No. _____

In The
Supreme Court of the United States

IN THE MATTER OF 8SPEED8, INC.,
Debtor.

VIBE MICRO, INC.,
Petitioner,

v.

SIG CAPITAL, LLC,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A circuit split currently exists over the scope of 11 U.S.C. § 303(i), which provides remedies for the improper filing of an involuntary bankruptcy petition. The Ninth Circuit has held that 11 U.S.C. § 303(i), an "ambiguous" statute, implicitly forbids non-debtors from obtaining any relief—under state or federal law—from an improper bankruptcy filing. *Miles v. Okun (In re Miles)*, 430 F.3d 1083, 1093-94 (9th Cir. 2005). By contrast, the Third Circuit has rejected that position, finding that 11 U.S.C. § 303(i) does not forbid non-debtors from obtaining state-law damages over a wrongful petition for involuntary bankruptcy. *Rosenberg v. DVI Receivables XVII, LLC*, 835 F.3d 414, 422 (3d Cir. 2016) (specifically rejecting *In re Miles*).

This Petition presents two questions for review:

1. Does 11 U.S.C. § 303(i) forbid any recovery except to the debtor?

2. If 11 U.S.C. § 303(i) does forbid recovery except in favor of the debtor, can a non-debtor defend an involuntary petition on the debtor's behalf and request a recovery be paid to the debtor?

PARTIES TO PROCEEDING

The parties to the judgment under review are listed on the Petition's cover.

CORPORATE DISCLOSURE STATEMENT

Vibe Micro, Inc., is not a publicly traded company. It has no parent corporation, and no publicly traded company owns 10% or more of its stock.

8Speed8, Inc., is not a publicly traded company. It has no parent corporation, and no publicly traded company owns 10% or more of its stock.

PRIOR PROCEEDINGS

Vibe Micro, Inc. v. SIG Capital, LLC (In re 8Speed8, Inc.), No. 17-16277. U.S. Court of Appeals for 9th Circuit. Judgment was entered April 29, 2019.

Vibe Micro, Inc. v. SIG Capital, LLC, No. 2:14-cv-01618-RFB. U.S. District Court for the District of Nevada. Judgment was entered May 22, 2017.

In re 8Speed8, Inc., No. l3-20371-led. U.S. Bankruptcy Court for the District of Nevada. Judgment was entered September 18, 2014.

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OPINIONS AND ORDERS

This Court has not previously considered this case or any directly related case.

The Ninth Circuit's opinion in this case, issued on April 29, 2019, was published as *Vibe Micro, Inc. v. SIG Capital, LLC (In re 8Speed8, Inc.)*, 921 F.3d 1193, 1194 (9th Cir. 2019) and is reproduced in the Appendix. The written opinion also constituted the judgment.

The opinion of the U.S. District Court for the District of Nevada is unpublished but is available electronically as *Vibe Micro, Inc. v. SIG Capital, LLC*, No. 2:14-cv-01618-RFB, 2017 U.S. Dist. LEXIS 77201, 2017 WL 2225569 (D. Nev. May 22, 2017) and is reproduced in the Appendix. The written opinion also constituted the judgment.

The opinion in *In re 8Speed8, Inc.*, case number 12-20371-abl of the U.S. Bankruptcy Court for the District of Nevada was delivered orally on September 15, 2014, and is reproduced in the Appendix. Written judgment was entered on September 18, 2014.

JURISDICTION

The bankruptcy court had jurisdiction to consider the bankruptcy petition, and the U.S. District Court for the District of Nevada had jurisdiction to review the bankruptcy court's judgment. 28 U.S.C. §§ 151, 158, 1334.

The U.S. Court of Appeals for the Ninth Circuit had jurisdiction to decide the appeal below. 28 U.S.C. § 158.

This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Ninth Circuit. 28 U.S.C. § 1254. The Ninth Circuit's judgment was entered on April 29, 2019. [App. A1]. No petition for rehearing was filed.

STATUTORY PROVISIONS

11 U.S.C. § 303:

> (a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(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—

(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 $10,000 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 $10,000 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 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.

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

(d) The debtor, or a general partner in a partnership debtor that did not join in the petition, may file an answer to a petition under this section.

(e) After notice and a hearing, and for cause, the court may require the petitioners under this section to file a bond to indemnify the debtor for such amounts as the court may later allow under subsection (i) of this section.

(f) Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced.

(g) At any time after the commencement of an involuntary case under chapter 7 of this title but before an order for relief in the case, the court, on request of a party in interest, after notice to the debtor and a hearing, and if necessary to preserve the property of the estate or to prevent loss to the estate, may order the United States trustee to appoint an interim trustee under section 701 of this title to take possession of the property of the estate and to operate any business of the debtor. Before an order for relief, the debtor may regain possession of property in the possession of a trustee ordered appointed under this subsection if the debtor files such bond as the court requires, conditioned on the debtor's accounting for and delivering to the trustee, if there is an order for relief in the case, such property, or the value, as of the date the debtor regains possession, of such property.

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

(1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount; or

(2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

(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 to 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.

(j) Only after notice to all creditors and a hearing may the court dismiss a petition filed under this section—

(1) on the motion of a petitioner;

(2) on consent of all petitioners and the debtor; or

(3) for want of prosecution.

(k) (1) If—

(A) the petition under this section is false or contains any materially false, fictitious, or fraudulent statement;

(B) the debtor is an individual; and

(C) the court dismisses such petition,

the court, upon the motion of the debtor, shall seal all the records of the court relating to such petition, and all references to such petition.

(2) If the debtor is an individual and the court dismisses a petition under this section, the court may enter an order prohibiting all consumer reporting agencies (as defined in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f))) from making any consumer report (as defined in section 603(d) of that Act) that contains any information relating to such petition or to the case commenced by the filing of such petition.

(3) Upon the expiration of the statute of limitations described in section 3282 of title 18, for a violation of section 152 or 157 of such title, the court, upon the motion of the debtor and for good cause, may expunge any records relating to a petition filed under this section.

STATEMENT OF THE CASE

I. Introduction

When none of 8Speed8, Inc.'s officers or directors sought to defend 8Speed8 against SIG Capital LLC's involuntary bankruptcy petition, Vibe Micro, Inc., a 50% shareholder, stepped up and obtained a dismissal of the bankruptcy petition. The Ninth Circuit below held that 11 U.S.C. § 303(i) precluded Vibe Micro from obtaining the statutory remedies of attorneys' fees and damages payable to 8Speed8 or otherwise.

If the judgment below is affirmed, SIG will have been allowed to file an involuntary petition—in bad faith, as Vibe Micro will establish on remand—with impunity, causing 8Speed8 (and, by extension, Vibe Micro) extensive damages that will go uncompensated. *See, e.g.*, *In re Reid*, 773 F.2d 945, 946 (7th Cir.1985) ("[T]he filing of an involuntary petition is an extreme remedy with serious consequences to the alleged debtor, such as loss of credit standing, inability to transfer assets and carry on business affairs, and public embarrassment." (citations omitted)).

This Court should hold that 11 U.S.C. § 303(i) does not forbid relief and remand with instructions to allow the bankruptcy court, in the first instance, to determine what damages and fees are appropriate.

II. Procedural History

In 2013, SIG filed an Involuntary Petition for Relief under Chapter 7 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq*. ("the Code"), against the alleged Debtor, 8Speed8. SIG alleged: (1) it was "eligible to file th[e] petition pursuant to 11 U.S.C. § 303 (b)"; (2) "debtor is a person against whom an order for relief may be entered under title 11 of the United States Code"; and, (3) "debtor is generally not paying such debtor's debts as they become due, unless such debts are the subject of a bona fide dispute as to liability or amount." SIG set out only a single debt in its petition, and did not indicate whether and/or what portion of the single debt was disputed.

Because no one else could or would appear for 8Speed8, Vibe Micro, Inc.—a fifty-percent vested shareholder of the Debtor, 8Speed8—filed a motion, on the Debtor's behalf, in January 2014 (1) to dismiss the involuntary case, or in the alternative, for summary judgment, and/or (2) for abstention pursuant to 11 U.S.C. § 305(a)(1), and (3) for an award of damages to Debtor..[1]

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[1] In July 2014, Vibe Micro moved to lift the automatic stay, to allow arbitration (per the shareholder agreement) to decide "which person(s) are in control of 8Speed8 and can enter into settlements or continue this strategy in litigation." That motion was denied.

Before disposition of Vibe Micro's Motion, SIG filed its own motion to dismiss the involuntary case (which it had filed). Vibe Micro opposed on the basis that the motion was improper because Vibe Micro's motion to dismiss on behalf of 8Speed8 was pending, and because Vibe Micro needed stipulated discovery to support its motion and to confirm that SIG filed the involuntary petition against 8Speed8 in bad faith.

The bankruptcy court conducted a hearing on the pending motions to dismiss. It issued an oral opinion, granting Vibe Micro's motion in part and dismissing the involuntary petition with prejudice. As to fees and damages, the court stated that it was "bound by" *In re Miles*, 430 F.3d 1083 (9th Cir. 2005). [App. A33]. "Based upon" that decision, the court "conclude[d] that [Vibe Micro] lack[ed] standing as a matter of law," and therefore denied Vibe Micro's "request for fees, costs, and damages under Section 303(i)." [*Id.*]. The bankruptcy court therefore did not reach the second question: whether, assuming standing, statutory remedies were appropriate on the record.

Vibe Micro timely appealed to the district court, which affirmed, likewise finding that *In re Miles* meant that Vibe Micro lacked standing to obtain relief from an involuntary bankruptcy. [App. A19].

A divided panel of the Ninth Circuit affirmed, finding that 11 U.S.C. § 303(i) permits "only the

debtor to seek damages" from an involuntary bankruptcy petition. [App. A7].

III. Factual Background

A. 8Speed8's Formation and Funding

The Debtor, 8Speed8 was incorporated in March 2012. As of the filing of the involuntary petition, 8Speed8's assets consisted chiefly of intellectual property and a partially developed payment services kiosk system intended for domestic and international deployment. 8Speed8 had not engaged in sales or generated any revenue.

Under the Shareholder's Agreement executed on November 1, 2012, 8Speed8 is owned and was intended to be operated by Luxor Entertainment, Inc. ("Luxor") and Vibe Micro, both owners of 20 million vested shares of voting stock, and SIG, holder of 20 million contingent shares. The three directors (who were also Officers) of 8Speed8 are Mark Okhman (for Luxor), Igor Shabanets (for SIG), and Edward Mandel (for Vibe Micro).[3] By the terms of the Agreement, SIG's shares did not vest until it provided financing for the first 1,000 payment terminals.

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[3] Mandel was a Director and Chairman of the Board of 8Speed8; Mark Okhman was a Director and President of 8Speed8; and Shabanets was a Director and Chief Operations Officer, Treasurer, and Secretary of 8Speed8.

Concurrently with the Shareholder's Agreement, the parties executed a Senior Secured Promissory Note for SIG's contribution of $250,000.00. The parties executed an Addendum to the Senior Secured Promissory Note for an additional $300,000.00 funding in April 2013, bringing the amount of the Original Note to $550,000.00, plus accrued interest. The Note was "due and payable on the earlier to occur of: (i) December 31, 2014 ("Maturity Date"); and (ii) when declared due and payable upon the occurrence of an Event of Default (as defined [therein])." At the time of the involuntary bankruptcy petition, December 13, 2013, there was no "Event of Default," and the due date for the Note remained December 31, 2014. As a Shareholder, Director and Officer (through Igor Shabanets) of 8Speed8, SIG maintained (and has) various fiduciary duties to the Debtor, including the duty of care and the duty of loyalty.

B. The Parties' Deteriorating Relationship

In September 2013, Karla Guarino, CEO of 8Speed8 purported to vest SIG's contingent shares by altering the terms of the Shareholder's Agreement—without the signature of any voting shareholder. On or about November 13, 2014, Mandel was contacted by an attorney representing SIG and Luxor, who wanted Mandel to turn over Vibe Micro's shares in 8Speed8 and walk away from the business enterprise. A few days later, Vibe Micro was sent a

defective "Notice of Special Meeting of the Stockholders of 8SPEED8, Inc." In response, Vibe Micro and Mandel notified the other parties that they were challenging the Notice and any actions taken thereto. Further, given the apparent material disputes (or "deadlock") between the parties, they indicated that they were, by copy to the parties' agreed arbitrator, submitting various disputes to binding arbitration under the terms of the Shareholders Agreement. On December 13, 2013, the arbitrator provided the parties with a Notice of Arbitration.

C. SIG's Involuntary Bankruptcy Petition to Avoid Arbitration and to Force 8Speed8's Liquidation

On the same day as the Notice of Arbitration, SIG filed the involuntary petition below. On one hand, SIG's filing appears to have been a litigation tactic to avoid the agreed-upon, binding arbitration. Moreover, the single significant and undisputed debt was its own promissory note to 8Speed8, which did not become due for over one year. According to discovery, SIG filed the involuntary petition for the purpose of getting its money back. [8]

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[8] Filing an involuntary petition and forcing a debtor into involuntary bankruptcy in order to collect a debt is an improper purpose of an involuntary petition. *See Atlas Machine & Iron Works, Inc. v Bethlehem Steel Corp.*, 986 F.2d 709, 716 (4th Cir. 1993) ("[B]ankruptcy court made an implicit finding of subjective bad faith, in that it concluded [petitioner] filed the peti-

SIG's further purpose in filing the Petition was to liquidate 8Speed8 to get 8Speed8's assets formally shifted over to its new corporation that did not include Vibe Micro or Mandel. According to SIG's attorney: "We filed this bankruptcy case to get a trustee in here to sell these assets, and we wanted to buy them." According to SIG's representatives: (1) We (SIG, Guarino, and Luxor, and others) "[h]ad to file bankruptcy to get [Mandel] out of the picture and dissolve 8Speed8," and (2) "Rain Kiosk, Inc. will be the new name officially."

Indeed, in the months before and after filing the involuntary petition, SIG, Luxor, and Guarino, took affirmative steps (a) to subvert 8Speed8, (b) to exclude Mandel and Vibe Micro as Shareholder and Director, respectively, and (c), to ready Rain Kiosk to take over 8Speed8's assets as soon as they could get Vibe Micro out of the picture.

On November 22, 2013, Shabanets created Rain Kiosk. On the same day, SIG contributed $30,000.00 to 8Speed8 only for 8Speed8 to pay $27,198.50 of that deposit to a company, Designit for Verbal Branding Development ("VBD") which would later be trademarked for the new corporation, Rain Kiosk. Indeed. Shabanets of SIG would ultimately pay over

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tion for an improper purpose. In light of [petitioner's] concessions that it filed the petition to collect the debt, the record evidence supports the court's conclusion").

$100,000.00 to Designit to create a VBD that included the rebranding of 8Speed8 to "Rain. My Money, My Gain."

On November 20, 2013, Mark Okhman of Luxor, president and director of Rain paid for the web domains www.rainkiosk.com and www.mymoneymygain.com using Debtor assets. Four days later, Rain Kiosk filed its trademark application for "Rain Kiosk My Money, My Gain" through the law firm of Eitan, Mehulal & Sadot.

As early as December 3, 2013, Ms. Guarino told Designit that instead of 8Speed8, the new company name should be Rain Kiosk, Inc. On December 18, 2013, notes produced via subpoena from Nanonation show that Debtor "[h]ad to file bankruptcy to get Ed [Mandel] out of the picture and dissolve 8Speed8. Rain Kiosk Inc will be new name officially." On December 31, 2013, Ms. Guarino emailed team members of Designit (a company intimately involved with bringing the kiosk to market) and claimed:

> As you know we have had some legal issues regarding a former shareholder that has made it extremely difficult to continue going forward as we were, on top of putting trust into consultants that took us off track and wasted a lot of time, in the end not delivering what they said they would. We were forced to file an involuntary bankruptcy on our existing company, and this will not be resolved

> through the courts until January 10th.We have since incorporated a new company, Rain Kiosk Inc., which cannot be implemented until the old business is closed.

In the same correspondence, Guarino gave permission to Designit to use 8Speed8 funds to pay for the Rain Kiosk rollout:

> [E]ven if you had to use the remaining funds to pay the latest invoice, there is still money on our account that you can work with based on our original required deposit. And as a side note, we did not include our invoice with the bankruptcy paperwork and have every intention of paying this at the end of January. Just keep in mind we paid all of our vendors a lot of money and still do not have a product.
>
> If you can have someone spend a day or so coming up with a logo [for Rain Kiosk] this would be so helpful to us at this point. I know this is not normal business practice for you but I am asking you as a partner and a friend to please continue to work to help us.

Finally, in March 2014, three months into the bankruptcy litigation, SIG's attorney filed an amended list of Rain Kiosk's Officers, which consisted of representatives from Luxor Entertainment, as well as Gurarino of 8Speed8.

Three months later, having been unable to force Vibe Micro's and Mandel's removal from the Debtor Company, 8Speed8, which Vibe Micro and Mandel helped to form and to develop, and for which they own 50% of vested, voting Shares, SIG's attorney told the bankruptcy court that "the involuntary bankruptcy [had been] a waste of the parties and the court's time and the parties' money."

REASONS FOR GRANTING THE PETITION

I. A Circuit Split Exists Over Whether 11 U.S.C. § 303(i) Precludes Relief to Non-Debtors.

"In an involuntary bankruptcy case it is the creditors, not the debtors, who start the proceedings by filing an involuntary petition under either Chapter 7 or 11 of the Code. 11 U.S.C. § 303(b)." *Rosenberg v. DVI Receivables XVII, LLC*, 835 F.3d 414, 418 (3d Cir. 2016). Although creditors can, if certain criteria are met, file an involuntary petition against a debtor, any such petition is always serious business. It is "an extreme remedy with serious consequences to the alleged debtor, such as loss of credit standing, inability to transfer assets and carry on business affairs, and public embarrassment." *In re Reid*, 773 F.2d 945, 946 (7th Cir.1985); *see also Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540, 1543 (10th Cir.1988); Timothy Bow, *Involuntary Petitions: Bad–Faith Motives and High Risks*, AM. BANKR. INST. J., August 2012, at 52, 53 (noting that "an involuntary petition can grievously wound a putative debtor"). To help ensure that an involuntary bankruptcy petition is only "a measure of last resort," *Higgins v. Vortex Fishing Sys.*, 379 F.3d 701, 707 (9th Cir. 2004), Congress authorized fees, costs, and—in the context of bad-faith filings—actual and punitive damages if the petition is dismissed:

> (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 to 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).

According to the Ninth Circuit, the statute has two potential readings vis-à-vis whether it can authorize damages to anyone other than a debtor:

> One possible reading is that by mentioning only the debtor and the petitioning creditors in § 303(i)(1), Congress intended to limit standing to the debtor. Another possible reading, however, is that by omitting the words "and in favor of the debtor" included in § 303(i)(1) from § 303(i)(2), Congress intended persons oth-

> er than the debtor to have standing to recover damages for bad faith filings of involuntary petitions.

Miles v. Okun (In re Miles), 430 F.3d 1083, 1093 (9th Cir. 2005). Resorting to legislative history and public policy consideration, the Ninth Circuit blue-penciled "and in favor of the debtor" into § 303(i)(2), holding that non-debtors cannot recover damages under that section against a creditor who filed an involuntary bankruptcy petition in bad faith. *In re Miles*, 430 F.3d at 1093. Furthermore, it held that although "[t]he Bankruptcy Code and its legislative history are silent on whether Congress intended 11 U.S.C. § 303(i) to provide the exclusive basis for awarding damages predicated upon the filing of an involuntary bankruptcy petition," *id.* at 1089, it nonetheless concluded that § 303(i) precluded relief to non-debtors under state-law theories (e.g. malicious prosecution), too. Thus, in the Ninth Circuit, nonparties—whether shareholders or other creditors of the debtor—have absolutely no recourse against a creditor whose bad-faith filing proximately causes them injury without an express command to that effect from Congress. *See Contra, e.g.*, *Silkwood v. Kerr-Mcgee Corp.*, 464 U.S. 238, 251 (1984) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." (citation omitted)).

In the Third Circuit, however, nonparties do have a remedy against a creditor who files an involuntary

petition in bad-faith because, while accepting § 303(i)(2)'s inapplicability to non-parties, the Third Circuit has rejected *In re Miles*' complete-preemption analysis:

> We do not find *Miles* persuasive on the preemption issue.... We ... think the analysis is inconsistent with the presumption against preemption, which, as we have discussed, requires that congressional intent to preempt state law must be clear and manifest. *In re Fed.-Mogul Glob. Inc.*, 684 F.3d at 365. Near the beginning of its analysis, the *Miles* Court admitted that the 'Bankruptcy Code and its legislative history are silent on whether Congress intended 11 U.S.C. § 303(i) to provide the exclusive basis for awarding damages predicated upon the filing of an involuntary bankruptcy petition.' 430 F.3d at 1089. If we apply faithfully the presumption against preemption, silence on the part of Congress should be the end of the analysis. But the Court went on to 'infer from Congress's clear intent to provide damage awards only to the debtor... that Congress did not intend [non-debtors] to be able to circumvent this rule by pursuing those very claims in state court.' *Id.* at 1091. Absent evidence that Congress actually meant for § 303(i) to be

> an exclusive remedy, we do not make the same inference.
>
> In this context, we hold that Bankruptcy Code § 303(i) does not preempt state law claims by non-debtors for damages based on the filing of an involuntary bankruptcy petition.

Rosenberg, 835 F.3d at 421-22.[2]

A split between two circuits is itself sufficient to merit this Court's attention. U.S. Sup. Ct. R. 10(a). But "the unique, historical, and even constitutional need for uniformity in the administration of the bankruptcy laws," *MSR Expl. v. Meridian Oil*, 74 F.3d 910, 915 (9th Cir. 1996) (citations omitted), make circuit splits especially problematic in the context of bankruptcy law. *See also* U.S. Const. Art. I, § 8, cl. 4 (granting Congress power to establish "*uniform* Laws on the subject of Bankruptcies throughout the United States." (emphasis added)). This

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[2] Although not circuit-court authority, Vibe Micro would note that at least one bankruptcy court in the Seventh Circuit—in contrast to the position of both the Third and the Ninth Circuits—has allowed a nondebtor to obtain damages, fees, and costs for itself under § 303(i). In *In re Fox Island Square Partnership*, 106 B.R. 962 (Bkr. N.D. Ill. 1989), the court issued an award to "the non-petitioning partner who attempted to save the Partnership from bankruptcy" because the partner "represented the Partnership and thus may seek an award under Section 303." *Id.* at 967.

Court should, therefore, grant this Petition to resolve that split, and return the Bankruptcy Code to uniformity with respect to 11 U.S.C. § 303(i).

II. If § 303(i) Limits All Relief to Debtors, Nonparties Who Defend the Debtor Should Still Be Able to Obtain Recovery for the Debtor.

As Judge Bennett's dissent recognized below, even if § 303(i) does limit all recovery to a debtor, Vibe Micro—who defended the deadlocked 8Speed8 when no one else could or would—should still be entitled to relief payable to 8Speed8:

> *Miles* found that the language in § 303(i)(1)—that fees and costs could only be awarded "in favor of the debtor"—should be read into § 303(i)(2). 430 F.3d at 1093–94. Consequently, § 303(i)(2) did not allow relatives of the debtors to recover damages they personally suffered, even if proximately caused by the bad faith filing of an involuntary petition against their family members. *Id.* at 1094. *Miles* says nothing about a non-debtor who obtains a dismissal for the debtor and requests that damages be awarded to the debtor under § 303(i)(2). Moreover, reading the words "in favor of the debtor" into § 303(i)(2), as *Miles* does, would seem to support, rather than defeat, the claim made here by Vibe Micro.

> And, *Miles* certainly should not be read to bar a nondebtor who successfully obtains dismissal of a petition from obtaining "judgment . . . in favor of the debtor for . . .A) costs; or B) a reasonable attorney's fee" pursuant to § 303(i)(1). Such a rule is inconsistent with the purposes underlying § 303(i) and takes Miles beyond both its facts and its holding.

[App. A16-17].

While shareholders may not normally exercise the prerogatives of the corporation, a bankruptcy court must necessarily have discretion to allow a shareholder to represent the debtor when management cannot or otherwise will not. *E.g.*, *In re Westerleigh Dev. Corp.*, 141 B.R. 38, 40 (S.D.N.Y. Bankr. 1992) ("[T]he debtor in the instant case is unable to answer the petition because its only two shareholders are on either side of the case, with neither having authority to act for the corporation…. In these circumstances, either shareholder should be afforded standing to contest an involuntary Chapter 11 petition…."); *In re Oakland Popcorn Supply, Inc.*, 213 F. Supp. 665, 667 (N.D. Cal. 1963) (explaining that "[w]hile it is true that stockholders of a bankrupt corporation have no statutory right to contest an involuntary petition, it is within the discretion of the bankruptcy court to permit them to do so" and allowing shareholders to file a motion to dismiss where "the purported president of the bankrupt was not

properly representing the interests of the corporation" (citations omitted)).

Vibe Micro successfully defended 8Speed8 against SIG's petition that was prosecuted in bad-faith, given the evidence that SIG "intended to shut-down the alleged Debtor's business because of personal antipathy or malice for [one of] the alleged Debtor's principals, [and was] using the case to gain control of [or destroy] the alleged Debtor." *Mundo Custom Homes*, 179 B.R. 566, 571 (Bankr. N.D. Ill. 1995) (noting circumstances where punitive damages are appropriate). The bankruptcy court below never questioned SIG's bad-faith, but dismissed a claim for relief because Vibe Micro was not the debtor—even though Vibe Micro agreed that any award could be paid directly to 8Speed8 (for distribution according to the shareholder's agreement). To prevent manifest misuse of the Bankruptcy Code, this Court should grant the Petition and reverse the judgment below, to allow the bankruptcy court to issue an appropriate award, if not to Vibe Micro then at least to 8Speed8.

CONCLUSION

This Court should grant the petition and, after briefing on the merits, reverse the judgment of the Ninth Circuit below, and remand with instructions to allow the bankruptcy court to consider whether to award fees, costs, and damages.

Dated this 24th day of July, 2019.

Respectfully submitted,

VIBE MICRO, INC.

s/Torrence E.S. Lewis
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