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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
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Barbara A. Schermerhorn
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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE C.W. MINING COMPANY, doing business as Co-Op Mining Company, Debtor.	BAP No. UT-08-102
C.W. MINING COMPANY, Appellant, v. AQUILA, INC. and OWELL PRECAST, LLC, Appellees, and KENNETH A. RUSHTON, Trustee, Intervenor.	Bankr. No. 08-20105 Chapter 7 OPINION*

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

Before MICHAEL, BROWN, and ROMERO, Bankruptcy Judges.

MICHAEL, Bankruptcy Judge.

It takes two to tango. It takes three to file an involuntary bankruptcy case. Three creditors, that is, whose claims are not "contingent as to liability or subject to a bona fide dispute." In this appeal, former management of a corporation

* This unpublished opinion is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

placed into involuntary bankruptcy asks us to make the bankruptcy case disappear because two of the three petitioning creditors do not fit this bill. The creditors and the trustee appointed in the case disagree. In addition, the trustee argues that his appointment divests former management of standing to appeal, and the creditors argue that events subsequent to the filing of the bankruptcy case render its undoing an exercise similar to unscrambling an egg. All in all, a very interesting case, with some very interesting issues. After careful review, we hold that the decision of the bankruptcy court was correct and should be affirmed. We also conclude that the appealing parties, though ultimately unsuccessful, were entitled to be heard.

I. BACKGROUND FACTS

Involuntary debtor C.W. Mining Company ("CWM") was in the business of coal production, and mined property in Bear Canyon, Utah. Creditor Aquila, Inc. ("Aquila"), an electric utility service, contracted with CWM to supply coal for two of its power plants in Missouri. In October 2007, after a three-day trial, Aquila obtained a judgment against CWM in the United States District Court for the District of Utah ("District Court") for approximately $25 million in damages for breaching the coal supply agreement ("Judgment"). CWM appealed the Judgment to the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit"). Creditor Owell Precast, LLC ("Owell") manufactures precast concrete products and supplied CWM with retaining wall materials for their mining operation. CWM and Owell agreed that as of January 4, 2008, CWM was indebted to Owell in the amount of at least $13,440 for previously supplied concrete products.

Pursuant to 11 U.S.C. § 303(b),[1] an involuntary bankruptcy case may be

[1] Unless otherwise indicated, all future statutory references are to the Bankruptcy Code, Title 11 of the United States Code.

commenced by three or more entities holding claims that are not contingent, or subject to a bona fide dispute as to liability or amount, and aggregate $13,475 more than the value of any lien on debtor's property securing such claims.[2] On January 8, 2008, Aquila and Owell, together with creditor House of Pumps, Inc., filed an involuntary Chapter 11 petition for relief against CWM. CWM answered the involuntary petition, asserting Aquila and Owell were not qualified petitioning creditors.[3] CWM argued Aquila's claim was subject to a bona fide dispute because the Judgment was on appeal.[4] With respect to Owell's claim, CWM argued it had been paid in full prior to filing of the involuntary petition.[5]

On July 6, 2008, Aquila filed a motion for partial summary judgment requesting the bankruptcy court to find Aquila and Owell were qualified creditors as of the petition date, and therefore authorized to commence the involuntary case against CWM pursuant to § 303(b). The bankruptcy court granted partial summary judgment by order dated September 17, 2008 ("Summary Judgment Order"),[6] and shortly thereafter, ordered involuntary Chapter 11 relief against CWM ("Order for Relief").[7] Within ten days, CWM filed a motion to alter or amend the Summary Judgment Order and Order for Relief ("Motion to Alter or

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[2] 11 U.S.C. § 303(b)(1) ($13,475 is an adjusted dollar figure effective as of April 1, 2007).

[3] CWM did not contest the qualified status of House of Pumps, Inc.

[4] The Judgment was affirmed by the Tenth Circuit on November 7, 2008. However, the determination as to whether a bona fide dispute exists and a creditor is thus qualified under § 303(b) must be made as of the date of filing of the involuntary petition. *See Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540, 1544 (10th Cir. 1988).

[5] Additional facts relevant to whether Owell's claim was subject to a bona fide dispute will be developed in the analysis section below.

[6] *Memorandum Decision Granting Aquila, Inc.'s Motion for Partial Summary Judgment, in* Appellant's App. at 93.

[7] *See Bankruptcy Docket No. 204, entered September 26, 2008, in* Appellant's App. at 65.

Amend"), which the bankruptcy court took under advisement.[8]

While CWM's Motion to Alter or Amend was pending, the bankruptcy court converted the case to one under Chapter 7 on Aquila's motion. Thereafter, Kenneth Rushton ("Rushton") was appointed interim and then permanent trustee. The bankruptcy court denied CWM's Motion to Alter or Amend by order dated November 26, 2008 ("Order Denying Motion to Alter or Amend").[9] On December 8, 2008, CWM timely lodged this appeal.[10]

II. APPELLATE JURISDICTION AND PENDING MOTION TO DISMISS

This Court has jurisdiction to hear timely filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[11] Neither party elected to have this appeal heard by the United States District Court for the District of Utah. The parties have therefore consented to appellate review by this Court.

A decision is considered final "if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"[12] On December 11, 2008, this Court issued an order to show cause regarding finality of the orders

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[8] *Motion to Alter or Amend Summary Judgment Order and Order for Relief, in* Appellant's Supp. App. at 95.

[9] *Order Denying Motion to Alter or Amend Summary Judgment Order and Order for Relief, in* Appellees' Supp. App. at 6.

[10] *Notice of Appeal, in* Appellant's App. at 289. Although the Notice of Appeal recites that CWM is appealing the Order Denying Motion to Alter or Amend, nowhere in its briefs on appeal does CWM specifically allege the bankruptcy court erred in doing so, or give grounds therefor. As a result, we focus solely on the underlying orders.

[11] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-1.

[12] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

being appealed.[13] After reviewing the parties' responses, on January 15, 2009, a motions panel of this Court entered an order allowing the appeal to proceed, explaining that the Summary Judgment Order was the predicate to the Order for Relief.[14] Further, the motions panel determined that although an order for relief does not formally end a bankruptcy case, it is nevertheless final for purposes of appeal because it may determine and seriously affect substantive rights and cause irreparable harm if appellate review is postponed.[15]

Subsequently, Rushton filed a motion to dismiss with this Court, arguing he was the only party with standing to pursue the appeal ("Motion to Dismiss"). Additionally, Rushton moved to intervene. On April 21, 2009, a motions panel of this Court issued an order granting Rushton's motion to intervene, and referred his Motion to Dismiss to the merits panel.[16] For the reasons set forth below, Rushton's Motion to Dismiss is denied, and this Court will review CWM's alleged errors on appeal.[17]

III. STANDARD OF REVIEW

A ruling on summary judgment is reviewed *de novo*, applying the same legal standard used by the bankruptcy court.[18] Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the

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13 *Docket No. 61682.*

14 *Docket No. 61988.*

15 *Id.* (citing *In re Mason*, 709 F.2d 1313, 1316 (9th Cir. 1983)).

16 *Docket No. 62626.*

17 Aquila's *Motion to Strike Appellant's Supplemental Appendix* filed October 15, 2009, is also DENIED.

18 *Kojima v. Grandote Int'l Ltd. Liability Co. (In re Grandote Country Club Co., Ltd.)*, 252 F.3d 1146, 1149 (10th Cir. 2001).

movant is entitled to judgment as a matter of law."[19] "In reviewing a summary judgment motion, the court is to view the record 'in the light most favorable to the nonmoving party.'"[20]

IV. ANALYSIS

A. Motion to Dismiss

We first address Rushton's Motion to Dismiss. As grounds for dismissal, Rushton argues CWM does not have standing to bring this appeal because after a Chapter 7 trustee is appointed in a corporate bankruptcy, former management is completely ousted. Further, Rushton claims CWM does not qualify as an aggrieved person because it is "hopelessly insolvent." We recognize these principles may very well dictate the analysis and results in voluntary bankruptcy cases, but their application in this involuntary proceeding would create unacceptable inequities.

As pointed out by CWM, there is a lack of case law specifically analyzing the standing of an involuntary debtor to appeal an order for relief.[21] Nevertheless, in numerous cases, courts have implicitly recognized that right without detailed elaboration.[22] The most recent of these cases, *In re Trusted Net Media Holdings*,

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[19] Fed. R. Civ. P. 56(c).

[20] *Grandote*, 252 F.3d at 1149 (quoting *Thournir v. Meyer*, 909 F.2d 408, 409 (10th Cir. 1990)).

[21] Appellant's Reply Br. at 24.

[22] *Trusted Net Media Holdings, LLC v. Morrison Agency, Inc. (In re Trusted Net Media Holdings, LLC)*, 550 F.3d 1035 (11th Cir. 2008) (*reh'g granted* en banc) (bankruptcy court decision regarding § 303(b) requirements appealed by involuntary debtor four years after appointment of Chapter 7 trustee); *In re Focus Media, Inc.*, 378 F.3d 916 (9th Cir. 2004) (Chapter 7 order for relief appealed by involuntary debtor); *In re McCloy*, 296 F.3d 370 (5th Cir. 2002) (Chapter 7 involuntary debtor allowed to appeal bankruptcy court decision approving settlement made by trustee); *Concrete Pumping Serv., Inc. v. King Constr. Co., Inc. (In re Concrete Pumping Serv., Inc.)*, 943 F.2d 627 (6th Cir. 1991) (Chapter 7 order for relief appealed by involuntary debtor on § 303(h) grounds); *Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540 (10th Cir. 1988) (dismissal of involuntary

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LLC ("*Trusted Net*"),[23] is illustrative. In *Trusted Net*, an officer and controlling member of the corporate involuntary Chapter 7 debtor filed a motion to dismiss the bankruptcy case on § 303(b) creditor qualification grounds, claiming the requirements were jurisdictional. Incredibly, the debtor filed the motion to dismiss more than four years after entry of the order for relief and appointment of a trustee.[24] The bankruptcy court denied the debtor's motion to dismiss, the debtor appealed, and the district court affirmed the bankruptcy court's decision. The debtor then appealed to the Eleventh Circuit Court of Appeals. The Eleventh Circuit not only heard the debtor's appeal, but granted rehearing *en banc*, and determined § 303(b) requirements are not subject matter jurisdictional in nature and had been waived by the debtor.[25] Standing of the debtor to pursue these appeals was never discussed, but assumed.

In the case before this Court, CWM immediately disputed Aquila's and Owell's qualified status under § 303(b) in its answer to the involuntary petition. Further, CWM timely appealed the determination that Aquila and Owell were qualified petitioning creditors following the bankruptcy court's denial of its Motion to Alter or Amend the Summary Judgment Order and Order for Relief.

The Bankruptcy Code gives a putative debtor the right to challenge the

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[22] (...continued)
petition appealed by creditors and reversal by district court then appealed by debtor to court of appeals); *B.D. Int'l Disc. Corp. v. Chase Manhattan Bank, N.A. (In re B.D. Int'l Disc. Corp.)*, 701 F.2d 1071 (2d Cir. 1983) (Chapter 7 order for relief appealed by involuntary debtor on § 303(b) & (h) grounds); *In re Mktg. & Creative Solutions, Inc.*, 338 B.R. 300 (6th Cir. BAP 2006) (Chapter 7 order for relief appealed by involuntary debtor on § 303(b) grounds). *But cf. In re Albicocco*, No. 06 CV 3409, 2006 WL 2376441 (E.D.N.Y. 2006) (involuntary debtor lacked standing to prosecute appeal because he failed to demonstrate solvency).

[23] 550 F.3d 1035 (11th Cir. 2008) (*reh'g granted* en banc).

[24] *Id.* at 1038.

[25] *Id.* at 1046.

involuntary petition by filing an answer pursuant to § 303(d). CWM asserts "[i]f involuntary debtors like C.W. Mining are denied standing to appeal, their right to answer is rendered a nullity."[26] We agree. A putative debtor must have standing to bring a bankruptcy court's involuntary order for relief before an appellate court to be reviewed for error. To rule otherwise would create disparity between the rights of creditors versus the rights of debtors in involuntary cases, and would divest a company placed in an involuntary Chapter 7 bankruptcy case of its right to appeal. Creditors have been permitted to appeal bankruptcy court dismissals of involuntary petitions on motions of involuntary debtors,[27] and the reverse is an easy corollary. We therefore hold CWM has standing to appeal the Summary Judgment Order and Order for Relief in this case, and accordingly, deny Rushton's Motion to Dismiss.[28]

B. Summary Judgment Order and Order for Relief

On appeal, CWM argues neither Aquila nor Owell were qualified creditors for purposes of § 303(b) as of the date of the petition because each of their claims was subject to a bona fide dispute.[29] In addition to countering that they were in

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[26] Appellant's Reply Br. at 23.

[27] *See, e.g., Bartmann*, 853 F.2d 1540; *In re Troutman Enters., Inc.*, 253 B.R. 8 (6th Cir. BAP 2000).

[28] We strongly caution, however, that our conclusion should not be interpreted as a blanket statement that involuntary Chapter 7 debtors have standing to appeal other types of bankruptcy court orders.

[29] Section 303(b)(1) provides as follows:

> (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–
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> > (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 as to liability or amount, or an indenture trustee representing such a holder, if such noncontingent, undisputed claims aggregate at least $13,475 more than the value of any lien on property of the debtor securing such claims held by the

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fact qualified creditors, Aquila and Owell argue this appeal should be dismissed on the grounds of equitable mootness.[30]

1. Equitable Mootness

Aquila and Owell argue CWM's appeal is equitably moot because "significant events have transpired since the petition date that make it inequitable for this Court to grant relief on appeal."[31] The Tenth Circuit formally adopted the doctrine of equitable mootness in the very recent case of *In re Paige*.[32] *Paige*, like almost all cases in which the doctrine of equitable mootness has been invoked, involved a confirmed Chapter 11 reorganization plan that had been substantially consummated. The bankruptcy court decision on appeal in this involuntary case does not fall in that category.

In reversing the district court's dismissal of the appeal on the grounds of equitable mootness, the *Paige* court stressed that application of the doctrine is both limited in scope[33] and discretionary in nature.[34] Further, "equitable mootness bears only upon the proper remedy, and does not raise a threshold question of our power to rule," and therefore, we are "not inhibited from considering the merits

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[29] (...continued)
holders of such claims[.]

11 U.S.C. § 303(b)(1) (footnote omitted).

[30] Aquila and Owell also contend only Rushton has standing to pursue this appeal on behalf of the debtor, but we have already concluded CWM has standing to maintain this appeal in the context of denying Rushton's Motion to Dismiss.

[31] Appellees' Br. at 15.

[32] 584 F.3d 1327 (10th Cir. 2009).

[33] *Id.* at 1331.

[34] *Id.* at 1334-35.

before considering equitable mootness."[35] With these principles in mind, we decline to exercise our discretion to decide the appeal on a basis other than its merits, and will address the alleged errors CWM raises on appeal.

2. Aquila's Status as Qualified Petitioning Creditor

A creditor is qualified to file an involuntary petition only if it holds a claim against the putative debtor that is not contingent as to liability, or the subject of a bona fide dispute as to liability or amount.[36] CWM asserts Aquila was not a qualified petitioning creditor because the pending appeal of the Judgment before the Tenth Circuit at the time the involuntary petition was filed created a bona fide dispute. Relying primarily on *In re Drexler*,[37] the bankruptcy court determined the appeal of a judgment alone does not create a bona fide dispute as to liability or amount of a claim.[38] We agree with the bankruptcy court, and because the District Court entered Judgment after a three-day trial on the merits of the case and CWM did not obtain a stay of the enforcement of the Judgment, rule that Aquila's claim was not subject to a bona fide dispute for purposes of § 303(b).

The term "bona fide dispute" is not defined by the Bankruptcy Code, but has been much debated by the courts.[39] With respect to claims reduced to judgment, the majority view is that unstayed final judgments are not subject to bona fide dispute for purposes of determining qualified petitioning creditor status,

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[35] *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 144 (2d Cir. 2005) (cited in *In re Paige*, 584 F.3d at 1348). Additionally, the Tenth Circuit set forth six factors for an appellate court to consider in determining whether to decline to hear an appeal of a bankruptcy court's decision, one of which is a "quick look at the merits of appellant's challenge." 584 F.3d at 1339.

[36] 11 U.S.C. § 303(b)(1).

[37] 56 B.R. 960 (Bankr. S.D.N.Y. 1986).

[38] *Summary Judgment Order* at *4, *in* Appellant's App. at 96.

[39] *Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540, 1543 (10th Cir. 1988).

even if an appeal of the judgment is pending.[40] However, in *In re Byrd*,[41] the Fourth Circuit Court of Appeals rejected the idea that an unstayed judgment on appeal necessarily means absence of a bona fide dispute.[42] Instead, the Fourth Circuit held the unstayed judgments involved in *Byrd* were not subject to bona fide dispute only because the debtor failed to raise any substantial factual or legal questions about the judgments.[43] CWM urges this Court to adopt the Fourth Circuit's approach in *Byrd* and reverse the bankruptcy court's decision, asserting it has sufficiently "demonstrated that substantial factual and legal questions existed with respect to Aquila's judgment."[44]

This Court declines to adopt the *Byrd* approach for the reasons so articulately and convincingly set forth by the Delaware Bankruptcy Court in *In re AMC Investors, LLC*.[45]

> Under *Byrd*, a creditor makes a prima facie showing of the absence of a bona fide dispute by presenting an unstayed judgment. The burden then shifts to the alleged debtor to demonstrate the existence of a bona fide dispute. *Byrd* requires the court in making that determination to conduct a derivative inquiry into the likelihood of success on appeal.

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[40] *In re AMC Investors, LLC*, 406 B.R. 478, 484 (Bankr. D. Del. 2009). *See also In re Euro-Am. Lodging Corp.*, 357 B.R. 700 (Bankr. S.D.N.Y. 2007); *In re Amanat*, 321 B.R. 30 (Bankr. S.D.N.Y. 2005); *In re Norris*, 114 F.3d 1182 (5th Cir. 1997); *In re Raymark Indus., Inc.*, 99 B.R. 298 (Bankr. E.D. Pa. 1989); *In re Drexler*, 56 B.R. 960 (Bankr. S.D.N.Y. 1986).

[41] *Platinum Fin. Servs. Corp. v. Byrd (In re Byrd)*, 357 F.3d 433 (4th Cir. 2004).

[42] *In re Graber*, 319 B.R. 374, 378-379 (Bankr. E.D. Pa. 2004).

[43] *In re Byrd*, 357 F.3d at 440 (debtor's subjective beliefs do not give rise to a bona fide dispute).

[44] Appellant's Br. at 15.

[45] 406 B.R. 478.

> This approach is unnecessarily intrusive into the trial court's ruling and undermines the objective analysis of bona fide disputes. In effect, *Byrd* turns the court into an odds maker on appellate decision-making. The inherent difficulty and lack of necessity in engaging in such analysis is borne out by *Byrd* itself, as the court only made a cursory examination into the pending appeals, finding the alleged debtor presented no evidence to support his likelihood of success on appeal and, thus, "failed to raise any substantial factual or legal questions about the continued viability of those judgments." The same analysis would have been reached simply by respecting the trial court's determination of this matter on the merits and the absence of a stay pending appeal.
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> Moreover, the *Byrd* analysis is based upon a faulty premise. The definition of "claim" under the Bankruptcy Code includes a "right to payment, whether or not such right is reduced to judgment." The *Byrd* court reads the phrase "whether or not such right is reduced to judgment" to mean that the definition of claim "permits some creditors who have not reduced their claims to judgment to file involuntary petitions, just as it prevents other creditors who have reduced their claims to judgment from filing." While this Court agrees that the relevant language clarifies that a right of payment may exist even if it has not been reduced to judgment; it disagrees that the entry of a judgment does not create a right to payment.
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> *Byrd* renders the entry of a judgment as completely irrelevant in determining the existence of a claim. This cannot be the correct reading of the statute. As the court in *Drexler* correctly noted, "[o]nce entered, an unstayed final judgment may be enforced in accordance with its terms and with applicable law or rules, even though an appeal is pending." The holder of an unstayed final judgment may utilize an array of state court enforcement procedures, including the filing of a judgment lien, as [creditor] did in this case. To hold that an unstayed final judgment is enforceable in state courts and voluntary proceedings in federal bankruptcy court, but not for involuntary cases would "effect a radical alteration of . . . the long-standing enforceability of unstayed final judgments."[46]

Put another way, a federal district court judgment is entitled to full faith and credit in a bankruptcy court, absent the most extraordinary of circumstances.[47]

In this case, the District Court entered the Judgment after a three-day trial on the merits. We decline to require the bankruptcy court to conduct a derivative

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[46] *Id.* at 485-86 (citations, emphasis, internal quotation marks, and footnotes omitted).

[47] *Id.* at 487. *See also In re Graber*, 319 B.R. 374 (bankruptcy court should evaluate state court actions that resulted in default judgments to assess likelihood that judgments would be reopened).

inquiry into the likelihood the Judgment will be affirmed on appeal in order to rule on the bona fide dispute issue.[48] As a result, we conclude the bankruptcy court correctly determined Aquila's claim was not subject to a bona fide dispute, and Aquila was therefore a qualified petitioning creditor.

3. Owell's Status as Qualified Petitioning Creditor

According to CWM, Owell was not a qualified petitioning creditor because CWM paid the debt due Owell in full prior to the filing of the involuntary petition on January 8, 2008. In other words, CWM contends Owell did not have a claim as of the relevant date. Alternatively, CWM argues there were genuine issues of material fact as to the validity of Owell's claim which precluded the bankruptcy court from granting summary judgment on Owell's qualified status. We disagree.

The Tenth Circuit explained the standard for determining the existence of a bona fide dispute as follows: "the bankruptcy court must determine whether there is an objective basis for either a factual or a legal dispute as to the validity of debt."[49] In this case, the following facts are undisputed: 1) the parties agreed that as of January 4, 2008, CWM owed Owell a principal sum of at least $13,440; 2) as payment in full of the debt, Owell agreed to accept from CWM a $10,000 credit card payment, together with a check in the amount of $3,440;[50] 3) CWM gave Owell a credit card number and authorization to charge the $10,000 payment on January 7, 2008; and 4) CWM mailed the $3,440 check to Owell on January 5, 2008, three days prior to the petition date. The date Owell received CWM's

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[48] Such an inquiry would be moot on remand, as the parties admitted at oral argument that the Judgment has now been affirmed by the Tenth Circuit.

[49] *Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540, 1543-44 (10th Cir. 1988) (quoting *In re Busick*, 831 F.2d 745, 750 (7th Cir. 1987)).

[50] As part of the agreement, Owell waived certain finance charges.

check is disputed. Owell asserts it received the check on January 11, 2008.[51] CWM claims Owell may have received the check prior to January 11, 2008.[52] CWM does not contend Owell received or negotiated the check before the involuntary petition was filed on January 8, 2008.

The bankruptcy court rejected CWM's legal argument that Owell's debt was satisfied when CWM placed the check in the mail on January 5, 2008.[53] Citing the United States Supreme Court and Tenth Circuit authorities of *Barnhill v. Johnson*[54] and *Dean Witter v. Variable Annuity*,[55] the bankruptcy court ruled that, absent an agreement to the contrary, a debt is not discharged when a debtor mails its check to a creditor, but rather when the creditor negotiates the check.[56] On appeal, CWM does not contest this legal determination. Instead, CWM alleges there was an agreement to the contrary, taking issue with the bankruptcy court's finding that there was no evidence Owell agreed that CWM's promise of mailing the check would satisfy the debt.[57] CWM claims the debt was satisfied

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[51] *Summary Judgment Order* at *6, *in* Appellant's App. at 99-100.

[52] Appellant's Br. at 22.

[53] *Summary Judgment Order* at *7, *in* Appellant's App. at 100-01.

[54] 503 U.S. 393, 400 (1992).

[55] *Dean Witter Reynolds Inc. v. Variable Annuity Life Ins. Co.*, 373 F.3d 1100, 1008 (10th Cir. 2004).

[56] *Summary Judgment Order* at *7, *in* Appellant's App. at 100-01.

[57] *Summary Judgment Order* at *6, *in* Appellant's App. at 99-100. Specifically the *Summary Judgment Order* states:

> A careful review of the statements included in the declarations, even viewed from a perspective most favorable to the nonmoving party, does not reveal a genuine dispute. Nowhere in any of the declarations does it say that Owell's debt would be extinguished when [CWM] placed the $3,440 check in the mail. Contrary to [CWM's] arguments, there are no facts before this Court showing that the new agreement included terms expressly providing that the debt would be satisfied upon the mailing of the $3,440 check.

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prior to the petition date because it "took every action possible to pay off its $13,440.00 debt to Owell" and "had completely complied with its obligations under its agreement with Owell to pay it $13,440.00 in full satisfaction of its debt."[58] CWM's argument fails because at the time of the bankruptcy court's ruling, CWM had proffered no evidence to support any agreement by Owell that the debt would be satisfied upon mailing of the check.

CWM's argument regarding the alleged agreement is based on its own version of the facts–a version relying heavily on testimony contained in the depositions of four individuals. As pointed out by Aquila and Owell, these depositions were not before the bankruptcy court when it granted partial summary judgment finding Owell was a qualified petitioning creditor. After the bankruptcy court entered its Summary Judgment Order and Order for Relief, CWM filed its Motion to Alter or Amend, claiming the depositions were newly discovered evidence. In its Order Denying Motion to Alter or Amend, the bankruptcy court specifically found that the depositions were available for filing at the summary judgment hearing, and therefore did not constitute newly discovered evidence.[59] Nothing has been presented to rebut this finding. Because the depositions were not properly before the bankruptcy court, they cannot now be considered by this Court on appeal.[60]

The parties do not dispute that shortly before the petition was filed, Owell

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[57] (...continued)
Id. at *6, *in* Appellant's App. at 100.

[58] Appellant's Br. at 19, 18.

[59] Appellees' Supp. App. at 7-8.

[60] *Garcia v. Am. Marine Corp.*, 432 F.2d 6, 8 (5th Cir. 1970) ("It is fundamental that facts not presented at trial may not be asserted on appeal. Any action on appeal can be properly based only on matters considered at trial; this court may not therefore, reverse a trial court on the basis of facts not in the record.").

agreed to accept from CWM a $10,000 credit card payment, together with a check in the amount of $3,440, as payment in full of the debt, thereby waiving finance charges. As a result, CWM also argues there is a factual or legal dispute as to the validity of the debt in that "Owell's claim is barred" by several contract law doctrines: 1) substituted contracts; 2) novation; and 3) accord and satisfaction.[61] However, CWM's reliance on these contract principles is misplaced.

First, the doctrine of substituted contracts holds that acceptance of a substituted contract itself satisfies the obligor's existing duty.[62] Because CWM has not proven the parties agreed that mailing of the check would constitute payment, even under the terms of an alleged substituted contract, CWM still owed Owell $3,440 on the petition date. Second, novation is a substituted contract including as a party one who was neither the obligor nor the obligee of the original duty.[63] Since no new party is involved here, novation is not applicable. Third, an accord and satisfaction requires execution or performance of the accord, and thus the original duty of the obligor is not discharged until such time.[64] The requirement of performance circles back to the bankruptcy court's conclusion that payment was not made prior to filing of the involuntary petition. Absent proof of an agreement to the contrary, the check deposited in the mail by CWM, but not yet received or negotiated by Owell, did not constitute performance. Consequently, there can be no accord and satisfaction.

Moreover, absent such agreement, there was no genuine issue as to any material fact supporting Owell's claim against CWM in the amount of $3,440 as of the filing date of the involuntary petition. This Court therefore concludes the

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61 Appellant's Br. at 22-25.

62 *See Restatement (Second) of Contracts* § 279 (1981).

63 *See id.* § 280.

64 *See id.* § 281.

bankruptcy court correctly granted summary judgment finding Owell was a qualified petitioning creditor.

V. CONCLUSION

CWM has not demonstrated that the bankruptcy court erred in ruling that, as of the date the involuntary petition was filed, Aquila and Owell were qualified creditors for purposes of § 303(b). Accordingly, the bankruptcy court's Summary Judgment Order and Order for Relief are affirmed.