

U.S. DISTRICT COURT
**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

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SOUTHERN DISTRICT
WEST VIRGINIA

IN RE: POLAN REALTY CORPORATION

Case No. 03-30550

Chapter 11

MOTION TO DISMISS BAD FAITH INVOLUNTARY PETITION

Polan Realty Corporation (hereafter "the Debtor"), by Counsel, respectfully requests that this Court enter an order summarily dismissing the involuntary petition in this matter and imposing sanctions against petitioners for having filed an involuntary petition against this Debtor in bad faith. As grounds for this motion, the Debtor states as follows.

I. PRELIMINARY STATEMENT

1. The filing of an involuntary bankruptcy petition is a very drastic step designed to deal with bona fide emergencies. The U. S. Congress has festooned the filing of an involuntary petition with many procedural requirements as safeguards to insure that this drastic tool is not abused and thereby allowed to destroy an otherwise healthy business. The law is particularly sensitive to the abuse of the bankruptcy process to serve a personal vendetta unrelated to bona fide debtor-creditor disputes.

2. Polan Realty Corporation owns and operates "The Prichard," a residential and office building in downtown Huntington, West Virginia. Polan Realty Corporation is a healthy business entity that is paying its bills as they come due and owing. Exhibit A to this Motion is a year-to-date financial statement through 7-31-03 reflecting gross income of \$305,912, operating expenses of \$70,191, other expenses of \$11,169, and an operating profit of \$60,530. Exhibit B is a schedule of Polan Realty Corporation's capital improvements to the buildings it owns in the period 7-1-01 through 7-01-02 in the amount of \$225,000 – most of which, about \$125,000, was paid for by cash and the balance of which was financed.

3. Even a superficial examination of the claims asserted by the three petitioners in this case will reveal that the claims are – each and every one of them – ineligible as a basis for an involuntary bankruptcy petition. Moreover, these claims did not spontaneously arise from the frustration of creditors unable to secure payment of legitimate bills that were due and unpaid.

4. Rather, these bills constitute merely the most recent instance of the continuing effort of Robert Shane Polan, a disgruntled heir to the Polan family fortune, to impair the financial ability of his father and uncle, Bill and Charles Polan, both of whom are involved with Polan Realty Corporation as shareholders and/or officers, and who depend on their income from Polan Realty Corporation for day-to-day living expenses, and a residence. Shane Polan has canvassed Huntington, West Virginia in a desperate attempt to gather meritless claims to provide a basis for this involuntary petition. Shane Polan's motive in bringing this

petition is to cripple the ability of his father and uncle to resist totally unrelated estate litigation against Bill and Charles Polan that Shane Polan has initiated.

5. Shane Polan has already obtained court orders throwing Charles and Bill Polan out of their home and cutting off their access to funds from West Virginia Industrial Parks Sales & Management, Inc. Importantly, all of those orders were obtained from Judge John Cummings of the Cabell County Circuit Court who has subsequently disqualified himself because of admitted bias against Bill Polan.

6. If he is successful in this Court, Shane Polan will have cut off all funds to Charles Polan, who is the sole beneficiary of the Nancy M. Polan Trust for his life. If Charles Polan, a 65 year old diabetic is unable to obtain funds to pay for medical care, and dies, Shane Polan will immediately enjoy 42% of the income from the Nancy M. Polan Trust. The Trustee of the Nancy M. Polan Trust -- who owes a duty of loyalty to Charles Polan during his life -- is Robert R. Waters, the individual who has, in breach of that trust, signed an involuntary bankruptcy petition intended to throw Charles Polan out into the street without a penny.

7. Any fairminded review of the facts of this case leads unmistakably to the conclusion that this is a classic example of abuse of the bankruptcy process, that the involuntary petition should be summarily dismissed, and that the persons responsible for its filing be subjected to the full panoply of sanctions available to this Court.

II. STATEMENT OF FACTS

8. On August 12, 2003, three purported creditors of Polan Realty Corporation filed an involuntary petition against the debtor alleging:

(a) that the petitioners were eligible to file the petition pursuant to 11 U.S.C. § 303 (b);

(b) that the debtor is a person against whom an order for relief may be entered under 11 U.S.C., and

(c) that the debtor is generally not paying its debts as they become due, unless such debts are the subject of a bona fide dispute.

9. In support of their claim that they were eligible petitioners under 11 U.S.C. § 303 (b), petitioners listed the following debts totaling \$67,804.15:

(a) West Virginia Industrial Parks	Debt	\$37,608.35
(b) City of Huntington	Fees	\$24,595.80
(c) Jamie Marlow	Rent	\$ 5,600.00

10. 11 U. S. C. § 303 (b)¹, in subsection (1), authorizes the filing of an involuntary petition against a debtor:

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, or an indenture trustee representing such 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) (emphasis added).

**II. THE CITY OF HUNTINGTON'S CLAIM CONSISTS OF:
(1) AN ESTIMATED B&O TAX "ASSESSMENT", NOT BASED UPON ANY
CALCULATION OF TAXES IN FACT DUE AND OWING, AND
(2) OTHER FEES THAT WERE NEVER INVOICED TO THE DEBTOR PRIOR
TO THE FILING OF THE INVOLUNTARY PETITION**

11. The claim of the City of Huntington for fees in the amount of \$24,595.80 is a claim for business and occupation taxes in the amount of \$7,000 to which a penalty of \$1,022 has been added, and fees applicable to two

¹ (b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title [11 USCS §§ 701 et seq. or 1101 et seq.]—

(1) 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, or an indenture trustee representing such 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;

(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 \$ 11,625 of such claims;

(3) if such person is a partnership--

(A) by fewer than all of the general partners in such partnership; or

(B) if relief has been ordered under this title [11 USCS §§ 101 et seq.] with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership; or

(4) by a foreign representative of the estate in a foreign proceeding concerning such person.

buildings the Debtor owns in the amount of \$14,622.02 and \$1,951.78, respectively (Exhibit C). The \$7,000 B&O claim is totally fictional. It is not based upon any report of income by the Debtor, because the Debtor has not filed any report from which the tax could be calculated. Nor is the B&O claim based upon any actual information available to the City of Huntington from any other source. The City of Huntington simply made up the number. Period.

12. The second portion of the City of Huntington claim appears to be a fee routinely due in the ordinary course of business – an assessment for two buildings owned by the Debtor – and has been routinely paid in the past. This charge was never invoiced to the Debtor prior to the filing of the involuntary petition, and cannot constitute evidence of a failure on the Debtor to pay his bills as they come due on a regular basis. In this case, there were other appropriate legal avenues for collection of any sums due to the City of Huntington, assuming the claims are proper and that a properly issued invoice remained unpaid after due.

13. However, the alleged claims in this case may be more than offset, and therefore unenforceable against Polan Realty Corporation, because the City has, without color of law or payment, trespassed on and taken a parcel of land owned by Polan Realty Corporation that the Debtor offered to sell to the City for a right of way needed for highway construction. Exhibits D-1 through D-3 consist of correspondence between the City of Huntington and Polan Realty Corporation pertaining to the acquisition of a right of way. These documents reflect that Polan offered to sell a parcel of land to the City for \$10,000. However, the City

(which is itself bankrupt as widely reported in all local newspapers) elected not to pay for the land. Instead, they just took it. Indeed, the City took a 32 foot wide right of way which, by extrapolation of the 10 feet offer at \$10,000, suggests that the City owes Polan Realy Corporation \$32,000, nearly \$8,000 more than the \$24,595.80 claim on which the involuntary petition is based. Exhibits D-4 to D-6 are pictures taken on August 24, 2003 depicting the occupation of the Debtor's land by the City .

14. Does anybody seriously think that an involuntary petition against the City of Huntington, filed by Polan Realty Corporation, and based on the claim documented herein, would not be dismissed as frivolous? But such a petition is clearly as well documented as the City's claim here. It just isn't liquidated or undisputed – also like the City's claim here.

III. JAMIE MARLOW'S CLAIM HAS ALREADY BEEN COMPROMISED BY THE DEBTOR AND IS, THUS, THE SUBJECT OF A BONA FIDE DISPUTE

15. Jamie Marlow signed the involuntary petition against the Debtor claiming that he is owed rent in the amount of \$5,600 for a parking lot he rents to the Debtor. However, on May 14, 2003, Jamie Marlow contacted the Debtor, advised that he was selling the parking lot. Because the Debtor has a lease which extends beyond the proposed closing date with Mr. Marlow's purchaser, Mr. Marlow offered to relieve the Debtor of any continuing obligations under the lease if the Debtor would release the term of the lease that extended past the closing (Exhibit E). The Debtor accepted the offer. There are, therefore, simply

no continuing obligations of this Debtor under the lease to Jamie Marlow. At the very least, such a claim is subject to a bona fide dispute, all that is necessary to render it ineligible here as the basis for an involuntary petition under 11 U.S.C. § 303.

IV. ROBERT R. WATERS' ACTIONS ARE ULTRA VIRES

16. The involuntary petition is also signed by Robert R. Waters as "Conservator" for WVIP. With a single exception not here relevant, Robert R. Waters' powers as Conservator of WVIP have expired. Moreover, those powers never included authority to file an involuntary bankruptcy petition (or for that matter to commence *any* litigation). On January 18, 2002, Judge John L. Cummings, in CA No. 00-C-904 (from which he has now recused himself because of bias) granted a motion to appoint Robert R. Waters as Conservator of WVIP and to require Waters' signature on all checks from the corporation. This order was not actually signed and entered until November 8, 2002. (Exhibit F) On December 27, 2002, Judge John L. Cummings entered another order (Exhibit G) extending Robert R. Waters' powers as conservator to enter into contracts (Exh. G, p. 2, ¶ a.), to enter a defense and represent WVIP in any causes of action filed by creditors or outside parties, and to settle disputes with creditors (Exh. G, p. 2, ¶ b.), to engage professionals (Exh. G, p. 2, ¶ c.). However, the conservator was to take no action affecting stock distribution (Exh. G, p. 2, ¶ d.) and was required to report monthly to each stockholder (Exh. G, p.2, ¶ e.).

17. Most importantly, the December 27, 2002 order – *by its own terms* – expired on or about February 27, 2003. The order expressly provided that: “These expanded duties for the Conservator shall continue for 60 days from the date of entry and may be renewable upon request of the Conservator to the Court” (Exh. G, p. 3, ¶ f.). On March 3, 2003, Robert R. Waters filed a motion for extension of the expanded powers (Exhibit H) given him on December 27, 2002, which he set for a hearing on March 7, 2003 (Exhibit I). Thereafter, that motion (and others) were set for a hearing on April 11, 2003 (Exhibit J), and a proposed order extending the powers was tendered to the Court for entry on that date (Exhibit K). The proposed order altered the December 2002 order only by adding a provision that authorized the direct receipt of rents from Lockheed Martin Corporation. (Exh. K, p. 2-3, ¶ e.) However, the proposed order was never entered by Judge Cummings. Instead, Judge Cummings on April 29, 2003 entered an order (Exhibit L) directing Robert R. Waters to receive all rental proceeds from Lockheed Martin or any other tenant of WVIP and to deposit them into the accounts of WVIP.

18. On May 12, 2003, in the course of a hearing in an action brought by Charles Polan against the executors of his parents estate's, CA No. 03-C-247, Judge Cummings stated that he was going to recuse himself in all proceedings involving the Polan family, including the litigation in CA No. 00-C-904 in which he had entered the order appointing Robert R. Waters as Conservator, (and which expired by its own terms on or about February 27, 2003). On August 19, 2003, all judges in the Sixth Judicial Circuit signed a letter to Chief Justice Starcher in

which they indicated that they were all recusing themselves from the Polan litigation (Exhibit M). No other order has been entered in the case.

19. One fact is unmistakable. Robert R. Waters expanded powers as a conservator for WVIP *never* included authority to commence litigation of any type. He was authorized to *defend* claims, and to compromise them. He was never authorized to *commence* any litigation, let alone an involuntary petition. His sole remaining power is to collect and deposit checks from tenants. In short, Robert R. Waters' actions as conservator of WVIP are totally *ultra vires*.

**V. WVIP's CLAIM FOR \$37,608.35 IS NOT LIQUIDATED
AND IS SUBJECT TO A BONA FIDE DISPUTE**

20. The \$37,608.35 claim of West Virginia Industrial Parks Sales and Management, Inc. represents payments made between August 2002 and January 2003 by WVIP to Polan Realty Corporation. Exhibit N to this motion is a copy of monthly banks statements and cancelled checks the Debtor obtained post-petition from counsel to the Petitioners. A summary of the payments consisting of 13 checks in various amounts is reflected on Exhibit O attached hereto, which was prepared by Polan Realty Corporation from the materials supplied by counsel for Petitioners on August 25, 2003. (Exhibit N).

21. All of the payments by WVIP to Polan Realty Corporation were for the purpose of reimbursing Polan Realty Corporation for money advanced by

Polan Realty Corporation -- on behalf of WVIP -- to discharge obligations WVIP owed to Charles E. Polan in the period from January 2002 through July 2002. Exhibit P is a schedule of expenses paid by Polan Realty Corporation to, or for the benefit of, Charles E. Polan in the months from January through July 2002. WVIP was contractually obligated to pay Charles E. Polan \$5,000 per month as a result of a contract entered into in May 2001. Because of the January 18, 2002 ruling in litigation pending in Cabell County, West Virginia (Exhibit F), Charles Polan was unable to write checks on the WVIP account without Robert Waters signature. However, Waters refused to sign until the order was actually entered, which did not happen until November 2002. In the interim, Polan Realty Corporation advanced sums due to Charles Polan that he was entitled to from WVIP. When the barrier to writing checks was removed in the latter part of 2002, WVIP was able to resume payments to Charles Polan, and in fact did resume those payments. During this same period, WVIP reimbursed Polan Realty Corporation for the sums advanced earlier on behalf of WVIP. It is those reimbursements which constitutes the WVIP claim against Polan Realty Corporation.

22. Although Charles Polan continuing status as an officer of the corporation was disputed because of a stockholder meeting in February 2002 at which he was purportedly removed,² W. V. Code § 31D-8-844 provides that a

² The West Virginia Supreme Court of Appeals has granted a Petition for Appeal from the order of the Cabell County Circuit Court sustaining Charles Polan's removal. Moreover, Judge John L. Cummings, the Circuit Judge who entered the challenged order has now recused himself on the grounds of bias in the case in which the order sustaining the 2002 meeting was entered.

stockholder vote removing an officer cannot terminate contractual obligations of the corporation.³ A May 2001 contract obligated WVIP to pay Charles Polan \$5,000 per month. Exhibit Q. Consequently, regardless of his status as an officer of the corporation, Charles Polan's position is that he was entitled to the funds at issue here because of ongoing contractual obligations of WVIP to him. And Polan Realty Corporation's position is that it was contractually entitled to reimbursement for having advanced those expenses to Charles Polan.

23. Specifically, Polan Realty Corporation made payments to Charles Polan which discharged obligations of WVIP with the understanding that the payments were loans, agreed to by Charles and Bill Polan, officers of both corporations. The understanding was that WVIP would reimburse Polan Realty Corporation. For present purposes, however, it is sufficient to note that the WVIP claim arising out of the sums reimbursed between August 2002 and January 2003 is *not* liquidated, and is in fact *totally disputed*. It has never been reduced to a judgment by any court, nor has it ever been invoiced to Polan Realty Corporation by WVIP. In short, the WVIP claim does not qualify as an eligible claim under 11 U.S.C. § 303.

24. It should be added, and underscored, that all of the rulings adverse to Charles and/or William Polan entered by Judge John L. Cummings – who has since recused himself after openly acknowledging his bias against Bill Polan –

³ W. V. Code § 31D-8-844, entitled "**Contract** rights of officers", provides in its entirety that: "(a) The appointment of an officer does not itself create **contract** rights. (b) An officer's removal does not affect the officer's **contract** rights, if any, with the corporation. An officer's resignation does not affect the corporation's **contract** rights, if any, with the officer."

are now subject to being revisited by the successor judge. None of these rulings validated the claim asserted, for the first time, in the involuntary petition, and none of these rulings can be asserted as a basis for legitimizing the assertion of that claim.

VI. THE DEFECTS IN THE INVOLUNTARY PETITION ARE FATAL AND THIS COURT SHOULD NOT REWARD THESE PETITIONERS WITH A POST-PETITION FISHING EXPEDITION THAT PERMITS PETITIONERS TO DESTROY AN OTHERWISE HEALTHY BUSINESS

25. The defects in WVIP's listed claim against Polan Realty Corporation are fatal to the involuntary petition filed on August 12, 2003. Three claims are required to sustain the filing of such a petition. 11 U.S.C. § 303 (b)(2) provides that an involuntary petition may be sustained by the filing of a *single* claim only if the total creditors of the debtor are fewer than *twelve*. Polan Realty Corporation has more than twelve creditors, and the petition can be sustained only with three qualified petitioners. Because this involuntary petition was filed in actual bad faith, Polan Realty Corporation should not be required to notify all of its outstanding creditors – none of whom have taken action adverse to the Debtor – as a condition for dismissal of this petition.

26. This result is strongly supported by Collier's discussion of bad faith filings that fail to satisfy the jurisdictional requirements for a § 303 involuntary petition. In "Chapter 1003: Involuntary Petitions", Colliers states as follows regarding a filing of a petition with claims that fail to satisfy the \$11,625 jurisdictional requirement:

[I]f the original petitioning creditors do not have an aggregate of \$ 11,625 of unsecured claims, the court would not have jurisdiction over the original petition and a postfiling joinder would not be permitted.

Collier on Bankruptcy, Chapter 1003, "Postfiling Joinder of Petitioners, P 1003.03.

27. This situation is contrasted with the situation where an involuntary petition is filed by fewer than three creditors who mistakenly believe that the debtor had fewer than 12 creditors, but otherwise satisfy the \$11,625 jurisdictional requirement. Colliers strongly suggests that such a filing should be dismissed to avoid the risk of encouraging fishing expeditions:

Unlike the case when fewer than three petitioners file in the mistaken belief that there are fewer than 12 creditors, **a petition with noncontingent, unsecured claims aggregating less than \$ 11,625 is clearly inadequate at the time it is filed. Thus, there is good reason not to require a list of creditors in such a case. Otherwise, an individual creditor with a small claim could embark on a "fishing expedition" in the hope of finding sufficient petitioners.** This does not appear to be the intent of section 303(c).

Id. (emphasis added).

28. Lastly, there is the situation presented by this petition – a petition filed by three creditors with claims aggregating more than \$12,625, but where one or more of the petitioners claim is subsequently deemed ineligible. Court retention of such a petition – and the requirement of post-petition notice on the debtor – turns, in Collier's view, on the good faith of the original filing:

It is unclear, though, whether this reasoning would apply if the original petitioning creditors had an aggregate of \$ 11,625 of unsecured claims but some of the claims were subsequently disqualified as contingent or as subject to a *bona fide* dispute. If the petitioning creditors reasonably believed at the time of the petition that the claims qualified, the court may have sufficient jurisdiction to permit other creditors to join the petition under section 303. ...

29. The corollary is also true, however. Where the petitioning creditors did *not* reasonably believe at the time the petition was filed that they had jurisdiction claims -- whether determined by amount or numerosity -- the Debtor should not be required to notice all creditors or permit joinder. Rather, such a petition should be dismissed and the court should retain jurisdiction to try the bad faith case for damages.

30. Polan Realty Corporation believes that this case presents the best possible reason for not requiring post-petition notice (or permitting joinder) as a condition for dismissal of an involuntary petition filed in the first instance in bad faith. Where, as here, the objective of the bad faith filer, is simply to bring the roof down on the otherwise healthy business, the knowing filing of the bad faith petition, coupled with the requirement of a post-petition notice to other non-filing creditors, may set off a "bank-run" style stampede of creditors, thereby allowing the bad faith filers to achieve their real objective -- destruction of the business -- in exchange for the negligible price of possibly compromising a claim that was meritless from the beginning.

VII. THIS INVOLUNTARY PETITION IS A BAD FAITH ABUSE OF THE BANKRUPTCY COURT INTENDED TO GIVE THE PETITIONER'S SPONSOR LEVERAGE IN TOTALLY UNRELATED ESTATE LITIGATION

31. It is apparent that this involuntary petition is not merely technically deficient, nor are its defects the result of a mere lack of due diligence. To the contrary, this involuntary petition was in fact filed with actual malice and in bad faith.

32. Robert R. Waters signed the Petition as "Conservator" of West Virginia Industrial Park Sales and Management, Inc. Mr. Waters was appointed as Conservator of WVIP by Judge John L. Cummings of the Circuit Court for Cabell County, West Virginia, in proceedings from which Judge Cummings has subsequently disqualified himself for bias. Robert R. Waters was *also* named as the Trustee of the Nancy M. Polan Trust by the Cabell County Commission.

33. By the terms of the Nancy M. Polan Trust, Charles Edwin Polan is the sole beneficiary of the income and principal of the Trust for the term of his life. The testamentary trust provides that:

The Trustee may in the Trustee's discretion pay to or use for the benefit of Charles Edwin Polan during his life so much of the income and principal as the Trustee from time to time determines to be required or desirable for his comfortable support and medical care, or for any other purpose the Trustee believes to be to his best interest, adding any excess income to the principal at the discretion of the Trustee. **My primary concern is for his comfort and support and the Trustee need not consider the interest of any other beneficiary in making distribution to him or for his benefit.**

Exhibit R - Nancy Polan Will at Section 3.3 (a)(emphasis added).

34. Robert R. Waters has since his appointment as the Trustee of the Nancy M. Polan Trust in June 2001 – more than two years ago – refused to distribute one penny of money to Charles Polan. Waters' defense to this has been that the Co-Executors have not funded the trust. There is, however, no evidence that Waters has even requested that the Co-Executors fund the trust.⁴

35. Charles Polan has in CA No. 03-C-247, a proceeding now pending in the Cabell County Circuit Court, requested that the Court order the Co-Executors to make an interim distribution to the Trustee, and that the Trustee (Robert R. Waters) be ordered to distribute those funds to Charles Polan (Exhibit S). The purpose for the interim distribution is to permit Charles Polan to travel to the Duke University Medical Center in North Carolina for long delayed and necessary medical treatment. Charles Polan is a 65 year old diabetic. He is a dwarf and has many serious medical problems attendant to that condition.

36. The sums requested are, in the context of this estate, modest. Charles Polan needs a minimum of \$7,500 per month to sustain him for at least two months in North Carolina. The estate has approximately \$800,000 in cash or other liquid assets, and receives a gross income of \$15,000 per month from Lockheed Martin to WVIP. According to the Co-Executors of the Lincoln Polan and Nancy M. Polan estates, 79% of the stock of WVIP was owned by Nancy

⁴ In this same time frame, however, Robert R. Waters, Conservator has managed to pay himself – without prior Court approval – not less than \$12,000 as a fee for his conservator duties. This was done by simply going to the check book and writing a check to himself. When challenged, Waters cited the court order appointing him to the conservatorship and authorizing “reasonable compensation” – and nothing else – as authority for this self-serving payment.

Polan at her death (Exhibit T) and the WVIP stock is the biggest asset of the estate.⁵

37. In other words, according to the Co-Executors, the vast majority of the stock of WVIP must, by the terms of the Nancy M. Polan Trust, be used for the exclusive benefit of Charles Polan during his lifetime. It is, therefore, nothing short of preposterous that Robert R. Waters, the "Conservator" of that corporation, should be expending that corporation's money to defeat the one clearly stated objective of Nancy M. Polan – to provide for Charles Polan – a duty owed Charles Polan by Robert R. Waters as trustee also.

38. Make no mistake about it; Robert R. Waters' intention in this involuntary petition is emphatically *not* to protect the assets of WVIP (79% of which are as noted already dedicated to Charles Polan's benefit). Robert R. Waters' intention in this proceeding is to destroy Polan Realty Corporation and thereby cause Charles Polan (and his brother Bill and his 15 year old child) to be thrown out into the street.

39. This is not an idle fantasy. The current Co-Executors of the Nancy and Lincoln Polan Estates obtained an order from Judge Cummings (in the proceeding in which he has subsequently recused himself because of bias) permitting the Co-Executors to evict Charles Polan (and his brother William Polan, and Bill Polan's fifteen year old Benjamin), from their parents' home in which they resided, off and on, for more than a half century. Charles Polan has

⁵ The actual amount of stock owned by Nancy M. Polan at the time of her death is in dispute, and that dispute is presently before the West Virginia Supreme Court of Appeals. Neither Polan Realty Corporation nor any of its shareholders in any way acquiesce in the position asserted by the Co-Executors of the Nancy M. Polan and Lincoln Polan Estates as to the amount of stock owned by Nancy M. Polan at her death.

moved into "The Prichard", a building owned and operated by the Debtor, Polan Realty Corporation, and located in Huntington, West Virginia. The intended result of Robert R. Waters' filing this proceeding is to insure that William Polan and Charles Polan are thrown out of that residence.

40. What possible motive could inspire these actions? The simplest motive in all human history – greed. Robert Shane Polan, one of four children of William Polan, will receive 42% of the Nancy M. Polan Trust's assets upon the death of Charles Polan. Shane Polan does not want to wait. Shane Polan has stated to Charles Polan in plain English that he will "drag out the litigation (and thereby block payments necessary for Charles Polan's health and medical care) until you die." Affidavit of Charles Polan attached as Exhibit U.

41. L. David Duffield, Esq., Shane Polan's attorney in CA No. 00-C-904, a suit pending in Cabell County against Bill and Charles Polan, has taken credit for securing the appointment of Robert R. Waters as Trustee of the Nancy M. Polan Trust and as Conservator of WVIP. In short, Robert R. Waters is "mustaching" this involuntary petition for Robert Shane Polan. Any contrary representation to this Court runs head on with the unambiguous fact that Robert R. Waters owes a fiduciary duty to Charles Polan as the Trustee for the Nancy M. Polan Trust, and even in his capacity as Conservator of WVIP, 79% of the stock of which is owned by the Nancy M. Polan Trust (according to the Co-Executors also appointed at the behest of Shane Polan's counsel).

42. This foray into the United States Bankruptcy Court represented by the involuntary petition filed on August 12, 2003 is simply the latest in a tawdry

saga of greed and pettiness which has already been played out in the state courts, and which has already resulted in catastrophic and possibly irreplaceable losses to Charles Polan. By any standard, the actions of Robert R. Waters, Shane Polan's nominee, constitute bad faith.

***PETITIONER'S WATERS' SPONSOR ONLY RESORTED TO THE
BANKRUPTCY COURT AFTER THE REBUFF OF HIS DIRECT EFFORTS TO
CONTROL POLAN REALTY CORPORATION BY APPROACHING
CONTROLLING STOCKHOLDERS***

43. The abuse of the bankruptcy process in this case is reinforced by the fact that Shane Polan attempted, unsuccessfully, to acquire control of Polan Realty Corporation directly by approaching Julian Neal, the principal stockholder of Polan Realty Corporation. Exhibit V, the affidavit of Mr. Neal, records the fact that, prior to filing the involuntary petition, Shane Polan approached him with a request that Neal vote his shares in favor of removal of William and Charles Polan as officers of Polan Realty Corporation at a special stockholders meeting. Upon receiving a clear "NO" from Mr. Neal, Shane Polan's nominees commenced the involuntary petition in this case.

VIII. Involuntary Bankruptcy Is A Drastic Remedy.

44. 11 U.S.C. § 303 (i) provides for the award of costs, attorneys fees, and damages, both compensatory and punitive, incident to the dismissal of involuntary petitions filed in bad faith. Rule 9011 of the Federal Rules of Bankruptcy Procedure provides an appropriate and complimentary basis for the imposition of an award of damages against Petitioners and their counsel.

Additionally, the imposition of sanctions against counsel for Petitioners is further warranted under 28 U.S.C. § 1927 , 11 U.S.C. § 105 , and the Court's inherent power.

45. The filing of the involuntary petition against Polan Realty Corporation represented the pursuit of a drastic remedy that had an immediate and a severely damaging impact on Polan Realty Corporation. Courts have recognized that the filing of an involuntary petition is a drastic remedy with serious consequences. For example, in *In re Landmark Distributors, Inc.*, 189 B.R. 290, 306 (Bankr. D.N.J. 1995), where the bankruptcy court awarded compensatory damages of \$ 3.2 million and punitive damages of \$500,000 against the petitioning creditors, the court stated:

46. As has been generally recognized, in light of Code Section 303, petitioning creditors should carefully examine the risks undertaken in the filing of an involuntary petition. The court in *In re McDonald Trucking Co., Inc.*, 76 B.R. 513, 516 (Bankr. W.D. Pa. 1987) stated:

The filing of an involuntary petition by a creditor must be carefully scrutinized by the court because such action is extreme in nature and carries with it serious consequences to the alleged debtor, examples of which include loss of credit standing, interference with general business affairs and public embarrassment.

47. The court in *In re Advance Press & Litho, Inc.*, 46 B.R. 700, 702 (D. Colo. 1984), warned that the filing of an involuntary petition is not something which should be lightly undertaken. The court noted that even a good faith filing

of such a petition creates onerous circumstances for a debtor. Moreover, in *In re Salem Corporation*, 29 B.R. 424 (S.D. Ohio 1983), the court admonished that the Bankruptcy Code was created by Congress to act as a shield for debtors, rather than as a sword for creditors. *In re Landmark Distributors, Inc.*, 189 B.R. at 306.

48. As another bankruptcy court noted, "[a] contested involuntary petition must be closely scrutinized because involuntary bankruptcy is a severe measure that frequently carries severe consequences for the debtor, such as loss of credit standing, interruption of business affairs, and even public embarrassment." *In re Compuhouse Systems, Inc.*, 168 B.R. 305, 308 (Bankr. W.D. PA. 1994), *aff'd*, 85 F.3d 612 (3rd Cir. 1996). Similarly, a bankruptcy court stated:

Involuntary bankruptcy is an extreme remedy with dire consequences upon a business enterprise. Such a remedy exists as an avenue of relief for the benefit of the overall creditor body of troubled businesses. Involuntary bankruptcy was not intended to redress the special grievances, no matter how legitimate, of particular creditors of a business otherwise holding its own.

In re Brooklyn Resource Recovery, Inc., 216 B.R. 470, 486 (Bankr. E.D.N.Y. 1997).

49. In this case, Petitioners and their counsel intentionally misused the involuntary bankruptcy system and the Court's jurisdiction as part of an improper attempt to tie up the funds of Polan Realty Corporation and thereby incapacitate Charles Polan, its shareholder and officer, from resisting Shane Polan's efforts to squeeze him into a settlement of the estate litigation that requires a payment to

Shane Polan prior to Charles Polan's death. As a result of this abuse, Polan Realty Corporation suffered severe financial consequences.

IX. Petitioners Failed To Meet Clear, Basic Requirements For Eligibility To File An Involuntary Bankruptcy Petition.

50. Section 303 of the Bankruptcy Code (11 U.S.C. § 303) governs the commencement of involuntary bankruptcy cases. To be eligible to file an involuntary petition, the holder of a claim against an alleged debtor must hold a claim "that is not contingent as to liability or the subject of bona fide dispute...." 11 U.S.C. § 303(b)(1) . Petitioners were not eligible to file an involuntary petition against Polan Realty Corporation. "The Bankruptcy Code clearly states that an involuntary petition can **only** be filed by creditors who hold claims that are not contingent as to liability or subject bona fide dispute." *Landon v. Hunt*, 977 F.2d 829, 832 (3d. Cir. 1992) (emphasis not added); *In re American President Lines, Ltd.*, 804 F.2d 1307, 1309 (D.C. Cir. 1986) (" Section 303(b) of the Bankruptcy Code explicitly and clearly prescribes the requirements for commencing an involuntary case..." and requires the filing of a petition by three or more entities holding claims against the debtor that are not contingent as to liability or subject to bona fide dispute.). "[I]f there is a bona fide dispute as to either the law or the facts, then the creditor does not qualify and the [involuntary] petition must be dismissed. *In re Lough*, 57 B.R. 993, 997 (Bankr. E.D. Mich. 1986).

51. The Ninth Circuit Court of Appeals, although not actually resolving the issue, has noted that most circuits have adopted an objective standard for determining whether a claim is subject to a bona fide dispute. *In re Seko*, 156 F.3d 1005, 1007, n. 1 (9th Cir. 1998). Under this standard, "the bankruptcy court must determine whether there is an objective basis for either a factual or legal dispute as to the validity of the debt." *Matter of Busick*, 831 F.2d 745, 750 (7th Cir. 1987). See also *Matter of Sims*, 994 F.2d 210, 221 (5th Cir. 1993); *In re Rimell*, 946 F.2d 1363, 1365 (8th Cir. 1991); *Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540, 1544 (10th Cir. 1988). "The court need not determine the probable outcome of the dispute, but merely whether one exists." *Bartmann*, 853 F.2d at 1544 (emphasis added).

52. At all times, there was no question that any claim that might be asserted by Petitioners against Polan Realty Corporation was subject to bona fide dispute. Nonetheless, Petitioners and their counsel pursued their bad faith tactic of creating leverage against Polan Realty Corporation and its shareholder by inflicting severe harm on Polan Realty Corporation through involuntary bankruptcy.

X. AN AWARD OF COSTS, ATTORNEYS' FEES, COMPENSATORY AND PUNITIVE DAMAGES IS WARRANTED UNDER 11 U.S.C. § 303(i)

53. Bankruptcy Code § 303(i) provides:

(i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right of judgment under this subsection, the court may grant judgment--

(1) against the petitioners and in favor of the debtor for--

(A) costs; or

(B) a reasonable attorney's fee; or

(2) against any petitioner that filed the petition in bad faith, for--

(A) any damages proximately caused by such filing; or

(B) punitive damages.

11 U.S.C. § 303(i) .

54. An alleged debtor can recover under both paragraphs 1 and 2 of section 303(i). 2 *Collier on Bankruptcy*, P 303.15[3], p. 303-96 (Matthew Bender 15th Edition Revised). "The legislative history of Section 303(i) indicates that the use of the term 'or' is not exclusive, and therefore punitive damages [and compensatory damages], if appropriate, may be added to an award of costs and reasonable attorneys' fees." *Jaffe v. Wavelength, Inc. (In re Wavelength, Inc.)*, 61 B.R. 614, 619 (Bankr. 9th Cir. 1986). A district court further explained the non-exclusive, cumulative nature of the damage awards available under section 303(i)(1), as follows:

The award of fees and costs under § 303(i)(1) and the award of compensatory damages or punitive damages under § 303(i)(2) are not exclusive. These damages may be allowed alternatively or cumulatively.

In re Advance Press & Litho, Inc., 47 B.R. 700, 701 (D. Colo. 1984) (citations omitted); *In re West Side Community Hospital, Inc.*, 112 B.R. 243, 257 (Bankr. N.D. Ill. 1990) (a court may grant any and all of the damages provided for under

§ 303(i)(1) and (2)); *In re Better Care, Ltd.*, 97 B.R. 405, 410 (Bankr. N.D. Ill. 1990) (same).

55. The facts of this case warrant the cumulative imposition of damages under section 303(i)(1) and (2).

XI. ATTORNEYS' FEES AND COSTS ARE "ROUTINELY" AWARDED TO THE ALLEGED DEBTOR FOLLOWING DISMISSAL OF AN INVOLUNTARY PETITION.

56. "[C]osts and attorneys fees may be awarded even in the absence of bad faith on the part of the Petitioners in an involuntary case." *In re Fox*, 171 B.R. 31, 33 (Bankr. E.D. Va. 1994); *In re Camelot, Inc.*, 25 B.R. 861, 865 (Bankr. E.T. Tenn. 1982) ("Bad faith on the part of a petitioning creditor is not a condition precedent to an award for costs and attorney fees in an involuntary bankruptcy case."); *In re Ross*, 135 B.R. 230, 236 (Bankr. E.D. Pa. 1991) ("Congress intended that attorney's fees under section 301(i)(1) may be awarded by a bankruptcy court upon the dismissal of an involuntary case, absent any showing of bad faith."); *In re Jeff*, 206 B.R. 407, 409 (Bankr. E.D. Va. 1997). "[P]etitioners should generally anticipate that an award of costs and fees will be granted upon the dismissal of an involuntary petition." *In re Landmark Distributors, Inc.*, 189 B.R. 290, 307 (Bankr. D.N.J. 1995); *see also In re K.P. Enterprise*, 135 B.R. 174, 177 (Bankr. D. Me. 1992). ("Because I consider that fairness requires it and that § 303(i) contemplates it, I adopt the view that unsuccessful Petitioners should generally expect that fees and costs will be awarded to the debtor.").

57. Although the award of attorney's fees and costs is discretionary, section 303(i)(1) routinely contemplates the award of costs and attorney's fees to the debtor. Attorney's fees may be awarded under section 303(i)(1) regardless of whether the petition was filed in bad faith or found to be frivolous. The judgment for costs or attorney's fees under section 303(i)(1) is "intended to reimburse an alleged debtor for its reasonable expenses in successfully defending an improper, involuntary petition." *In re Leach*, 102 B.R. 805, 808 (Bankr. D. Kan. 1989).

58. One court explained the approach taken by courts when exercising their discretion with regard to whether costs and attorney's fees should be awarded pursuant to § 303(i)(1), as follows:

[O]nce the alleged debtor establishes the case has been dismissed, the burden shifts to the petitioning creditors to present evidence to support disallowing costs and attorney fees; unless the petitioners can overcome their burden, the court may "routinely" allow costs and attorney fees to the alleged debtor.

In re Fox, 171 B.R. at 33 (citation omitted).

59. As of August 25, attorneys' fees and costs incurred by Polan Realty Corporation as a result of the involuntary petition amounted to \$ 7,500. Such fees and costs, plus any further attorneys' fees and costs relating to the involuntary petition, should be awarded against Petitioners and their counsel.

60. In addition to recovering attorneys' fees and costs incurred in defending and obtaining the dismissal of the involuntary petition, Polan Realty Corporation should recover the fees and costs it incurs in presenting its request for fees, costs and damages resulting from the involuntary petition as well as in connection with defending any subsequent appeal from the Court's order dismissing the involuntary petition. *In re Atlas Machine and Iron Works, Inc.*, 190 B.R. 796, 803 (Bankr. E.D. Va. 1995) ("[C]ompensable fees include time expended ... not only in defending the initial filing of the involuntary petition, but also time expended in defending ... appeals of the dismissal of the petition and preparing ... [a] request for fees, costs and damages."); *In re Landmark Distributors, Inc.*, 195 B.R. at 846 ("I find nothing in the Code or case authority limiting an award to the date of dismissal. Preparation for and attendance at the hearing on attorney's fees, costs and damages are also part of the matters which are occasioned as a result of an involuntary petition. As such, they are compensable under § 303(i)."), quoting *In re Advance Press & Litho, Inc.*, 46 B.R. 700, 703 (D. Colo. 1984).

XII. PETITIONERS' BAD FAITH CONDUCT WARRANTS AN IMPOSITION OF COMPENSATORY AND PUNITIVE DAMAGES.

61. If bad faith is found to exist, in addition to costs and attorneys' fees, compensatory and punitive damages may be awarded. *In re K.P. Enterprise*, 135 B.R. at 177 ("The debtor who successfully defends an involuntary petition may obtain an award of costs and fees against the petitioner and, if a petitioner

brought the petition in bad faith, the debtor may, in addition, have damages and punitive damages from it."); *In re West Side Community Hospital, Inc.*, 112 B.R. at 257 ("If the court finds bad faith, it is empowered to award the entire panoply of damages listed in § 303(i)); *In re Landmark Distributors, Inc.*, 189 B.R. at 316 (same).

62. Petitioners and their counsel engaged in bad faith tactics by filing the involuntary petition against Polan Realty Corporation. The Ninth Circuit's Bankruptcy Appellate Panel discussed the concept of bad faith in the context of an involuntary bankruptcy petition as follows:

The Bankruptcy Code does not define "bad faith" for purposes of awarding punitive damages [or compensatory damages] under § 303(i). Courts wrestling with this term have used somewhat vague definitions. One line of cases holds that bad faith exists when a petition is "ill-advised or motivated by spite, malice or desire to embarrass the debtor." ... A second line of authority looks to whether the creditor's actions were an improper use of the Bankruptcy Code as "a substitute for customary collection procedures." ... Whether a party acted in bad faith is essentially a question of fact. ... Bad faith should be measured by an "objective test" that asks "what a reasonable person would have believed."

In re Wavelength, Inc., 61 B.R. 619-620.

63. When bad faith exists, as is the case here, the award of compensatory and punitive damages (in addition to costs and attorneys' fees) is appropriate.

If a petitioning creditor files an involuntary petition in bad faith, the Court may award the debtor any damages proximately caused by the filing of the petition. Title 11 U.S.C. § 303(i)(2)(A). Damages may include such items as loss of business during and after the

pendency of the case, and so on.' ... The Court may also award costs (section 303(i)(1)(A)), reasonable attorney's fees (Section 303(i)(1)(B)) and punitive damages (Section 303(i)(2)(B)).

Sjostedt v. Salmon (In re Salmon), 128 B.R. 313, 316 (Bankr. M.D. Fla. 1991).

64. Petitioners' bad faith is shown both by the improper purpose for their filing of the involuntary petition and their improper use of the Bankruptcy Code. See *In re Better Care, Ltd.*, 97 B.R. at 410-411; *In re Wavelength, Inc.*, 61 B.R. at 619-620. An involuntary petition is pursued in bad faith for an "improper purpose" when it is used "as a collection device in lieu of filing an action in State Court." *In re Century Tile and Marble, Inc.*, 152 B.R. at 688, 689 (Bankr. S.D. Fla. 1993); *In re West Side Community Hosp., Inc.*, 112 B.R. at 253 ("The policy underlying the 'bona fide dispute' exception is to prevent creditors from using the bankruptcy court as a means of collecting disputed claims."), citing *In re Nordbrock*, 772 F.2d 397, 399 (8th Cir. 1985).

65. In this case, where none of the Petitioners had a bona fide claim against Polan Realty Corporation which was not the subject of a good faith dispute, the bad faith conduct engaged in by a Petitioners is even more severe than if they were merely attempting to improperly pursue collection of a claim through the involuntary bankruptcy process. In a similar context, the Third Circuit Court of Appeals stated:

Appellants point to nothing in the record which could possibly render the bankruptcy court's findings of bad faith to be clearly erroneous. On the contrary, the record amply demonstrates appellants' and counsels' bad faith and disregard for bankruptcy law

and procedure. The bankruptcy judge expressed his distress and concern that "Ertel's actions cannot even be characterized as a conscious tactic of using the Bankruptcy Court as a debt collection device when Cambel, Moyer, & Chaddick [petitioners] had no bona fide debts against the Hunts [alleged debtors]."

Landon v. Hunt, 977 F.2d 829, 833 (3rd Cir. 1992).

66. In this case, the record also amply demonstrates the bad faith of Petitioners and their counsel and their disregard for bankruptcy law, procedure, this Court's jurisdiction, and the severe consequences their improper involuntary petition imposed on Polan Realty Corporation.

67. Petitioners' wrongful attempt to commence an involuntary bankruptcy case against Polan Realty Corporation constitutes bad faith. See *Basin Elec. Power Co-op. v. Midwest Processing Co.*, 769 F.2d 483, 486 (8th Cir. 1985). The actions of Petitioners and their counsel were not objectively reasonable. They were motivated by malice and pursued a course of conduct designed to imposed devastating losses on Polan Realty Corporation's business resulting in Charles and Bill Polan's inability to continue to resist Shane Polan's efforts to defeat his grandmother's unambiguous will and trust.

68. Because the involuntary petition filed by Petitioners and their counsel was motivated by an improper purpose (a desire to extort funds from Polan Realty Corporation and/or its shareholder), the petition against Polan Realty Corporation was filed in bad faith. See *In re K.P. Enterprise*, 135 B.R. at 182; see also *In re Wavelength, Inc.*, 61 B.R. at 619-620.

69. In their involuntary petition filed against Polan Realty Corporation, Petitioners and their counsel falsely alleged, among other things, that Polan Realty Corporation was not generally paying its debts as they came due, unless such debts were the subject of a bona fide dispute. This contention was false. "A material false statement in support of an involuntary petition constitutes bad faith for purposes of section 303(i)(2)." *Koffman v. Osteoimplant Technology, Inc.*, 182 B.R. 115, 124 (D. Md. 1995), citing *In re Kidwell*, 158 B.R. 203, 217 (Bankr. E.D. Cal. 1993), and *In re Wavelength, Inc.*, 61 B.R. at 620. Further, "[p]unitive damages may be assessed if appellants rely on counsel for all of the resulting acts exhibiting bad faith." *In re Wavelength, Inc.*, 61 B.R. at 620.

70. Moreover, Petitioners' counsel had an obligation to investigate the circumstances relating to the filing of the involuntary petition against Polan Realty Corporation. In that regard, the Fifth Circuit Court of Appeals stated:

If the creditor did merely rely on his counsel to collect the debt, the onus is on the attorney to investigate the debtor's financial position prior to filing an involuntary petition in bankruptcy. An allegation of bankruptcy invokes remedies not available to any ordinary debt collection procedures. It should not be invoked unadvisedly and contrary to statutory right.

Walden v. Bright Products, Inc. (In re Walden), 781 F.2d 1121, 1123 (5th Cir. 1986).

71. Compensatory damages may include fees and costs incurred with regard to services rendered by its accountant as a result of Petitioners' involuntary petition. If this proceeding is allowed to go forward, accountant's

services and expenses the Debtor will incur expenses that would not have been required if the involuntary petition had not been filed.

72. It is also worth noting that punitive damages may be awarded whether or not actual damages were incurred. *In re Oakley Custom Homes, Inc.*, 165 B.R. 232, 241 (Bankr. D. Colo. 1994); *In re Atlas Machines and Iron Works, Inc.*, 190 B.R. at 804.

XIII. THE IMPOSITION OF SANCTIONS AGAINST COUNSEL AND PETITIONERS IS APPROPRIATE PURSUANT TO RULE 9011.

73. Rule 9011 of the Federal Rules of Bankruptcy Procedure provides an appropriate and complimentary basis for the imposition of an award of damages against Petitioners and their counsel. Because the pertinent language of Rule 9011 of the Federal Rules of Bankruptcy Procedure tracks Rule 11 of the Federal Rules of Civil Procedure, authorities analyzing Rule 11 are held to govern the application of Rule 9011. *Valley Nat'l Bank of Arizona v. Needler (In re Grantham Bros.)*, 922 F.2d 1438, 1441 (9th Cir. 1991).

74. Rule 9011 provides three appropriate grounds for imposing sanctions against Petitioners and their counsel in this matter: (1) the involuntary petition was filed for an "improper purpose"; (2) the involuntary petition was "frivolous" in that it was not warranted by existing law or by any argument for the extension, modification, or reversal of existing law or the establishment of new law; and (3) the involuntary petition was not well-grounded in fact and the

allegations contained therein did not have evidentiary support. See *Cooter & Gel v. Hartmarx Corp.*, 496 U.S. 384, 110 S. Ct. 2447, 2454, 110 L. Ed. 2d 359 (1990) ("Rule 11 imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the Court are well-grounded in fact, legally tenable, and "not interposed for any improper purpose."); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830-31 (9th Cir. 1986); *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1140 (9th Cir. 1990). Both the improper purpose and frivolousness tests are applied through an objective standard that looks to the reasonableness of the conduct under the circumstances. *Zaldivar v. City of Los Angeles*, 780 F.2d 829; *Unioil, Inc. v. E.F. Hutton & Co., Inc.*, 809 F.2d 548, 557 (9th Cir. 1986); *In re Grantham Bros.*, 922 F.2d at 1441.

75. Rule 9011 has frequently been applied to impose sanctions against petitioners and/or their counsel involved in the filing of an improper involuntary petition. One court summarized the application of Rule 9011 in the context of involuntary petitions as follows:

Sanctions under Rule 9011 are appropriate for the filing of an involuntary petition if a petitioning creditor and its counsel failed to make "a reasonable inquiry into the existence of the elements necessary for filing an involuntary petition." See *In re West Side Community Hosp.*, 112 B.R. 243, 259 (Bankr. N.D. Ill. 1990). Bad faith is not required, but bad faith certainly warrants sanctions. *In re Poterek*, 169 B.R. at 909. Moreover, if a petition is filed for any improper purpose, it is sanctionable even if it is warranted by existing law and supported by the facts. *In re Century Tile and Marble Inc.*, 152 B.R. 688, 689 (Bankr. S.D. Fla. 1993). In determining the legal sufficiency of a position under Rule 9011, a

party must investigate the facts and the law prior to the signing and submission of a pleading. *In re Better Care, Ltd.*, 97 B.R. at 405, 411 (Bankr. N.D. Ill. 1989) (citing *In re McDonald Trucking Co., Inc.*, 76 B.R. 513, 516 (Bankr. W.D. Pa. 1987)).

In re Atlas Mach. and Ironworks., Inc., 190 B.R. at 806.

76. An involuntary petition is filed for an improper purpose under Rule 9011 when it is filed to collect an alleged debt. See *Keiter v. Stracka*, 192 B.R. 150, 155 (Bankr. S.D. Tex. 1996).

77. Addressing a case involving similar circumstances, a District Court upheld the Bankruptcy Court's imposition of sanctions pursuant to Rule 9011, citing the following cases:

[T]he bankruptcy court did not abuse its discretion by issuing sanctions pursuant to Bankruptcy Rule 9011. See, e.g., *Landon v. Hunt*, 977 F.2d 829 (3rd Cir. 1992) (Rule 9011 sanctions against attorney are appropriate when involuntary petition is filed and creditor had no bona fide debt against the debtor); *In re Oakley Custom Homes*, 168 B.R. 232 (Bankr. D. Colo. 1994) (Rule 9011 sanctions against attorney are appropriate when involuntary petition is filed but amount of debt is disputed); *In re Century Tile & Marble, Inc.*, 152 B.R. 688 (Bankr. S.D. Fla. 1993) (Rule 9011 sanctions against attorney are appropriate when involuntary petition is filed for sole purpose of collecting on a debt).

Keiter v. Stracka, 192 B.R. at 155.

XIV. SANCTIONS MAY ALSO BE IMPOSED AGAINST THE PETITIONERS' COUNSEL UNDER 28 U.S.C. § 1927 AND 11 U.S.C. § 105.

78. Section 1927 of Title 28 of the United States Code provides that any attorney who multiplies proceedings "unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorney's fees reasonably incurred because of such conduct." 28 U.S.C. § 1927 ; see *Toombs v. Leone*, 777 F.2d 465, 461 (9th Cir. 1985); *Eisenman v. Propeoro (In re Pro)*, 793 F.2d 1048, 1051 (9th Cir. 1986), citing *United States v. Associated Convalescent Enterprises*, 766 F.2d 1342, 1346-7 (9th Cir. 1985) (a finding that misconduct was "calculated" was sufficient to uphold the award under 28 U.S.C. § 1927). "As officers of the Court, counsel owe a duty to the judicial system not to abuse it." *National Home Equity Corporation v. Villa Real (In re Villa Real)*, 46 B.R. 284, 285 (Bankr. C.D. Cal. 1984). Under 28 U.S.C. § 1927 , courts have imposed sanctions against both individual attorneys and against law firms. See *In re TCI Ltd.*, 769 F.2d 441, 448-449 (7th Cir. 1985).

79. In addition to its authorization under Bankruptcy Code Section 303(i), Rule 9011, and 28 U.S.C. § 1927, the Bankruptcy Court has the inherent power to impose sanctions where there has been a wilful abuse of judicial process or litigation has otherwise been conducted in bad faith. *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.)*, 77 F.3d 278, 283-85 (9th Cir. 1996); *Bader v. Itel Corp. (In re Itel Securities Litigation)*, 791 F.2d 672, 675 (9th Cir. 1986); *Toombs v. Leone*, 777 F.2d at 471; *Chamber v. Nasco, Inc.*, 501

U.S. 32, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991); *Sundstrom Mortgage Co. v. 2218 Bluebird Limited Partnership (In re Bluebird Limited Partnership)*, 41 B.R. 540, 544 (Bankr. S.D. Cal. 1984); *Roadway Express, Inc. v. Piper, et al.*, 447 U.S. 752, 764-65, 100 S. Ct. 2455, 2464, 65 L. Ed. 2d 488 (1980).

80. Additionally, Courts have held that "11 U.S.C. § 105 permits bankruptcy courts to impose sanctions against both parties and counsel who wilfully abuse the judicial process." *Knepper v. Skekloff*, 154 B.R. 75, 80 (N.D. Ind. 1993), citing *Regensteiner Printing Co. v. Graphic Color Corp.*, 142 B.R. 815, 819 (Bankr. N.D. Ill. 1992); see also *In re Rainbow Magazine*, 77 F.3d at 283-85.

XV. THE COURT RETAINS JURISDICTION TO GRANT THE REQUESTED SANCTIONS AND AWARD OF COST AND OTHER RELIEF

81. The Court has jurisdiction to address this matter. *In re Fox*, 171 B.R. 31, 33 (Bankr. E.D. Va. 1994) (In a case addressing § 301(i), a court stated "Fox seeks to enforce a specific section of the bankruptcy code. Thus, the court has jurisdiction over this motion even though the case has been closed."); 2 *Collier on Bankruptcy*, P 303.15[1], p. 303-94 (Matthew Bender 15th ed. rev. 1999) ("It is clear... that even if an involuntary case is dismissed under section 303(j), the court retains jurisdiction for purposes of determining any monetary award under section 303(i)."); *Bradner v. Cooper School of Art, Inc.*, 709 F.2d 1104, 1106 (6th Cir 1983); *In re Apache Trading Group, Inc.*, 210 B.R. 869, 878 (Bankr. S.D. Fla. 1997).

82. Further, the United States Supreme Court, addressing a request for the imposition of damages as a result of a violation of Rule 11 of the Federal Rules of Civil Procedure, stated:

It is well established that a federal court may consider collateral issues after an action is now long pending. For example, district courts may award costs after an action is dismissed for lack of jurisdiction... [A] Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue. Whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate. Such a determination may be made after the principal suit has been terminated.

Cooter & Gell v. Hartmarx Corp., et al., 496 U.S. 384, 396, 110 S.Ct. 2447, 2445-56 (1990).

83. Similarly, the Ninth Circuit Court of Appeals has held that the prior dismissal of a case does not deprive a district court of jurisdiction to consider a motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure. *Greenberg, et al. v. Sala et al.*, 822 F.2d 882, 885 (9th Cir. 1987).

WHEREFORE, Polan Realty Corporation, the Debtor, respectfully requests that the involuntary petition in this matter be summarily dismissed and that the Debtor's counterclaim be set down for trial at the earliest possible date.

POLAN REALTY CORPORATION
By Counsel



William V. DePaulo, Esq. #995
ROSS & DEPAULO, PLLC
151 Dudding Avenue
Hurricane, WV 25526-1417
Tel: 304-562-9045
Fax: 304-562-9093
william.depaulo@verizon.net

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss was mailed this 28 day of August to the following person at the address and number listed below:

Brian P. Conaty, Esq.
McGuire Office Center, Suite 3
1001 Sixth Avenue
Huntington, WV 25701
Tel: 304-522-4118
Fax: 304-522-1086

Debra A. Wertman, Esq.
Asst. U. S. Trustee
300 Virginia Street, E., Room 2025
Charleston, WV 25337
Tel: 304-347-3405
Fax: 304-347-3402

Charles I. Jones, Esq.
Campbell, Woods, Bagley,
Emerson, McNeer & Herndon, PLLC
300 Summers Street, Suit 810
P. O. Box 2393
Charleston, WV 25328-2393
Tel: 304-346-2391
Fax: 304-346-2433



William V. DePaulo