In the

United States Court of Appeals
For the Fifth Circuit

No. 14-10092

In the Matter of
JEFFREY BARON
Debtor

SCHURIG JETEL BECKETT TACKETT; DEAN FERGUSON; POWERS TAYLOR, LLP; GARY LYON; JEFFREY HALL; ROBERT GARREY; PRONSKE & PATEL, P.C.; DAVID PACIONE,

Appellants

v.

JEFFREY BARON,

Appellee

Appeal from the United States District Court
Northern District of Texas, Dallas Division

BRIEF FOR NOVO POINT LLC AND QUANTEC LLC

Respectfully submitted,

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal: Novo Point LLC and Quantec LLC adopt the Certificate filed by Appellee Baron and Appellants.

/s/ Christopher A. Payne
Christopher A. Payne

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would be a waste of the Court's resources because the petitioning attorneys failed to raise their argument for remand while the District Court had the opportunity to rule on it. Therefore, the argument has been waived on appeal.[1]

Likewise, the 'alternative' theory offered by the petitioning attorneys to avoid their waiver is frivolous and would be a waste of this Court's resources to schedule for oral argument. Since the remand argument was not raised while the case was before the district court, the petitioning creditors have requested 'in the alternative to a remand', for the Court of Appeals to decide the merits. The petitioning attorneys' request is frivolous: As succinctly stated by the Sixth Circuit, "An appellate court does not try cases de novo. We review cases on questions of law." [2]

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[1] In *DIC v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994) this Honorable Court dispositively ruled as follows:

> "if a litigant desires to preserve an argument for appeal, the litigant must press and not merely intimate the argument during the proceedings before the district court. If an argument is not raised to such a degree that the district court has an opportunity to rule on it, we will not address it on appeal."

[2] *Northcross v. Board of Education of Memphis City Sch.*, 444 F.2d 1179, 1181 (6th Cir. 1971). Notably, if this Honorable Court were to try the case on the merits, as noted in his Statement Regarding Oral argument, Baron has multiple merits arguments to present.

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RESPONSE STATEMENT OF THE JURISDICTION

This Honorable Court has ruled that a claimholder does not have standing to file a petition under § 303(b) if its claim is the subject of a bona fide dispute as to liability ***or*** amount.[3]

The petitioning attorneys conceded that "there's been a bona fide dispute raised as to each" of their claims.[4] Accordingly, the bankruptcy court lacked jurisdiction to impose involuntary bankruptcy upon their petition.[5]

[3] *In re Green Hills Development Co., LLC*, 741 F.3d 651, 655 (5th Cir. 2014).

[4] ROA. 302, lines 16-17.

[5] *See e.g.*, *Linda RS v. Richard D.*, 410 U.S. 614, 617 (1973) (standing is a prerequisite to jurisdiction).

ISSUES PRESENTED FOR REVIEW

ISSUE 1:

The Petitioning Attorneys Failed to Preserve their Argument for Appeal

ISSUE 2:

The Petitioning Attorneys' Argument is FRIVOLOUS

STATEMENT OF THE CASE

Novo Point LLC and Quantec LLC add to the petitioning creditors' statement of the case only that Novo Point LLC and Quantec LLC moved for reversal of both (1) the bankruptcy court's ruling on partial summary judgment and (2) the bankruptcy court's ruling on Baron's motion for dismissal for want of jurisdiction.[6]

[6] ROA. 6719.

STATEMENT OF FACTS

Novo Point LLC and Quantec LLC dispute the petitioning creditors' erroneous assertions, as follows:

(1) *"The Petitioning Creditors were not involved in any way with the appointment of the Receiver."*

The petitioning creditors' assertion is not supported by the record.

(2) *"the Receiver offered live testimony of many of the attorney declarants, including several of the Petitioning Creditors."*

The petitioning creditors' assertion is not supported by the record.

(3) *"the evidence introduced at the April 28, 2011 hearing shows that the Alleged Debtor is indebted to no less than twenty-two law firms in the amount of $870,237.191 for legal services rendered to the Alleged Debtor without compensation"*.

The petitioning creditors' assertion is not supported by the record. In fact, the receivership affidavits established that Baron, the alleged debtor, was not indebted in the amount claimed by the petitioning creditors.[7]

[7] See ROA. 175-6.

(4) "The Fifth Circuit Opinion is silent to the disposition of the Attorneys Fee Order".

The petitioning creditors' assertion is not supported by the record. Opposite the petitioning creditors' assertion, this Honorable Court was explicit in the disposition of the attorneys fee order and ruled that the order was still pending before the district court and therefore not ripe for appeal. [8]

(5) "this Court entered a clarification order on December 31, 2012, finding that '[t]he district court orders that were in place prior to the release of our opinion remain in place.' (ROA.1593) (emphasis added) The mandate did not alter the disposition".

Contrary to the petitioning creditors' assertion, the mandate fundamentally altered the trial court's disposition—reversing and vacating the entire receivership. The relevant portion of this Honorable Court's clarification order discussed the effect of the mandate on the district court's orders, not the effect of the Court's opinion on the district court's orders – i.e., this Honorable Court clarified that its opinion took effect upon the district court's orders only when the mandate issued.

[8] *Netsphere, Inc. v. Baron*, 703 F.3d 296, 305 n.1 (5th Cir. 2012).

ARGUMENT SUMMARY

The Petitioning Attorneys Failed to Preserve their Argument for Appeal

Because the petitioning attorneys failed to raise their new arguments for remand while the district court had the opportunity to rule on them, those arguments have been waived on appeal to this Honorable Court.[9] It is, *at best*, frivolous for the petitioning attorneys to wait until the district court has lost plenary power over the judgment to raise new arguments.

This Appeal is Frivolous

In the bankruptcy court, the petitioning attorneys conceded that "there's been a bona fide dispute raised" as to each of their claims.[10] This Honorable Court has dispositively ruled that a creditor holding a claim subject to a bona fide dispute does not have standing to petition for the imposition of involuntary bankruptcy.[11]

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[9] *Keenan v. Tejeda*, 290 F.3d 252, 262 (5th Cir. 2002) (Fifth Circuit will not consider arguments not properly presented to the district court).

[10] ROA. 302, lines 16-17.

[11] E.g., *In re Green Hills Development Co., LLC*, 741 F.3d at 655.

ISSUE 1: THE PETITIONING ATTORNEYS FAILED TO PRESERVE THEIR ARGUMENT FOR APPEAL

Standard of Review

This Honorable Court has ruled that:

> "**If an argument is not raised to such a degree that the district court has an opportunity to rule on it, we will not address it on appeal.**" [12]

The petitioning attorneys raise on appeal the argument that the case should not be dismissed for want of jurisdiction but instead should be remanded for discovery and trial. However, the petitioning attorneys failed to raise that argument while the district court had plenary power over the case.[13]

Because the petitioning attorneys failed to raise their arguments while the district court had the opportunity to rule on them, those arguments have been waived on appeal.[14]

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[12] *DIC v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994)(emphasis added).

[13] ROA. 8126.

[14] *Keenan v. Tejeda*, 290 F.3d at 262.

ISSUE 2: THE PETITIONING ATTORNEYS' ARGUMENT IS FRIVOLOUS

Standard of Review

Issues of law are reviewed *de novo*.[15]

A. The ruling of the District Court reversed the bankruptcy court's ruling on Baron's motion to dismiss for want of jurisdiction.

The petitioning attorneys fallaciously argue that the District Court only reversed the order granting their motion for summary judgment. The District Court, however, ruled that the petitioning attorneys "do not have standing to proceed with the involuntary bankruptcy" and therefore overturned the bankruptcy court's ruling on Baron's motion to dismiss for want of jurisdiction, which was incorporated by law in the bankruptcy court's Order for Relief. [16]

As a matter of well-established law, review of a denial of a motion to dismiss based upon jurisdictional grounds "may be saved for disposition upon review of final judgment disposing of

[15] *E.g., Southmark Corp. v. Coopers & Lybrand*, 163 F.3d 925, 928 (5th Cir. 1999).

[16] ROA. 8059.

all issues involved in the litigation".[17] Thus, the ruling of a lower court on a jurisdictional challenge is reviewable in the regular course of appeal, as was done by the district court.[18]

B. When jurisdiction was challenged in the bankruptcy court, the petitioning attorneys failed to establish their standing

Baron moved to dismiss the involuntary case based on lack of standing due to the existence of a bona fide dispute over the petitioning attorneys' claims.[19] Once a court's jurisdiction has been challenged it must be presumed that a cause lies outside the court's limited jurisdiction.[20] The burden of establishing the contrary rests upon the party asserting jurisdiction, in this case the petitioning attorneys.[21]

In defense of Baron's motion to dismiss, the petitioning attorneys put forth only a single ground to support their standing– arguing that the district court entered an unstayed final judgment resolving the dispute over the claims which was

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[17] *Catlin v. United States*, 324 U.S. 229, 236 (1945).

[18] *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943).

[19] ROA. 161.

[20] *Turner v. Bank of North-America*, 4 Dall. 8, 11 (1799).

[21] *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-183 (1936); *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994).

affirmed on appeal.[22] The petitioning attorneys conceded that the matter was a "legal issue".[23]

To be clear, **the petitioning creditors conceded that there was a bona fide dispute** raised as to each of their claims and stated as follows:

> "**there's been a bona fide dispute raised as to each of those seven petitioning creditors,** but … I would put on one piece of evidence and I would rest. And that is, right now, we have an order from Judge Furgeson that approves the fees as to each of those seven attorneys in specific dollar amounts". [24]

No other ground for standing was asserted by the petitioning attorneys in the bankruptcy court and the aforesaid ground was the basis upon which the bankruptcy court denied Baron's motion to dismiss for want of jurisdiction.[25]

The District Court ruled that the ground relied upon by the petitioning creditors to establish standing was erroneous as a matter of law,[26] and the petitioning creditors do not challenge

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[22] ROA. 274, ROA. 302.
[23] ROA. 275, lines 18-21.
[24] ROA. 302, lines 16-22.
[25] ROA. 2303-4.
[26] ROA. 8084, *et. seq*.

that ruling in this appeal. Accordingly, the District Court correctly reversed the Bankruptcy Court's ruling on Baron's motion to dismiss for lack of jurisdiction and correctly found that the petitioning creditors lacked standing.

C. There is no 'special circumstances' exception to jurisdiction

Bankruptcy courts are "courts of limited jurisdiction, with their scope defined by statute".[27] The Supreme Court has ruled as follows:

> "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute which is not to be expanded by judicial decree."[28]

Standing is jurisdictional and a threshold issue in all cases.[29] A petitioning creditor does not have standing if his claim is subject to a bona fide dispute as to liability or amount and there must be three petitioning creditors where a debtor, such as Baron,[30] has twelve or more creditors.[31]

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[27] *Matter of Majestic Energy Corp.*, 835 F.2d 87, 89 (5th Cir. 1988).

[28] *Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 377 (1994) (inner citations omitted).

[29] *E.g.*, *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 117 (2nd Cir. 1991) ("Because standing is jurisdictional under Article III of the

The applicable language of 11 U.S.C. § 303(b)(1) is explicit and requires petition "by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount".[32] There is no 'special circumstances' exception to the statutorily mandated requirements of standing.[33]

The petitioning creditors conceded their claims were each subject to a bona fide dispute.[34] 11 U.S.C. § 303(b) is unambiguous: As a matter of law the petitioning creditors lack standing to petition for the imposition of involuntary bankruptcy. This appeal is frivolous.

United States Constitution, see *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-76, 102 S.Ct. 752, 757-61, 70 L.Ed.2d 700 (1982), it is a threshold issue in all cases").

[30] ROA. 1409-1413.

[31] 11 U.S.C. § 303(b)(1). *Cf.,* 11 U.S.C. § 303(b)(2)*; e.g., In re Concrete Pumping Service, Inc.,* 943 F.2d 627, 630 (6th Cir. 1991) (in cases where a debtor has *fewer than 12 creditors*, 11 U.S.C. § 303(b)(2) provides that only a single creditor is required to petition for relief).

[32] *E.g. In re Green Hills Development Co., LLC*, 741 F.3d 651 at 655; *Bartmann v. Maverick Tube Corp*., 853 F.2d 1540, 1543 (10th Cir. 1988)("a petitioning creditor does not have standing when its debt is subject to a bona fide dispute.").

[33] The Fifth Circuit applies a "plain language" rule to the requirements of title 11. *E.g.*, *In re DP Partners Ltd. Partnership*, 106 F. 3d 667, 671 (5th Cir. 1997) ("statutory mandate permits of no discretionary calls by the courts.").

[34] ROA. 302, lines 16-17.

CONCLUSION & PRAYER

Creditors holding claims subject to a bona fide dispute as to liability or amount lack standing to petition for the imposition of involuntary bankruptcy. The petitioning attorneys have conceded that their claims are subject to a bona fide dispute. The instant appeal is frivolous.

For the foregoing reasons the judgment of the District Court should be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because: this brief contains 2,875 words.

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DATED: June 3, 2014.

CERTIFIED BY: /s/ Christopher A. Payne
Christopher A. Payne

CERTIFICATE OF SERVICE

This is to certify that this brief was served this day on all parties who receive notification through the Court's electronic filing system.

CERTIFIED BY: /s/ Christopher A. Payne
Christopher A. Payne