruptcy Judge for the Southern District of California, sitting by designation.



1 debt.<sup>5</sup> Their prepetition collection activities included a \$65  
2 garnishment and demand letters, to which Pete made no response  
3 or other payments.

4 On October 17, 2001, the Petitioning Creditors filed an  
5 involuntary petition against Pete, and commenced discovery  
6 regarding Pete's creditors. In November, the bankruptcy court  
7 issued two orders for Pete to appear for an examination and to  
8 produce documentary evidence of his debts, payment on debts,  
9 bank accounts, sources of income, and 1999-2000 state and  
10 federal tax returns, all by November 28, 2001. Pete missed the  
11 deadline and, on November 30, 2001, produced only income tax  
12 returns for 1999 and 2000 and several months' worth of his  
13 Discover Card statements.<sup>6</sup>

14 Pete then moved to dismiss the petition, asserting that he  
15 had more than twelve creditors and, thus, that the Petitioning  
16 Creditors were one creditor shy of the required minimum of three  
17 creditors.<sup>7</sup> The Petitioning Creditors opposed Pete's motion.  
18 At the hearing thereon, the court denied Pete's motion, and  
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20 <sup>5</sup> The bankruptcy court found that because of their marital  
21 status the judgment creditors constituted two Petitioning  
22 Creditors, and that finding was undisputed.

23 The Petitioning Creditors filed affidavits stating that the  
24 debts were general unsecured claims. The debts were \$225,632.14  
25 and \$169,335.14, respectively. See Letter Opinion (Feb. 1,  
26 2002), at 6-7.

<sup>6</sup> While Pete's response has not been included in the  
excerpts of record, these facts are undisputed.

<sup>7</sup> The dismissal motion has not been made part of the  
excerpts of record.

1 found that his evidence of creditors was incomplete. See Tr. of  
2 Proceedings (Dec. 21, 2001), at 3-4. Facing possible discovery  
3 sanctions, Pete's attorney argued that he did not have the  
4 burden of proof on the creditor number issue. The court found  
5 that Pete simply had failed to comply with the discovery orders.

6 As a result, on December 27, 2001, the court issued a  
7 warning order directing Pete to file an answer and a proper  
8 creditor list pursuant to Rule 1003(b)<sup>8</sup> ("Rule 1003(b) List").  
9 Pete was also ordered to complete his discovery response by  
10 January 4, 2002, including the production of additional  
11 enumerated documents, and to appear for a telephonic deposition.  
12 The order warned that if Pete failed to comply, the court would  
13 consider striking any answer and enter an order for relief. A  
14 trial was set for January 23, 2002.

15 Pete filed an answer. As defenses, Pete alleged that he  
16 was generally paying his debts as they came due. He also  
17 contended that the involuntary petition was filed in bad faith  
18

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19 <sup>8</sup> Rule 1003(b) provides:

20  
21 **(b) Joinder of Petitioners After Filing.** If the  
22 answer to an involuntary petition filed by fewer than  
23 three creditors avers the existence of 12 or more  
24 creditors, the debtor shall file with the answer a list  
25 of all creditors with their addresses, a brief statement  
26 of the nature of their claims, and the amounts thereof.  
If it appears that there are 12 or more creditors as  
provided in § 303(b) of the Code, the court shall afford  
a reasonable opportunity for other creditors to join in  
the petition before a hearing is held thereon.

Fed. R. Bankr. P. 1003(b).

1 because the Petitioning Creditors had not exhausted their state  
2 law collection remedies and had filed for the improper purpose  
3 of ruining his business. His primary argument, however, was  
4 that the Petitioning Creditors were fewer than the required  
5 three in number because he had twelve or more creditors. Pete  
6 submitted a Rule 1003(b) List of twenty-seven creditors, but  
7 with a motion for permission to file it under seal and for in  
8 camera review only. In a January 4, 2002 order, the court  
9 denied Pete's motion to submit the creditor list under seal, and  
10 ruled that he had the burden of proving the existence of twelve  
11 or more creditors.

12 In another order issued on January 4, 2002, the court  
13 extended the deadline for Pete's production of documents, but  
14 warned him of possible sanctions. That order stated, in  
15 pertinent part:

16 The alleged debtor is to complete the production  
17 of documents required under the discovery and  
18 December 27, 2001 orders by Tuesday, January 8,  
19 2002. If he fails to do so, he will be precluded  
from introducing at trial any documents within the  
scope of those orders that were not produced.  
Additional sanctions may also be imposed.

20 Order Overruling Alleged Debtor's Objection (Jan. 4, 2002), at  
21 2.

22 Despite the court's orders, Pete failed to produce any  
23 documents other than those he had already produced on November  
24 30, 2001, including the tax returns and Discover Card  
25 statements. See Letter Opinion (Feb. 1, 2002), at 4.

26 On January 9, 2002, the Petitioning Creditors moved for

1 entry of an order for relief and to strike Pete's Rule 1003(b)  
2 List, arguing that, although Pete listed twenty-seven creditors,  
3 he had only provided documentary evidence as to the Discover  
4 Card debt.<sup>9</sup> At the January 17, 2002 hearing on the Petitioning  
5 Creditors' motion, Pete's attorney maintained that Pete had no  
6 additional documents to produce that were within the scope of  
7 the discovery orders. However, he proposed to obtain witness  
8 statements and to deliver such further evidence to opposing  
9 counsel by Monday, January 21, 2002, two days before trial. The  
10 court rejected this offer, finding that Pete's evidence should  
11 have been produced earlier.

12 Instead of imposing the ultimate sanction--a default entry  
13 of relief--for Pete's failure to comply with the discovery  
14 orders, the court orally ruled that Pete would be precluded from  
15 introducing at trial any evidence of the existence of other  
16 debts within the scope of the discovery orders.

17 Pete produced no more documents at his January 21, 2002  
18 deposition. Because there was a pending criminal prosecution  
19 against him, Pete invoked the Fifth Amendment and refused to  
20 answer almost all questions concerning his income and any  
21 payments made to the creditors on the Rule 1003(b) List.<sup>10</sup> He  
22 answered, generally, that he earned enough to pay his creditors  
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24 <sup>9</sup> As noted above, the court also found that Pete provided  
25 state and federal tax returns.

26 <sup>10</sup> The bankruptcy court stated that it did not draw a  
negative inference from Pete's invocation of the Fifth  
Amendment. See Letter Opinion (Feb. 1, 2002), at 8.

1 and was current in payments.

2 The trial went forward on January 23, 2002. Pete's  
3 attorney made an offer of proof of the Rule 1003(b) List. The  
4 court took the offer under advisement, and subsequently admitted  
5 it as evidence of only the nonprecluded debts. See Letter  
6 Opinion (Feb. 1, 2002), at 6-8.

7 The Petitioning Creditors and their attorney were the only  
8 witnesses to present evidence of their debts. A demand letter  
9 and the Pete deposition were admitted into evidence.<sup>11</sup>

10 The bankruptcy court entered the Order for Relief and a  
11 separate Letter Opinion on February 1, 2002. Pete timely filed  
12 a notice of appeal.

13

14

#### ISSUES

15

16 1. Whether the bankruptcy court erred in ruling that Pete  
17 had the burden of proving the existence of twelve or  
18 more creditors.

19

20 2. Whether imposition of the discovery sanction, which  
21 precluded Pete from producing evidence of additional  
22 creditors, was an abuse of discretion.

23

24 3. Whether the court erred in finding that Pete had only

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26 <sup>11</sup> The demand letter has not been made part of the  
excerpts of record.

1 five creditors.

2  
3 4. Whether the court correctly found that Debtor was  
4 generally not paying his debts as they came due.

5  
6 5. Whether the court abused its discretion in denying  
7 Pete's motion to dismiss the involuntary petition on  
8 the basis of bad faith.

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10 **STANDARDS OF REVIEW**

11  
12 We review conclusions of law de novo and factual  
13 conclusions for clear error. Liberty Tool, & Mfg. v. Vortex  
14 Fishing Sys., Inc. (In re Vortex Fishing Sys., Inc.), 277 F.3d  
15 1057, 1064 (9th Cir. 2002). The court's interpretation of the  
16 Bankruptcy Code is reviewed de novo. Grey v. Federated Group,  
17 Inc. (In re Federated Group, Inc.), 107 F.3d 730, 732 (9th Cir.  
18 1997). A conclusion relative to the burden of proof is subject  
19 to de novo review. W. Wire Works, Inc. v. Lawler (In re  
20 Lawler), 141 B.R. 425, 428 (9th Cir. BAP 1992).

21 Discovery sanctions are reviewed for an abuse of  
22 discretion. Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1408  
23 (9th Cir. 1990). Related findings of fact are reviewed under  
24 the clearly erroneous standard. Id. A court abuses its  
25 discretion if it does not apply the correct law, or if it rests  
26 its decision on a clearly erroneous finding of a material fact.

1 See Lopez v. Specialty Rests. Corp. (In re Lopez), 283 B.R. 22,  
2 26 (9th Cir. BAP 2002).

3 Whether a debtor is paying his debts as they come due is a  
4 question of fact reviewed for clear error. Vortex Fishing Sys.,  
5 277 F.3d at 1072. We review a finding of whether an involuntary  
6 petition was filed in "bad faith" for clear error. Jaffe v.  
7 Wavelength, Inc. (In re Wavelength, Inc.), 61 B.R. 614, 620 (9th  
8 Cir. BAP 1986).

9  
10 **DISCUSSION**

11  
12 **A. Burden of Proof As to Creditor Number**

13  
14 Under § 303(b)(2), if a debtor has fewer than twelve  
15 eligible creditors, an involuntary filing can be made by as few  
16 as one qualifying creditor. 11 U.S.C. § 303(b)(2);<sup>12</sup> 2 Collier  
17 on Bankruptcy ¶ 303.03[1] (Alan N. Resnick & Henry J. Sommer,  
18 eds., 15th ed. rev. 2002).

19  
20 <sup>12</sup> Section 303(b)(2) provides:

21 (b) An involuntary case against a person is  
22 commenced by the filing with the bankruptcy court of a  
petition under chapter 7 or 11 of this title—

23 . . . .  
24 (2) If there are fewer than 12 such holders,  
25 excluding any employee or insider of such  
26 person and any transferee of a transfer that  
is voidable . . . , by one or more of such  
holders that hold in the aggregate at least  
\$11,625 of such claims;

11 U.S.C. § 303(b)(2).

1           Only holders of claims that are not contingent as to  
2 liability or the subject of a bona fide dispute may be  
3 petitioning creditors. Collier on Bankruptcy, supra,  
4 ¶ 303.03[2]. Petitioning creditors must make a prima facie  
5 showing that they are entitled to relief under § 303 by  
6 establishing that they are proper holders of claims that are not  
7 in bona fide dispute. See id. ¶ 303.03[2][b][ii] (burden is on  
8 petitioning creditor to establish a prima facie case that there  
9 is no bona fide dispute).

10           Here, the Petitioning Creditors held final state court  
11 judgments. The bankruptcy court determined that the debts were  
12 neither contingent nor in bona fide dispute, and Pete has not  
13 challenged that ruling in this appeal. See id., ¶ 303.02[a]  
14 (providing that a state court judgment establishes a  
15 noncontingent claim).

16           Although the Petitioning Creditors did not allege the  
17 number of creditors of the estate in their involuntary petition  
18 and affidavits, the court found that there were only five proven  
19 creditors: the Petitioning Creditors; the Internal Revenue  
20 Service ("IRS"); the Oregon Department of Revenue; and Discover  
21 Card. Therefore, the Petitioning Creditors qualified under  
22 § 303(b)(2).

23           Pete moved to dismiss the petition on the grounds that he  
24 had more than twelve creditors and therefore at least three  
25  
26

1 qualifying creditors were required, pursuant to § 303(b)(1).<sup>13</sup>  
2 In essence, Pete contends that, after he filed the Rule 1003(b)  
3 List of twenty-seven alleged creditors, the Petitioning  
4 Creditors were required to prove the nonexistence of those  
5 additional creditors in order to make their prima facie case.

6 The bankruptcy court concluded that Pete had the burden of  
7 proving he had twelve or more creditors, and held: "Unless an  
8 alleged debtor proves that there are twelve or more creditors,  
9 the case must be treated as one involving fewer than twelve  
10 creditors, making additional petitioning creditors unnecessary."  
11 Order Denying . . . In Camera Review and Sealing, (Jan. 4,  
12 2002), at 3. We agree with the bankruptcy court's holding in  
13 this case.

14 It is well established that if an involuntary debtor files  
15 an answer alleging as a defense that he has twelve or more  
16 creditors, then the burden of proving that fact rests with the  
17 debtor. Collier on Bankruptcy, supra, ¶ 303.04[8] (citing

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18  
19 <sup>13</sup> Section 303(b)(1) provides:

20 (b) An involuntary case against a person is commenced by  
21 the filing with the bankruptcy court of a petition under  
chapter 7 or 11 of this title—

22 (1) by three or more entities each of which is  
23 either a holder of a claim against such person that is  
24 not contingent as to liability or the subject of a bona  
25 fide dispute, or an indenture trustee representing such  
26 a holder, if such claims aggregate at least \$11,625 more  
than the value of any lien on property of the debtor  
securing such claims held by the holders of such claims;

11 U.S.C. § 303(b)(1).

1 Cunningham v. Rothery (In re Rothery), 143 F.3d 546 (9th Cir.  
2 1998)).

3 In Rothery, the Ninth Circuit held that a debtor was  
4 "mistaken" when she argued that the burden of proof on the  
5 creditor number issue rested with the petitioning creditor,  
6 after she made only a bare allegation that she had more than  
7 twelve creditors. Rothery, 143 F.3d at 549. Pete's allegation  
8 that he had more than twelve creditors was in the nature of an  
9 affirmative defense. Thus, Pete had the burden of proof on the  
10 issue, and the Petitioning Creditors were not required to prove  
11 a negative.

12 Pete argues that the court in Rothery was merely applying a  
13 summary judgment standard, which requires more than a bare  
14 assertion to defeat summary judgment. This argument misses the  
15 point, for in a summary judgment proceeding, the parties retain  
16 the same burdens of proof that they would have at trial on the  
17 essential elements of their claims or defenses. See Celotex  
18 Corp. v. Catrett, 477 U.S. 317, 322 (1986). The Rothery court  
19 expected the debtor to meet her requisite burden of proof to  
20 defeat summary judgment. See Rothery, 143 F.3d at 549.

21 Pete also cites In re Braten, 99 B.R. 579 (Bankr. S.D.N.Y.  
22 1989), for the proposition that, once the debtor files a Rule  
23 1003(b) list showing more than twelve creditors, the burden of  
24 proof shifts to the petitioning creditors. That case is  
25 distinguishable on its facts because the Braten court admitted  
26

1 the Rule 1003(b) list into evidence.<sup>14</sup> Therefore, the burden was  
2 shifted to the petitioning creditors to show that there were  
3 less than twelve creditors. Here, the bankruptcy court did not  
4 allow into evidence the full Rule 1003(b) List; it only accepted  
5 this evidence for purposes of identifying the five creditors.

6 Pete also maintains that decisions from outside the Ninth  
7 Circuit support his argument that the Petitioning Creditors have  
8 the burden of proving the number of creditors. See Atlas Mach.  
9 & Iron Works, Inc. v. Bethlehem Steel Corp., 986 F.2d 709, 715  
10 (4th Cir. 1993) (stating that sole petitioner has burden of  
11 showing fewer than twelve creditors); In re Smith, 243 B.R. 169,  
12 183 (Bankr. N.D. Ga. 1999) ("As the sole petitioning creditor,  
13 SDC has the burden of proving that Smith had less than twelve  
14 qualifying creditors as of the filing date."); Pleas Doyle &  
15 Assocs. v. James Plaza Joint Venture (In re James Plaza Joint  
16 Venture), 67 B.R. 445, 447-48 (Bankr. S.D. Tex. 1986) (finding  
17 that only one of three petitioning creditors had standing, and  
18 that it was the "plaintiffs' burden to demonstrate the number of  
19 creditors of a debtor's estate.").<sup>15</sup>

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20  
21 <sup>14</sup> The bankruptcy court in Braten noted that the  
22 petitioning creditors objected to the debtor's Rule 1003(b) list  
23 but did not "put the debtor to the test," because they continued  
24 the hearing in pursuit of joining a third creditor. Braten, 99  
B.R. at 583. Therefore, the court held that the creditors did  
not defeat the debtor's evidence and establish that the debtor  
had "fewer than twelve eligible creditors." Id.

25 <sup>15</sup> These cases involve sole petitioning creditors still  
26 involved in litigating the debt. Such cases are often analyzed  
differently because of the policy against using bankruptcy as a  
(continued...)

1           The cases cited by Pete generally refer to the petitioning  
2 creditors' burden of presenting a prima facie involuntary  
3 petition by establishing that they are qualifying creditors  
4 under § 303(b)(2). Such proof includes showing that the debtor  
5 has fewer than twelve creditors, although there is no  
6 requirement that the petitioning creditors allege that the  
7 debtor has fewer than twelve creditors.<sup>16</sup> See 9 Collier on

8 \_\_\_\_\_  
9           <sup>15</sup>(...continued)  
10 forum to resolve a two-party dispute. See Collier on  
11 Bankruptcy, supra, ¶ 303.04[5]. For example, in Atlas Mach.,  
12 the single creditor filed the petition, even though it had  
13 conducted discovery which showed that the debtor had sixty-six  
14 trade creditors. Atlas Mach., 986 F.2d at 714.

15           In a two-party dispute, abstention may be in order if the  
16 motivation of the petitioning creditor is simply to avoid  
17 litigating in state court. See Remex Elecs. Ltd. v. AXL Indus.,  
18 Inc. (In re AXL Indus., Inc.), 127 B.R. 482, 484 (S.D. Fla.  
19 1991), aff'd in part and appeal dismissed in part, 977 F.2d 598  
20 (11th Cir. 1992) (table item) ("The bankruptcy courts generally  
21 grant motions to abstain in two-party disputes where the  
22 petitioner can obtain adequate relief in a non-bankruptcy forum.  
23 Courts consider the motivation of the petitioning creditor as a  
24 factor in making such a determination.").

25           This case is distinguishable because the subject claims  
26 were based on final judgments, and bankruptcy protected Pete  
from multiple collection activities by the two creditors.

<sup>16</sup> The Bankruptcy Code and Rules anticipate that  
petitioning creditors may not be correct in their initial  
assumption that there are fewer than twelve creditors, and  
provides that additional creditors may join in an involuntary  
petition, if necessary. See 11 U.S.C. § 303(c); Fed. R. Bankr.  
P. 1003(b), Advisory Comm. Note (1987) (providing for joinder of  
petitioners after filing of proper creditor list by the  
prospective debtor showing the existence of twelve or more  
creditors). These provisions are meant to "facilitate [the]  
bankruptcy proceedings regardless of the correctness of the  
originating petition." In re Crown Sportswear, Inc., 575 F.2d  
991, 993 (1st Cir. 1978) (case discussing similar provision  
under the Bankruptcy Act). See also Vortex Fishing Sys., 277

(continued...)



1 such additional and new evidence at trial. See Fed. R. Bankr.  
2 P. 7037, incorporating Fed. R. Civ. P. 37 ("Rule 37").

3 The court had discretion to exclude his documents and  
4 witnesses under Rule 37, which provides, in pertinent part:

5 A party that without substantial justification  
6 fails to disclose information required by Rule  
7 26(a) or 26(e)(1) [requiring supplementation of  
8 responses], or to amend a prior response to  
9 discovery as required by Rule 26(e)(2), is not,  
unless such failure is harmless, permitted to use  
as evidence at a trial, at a hearing, or on a  
motion any witness or information not so  
disclosed.

10 Fed. R. Civ. P. 37(c)(1).

11 Sanctions imposed under Rule 37 "must be just . . . ."  
12 Rubin v. Belo Broadcasting Corp. (In re Rubin), 769 F.2d 611,  
13 615 (9th Cir. 1985). The Ninth Circuit has addressed the issue  
14 of what may be considered to be an appropriate sanction under  
15 Rule 37 for willful failure to comply with Fed. R. Civ. Proc.  
16 26. See, e.g., Valley Eng'rs Inc. v. Elec. Eng'g Co., 158 F.3d  
17 1051, 1057 (9th Cir. 1998); Wendt v. Host Int'l, Inc., 125 F.3d  
18 806, 814 (9th Cir. 1997); Wanderer v. Johnston, 910 F.2d 652,  
19 656 (9th Cir. 1990). In those cases, the court set forth a  
20 five-part test for the imposition of sanctions, such as entry of  
21 default, dismissal of claims, or exclusion of testimony. The  
22 reasons for sanctions, warranted under Rule 37, are:

- 23 (1) The public's interest in expeditious resolution  
24 of litigation;  
25 (2) The court's need to manage its docket;  
26 (3) The risk of prejudice to the [party seeking  
sanctions];

1 (4) The public policy favoring disposition of cases  
2 on their merits; and

3 (5) The availability of less drastic sanctions.

4 Valley Eng'rs, 158 F.3d at 1057; Wanderer, 910 F.2d at 656.

5 Here, the bankruptcy court expressly stated that it  
6 considered preclusion of Pete's evidence to be a lesser sanction  
7 than ordering relief by default. Pete argues that the sanction  
8 was a de facto order for relief by default, because he could not  
9 thereafter produce any evidence to support his defense. See  
10 United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365,  
11 1369 (9th Cir. 1980) (stating that preclusion of evidence is  
12 tantamount to dismissal).

13 Pete's argument is misplaced. Pete had already sealed his  
14 fate by refusing to comply with the discovery orders. See id.  
15 (further stating that ultimate sanction may not be imposed when  
16 the failure to comply is due to circumstances beyond the  
17 disobedient party's control.)

18 The record contains voluminous discussions between the  
19 court and Pete's attorney concerning the court's expectation for  
20 production, its fair warnings, and the attorney's concession  
21 that he would attempt to get the material from Pete.<sup>17</sup> The

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22  
23 <sup>17</sup> Pete contends that the court imposed the sanction  
24 without notice at the January 17, 2002 hearing. This is  
25 incorrect. In its January 4, 2002 order, the court expressly  
26 stated that Pete would be precluded from introducing at trial  
any documents within the scope of the discovery orders that were  
not produced, and that additional sanctions could also be  
imposed. Order Overruling Alleged Debtor's Objection (Jan. 4,  
2002), at 3.

1 documents were not burdensome or costly, but were simply bank  
2 statements, bills, check stubs, etc., that Pete would have  
3 received or prepared in regard to the alleged creditors.

4 When Pete failed to produce these documents, his attorney  
5 then belatedly requested that he be allowed to produce evidence  
6 of the other creditors two days before trial. The court  
7 properly refocused the issue upon Pete's failure to cooperate in  
8 discovery:

9 THE COURT: Mr. Glass, how are you going to prove  
10 this at trial?

11 MR. GLASS: We would get all of the documents from  
12 the creditors.

13 THE COURT: Well, Mr. Glass, if you're going to do  
14 that, then you've got to produce them  
15 in discovery.

16 MR. GLASS: Right, but -

17 . . . .

18 THE COURT: . . . .  
19 Your trial is coming up in less than a week  
20 . . . . [I]f you're going to produce things  
21 at trial you have to produce them in  
22 discovery.

23 Tr. of Proceedings (Jan. 17, 2002), at 66 (alteration added).

24 The evidence supports the court's ultimate finding that  
25 Pete was intentionally withholding evidence. Such a tactic is  
26 improper in discovery. See Charles Alan Wright, et al., Federal  
Practice and Procedure: Civil 2d § 2001 (1994). The court gave  
Pete multiple chances but finally had to move on to trial in  
order to facilitate the Bankruptcy Rules' requirement for a  
prompt hearing. See Fed. R. Bankr. P. 1013(a). Therefore, the

1 court did not abuse its discretion in imposing the discovery  
2 sanction.

3  
4 **C. Pete's Evidence**

5  
6 The bankruptcy court considered the evidence produced by  
7 Pete on November 30, 2001. His discovery response referred only  
8 to an IRS debt, an Oregon Department of Revenue debt, and a  
9 Discover Card debt, in addition to the two debts of the  
10 Petitioning Creditors.

11 Pete contends that the court admitted the entire Rule  
12 1003(b) List, which contained the names of twenty-seven  
13 creditors, and thus it erred in its ultimate finding that there  
14 were only five creditors. The record does not support Pete's  
15 argument that the court admitted the Rule 1003(b) List in its  
16 entirety.

17 At trial, Pete's attorney made an offer of proof of the  
18 Rule 1003(b) List, and the court took it under advisement.  
19 Then, in its Letter Opinion, the court clearly admitted the Rule  
20 1003(b) List, but only in reference to the debts of creditors  
21 established in the documents produced on November 30, 2001, and  
22 not as to any other creditors. This ruling was consistent with  
23 the court's January 4, 2002 order and January 17, 2002 oral  
24 ruling.

25 Therefore, we affirm the court's finding that Pete had only  
26 five creditors.

1        D. Section 303(h) - Failure to Generally Pay Debts When Due

2  
3            The court found that the Petitioning Creditors met their  
4 burden to prove that Pete was not generally paying his debts as  
5 they became due, a required element of proof under § 303(h)<sup>18</sup>;  
6 see Rothery, 143 F.3d at 548.

7            This determination requires a totality of the circumstances  
8 analysis. Vortex Fishing Sys., 277 F.3d at 1072; Hayes v.  
9 Rewald (In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.),  
10 779 F.2d 471, 475 (9th Cir. 1985). A negative finding "requires  
11 a more general showing of the debtor's financial condition and  
12 debt structure than merely establishing the existence of a few  
13 unpaid debts." Vortex Fishing Sys., 277 F.3d at 1072 (citation  
14 omitted). Instead, courts should "compare the number of debts  
15 unpaid each month to those paid, the amount of the delinquency,  
16 the materiality of the non-payment, and the nature of the  
17 [d]ebtor's conduct of its financial affairs." Id. (citation  
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19            <sup>18</sup> Section 303(h) provides, in pertinent part:

20            (h) If the petition is not timely controverted, the  
21 court shall order relief against the debtor in an  
22 involuntary case under the chapter under which the  
23 petition was filed. Otherwise, after trial, the  
24 court shall order relief against the debtor in an  
25 involuntary case . . . only if-

26            (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; . . .

11 U.S.C. § 303(h).

1 omitted).

2 Again, Pete maintains that the court failed to consider the  
3 Rule 1003(b) List in conjunction with his deposition testimony  
4 in which he stated that he earned enough to pay his creditors  
5 and was current with those creditors.

6 The court did not admit Pete's Rule 1003(b) List in its  
7 entirety, but limited it to the five proven creditors. Pete's  
8 testimony that he earned enough money to pay his creditors, and  
9 that he was current in payments, was overcome by evidence of:  
10 the settlement with the IRS, from which the court inferred that  
11 Pete was not current with it; the absence of evidence concerning  
12 any payment on the State of Oregon and Discover Card debts; and  
13 the Petitioning Creditors' testimony that no payments were made  
14 on their debts, other than the \$65 collected through a  
15 garnishment proceeding.

16 The court found that, of the five debts, aggregating  
17 \$408,523.28, ninety-nine percent or \$402,967.28 of that amount  
18 was not being paid when due. Letter Opinion (Feb. 1, 2002), at  
19 9. Pete failed to rebut the evidence provided by the  
20 Petitioning Creditors. Therefore, the bankruptcy court did not  
21 err in finding that the Petitioning Creditors met their burden  
22 of proof on this issue.

23

24

**E. Bad Faith**

25

26 There is a presumption that the Petitioning Creditors filed

1 the involuntary petition in good faith, and Pete had the burden  
2 of proving bad faith by a preponderance of the evidence.  
3 Collier on Bankruptcy, supra, ¶ 303.06. The Bankruptcy Code  
4 does not define what constitutes "bad faith" for the purpose of  
5 sanctioning an improper involuntary petition. We have held that  
6 the test for bad faith under § 303 is an objective one "that  
7 asks 'what a reasonable person would have believed.'" Wavelength, 61 B.R. at 620 (quoting In re Grecian Heights  
8 Owners' Ass'n, 27 B.R. 172, 173 (Bankr. D. Or. 1982)).<sup>19</sup>

10 Pete maintains that the involuntary petition should have  
11 been dismissed for bad faith because the Petitioning Creditors  
12 failed to exhaust their state law collection remedies due to  
13 "laziness." Appellant's Opening Brief, (June 26, 2002), at 12.<sup>20</sup>

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15 <sup>19</sup> We are bound to use the objective test, although many  
16 courts apply a combination of objective and subjective standards  
17 or the standard used for Rule 9011/Fed. R. Civ. P. 11 sanctions.  
18 See Gen. Trading Inc. v. Yale Materials Handling Corp., 119 F.3d  
19 1485, 1501-02 (11th Cir. 1997) (observing that a number of  
20 courts have sought to model the bad faith inquiry on the  
21 standards set forth in Bankruptcy Rule 9011). See also Collier  
22 on Bankruptcy, supra, ¶ 303.06[1].

23 <sup>20</sup> It is unclear from the record where Pete made the "bad  
24 faith" argument in bankruptcy court. His motion to dismiss is  
25 not included in the excerpts of record. His answer contains a  
26 prayer for damages under § 303(i), an action which must be  
brought after a resolution of the petition in his favor. See  
Miyao v. Kuntz (In re Sweet Transfer & Storage, Inc.), 896 F.2d  
1189, 1191 (9th Cir. 1990) ("Any actual claim brought for  
damages is premature prior to dismissal of the petition."). See  
also 11 U.S.C. § 303(i)(2) (providing for damages and punitive  
damages against any petitioner that filed in bad faith, "if the  
court dismisses a petition under this section"). Nevertheless,  
the court considered, and we may too, his "bad faith" argument  
to the extent that it was asserted merely to defeat the

(continued...)

1 Relying on the testimony of the Petitioning Creditors' attorney,  
2 Pete asserts that they improperly used bankruptcy as a  
3 substitute for customary collection procedures under state law.

4 At trial, the Petitioning Creditors' attorney was cross-  
5 examined as to why he had not conducted a judgment debtor's  
6 examination, and he explained:

7 A. Well, I've been doing this for 25 years, and I  
8 find that judgment debtor exams are less than  
9 fruitful. Frequently the judgment debtor will not  
10 bring the documents that are requested; they won't  
11 produce the evidence. I think Mr. Pete's conduct  
12 in this case is evidence of that. And after  
13 you've gone through and spent a lot of money on  
14 judgment debtor exams and fruitless garnishments,  
15 then - and perhaps start fraudulent transfer  
16 actions, then what happens when you finally get to  
17 the goal they [sic] file a Chapter 7 proceeding  
18 anyway.

19 So, in this particular case, we determined because  
20 of the lack of cooperation on the part of Mr.  
21 Pete, to fast forward that track, skip the  
22 spending of the money on the state court  
23 procedures, and try and economize by getting it  
24 done in the bankruptcy court where all of the same  
25 relief is available as well.

26 Q. You presumed that the state court procedures then  
are ineffective?

A. No, I think state court procedures are equally  
effective, but . . . As I was saying, we wanted to  
skip all of those state court procedures because  
it looked to me like Mr. Pete was going to  
eventually file bankruptcy anyway.

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20 (...continued)

petition. See Sweet Transfer & Storage, 896 F.2d at 1191  
("Although a debtor may include a 'counterclaim' for damages as  
described under § 303(i), it is only permissible under [Rule]  
1011(d) to the extent that bad faith is considered in defeating  
the petition."); Rule 1011(d) ("A claim against a petitioning  
creditor may not be asserted in the answer except for the  
purpose of defeating the petition.").

1 Tr. of Proceedings (Jan. 23, 2002), at 102-03.

2 The Bankruptcy Code does not require a petitioning creditor  
3 to exhaust state remedies prior to filing an involuntary  
4 petition. There may be circumstances where a judgment debtor's  
5 conduct prevents any progress from being made under state law,  
6 thereby forcing the judgment creditor to seek alternatives such  
7 as an involuntary bankruptcy. The question before us,  
8 therefore, is whether good faith required the Petitioning  
9 Creditors to fully exhaust their state court remedies before  
10 seeking relief in bankruptcy court. The case law is unclear as  
11 to whether a creditor's frustration in collection efforts,  
12 alone, can constitute an "exhaustion of state remedies."

13 Pete cites single-creditor cases where bad faith was found  
14 for the creditor's seeking of bankruptcy relief in a two-party  
15 dispute. While the Code clearly allows for a single-creditor  
16 involuntary petition, see 11 U.S.C. § 303(b)(2), such petitions  
17 have not been favored.<sup>21</sup> See Collier on Bankruptcy, supra,

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18  
19 <sup>21</sup> A number of courts have denied relief in single-  
20 creditor involuntary cases. See Atlas Mach., 986 F.2d at 715  
21 (stating that "[d]ebt collection is not a proper purpose of  
22 bankruptcy"); Bankers Trust Co. v. Nordbrock (In re Nordbrock),  
23 772 F.2d 397, 398 (8th Cir. 1985) (finding single petitioning  
24 creditor filed in bad faith by using the bankruptcy court "as a  
25 forum for the trial and collection of an isolated disputed  
26 claim"); Smith, 243 B.R. at 197 ("[C]ourts have been reluctant  
to entertain a one creditor case absent a showing that  
bankruptcy can do something for the creditor that state law can  
not [sic]"); In re Kass, 114 B.R. 308, 309 (Bankr. S.D. Fla.  
1990) (treating the involuntary petition as essentially a two-  
party dispute and stating that "[d]ismissal should be granted  
where the Court finds that the petitioning creditors have

(continued...)

1 ¶ 303.04[5] (stating public policy to protect prospective debtors  
2 involved in a two-party dispute). Generally, courts which invoke  
3 the "single creditor rule"<sup>22</sup> will order relief in a single-  
4 creditor involuntary case if: (1) there is a showing of fraud or  
5 artifice on the part of the debtor; or (2) the debt is not  
6 otherwise recoverable under state law. See, e.g., Concrete  
7 Pumping Serv., Inc. v. King Constr. Co. (In re Concrete Pumping  
8 Serv., Inc.), 943 F.2d 627, 630 (6th Cir. 1991); H.I.J.R. Props.  
9 Denver v. Schideler (In re H.I.J.R. Props. Denver), 115 B.R. 275,  
10 278 (D. Colo. 1990).

11 The Fifth Circuit has indicated that the policy reasons for  
12 the three-creditor requirement under § 303(b)(1) are "(1) 'the  
13 fear that involuntary bankruptcy might be used by one or two  
14 recalcitrant creditors as a means of harassing an honest debtor';  
15 and (2) 'the possibility that the threat of an involuntary  
16 petition would be used to compel the debtor to make preferential  
17 payments to one or more litigious creditors.'" Subway Equip.  
18 Leasing Corp. v. Sims (In re Sims), 994 F.2d 210, 217 (5th Cir.  
19 1993), (emphasis added) (quoting 2 Collier on Bankruptcy

20  
21 <sup>21</sup>(...continued)  
22 adequate State law remedies"); In re Dvoskin, 24 B.R. 41, 42  
23 (Bankr. S.D. Fla. 1982) (holding that petition should be denied  
unless the judgment creditor "would otherwise be without an  
adequate remedy under non-bankruptcy law").

24 <sup>22</sup> The "single creditor rule" arises from the notion that  
25 failure to pay the debt of a particular creditor will not  
26 justify an involuntary petition, or in other words, will not  
lead to the conclusion that the debtor is not generally paying  
his debts as they become due. See H.I.J.R. Props. Denver, 115  
B.R. at 279.

1 ¶ 303.08[12][a], at 303-42 (1993)). See also Collier on  
2 Bankruptcy, supra, ¶ 303.04[2]. Therefore, the fear that a  
3 single creditor may use involuntary bankruptcy to harass the  
4 debtor may also apply to a two-creditor scenario.

5         Some courts have opened the possibility that the rule  
6 against single-creditor involuntary petitions could also apply to  
7 a two-creditor scenario. In Kass, 114 B.R. 308, five creditors  
8 filed an involuntary petition against the debtor after being  
9 frustrated in their efforts to obtain relief in a pending divorce  
10 litigation in state court.<sup>23</sup> The debtor objected to the  
11 petition. The bankruptcy court found that all the claims were  
12 related to the dissolution proceeding and therefore the  
13 involuntary petition was essentially a two-party dispute. See  
14 Kass, 114 B.R. at 308. Further, the bankruptcy court noted that  
15 all of the creditors' claims were pending in state court  
16 litigation and that their frustration in obtaining relief did not  
17 constitute a basis for allowing an involuntary petition to  
18 proceed. Therefore, the court granted a dismissal because "the  
19 petitioning creditors are attempting to use the Bankruptcy Court  
20 as an alternative to proceeding with pending State Court  
21 litigation to resolve what is essentially a two-party dispute."  
22 Id. at 309.<sup>24</sup> The Kass court clearly stated: "Dismissal should

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23  
24         <sup>23</sup> The petitioning creditors were the debtor's ex-wife,  
25 three attorneys and one accountant who provided services to the  
ex-wife. Kass, 114 B.R. at 308.

26         <sup>24</sup> Even though there were technically more than one

(continued...)

1 be granted where the Court finds that the petitioning creditors  
2 have adequate State law remedies." Id. at 309. Accord In re  
3 Petro Fill, Inc., 144 B.R. 26, 30 (Bankr. W.D. Pa. 1992) ("An  
4 involuntary petition should be dismissed where petitioning  
5 creditors have adequate remedies under state law.").

6 To the extent that "bad faith" is measured by an objective  
7 test in the Ninth Circuit, the pertinent question is whether the  
8 Petitioning Creditors acted reasonably in filing the involuntary  
9 petition. Wavelength, 61 B.R. at 619; Collier on Bankruptcy,  
10 supra, ¶ 303.06[1].

11 Although the Petitioning Creditors believed that the state  
12 court procedures were "equally effective," they decided not to  
13 take full advantage of their state law remedies because "it  
14 looked . . . like Mr. Pete was going to eventually file  
15 bankruptcy anyway." Tr. of Proceedings, (Jan. 23, 2002), at 103.  
16 According to the Petitioning Creditors, "because of the lack of  
17 cooperation on the part of Mr. Pete," they decided "to fast  
18 forward that track, skip the spending of the money on the state  
19 court procedures, and try and economize by getting it done in the  
20 bankruptcy court where all of the same relief is available as  
21 well." Id.

22 There was evidence that the Petitioning Creditors attempted  
23

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24 <sup>24</sup>(...continued)  
25 creditor, the court treated the proceeding as a "two-party  
26 dispute" because the creditors' claims were related. Id. at  
308. It is unclear from the excerpts of record whether the  
state judgments awarded to the Petitioning Creditors were  
related.

1 to collect their judgments under state law, but Pete did not  
2 cooperate. According to the bankruptcy court:

3 the petitioning creditors made sufficient attempts to  
4 collect their judgments prior to filing the petition.  
5 At least one garnished debtor's bank account but,  
6 according to Mr. Gemignani's testimony, only succeeded  
7 in collecting approximately \$65. The petitioning  
8 creditors also sent debtor a demand letter, requesting  
9 payment or payment arrangements . . . Charles Markley,  
10 an attorney who represented the petitioning creditors,  
11 testified that the petitioning creditors' attempts to  
12 collect their judgments were met with consistent  
13 refusals to pay or make payment arrangements.

14 Letter Opinion (Feb. 1, 2002), at 10. On appeal, Pete conceded  
15 these facts and added that the Petitioning Creditors' attorney  
16 made several telephone calls to Debtor's attorney, presumably to  
17 collect debts. Therefore, even though the Petitioning Creditors  
18 did not exhaust their state law remedies, the bankruptcy court's  
19 finding that an involuntary bankruptcy was a reasonable course of  
20 action was not clearly erroneous.

21 On appeal, Pete relies on Atlas Mach., Smith, and In re  
22 Broshear, 122 B.R. 705 (Bankr. S.D. Ohio 1991), to support his  
23 contention that the Petitioning Creditors' involuntary petition  
24 was filed in bad faith because they did not exhaust their state  
25 remedies. These cases are distinguishable.

26 In Atlas Mach., a single creditor filed an involuntary  
petition against the debtor after it failed to pay a debt  
pursuant to a settlement agreement. Under the settlement  
agreement, the creditor was required to satisfy the debt first  
through foreclosure on the debtor's property. The creditor made  
several unsuccessful attempts to collect the debt before filing

1 the involuntary petition. See Atlas Mach., 986 F.2d at 711-12.  
2 However, the court dismissed the petition for bad faith, finding  
3 that the creditor was aware that the debtor had more than twelve  
4 creditors. Further, the court found that the creditor filed the  
5 petition solely for the improper purpose of debt collection. Id.  
6 at 716. Here, unlike the creditor's awareness in Atlas Mach.,  
7 there was no evidence that the Petitioning Creditors knew that  
8 Pete had twelve or more creditors at the time of their filing.<sup>25</sup>

9 In Smith, a single corporate creditor filed an involuntary  
10 petition against the debtor. The bankruptcy court subsequently  
11 dismissed the case because, among other reasons, it found that  
12 the creditor filed the involuntary petition in bad faith. Smith,  
13 243 B.R. at 173, 194-97. Specifically, the court found that the  
14 creditor was the only creditor complaining about the debtor's  
15 financial problems and admitted, in trial, that the case  
16 "boil[ed] down to a two-party dispute." Id. at 197. According  
17 to the creditor, it filed an involuntary petition because the  
18 debtor was fraudulently transferring assets. Id. at 196.

19 However, the bankruptcy court held that such transfers could be  
20 set aside under state law. The court dismissed the case because

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21  
22 <sup>25</sup> At the trial, Pete's attorney attempted to prove that  
23 the Petitioning Creditors knew that there were twelve or more  
24 creditors through Mr. Gemignani's testimony that he had seen a  
25 copy of the creditor list in Pete's related corporate bankruptcy  
26 case. The court sustained an objection to this evidence on the  
grounds of relevance, because such list did not prove Pete's  
personal debts. The court also declined to take judicial notice  
of the list, which was unavailable in the courtroom. See Tr. of  
Proceedings (Jan. 23, 2002), at 94-96. Pete has not challenged  
the court's evidentiary rulings in this matter.

1 there was no evidence that the creditor even attempted to recover  
2 the transfers under state law and, thus, the creditor had not  
3 shown that its state court remedies were inadequate. Id. at 198.  
4 Furthermore, the court found that the creditor filed the petition  
5 as a means to avoid collecting its debt under state law. Id.  
6 Here, unlike Smith, there was evidence that the Petitioning  
7 Creditors made numerous unsuccessful attempts to collect their  
8 judgments under state law.

9 In Broshear, an involuntary petition was initially filed  
10 against the debtor by a single creditor, and was later joined by  
11 two additional creditors. The creditors and the debtor entered  
12 into an agreement to pay the creditors and dismiss the petition.  
13 A day before the entry of the dismissal order, CBS, another  
14 creditor of the debtor, filed a request for additional time to  
15 object to dismissal because it did not receive notice of the  
16 dismissal. The court overruled the motion on the condition that  
17 the creditors return to the debtor any benefits that they  
18 received under the settlement. The court found merit in  
19 CBS's motion because policy considerations did not favor  
20 initiation of an involuntary bankruptcy "in furtherance of debt  
21 collection activities by a creditor or creditors against a  
22 debtor" to the exclusion of other creditors who did not  
23 participate in the case. Broshear, 122 B.R. at 707-08. Here,  
24 there was no settlement between the Petitioning Creditors and  
25 Pete. Therefore, the Petitioning Creditors did not benefit to  
26 the exclusion of other creditors by means of the involuntary

1 petition.

2 In summary, the bankruptcy court did not err in concluding  
3 that the Petitioning Creditors filed the involuntary petition in  
4 good faith. See Wavelength, 61 B.R. at 619; Collier on  
5 Bankruptcy, supra, ¶ 303.06[1]. First, there is no per se rule  
6 requiring petitioning creditors to exhaust their state remedies  
7 before filing an involuntary petition. Rather, the inquiry of  
8 bad faith is fact intensive. Here, Pete's only bad-faith  
9 argument on appeal was that the Petitioning Creditors failed to  
10 exhaust their state remedies before filing the involuntary  
11 petition. This fact alone was insufficient to find bad faith.

12 Second, the Petitioning Creditors' actions did not support  
13 a finding of bad faith. The Petitioning Creditors attempted to  
14 collect their state judgments utilizing remedies available under  
15 state law, and Pete consistently refused to pay.<sup>26</sup> The court  
16 also found that the Petitioning Creditors reasonably relied on  
17 their attorney's advice that a debtor's examination would not be  
18 useful, in light of Pete's unresponsiveness. These findings were  
19 not clearly erroneous. Furthermore, there was no evidence that  
20 the Petitioning Creditors knew that Pete had twelve or more

21

22

23 <sup>26</sup> In their demand letter, the Petitioning Creditors  
24 indicated that they believed Pete was engaging in fraudulent  
25 transfers to dispose of his assets. According to the bankruptcy  
26 court, the Petitioning Creditors' belief would suggest that they  
filed the petition in good faith because they believed that "a  
court supervised disposition of debtor's assets, such as is  
available in a chapter 7 case, was necessary." Letter Opinion  
(Feb. 1, 2002), at 10 n.8.

1 creditors at the time they filed the involuntary petition.<sup>27</sup>

2 In examining all of the circumstances, the court found that  
3 bankruptcy court was the proper forum for the marshaling of  
4 Pete's assets to pay the two unsatisfied state court judgments.  
5 The involuntary petition also protected Pete from multiple  
6 collection activities.

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8           <sup>27</sup> The "reasonable person" test may also include "a review  
9 of the petitioner's pre-filing inquiries into the total number  
10 of claim holders . . . ." In re Caucus Distrib., Inc., 106 B.R.  
11 890, 924 (Bankr. E.D. Va. 1989). However, Pete has not  
12 preserved this issue on appeal.

13           The trial transcript shows that the court sustained an  
14 objection, on the basis of relevance, to Pete's attorney's line  
15 of questioning concerning the Petitioning Creditors' duty to  
16 investigate Pete's creditors. See Tr. of Proceedings (Jan. 23,  
17 2002), at 87. The court then noted that the Petitioning  
18 Creditors filed as separate creditors, believing that they would  
19 also meet any three-creditor requirement. Therefore, the court  
20 found that the Petitioning Creditors were reasonable in not  
21 making any allegations with regard to the number of Pete's  
22 creditors. Letter Opinion (Feb. 1, 2002), at 11.

23           In a footnote in his opening brief, and then more  
24 extensively in his reply brief, Pete argues that the Petitioning  
25 Creditors' petition was filed in bad faith because they made no  
26 efforts to determine who Pete's creditors were prior to filing.  
See Appellant's Opening Brief (June 26, 2002), at 11 n.8 and  
Appellant's Reply Brief (Aug. 15, 2002), at 6. Pete's mere  
mention of this issue in a footnote and presenting argument for  
the first time in the reply brief is inadequate to preserve any  
challenge to the court's findings, and, thus, he has waived this  
issue. See Branam v. Crowder (In re Branam), 226 B.R. 45, 55  
n.10 (9th Cir. BAP 1998), aff'd mem., 205 F.3d 1350 (9th Cir.  
1999) (issues discussed in headnote-type statements were deemed  
abandoned); St. Paul Fire & Marine Ins. Co. v. Fort Vancouver  
Plywood Co. (In re Brazier Forest Products, Inc.), 921 F.2d 221,  
224 n.2 (9th Cir. 1990) (court would not consider matter raised  
for the first time in appellant's reply brief); Miller v.  
Fairchild Industries, Inc., 797 F.2d 727, 738 (9th Cir. 1986)  
(appellate courts will not "consider matters on appeal that are  
not specifically and distinctly argued in appellant's opening  
brief").

