IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE: Tri-Star Communications, Inc., Debtor	Case Number 05-45299-hb Chapter 11 - Involuntary

ORDER DENYING PETITION FOR INVOLUNTARY RELIEF

This matter comes before the court on the Involuntary Petition of H. Hugh Andrews, II for an order for relief under chapter 11 of the Bankruptcy Code against Tri-Star Communications, Inc., and the reply thereto filed by Tri-Star, by and through its attorney. At the trial of this matter, the parties presented Stipulations of Fact and various agreed exhibits for consideration to aid the court in deciding the following issues:

1) **Was Andrews' petitioning claim satisfied pre-petition, thereby disqualifying him as a petitioning creditor;**

2) **Did Andrews actively refuse acceptance of tender of payment on his claim pre-petition in order to retain a claim qualifying him to serve as a petitioning creditor;**

3) **Did Andrews' acceptance of payment of his claim post-petition extinguish his claim, thereby disqualifying him as a petitioning creditor;**

4) **Does Andrews, an admitted insider of Tri-Star, have standing to be a petitioner in this involuntary case;**

5) **Was Tri-Star generally not paying its debts as they became due?**

FINDINGS OF FACT

1. This court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a). This is a core proceeding in accordance with 28 U.S.C. § 157(b)(2)(A).

2. Tri-Star is a corporation duly organized and existing under and by virtue of the laws of South Carolina and is in good standing.

3. The sole shareholders of Tri-Star are Quentin S. Broom, Jr., and Andrews. Andrews is the petitioning creditor.

4. The parties agree that Tri-Star has fewer than twelve (12) holders of claims against it that are not contingent as to liability or the subject of a bona fide dispute. Further, the petitioning claim exceeds $12,300.00 in value.

5. On December 7, 2005, Andrews filed the involuntary petition. The petitioning claim is one of $130,000 indisputably owed by Tri-Star to Andrews at some time pre-petition. This debt also appears on Tri-Star's September 30, 2005 balance sheet.

6. The only potential remaining creditor claim as of the petition date was a claim of Best Games, Inc., an entity controlled by Broom. That alleged claim appears on Tri-Star's balance sheet dated September 30, 2005.

7. Tri-Star's general ledgers are in evidence to indicate its accounts payable activity including the period of January 1, 2005 through August 31, 2005, along with various balance sheets. The most current balance sheet is dated September 30, 2005, indicating assets of $694,809.20, liabilities of $260,801.05 ($130,000 owed to Andrews and $130,801.05 owed to Best Games, Broom's company, referenced in (5) and (6) above, respectively), and "Total Stockholders' Equity" of $434,008.15.

8. On November 3, 2005, Broom caused Tri-Star to issue a check to Andrews to satisfy his petitioning claim, along with two other checks in the amounts of $25,000 and $60,000, both allegedly representing Andrews' equity in Tri-Star after liquidation of assets. Those checks were sent by certified mail with a return receipt requested through the U. S. Postal Service to Andrews "c/o Claudia Humphries, 9107 Asheville Hwy, Boiling Springs, SC." Humphries is Andrews' secretary, and the mailing address is Andrews' place of business. The U.S. Postal Service returned this mailing to Tri-Star "unclaimed." Thereafter, on December 5,

2005, Patrick E. Knie, counsel for Broom, forwarded correspondence via regular U.S. mail to Curtis W. Stodghill, then counsel for Andrews, enclosing those checks and advising Stodghill of Knie's earlier attempts to mail the check in question.

9. No evidence was presented to support a finding that the mailing was received by Stodghill prior to the filing of the involuntary bankruptcy petition on December 7, 2005. Nor is there evidence that said checks were negotiated prior to the bankruptcy petition filing.

10. Tri-Star has alleged that pre-petition, Andrews actively refused tender of the checks mailed to him in an intentional attempt to retain an undisputed, qualifying claim under 11 U.S.C. § 303(b). However no evidence has been presented that either Andrews or his secretary was aware of the impending arrival of the checks in question or that they refused tender in any way.

11. At some point subsequent to December 5, 2005 but prior to March 1, 2006, it is not disputed that Andrews received the checks in question and deposited them on March 1, 2006, satisfying his petitioning claim that appeared on the September 30, 2005 balance sheet.

12. Tri-Star's primary business was the operation of video poker machines in the Dominican Republic. It is stipulated that on June 27, 2005, without notice, the Attorney General of the Dominican Republic gave a directive that all video poker machine operators had forty-eight (48) hours to remove all machines from the streets in the Dominican Republic and advised Tri-Star that all remaining machines on the street would be confiscated and destroyed.

13. As a result of the actions of the government of the Dominican Republic, Tri-Star, through Broom, undertook to assemble and marshal most of its machines to a warehouse and completed that task by June 30, 2005.

14. On July 4, 2005, the Attorney General issued another directive to all video poker operators that the machines had to be "retired" or removed from the country within twenty (20)

days. Tri-Star tried to manage the situation and monitor the political situation in the hope that the political climate might change and it could resume operations. However, Broom eventually liquidated the assets of Tri-Star rather than resume operations.

15. The evidence presented includes numerous letters between the parties wherein the financial situation of Tri-Star was discussed, including the following:

a. Letter from Broom's attorney to Andrews dated August 10, 2005:

> . . . Quentin [Broom] and Tri-Star's employee, Frank, are working diligently to safeguard the machines, as well as limit all necessary expenses. Quentin is working with Tri-Star's Dominican Republic partner to try and fashion a law to present to the legislature allowing Tri-Star to return to some sportbook locations. This, however, will take some time due to the fact that the legislature will not return from summer vacation until August 16. The legislature is also dealing with the passage of CAFTA which may cause some delay as well.
>
> Quentin does not believe it is an option to export the machines at this point. Most certainly, the machines would be confiscated and destroyed (either by the police or Tri-Star's very influential partner). If the situation does not resolve quickly, it will be necessary to fund Tri-Star to allow the continuation of work to resolve the issue. Quentin is hopeful that it will be resolved by mid-September. . . .

b. A second similar letter from Broom's attorney to attorney Charles J. Hodge, assisting Andrews, dated August 17, 2005, containing much of the same information.

c. Letter from Broom's attorney to Stodghill dated September 28, 2005:

> . . . Because of ongoing problems in the Dominican Republic, Quentin [Broom] is making every effort to reduce overhead. In that regard, TriStar has vacated a warehouse in Georgia in an effort to minimize expenses and all remaining equipment in the warehouse belongs to Hugh Andrews or Drew's, Inc. and/or related entities. The rent is $1,500.00 a month and has been paid through October 1, 2005 and your client needs to take over the rental payments or take steps to remove his equipment from the warehouse.
>
> TriStar will also need to be funded for protection of its assets in the Dominican Republic, overhead, employees and the cost of continued travel to the Dominican Republic for work on impending legislation. The exact

contributions of Mr. Andrews and Mr. Broom have not yet been calculated, however, this letter is notice that contributions will be needed. . . .

d. Letter from Broom's attorney to Stodghill dated September 30, 2005:

> As I have indicated in earlier correspondence, Tristar and Worldwide are facing impending financial difficulty due to the recent action of the Dominican Republic's Attorney General who has shut down the video poker gaming industry in that country.
>
> Our latest information is that the new law which would reopen the video poker gaming industry will take approximately another ninety (90) days to pass and our Dominican partner is requesting $RD 1,250,000 (approximately $40,000 U.S. dollars) in contributions to help facilitate the passage of the bill with provisions favorable to our industry. In the meantime, Tristar is in dire need of capital. It is recommended that the principals contribute $20,000 each immediately in order to maintain the operation of the business and our position in the Dominican Republic for thirty (30) additional days.
>
> . . . Worldwide immediately needs $20,000 for expenses related to the protection of its assets as well as Tristar's, including but not limited to, warehouse rental, security for the equipment, Frank's living expenses, insurance, fuel, legal, accounting, vehicles, and phones, etc. . . .
>
> In summary, time is of the essence. We could lose all of our assets in the Dominican Republic if immediate action is not taken on these issues. It is therefore imperative that we know Mr. Andrews' position so the appropriate measures can be taken to protect these jointly owned businesses and so Mr. Broom can make appropriate decisions concerning his future as well.

e. Letter from Broom's attorney to Stodghill dated October 10, 2005:

> . . . On September 30, 2005, Mr. Broom sent Mr. Andrews a letter, through your office as his legal counsel, in which he requested contributions from Mr. Andrews, both to Tri-Star and Worldwide, to keep those entities afloat. While Mr. Broom is hopeful that the political climate will change and that we will eventually be able to resume business operations in the Dominican Republic, Tri-Star and Worldwide will simply not be able to survive without an injection of capital.
>
> Mr. Broom is aware that Mr. Andrews has multiple sources of income in addition to the Tri-Star/Worldwide endeavor, and therefore, the Dominican Republic situation may not be as important to him as it is to Mr. Broom. Mr. Broom, however, relies on the Tri-Star/Worldwide endeavor as his primary source of income. Mr. Broom is not willing to fund Tri-Star and Worldwide on his own and further is not willing to work without being compensated.

If Mr. Andrews does not forthwith contribute the funds requested to Tri-Star and Worldwide, Mr. Broom will begin the process of liquidating the assets of those entities to meet pending financial obligations, including taxes.

Please respond on or before 5:00 p.m. on October 13, 2005. If Mr. Broom receives no response, he will begin the liquidation process.

f. Letter from Stodghill to Broom's attorney dated October 19, 2005:

> . . . You stated that Quentin [Broom] intends to liquidate Tri-Star beginning October 13th. As a 50% stockholder, Quentin does not have authority to effect the liquidation of Tri-Star without Hugh's [Andrews] approval. I request that Quentin . . . communicate any proposals regarding Tri-Star's liquidation in sufficient time for Huge [sic] and me to determine their impact, and approve or disapprove same.
>
> With respect to your letter of September 30th, two weeks after serving Hugh with a law suit related to Tri-Star, you requested that he make additional contributions to Tri-Star and Worldwide Entertainment, S.A. He is not inclined to make any such contributions without a compelling reason to do so. The summary nature of the information contained in your letter was simply insufficient. I request that the specifics underlying those requests be provided to us by Quentin, as Tri-Star's and Worldwide's operating officer. . . .

g. Letter from Broom's attorney to Stodghill dated November 4, 2005:

> . . . We specifically requested that each principal contribute funds immediately in a letter of September 30, 2005. Mr. Broom has stood ready to contribute his half but is unwilling to finance the operations of these two (2) entities without an equal contribution by Mr. Andrews.
>
> . . . Facing the threat and seizure of the video poker machines by both the government and by the owners of the local warehouses, Mr. Broom has had no choice but to liquidate the machines. . . .
>
> . . . Mr. Broom contacted a gaming machine broker in an attempt to determine the value of these machines, if any, in the Dominican. Unfortunately, they are of little value. Nonetheless, Mr. Broom fortunately secured a Dominican who was willing to pay cash for the machines and has sold one thousand one hundred twenty-two (1,122) machines of which nine hundred sixty (960) were operational for a total of Four Hundred Thousand ($400,000.00) Dollars. This transaction has been consummated in the Dominican, and the proceeds, after the payment of remaining expenses owed by Tri-Star, will be equally distributed as a final distribution to each principal of Tri-Star.
>
> Mr. Broom plans to leave a few thousand dollars in Tri-Star to cover

necessary accounting expenses. . . .

16. On September 16, 2005, Knie, on behalf of Broom, filed a lawsuit against various entities including Andrews in the Spartanburg County Court of Common Pleas. While Tri-Star was not a party to that proceeding, it included allegations relating to Tri-Star to support Broom's causes of action against Andrews and sought recovery of money from Andrews and the other defendants therein. At some point thereafter (no date is evident from the pleadings presented into evidence) Andrews filed an Amended Answer and Counterclaims captioned "Defendant H. Hughes Andrews, Individually and on behalf of Tri-Star Communications, Inc., as a Third-party Plaintiff, v. Quentin S. Broom, Jr., Third-party Defendant." That counterclaim alleged causes of action for recovery on behalf of Andrews and Tri-Star from Broom for breach of fiduciary duty, breach of contract, breach of contract accompanied by a fraudulent act, breach of covenant of good faith and fair dealing, conversion, promissory estoppel, fraud, negligent misrepresentation and various other theories. All third-party plaintiff causes of action arise out of the business relationship between Broom and Andrews and relate to Tri-Star.

17. The parties did not present any evidence indicating that one shareholder or any other corporate officer of Tri-Star has the right to file a voluntary bankruptcy petition on behalf of the corporation without the consent of the remaining shareholder(s).

DISCUSSION AND CONCLUSIONS OF LAW

1) Was Andrews' petitioning claim satisfied pre-petition thereby disqualifying him as a petitioning creditor?

Tri-Star asserts that its mailing of checks to satisfy Andrews' claim disqualifies him as a petitioning creditor. "To constitute a good tender, the law requires payment to be in money, for the proper amount due, made to the proper person, at the proper place." Anderson v. Citizens Bank, 294 S.C. 387, 395, 365 S.E.2d 26, 31 (Ct. App. 1987), overruled on other grounds, Ward

v. Dick Dyer & Assocs., 304 S.C. 152, 403 S.E.2d 310 (1991) (citing Aldrach v. South Carolina Light, Power & Rys. Co., 101 S.C. 32, 85 S.E. 164, 165 (1915) (payment must be in money); Tolbert v. Fouché, 129 S.C. 338, 123 S.E. 859, 861 (1924) (for proper amount due); Maryland Cas. Co. v. Hanson Dredging, Inc., 393 So.2d 595, 596 (Fla. App. 1981) (to the proper person); McFarland v. Christoff, 120 Ind. App. 416, 423, 92 N.E.2d 555, 558 (1950); Waller v. Brooks, 267 Cal. App. 2d 389, 394, 72 Cal. Rptr. 228, 232 (1968) (at proper place)). Payment offered to a person who does not have authority from the creditor to accept it is not tender. Rice v. Palmetto State Life Ins. Co., 196 S.C. 410, 13 S.E.2d 493, 497 (1941). Likewise, "payment offered at a place other than the creditor's place of business is not tender, unless the creditor agrees otherwise." 86 C.J.S. Tender § 16 (2006). See Berley & Kyzer v. Columbia, Newberry & Laurens R.R. Co., 82 S.C. 232, 64 S.E. 397, 398 (1909); Weyand v. Randall, 131 A.D. 167, 115 N.Y.S. 279, 281 (N.Y. App. Div. 1909).

In this case, the parties have stipulated that the checks to satisfy Andrews' claim were originally sent by certified mail with a return receipt requested to Andrews at his business location in care of his secretary, but that they were not cashed. There is no evidence that the certified mail was claimed or that these checks were received or negotiated before the filing of the petition. Further, Knie's mailing dated December 5, 2005 to Stodghill also fails to constitute good tender. First, no evidence was presented that Stodghill had the authority to accept a tender on Andrews' personal behalf. Second, although the mailing from Knie transmitting checks is dated December 5, 2005, there is no evidence that the mailing was received by Stodghill prior to the filing of the involuntary bankruptcy petition on December 7, 2005. In short, the presentation of facts to the court fails to meet all of the elements set forth by Anderson v. Citizens Bank, as there is no evidence that the checks were received and negotiated prior to the filing of the case, and therefore there is no evidence to support a finding that the petitioning claim was satisfied

prior to the filing of the petition. Andrews is therefore not disqualified as a petitioning creditor.

2) Did Andrews actively refuse acceptance of tender of payment on his claim pre-petition in order to retain a qualifying claim, thereby enabling him to serve as a petitioning creditor?

There is no evidence that Andrews or his secretary received the initial notification of awaiting certified mail or that Andrews or his counsel were put on notice of the impending arrival of funds to satisfy the petitioning claim before the petition was filed. Therefore, there is no evidence of any act of manipulation on the part of the petitioning creditor to avoid tender.

3) Did Andrews' acceptance of payment of his claim post-petition extinguish his claim, thereby disqualifying him from serving as a petitioning creditor?

At some point subsequent to December 5, 2005 but prior to March 1, 2006, it is not disputed that Andrews received the checks in question and deposited them on March 1, 2006, satisfying his petitioning claim. A post-petition payment of a debt before the hearing on the involuntary petition does not alter the creditor's status at the time of filing. The date of filing is the operative date for whether a creditor holds a qualified petitioning claim. See Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1546 (10th Cir. 1988). The petitioner's post-petition acceptance of tender and satisfaction of the petitioning claim has no bearing on his status as a petitioning creditor.

4) Does Andrews, an admitted insider, have standing to be a petitioner in an involuntary case?

11 U.S.C. § 303(b)(2) provides that:

> An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 of 11 of this title – . . .
>
> (2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549 or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $12,300 of such claims.

At issue is whether the limiting language, "excluding any employee or insider of such person" is

solely for the purpose of calculation of "fewer than twelve such holders" or is also for the purpose of excluding insiders from qualifying as petitioning creditors.

Some courts have interpreted § 303(b)(2) to allow an insider, employee or transferee to file an involuntary petition, even though they are excluded from the "fewer than 12" calculation. In re Little Bldgs., Inc., 49 B.R. 889, 890 (Bankr. N.D. Ohio 1985) ("a single creditor is eligible to file an involuntary petition, irrespective of whether that creditor is, or at one time was, an insider"); In re United Kitchen Assocs., 33 B.R. 214, 215 (Bankr. W.D. La. 1983) ("Under the plain meaning of 11 U.S.C. § 303(b)(1) and (2), employees of the debtor may be petitioning creditors for involuntary bankruptcy of the debtor"); Sipple v. Atwood (In re Atwood), 124 B.R. 402, 405 n.2 (S.D. Ga. 1991) ("Petitioning creditors . . . qualify [to file an involuntary petition] even if their claim is voidable").

The Little Buildings court reviewed the language of the statute and explained the basis for its decision to allow an involuntary petition filed by a single creditor, even though that creditor is or was an insider:

> Although the [debtor] in this case has argued that the language of the involuntary provisions should be interpreted to mean that insiders must be excluded from the group of claimants eligible to file a petition, the language of the section states, with mathematic-like certainty, that the claims of insiders are excluded only from consideration in determining the number of an alleged debtor's creditors.

49 B.R. at 890-91. The court concluded that, "[i]nsiders are still eligible to initiate involuntary proceedings against the entity they are or were associated with." Id. at 891.

Other courts have reached the opposite result, but none which represents binding authority. See In re Runaway II, Inc., 168 B.R. 193, 198 (Bankr. W.D. Mo. 1994); In re Kreidler

Import Corp., 4 B.R. 256, 259 (Bankr. D. Md. 1980).[1] The analysis of §§ 303(b)(1) and (2) set forth in Little Buildings is convincing. Therefore, this court adopts the interpretation of Little Buildings for the exclusion of insiders for counting purposes only under § 303(b)(2) and thereby finds that Andrews' status as an insider does not impair his qualification as a petitioning creditor.

5) Was Tri-Star generally not paying its debts as they became due?

11 U.S.C. § 303(h)(1) requires a finding by this court that "the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount." The test of whether a debtor is "generally not paying" is applied as of the date of the filing of the involuntary petition. Matter of Bishop, Baldwin, Rewald, Dillingham & Wong, Inc., 779 F.2d 471, 475 (9th Cir. 1985). The petitioning creditor has the burden of proving that debts were not being paid as they came due and must show more than just a few unpaid debts. In re Galaxy Boat Mfg. Co., 72 B.R. 200, 203 (Bankr. D.S.C. 1986) (citing Matter of Cinnamon Lake Corp., 48 B.R. 70, 72 (Bankr. M.D. Fla. 1985)). To make this determination the court can look to a mechanical test including the following factors: the timeliness of payment on past due obligations, the amount of debts long overdue, the length of time during which the debtor has been unable to meet large debts, any reduction in the debtor's assets, and the debtor's deficit financial situation. In re Knoth, 168 B.R. 311, 317 (Bankr. D.S.C. 1994); In re Dakota Lay'd Eggs, 57 B.R. 648, 657 (Bankr. D.N.D. 1986). "Although offering guidance, the mechanical test must be employed with regard to any unique circumstances

[1] In Atlas Mach. & Iron Works, Inc. v. Bethlehem Steel Corp., 986 F.2d 709 (4th Cir. 1993) the Fourth Circuit stated that "*for purposes of the § 303(b) calculation* . . . the following claims are ineligible: (a) claims contingent as to liability, (b) claims subject to a bona fide dispute, (c) claims of employees of the debtor, (d) claims of insiders of the debtor, (e) claims of recipients of" voidable transfers. Id. at 715 (emphasis added). The court in Atlas Machine acknowledges that it was making the numerical calculation, not determining the particular creditor's standing to bring an involuntary petition. Accordingly, that case provides no assistance to our determination. Similarly, in In re Gills Creek Parkway Assocs., 194 B.R. 59 (Bankr. D.S.C. 1995), this court quoted Atlas Machine to state that "[p]ursuant to [§303(b)], certain types of claims are excluded from consideration; i.e. . . . '(d) claims of insiders of the debtor . . . .'" Id. at 62 (quoting Atlas Machine, 986 F.2d at 715). However, in Gills Creek, Judge Waites determined that the sole petitioning creditor's claim was the subject of a bona fide dispute under § 303(b)(1) and therefore that creditor was ineligible to bring an involuntary petition. The language of § 303(b)(2) was not at issue in Gills Creek.

attendant to a particular proceeding." 57 B.R. at 657 (citations omitted).

In this case, as of the petition date only two debts not subject to a bona fide dispute have been identified: the $130,000 debt to the petitioning creditor, which has now been paid in full via the checks written and transmitted pre-petition but negotiated post-petition; and the $130,801.05 entry on a financial statement allegedly owed to Best Games, an entity admittedly controlled by liquidating shareholder Broom. There was no evidence presented that any demand was being made for payment of any debt as of the petition date, that the Best Games debt would ever be asserted by Broom, that it or any debt was past due or not being paid as due as of the petition date, nor that the Best Games claim appearing on the September 30, 2005 financial statement was still outstanding as of the date the petition was filed. Further, there is no indication from the evidence that any debt of Tri-Star had been outstanding for any length of time or that Tri-Star experienced any inability to meet large debt obligations as of December 7, 2005. Rather, the evidence presented indicates that from a balance sheet perspective Tri-Star was solvent a little more than two months before the petition, even after considering payment of the alleged remaining debt. Further, documentary evidence states that only one month before the petition was filed, Tri-Star was successfully liquidating its assets to pay outstanding obligations. Broom's counsel stated that "the proceeds, after the payment of remaining expenses owed by Tri-Star will be equally distributed as a final distribution to each principal of Tri-Star. Mr. Broom plans to leave a few thousand dollars in Tri-Star to cover necessary accounting expenses." (Excerpt from letter dated November 4, 2005). The evidence further indicates that at Broom's direction Tri-Star did in fact issue a check to Andrews thereafter for payment of the remainder of his debt plus checks intended by Broom as equity distributions of $25,000 and $60,000. The evidence indicates that Tri-Star, through Broom, liquidated assets, paid debts, and the remainder was distributed to equity holders, with a little left in the bank.

Andrews points to a request for a capital contribution from shareholders to meet obligations prior to December 7 as evidence that Tri-Star was not paying debts as they became due. However, the reason for the request as stated in the correspondence is as follows:

> Tristar is in dire need of capital. It is recommended that the principals contribute $20,000 each immediately in order to maintain the operation of the business and our position in the Dominican Republic for thirty (30) additional days.
>
> . . . Worldwide immediately needs $20,000 for expenses related to the protection of its assets as well as Tristar's, including but not limited to, warehouse rental, security for the equipment, Frank's living expenses, insurance, fuel, legal, accounting, vehicles, and phones, etc. . . .
>
> In summary, time is of the essence. We could lose all of our assets in the Dominican Republic if immediate action is not taken on these issues.

(Excerpt from letter dated September 30, 2005). The primary reason for the capital contribution is protection of assets and ongoing operating expenses. There is no mention of any outstanding and unpaid debts and further the focus is on maintaining the value of Tri-Star's assets for the equity holders, not on repaying debt.

A debtor must neglect more than one debt for the nonpayment of debt to be general. In re Reed, 11 B.R. 755, 760 (Bankr. S.D. W.Va. 1981). Therefore, even if the debt to Best Games is still due, on these facts, that one debt is not sufficient to meet the petitioning creditor's burden of proof, given that the alleged debt was owed to a company controlled by the individual who fashioned the final distribution from Tri-Star to creditors and equity security holders. If the debt in question was a concern, Broom could easily have paid it before making any equity distribution.

While Andrews has shown a reduction of assets by Tri-Star and the winding down of that business, he has failed to meet his burden of proving that as of December 7, 2005, Tri-Star was not paying its ***debts*** as they came due. Rather, the evidence indicates that the assets of the business were liquidated, relevant debts paid and Broom thereafter distributed funds that were

sufficient to make a distribution to equity holders with a few thousand dollars remaining in the bank. Liquidation of assets resulting in payment of debt, whether voluntary or economically unavoidable, is not the equivalent of a failure to meet creditor obligations as they come due.

It should also be noted that from the evidence presented the only potential claims not satisfied prior to the hearing date, if any, are claims held by insiders or entities they control, not general creditors whose debts were not being paid as contemplated by the statute. This is essentially a dispute between equity holders supplementing litigation already pending in state court. There may be a set of facts which make an involuntary bankruptcy for the benefit of only equity holders appropriate, but as the petitioning creditor has failed to meet his burden of proof pursuant to 11 U.S.C.§ 303(h)(1), a decision regarding that question is unnecessary in this case. See In re AXL Industries, Inc., 127 B. R. 482, 485 (Bankr. S.D. Fla. 1991)(involuntary petition by 50% shareholder filed in order for one shareholder to gain leverage over another shareholder in two-party dispute pending in state court was inappropriate where adequate state remedies existed).

REQUEST FOR FEES AND COSTS PURSUANT TO 11 U.S.C. § 303(i)

As Andrews has failed to meet his burden of proof, the court must address Tri-Star's request for recovery of attorney's fees and costs pursuant to § 303(i). The award of attorney's fees and costs is not automatic but falls within the sound discretion of the trial court. In re Reid, 854 F.2d 156, 159 (7th Cir. 1988); In re Gills Creek Parkway Assocs., 194 B.R. 59, 64 (Bankr. D.S.C. 1995). Whether costs and attorney's fees should be awarded pursuant to § 303(i) is "properly determined by a totality of circumstances test." In re Ross, 135 B.R. 230, 237-39 (Bankr. E.D. Pa. 1991); In re Fox, 171 B.R. 31, 33 (Bankr. E.D. Va. 1994). "The closer the question of dismissal, the less likely it may be appropriate to award counsel fees." Id. at 230. As the court found in favor of Andrews on four of the five issues decided herein, the decision for the

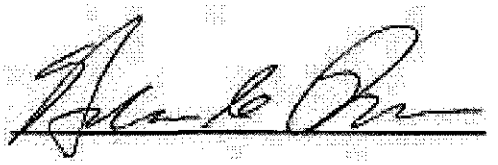
court in fact was a close question. Further, just as one could infer that shareholder Andrews' motivation in filing this petition was solely to benefit himself and not the interests of any creditor of Tri-Star, one could also infer from these facts that Tri-Star's opposition to the involuntary petition, driven by shareholder Broom, was primarily to benefit Broom. Therefore, the court sees no inequities in these facts warranting a shifting of attorney's fees to the losing party. Further, given that the decision herein presented close and somewhat novel questions for the court, the request for fees and costs pursuant to § 303(i) is denied.

IT IS THEREFORE, ORDERED:

1. That the petitioning creditor has not met his burden of proof as to all of the requirements under 11 U.S.C. § 303, and therefore the relief requested under this section is **DENIED**;

2. That the request for fees and costs pursuant to 11 U.S.C. § 303(i) is also **DENIED**;

3. That this case is hereby **DISMISSED**.



November 22, 2006
Spartanburg, SC

United States Bankruptcy Judge