

No. \_\_\_\_\_

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In The  
Supreme Court of the United States

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

VIBE MICRO, INC.,  
*Petitioner,*

v.

SIG CAPITAL, LLC,  
*Respondent.*

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

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**APPENDIX**

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**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

IN THE MATTER OF 8SPEED8, INC.	No. 17-16277
VIBE MICRO, INC., <i>Appellant,</i>	D.C. No. 2:14-cv-01618- RFB
v.	
SIG CAPITAL, LLC, <i>Appellee</i>	OPINION

Appeal from the United States District Court  
for the District of Nevada  
Richard F. Boulware II, District Judge, Presiding

Argued and Submitted November 15, 2018  
San Francisco, California

Filed April 29, 2019  
Before: Susan P. Graber, Stephanie Dawn Thacker,\*  
and Mark J. Bennett, Circuit Judges.

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\* The Honorable Stephanie Dawn Thacker,  
United States Circuit Judge for the U.S. Court of Ap-  
peals for the Fourth Circuit, sitting by designation.

IN THE MATTER OF 8SPEED8, INC.

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Opinion by Judge Thacker;  
Dissent by Judge Bennett

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**SUMMARY\*\***

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**Bankruptcy**

The panel affirmed the district court's decision affirming the bankruptcy court's denial of a request for statutory damages made by a 50% shareholder in an involuntary debtor following dismissal of the bankruptcy case.

The panel held that the shareholder lacked standing to seek damages under 11 U.S.C. § 303(i) because it was not the debtor.

Dissenting, Judge Bennett wrote that *Miles v. Okun (In re Miles)*, 430 F.3d 1083 (9th Cir. 2005), holding that a third party could not seek damages under § 303(i), was not dispositive, and the shareholder did not lack standing to seek damages and attorneys' fees that would be awarded to the debtor, regardless of the debtor's ability to defend itself in the

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\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

bankruptcy action, and notwithstanding that the shareholder actually obtained a dismissal on behalf of the debtor.

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**COUNSEL**

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David A. Stephens (argued), Stephens Gourley & Bywater, Las Vegas, Nevada, for Appellee.

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**OPINION**

THACKER, Circuit Judge:

This case asks whether a 50% shareholder of an involuntary debtor may seek damages under 11 U.S.C. § 303(i). We hold that it may not. Accordingly, we affirm the decision of the district court.

In March 2012, 8Speed8, Inc. was incorporated in the state of Nevada. Appellant Vibe Micro, Inc. is a 50% owner of 8Speed8's voting stock. Appellee SIG Capital, Inc. is a creditor of 8Speed8 and owns 20 million contingent shares.

On December 13, 2013, SIG filed the involuntary bankruptcy petition at the center of this dispute. 8Speed8 never appeared in the bankruptcy action.

Instead, on January 10, 2014, Vibe Micro filed a motion to dismiss the bankruptcy. Vibe Micro also asked for costs, fees, and actual and punitive damages under § 303(i). The bankruptcy court held a hearing August 28, 2014. At the hearing, SIG conceded that dismissal was appropriate. The bankruptcy court agreed but denied Vibe Micro's request for statutory attorney's fees and damages.

The court concluded that Vibe Micro did not have standing under § 301(i). The district court affirmed that decision, and this appeal followed.

We review the bankruptcy court's interpretation of bankruptcy statutes de novo. *See Sofris v. Maple-Whitworth, Inc. (In re Maple-Whitworth, Inc.)*, 556 F.3d 742, 745 (9<sup>th</sup> Cir. 2009). No deference is given to the district court's review of that decision. *See Higgins v. Vortex Fishing Sys., Inc.*, 379 F.3d 701, 705 (9<sup>th</sup> Cir. 2004).

Section 303(i) provides:

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) (emphasis added).

In *In re Miles*, we considered whether third parties may seek damages under § 303(i). *See Miles v. Okun (In re Miles)*, 430 F.3d 1083, 1093–94 (9th Cir. 2005). Specifically, we examined two interpretations of standing to seek § 303(i) damages: Either the presence of the phrase “in favor of the debtor” in § 303(i)(1) (regarding costs and attorney's fees) limits standing to collect all § 303(i) damages to the debtor, or the omission of that phrase from § 303(i)(2) (regarding other damages for bad faith filings) allows persons other than the debtor to collect damages for bad faith filings, but not costs and attorney's fees. *See id.* At 1093. In evaluating those competing interpretations, we considered legislative history, relevant caselaw, and public policy to determine the proper reading of the statute. *See id.* (citing *Barstow v. IRS (In re Bankr. Estate of Mark Air, Inc.)*, 308 F.3d 1038, 1043–46 (9th Cir. 2002)). With those factors in mind, we concluded that § 303(i) limits standing to recover

statutory damages resulting from an involuntary bankruptcy proceeding to the debtor. Those same factors compel a similar result here.

First, the relevant House and Senate Reports suggest that only the debtor has standing to seek § 303(i) damages. *See* H.R.Rep. No. 95-595, at 324 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6280; S.Rep. No. 95-989, at 34 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5820. According to those reports, “if a petitioning creditor filed the petition in bad faith, the court may award the debtor any damages proximately caused by the filing of the petition.” *Id.* “This specific reference to the ‘debtor’ is a strong indication that Congress intended only the debtor to have standing to seek damages.” *Franklin v. Four Media Co. (In re Mike Hammer Prods., Inc.)*, 294 B.R. 752, 754 (B.A.P. 9th Cir. 2003).

Second, appellate courts in this circuit have twice considered whether a non-debtor can seek damages under § 303(i), and twice those courts have decided it cannot. *See In re Miles*, 430 F.3d at 1093–94; *In re Hammer*, 294 B.R. at 753–54. Appellant’s attempts to distinguish *Miles* on its facts are unavailing. Appellant notes that, in *Miles*, the debtor actually appeared in the involuntary proceedings, but in contrast, 8Speed8 never appeared in this case. Although true, Appellant’s distinction does not require disparate treatment.

Appellants would have this court believe they are mere martyrs, standing up for the interests of 8Speed8 when no one else would. But, as valiant as Vibe Micro's intentions may have been, they were unnecessary. The Code has within its sections a remedy for cases like this: Section 305 gives the bankruptcy court the power to dismiss an involuntary petition sua sponte. "The court, after notice and a hearing, may dismiss a case . . . at any time if . . . the interests of creditors and the debtor would be better served by such . . . ." 11 U.S.C. § 305(a); *see also In re Accident Claims Determination Corp.*, 146 B.R. 64, 67–68 (Bankr. E.D.N.Y. 1992) (dismissing an involuntary petition where the petitioning creditors were intending to harass the debtor and its principals); *In re Westerleigh Dev. Corp.*, 141 B.R. 38, 41 (Bankr. S.D.N.Y. 1992) (dismissing an involuntary petition after finding that the petition was filed by a corporate shareholder to gain leverage over another shareholder). Accordingly, Vibe Micro's appearance in this case was just as voluntary as was the appearance of the third parties in *Miles*.

Third, reading § 303(i) to permit only the debtor to seek damages is consistent with its purpose and the policy interests underlying it. Section 303(i) is intended to alleviate the consequences that involuntary proceedings impose on the debtor. Those consequences include "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). A third party, who intervenes freely in an

involuntary action, does not face those same consequences. Even if it did, § 303(i) would still not *guarantee* costs, fees, or damages. An award under § 303(i)—which states that the court “may” award costs, fees, or damages—is not mandatory. *See Susman v. Schmid (In re Reid)*, 854 F.2d 156, 159 (7th Cir. 1988) (explaining that an award of attorney’s fees under § 301(i) is “committed to the discretion of the district court”); *Bankers Tr. Co. BT Serv. Co. v. Nordbrock (In re Nordbrock)*, 772 F.2d 397, 400 (8th Cir. 1985) (stating that a motion for attorney’s fees is addressed in the discretion of the court); *In re Kidwell*, 158 B.R. 203, 217 (Bankr. E.D. Cal. 1993) (stating that “the better view is that [an award of costs and fees is] discretionary and not mandatory”); *In re Johnston Hawks Ltd.*, 72 B.R. 361, 365 (Bankr. D. Haw. 1987) (stating that “the award of attorney’s fees and costs is discretionary”). Indeed, “the plain language of the statute clearly contemplates that fees and costs will not be awarded in all cases, even though a party will ordinarily incur attorneys’ fees in seeking to dismiss the petition.” *In re Reid*, 854 F.2d at 159.

### **AFFIRMED.**

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BENNETT, Circuit Judge, dissenting:

The Majority holds that, under *Miles v. Okun (In re Miles)*, 430 F.3d 1083 (9th Cir. 2005), a third party who appears for a debtor and successfully defends against an involuntary bankruptcy petition can never

request that the debtor be awarded costs, a reasonable attorney's fee, or damages. The Majority finds that this is the case even when, as here, the debtor never appeared in the involuntary bankruptcy action, was prevented from appearing by its deadlocked governance, and the third party who appeared on behalf of the debtor successfully defended the involuntary bankruptcy. This rule, according to the Majority, is absolute, regardless of how closely related the third party is to the debtor, and even though the third party only seeks an award in favor of the debtor.<sup>1</sup> Because *Miles* never went so far, and because I believe the Majority's rule is inconsistent with both the relevant statutory text and the policies underlying the Bankruptcy Act, I respectfully dissent.

Appellant Vibe Micro, Inc. owned 50% of the debtor 8Speed8's vested voting shares. Appellee SIG, LLC owned contingent shares in 8Speed8, which had not vested at the time of the involuntary bankruptcy petition. 8Speed8's board of directors reflected its collective ownership, with a director appointed from each of the owners, including SIG. Any action taken

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<sup>1</sup> I don't believe Appellant's position on this is unclear—it sought fees and damages to be awarded *to the debtor*. My dissent goes to this circumstance only—a third party asking that fees and damages be awarded to the debtor in a case where the debtor has not appeared, and the third party appeared on behalf of the debtor.

on behalf of the company required a two-thirds majority of the directors or the shareholders.

On December 13, 2013, SIG filed an involuntary bankruptcy petition against 8Speed8. According to Vibe Micro, both SIG and Luxor Entertainment, Inc.—the other 50% shareholder—intended to liquidate 8Speed8 contrary to Vibe Micro’s position and inconsistent with its interests. Since “no one else could or would appear,” Vibe Micro filed a motion to dismiss on behalf of 8Speed8, which the bankruptcy court granted. Vibe Micro also sought, on behalf of the debtor, 1) costs or a reasonable attorney’s fee, pursuant to 11 U.S.C. § 303(i)(1); and 2) “damages proximately caused by” what it claimed was the bad faith filing of the petition, pursuant to 11 U.S.C. § 303(i)(2). The bankruptcy court granted Vibe Micro’s motion to dismiss, but it (and later the district court) held that Vibe Micro did not have standing to seek either fees or damages that would be awarded to the debtor because Vibe Micro was not actually “the debtor.”

Involuntary bankruptcy is a drastic course of action that carries significant consequences, and “[f]iling an involuntary petition should be a measure of last resort.” *Higgins v. Vortex Fishing Sys., Inc.*, 379 F.3d 701, 707 (9<sup>th</sup> Cir. 2004). The fee-shifting and damages provisions of § 303(i) are intended to deter frivolous filings. *See id.* (regarding fee-shifting under § 303(i)(1)); *In re Fox Island Square P’ship*, 106 B.R. 962, 968 (Bankr. N.D. Ill. 1989) (regarding damages under § 303(i)(2)) (“This deterrent should be directed

not merely to the petitioning creditor in the case at bar, but also should serve as an example for similar circumstances in future cases.” (quoting *In re Advance Press & Litho*, 46 B.R. 700, 706 (Bankr. D. Colo. 1984)). Appropriate deterrence serves not only to protect debtors from the very significant (and often irreparable) consequences that flow from an involuntary bankruptcy petition<sup>2</sup>, but also to try to insulate the bankruptcy court from being unnecessarily and improperly used as a tool to resolve disputes. *See Advance Press*, 46 B.R. at 702 (“It is . . . obvious that the use of the bankruptcy court as a routine collection device would quickly paralyze this court.” (quoting *In re SBA Factors of Miami*, 13 B.R. 99, 101 (Bankr. S.D. Fla. 1981))). For these reasons, “there must be available some remedy for the improper filing of an involuntary petition.” *In re Ed Jansen’s Patio, Inc.*, 183 B.R.

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<sup>2</sup> “An allegation of bankruptcy is a charge that ought not to be made lightly. It usually chills the alleged debtor’s credit and his sources of supply. It can scare away his customers. It leaves a permanent scar, even if promptly dismissed.” *In re SBA Factors of Miami*, 13 B.R. 99, 101 (Bankr. S.D. Fla. 1981); *see also* 2 *Collier on Bankruptcy* 303.37 (16th ed. 2018) (“Since the Code was enacted in 1978, some people have used section 303 as a means of harassment; this was an effective technique in the sense that even if the wrongful cases were dismissed (after effort to be sure), they resulted in serious consequences for the victim of the wrongful filing.”).

643, 644 (Bankr. M.D. Fla. 1995) (permitting the assignee for benefit of creditors to assert a claim for costs, fees, and damages on behalf of the debtor under § 303(i)).

In keeping with the purpose and nature of § 303(i), parties with a close relationship to a debtor, who have actually defended against an involuntary bankruptcy petition, have been allowed to collect damages and fees. *See, e.g., Fox Island*, 106 B.R. at 967 (holding that non-petitioning partners can collect damages for defending the partnership against an involuntary petition filed by other partners); *see also Havens v. Leong P'ship*, 586 B.R. 760 (Bankr. N.D. Cal. 2018) (holding that an alleged partner in a fictitious partnership had standing to seek damages), *appeal docketed*, No. 18-15679.<sup>3</sup>

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<sup>3</sup> In fact, the cases in which non-debtors successfully claimed damages each involved a debtor who did not appear and a third party closely aligned with the debtor. *Compare, e.g., Ed Jansen's Patio*, 183 B.R. at 644 (assignee for benefit of non-petitioning creditors) and *Inre Synergistic Techs., Inc.*, No. 07-31733-SGJ-7, 2007 WL 2264700, at \*6 (Bankr. N.D. Tex. Aug. 6, 2007) (33% shareholder and board member), *with Franklin v. Four Media Co. (In re Mike Hammer Prods., Inc.)*, 294 B.R. 752 (B.A.P. 9th Cir. 2003) (holding creditors, who had no other affiliation to the debtor, did not have standing to seek costs or damages under § 303(i)).

Similarly, the Southern District of New York found that a 50% shareholder had standing to contest an involuntary bankruptcy petition: “[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.”<sup>4</sup> *In re Westerleigh Dev. Corp.*, 141 B.R. 38, 40 (Bankr. S.D.N.Y. 1992); *see also In re Synergistic Techs., Inc.*, No. 07-31733- SGJ-7, 2007 WL 2264700, at \*5 (Bankr. N.D. Tex. Aug. 6, 2007) (“[W]hen there is a corporate governance deadlock that prevents a corporate debtor from taking a position with regard to an involuntary bankruptcy petition, the court should allow shareholders to assert positions [including requests for damages under § 303(i)] on behalf of the alleged debtor.”). Decisions allowing third parties that successfully defend against involuntary bankruptcy petitions to seek fees and damages that would be awarded to the debtor are in accord with the actual language of § 303(i)(1) which permits a judgment for fees or costs “against the petitioners and in favor of the debtor,” and are certainly

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<sup>4</sup> The Majority cites *Westerleigh* for the proposition that a bankruptcy court can dismiss a petition sua sponte if it is filed by a shareholder to gain leverage against another shareholder. Maj. Op. at 6. But the bankruptcy court in *Westerleigh* did not act sua sponte. Rather, the court found that the non-petitioning 50% shareholder had standing to contest the involuntary bankruptcy petition and granted that shareholder’s motion to dismiss. 141 B.R. at 41.

not inconsistent with § 303(i)(2), which permits an award of damages against a petitioner that files a petition in bad faith. See *Ed Jansen's Patio*, 183 B.R. at 644.

Here, Vibe Micro owned 50% of the debtor's stock and stepped into the debtor's shoes to defend against the involuntary bankruptcy proceeding, and the party that filed the involuntary bankruptcy petition was itself a shareholder and on the board of directors. SIG admitted that 8Speed8 was essentially non-functional because of the shareholders' disputes: "[T]here was a breakdown. There was a lack of communication. There was a shareholder meeting called that was—that not all the shareholders wanted to attend." Any action on behalf of 8Speed8 required a two-thirds majority, either of the board (which included SIG) or of the shareholders (which were split 50–50). There is no indication that a vote of any kind ever took place. Under these circumstances, it is likely that Vibe Micro was the only party willing or able to defend 8Speed8 against involuntary bankruptcy, as it has asserted. The bankruptcy court should have at least determined whether Vibe Micro was correct in its assertion that, but for its actions, the debtor's interests would have gone wholly unrepresented and undefended. If Vibe Micro was truly the only party willing and able to act for 8Speed8, it should have been allowed to seek fees and damages under § 303(i).

The cases cited by the Majority do not support its rule. *In re Mike Hammer Productions, Inc.*, which the

Majority cites for the proposition that “Congress intended only the debtor to have standing to seek damages,” Maj. Op. at 5, stands only for the commonsense proposition that if a party lacks standing to contest an involuntary bankruptcy petition—as creditors do in most circumstances—then it also lacks standing to collect costs, fees, or damages under § 303(i). *Franklin v. Four Media Co. (In re Mike Hammer Prods., Inc.)*, 294 B.R. 752, 754–55 (B.A.P. 9th Cir. 2003). The case says nothing about third parties who step into a debtor’s shoes.<sup>5</sup> In fact, the court in *Hammer* appears to recognize that third parties have standing to seek damages when they represent the debtor. 294 B.R. at 755 (noting that in *Ed Jansen’s Patio*, 183 B.R. at 644, the “assignee for benefit of creditors” was eligible to recover damages as a “representative of the debtor’s estate”; observing that the third party with standing in *Fox Island*, 106 B.R. at 968, had “represented the Partnership”; and citing approvingly to an *American Law Reports* analysis of § 303(i)(1)(B) entitled “Standing of parties other than alleged debtor to seek award of attorney’s fees”).

The Majority primarily relies on *Miles* to support its holding that a third party can never collect damages, contending that “Appellant’s appearance in this case was just as voluntary as the third parties in

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<sup>5</sup> There was no suggestion that the non-petitioning creditors in *Hammer* were acting on behalf of the debtor—they were, in fact, simultaneously suing the debtor in state court. *See* 294 B.R. at 753.

*Miles*.” Maj. Op. at 6. But *Miles* involved true third parties—relatives of the debtors—who filed a separate suit in state court and who never appeared in the underlying bankruptcy cases. 430 F.3d at 1086. Vibe Micro is not such an independent third party—it was acting as a 50% shareholder during a corporate governance breakdown. Vibe Micro has always asserted that no other entity was willing to defend 8Speed8, and Vibe Micro claimed fees and damages, not after the fact and not for itself, as in *Miles*, but in the bankruptcy proceeding and for the debtor, as part of its motion to dismiss filed on the debtor’s behalf.

*Miles* primarily dealt with the meaning of § 303(i)(2), which allows for “damages against any petitioner” proximately caused by the bad faith filing of an involuntary petition. *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 non-debtor 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).<sup>6</sup> Such a rule is inconsistent with the purposes underlying § 303(i) and takes *Miles* beyond both its facts and its holding.

Of course, Vibe Micro should not *automatically* get its fees and damages. I would remand this case for factual findings that were never made. The bankruptcy court would need to, *inter alia*, 1) determine whether any party other than Vibe Micro could have appeared on 8Speed8’s behalf, *see Fox Island*, 106 B.R. at 967 (making a factual finding that a non-petitioning partner represented the partnership); 2) decide whether the filing was in bad faith; and 3) calculate the appropriate damages and fees—if any—in light of the totality of the circumstances, *Higgins*, 379 F.3d at 707. I cannot agree with the Majority’s

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<sup>6</sup> We do not here face the question of whether *Miles* bars a third party closely related to the debtor from collecting fees or damages *for itself* when it acts on behalf of a non-appearing debtor in successfully defending against an involuntary bankruptcy proceeding (though I note the policies underlying the statute would counsel in favor of allowing such awards). As noted, we are here faced only with the question of whether a third party closely related to the debtor can obtain fees or damages *for the debtor* in a case where the debtor did not appear, and the third party obtained a dismissal of the involuntary petition on the debtor’s behalf.

determination that Vibe Micro lacks standing to seek fees and damages that would be awarded to the debtor, regardless of the debtor's ability to defend itself in the bankruptcy action, and notwithstanding that Vibe Micro actually obtained a dismissal on behalf of the debtor. Accordingly, I respectfully dissent.

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

VIBE MICRO, INC.,

Plaintiff,

v.

SIG CAPITAL, LLC.,

Defendant

Case No. 2:14-cv-  
01618-RFB

ORDER

**I. Introduction**

This case was taken on appeal from the Bankruptcy Court on 10/1/14. A status conference was held on 12/12/14. Before the Court are Appellant Vibe Micro's Opening Brief [ECF No. 17], Appellee SIG Capital's Answering Brief [ECF No. 19], and Appellant Vibe Micro's Reply Brief [ECF No. 24].

**II. Background**

This case is an appeal from a final order of the United States Bankruptcy Court for the District of Nevada, issued on September 18, 2014. [ECF No. 1]. The issue on appeal is whether the bankruptcy court erred in holding, as a matter of law, that Vibe Micro, Inc., a shareholder of the involuntary debtor,

8Speed8, Inc., did not have standing to seek statutory remedies under 11 U.S.C. 303(i), and against SIG Capital, Inc., Petitioner, for costs, attorneys' fees, and damages, on behalf of the debtor, 8Speed8, Inc.

The Court relies on and reiterates the findings of fact of the bankruptcy court, which are reviewed for clear error. In re Summers, 332 F.3d 1250, 1252 (9th Cir. 2003). On December 13, 2013, Appellee SIG Capital, Inc., a Nevada corporation, filed an involuntary petition for relief under Chapter 7 of the U.S. Bankruptcy Code, against the Debtor, 8Speed8, Inc. SIG and Vibe Micro are both shareholders of 8Speed8. SIG was also a creditor of 8Speed8, lending money to fund 8Speed8's development of payment services kiosk systems. A shareholder dispute arose between SIG and Vibe Micro, and Vibe Micro initiated arbitration proceedings against SIG. Subsequent to the initiation of arbitration proceedings, in December 2013, SIG filed an involuntary bankruptcy petition against 8Speed8. 8Speed8 never appeared in the bankruptcy action. Vibe Micro appeared, and asserted that it was representing the interest of 8Speed8, and stated in its pleadings that the debtor was not represented in the proceedings. [ECF No. 18, p 93, Transcript of Bankruptcy Hearing].

In January 2014, Vibe Micro moved to dismiss the bankruptcy. Vibe Micro also sought to obtain fees and costs, actual damages, and punitive damages pursuant to 11 U.S.C. 303(i). SIG opposed the motion, and the parties agreed that further discovery was

necessary before the Court could decide the merits of dismissal on the grounds asserted by Vibe Micro. However, in June 2014, SIG decided that dismissal was appropriate, and filed its own motion to dismiss.

The Bankruptcy Court held a hearing on both motions to dismiss in August 2014. At this hearing, the Court deemed it appropriate to dismiss the case since both parties had moved to dismiss. It then allowed SIG and Vibe Micro to present oral arguments on the issue of Vibe Micro's entitlement to receive fees under 11 U.S.C. 303(i).

The Bankruptcy Court issued a verbal ruling on the motions on September 15, 2014. It held that under a Ninth Circuit holding, In re Miles, 430 F.3d 1083 (9th Cir. 2005), only the debtor has standing to seek damages under Section 303(i). It entered an order dismissing the bankruptcy case and denying Vibe Micro any attorneys' fees and costs, and damages, on September 18, 2014.

### **III. Legal Standard**

On appeal to the District Court, the Bankruptcy Court's conclusions of law are reviewed *de novo*, and its factual findings are reviewed for clear error. In re Summers, 332 F.3d 1250, 1252 (9th Cir. 2003). Interpretation of statutes, and standing issues, are issues of law, which are reviewed by the appellate court *de novo*. In re Mike Hammer Prod., Inc., 294 B.R. 752, 753 (9th Cir. B.A.P. 2003).

#### IV. Discussion

The statute at issue in this case is 11 U.S.C. § 303(i). Section 303(i), which provides for costs and fees in the resolution of bankruptcy proceedings, states: “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. The Ninth Circuit analyzed the language of this statute in In re Miles, which, on its face, “is ambiguous as to whether damages...can be awarded only in favor of the debtor or in favor of other parties.” 430 F.3d 1083 (9th Cir. 2005). Looking at legislative history, determining that “reading 303(i)(2) to allow third parties to seek damages could invite abuse of the system”, and determining that “reading 303(i) to limit standing to the debtor is consistent with the admittedly rather sparse authority addressing this issue,” the Ninth Circuit held that appellants in that case, a putative debtor’s wife and children, did not have standing to recover damages under the statute. In re Miles, 430 F.3d 1083 (9th Cir. 2005).

Vibe Micro argues that for purposes of fees and costs, it functioned as the Debtor in the bankruptcy

action, and thus had standing to seek an award on 8Speed8's behalf. Vibe Micro argues that it was a fifty percent vested shareholder trying to protect the Debtor, 8Speed8. SIG disputes the contention that Vibe Micro was a fifty percent vested shareholder, and rather, states that Vibe Micro, SIG, and Luxor, each were thirty percent shareholders in 8Speed8. The bankruptcy court did not make a factual determination as to Vibe Micro's ownership interest in 8Speed8, and the Court does not deem this determination material to whether, under In re Miles, a shareholder, rather than the Debtor itself, may recover under Section 303(i). Vibe Micro raises facts regarding SIG's purposes in bringing the involuntary bankruptcy petition, and alleges that SIG was bringing it in bad faith, to subvert and/or evade the arbitration proceedings that Vibe Micro had initiated amongst the shareholders, and to liquidate 8Speed8. The bankruptcy court did not make a determination as to whether the petition was brought in "bad faith" by SIG. The Court does not find it necessary to reach this issue, in order to address the issue on appeal of whether Vibe Micro has standing, as a non-Debtor in the bankruptcy proceeding, to assert a right to costs, fees, and damages, under Section 303(i).

Vibe Micro further supports its position that it functioned as the debtor in this action, by arguing that its fees were incurred for the sole benefit of the debtor. 8Speed8 never appeared in the bankruptcy action. Vibe Micro appeared, and asserted that it was representing the interest of 8Speed8. However, Vibe

Micro also filed a motion to compel against the President of 8Speed8, and stated in their pleadings that the debtor was not represented in the proceedings. Regardless of whether Vibe Micro felt that it was acting for the benefit of the debtor, there was never an explicit determination by the bankruptcy court that Vibe Micro was the Debtor in the underlying action. Ultimately, the bankruptcy court held: “I find and conclude that Vibe Micro lacks standing as a matter of law. Consequently, the involuntary petition is dismissed with prejudice and Vibe Micro’s request for fees, costs, and damages under Section 303(i) is denied.” This Court infers, from the bankruptcy court’s ruling, that it determined Vibe Micro not to have been the Debtor, because of its standing ruling. The Court affirms the implicit conclusion of the bankruptcy court, that Vibe Micro was not the debtor in the underlying action.

Vibe Micro further argues that In re Miles does not control in this case. In re Miles involved three daughters of the debtor who had never appeared or represented the interests of the debtor in the involuntary bankruptcy proceedings, and therefore constituted third parties who were not entitled to costs and fees; Vibe Micro argues that this case is distinguishable because Vibe Micro acted on behalf of the debtor. However, absent a holding from the bankruptcy court that Vibe Micro was the debtor in this action, for purposes of the Section 303(i) analysis, the Court does not find this argument persuasive. Vibe Micro has not raised any controlling or persuasive authority that

states that a shareholder appearing in a bankruptcy proceeding alleging that it represents the interests of the named debtor, is entitled to fees, costs, and damages under Section 303(i) as though it were the debtor. The plain holding of In re Miles was that standing to assert a right to costs, fees, and damages under Section 303(i) is limited to the debtor.

The Court rejects Vibe Micro's attempt to invoke other authority. Specifically, Vibe Micro analogizes this case to a 1989 bankruptcy case from Illinois, In re Fox Island Square P'ship, 106 B.R. 962, 966 (Bankr. N.D. Ill. 1989), where general partners filed an involuntary petition against the Partnership, and another general partner filed a motion to dismiss. In that case, the Court found that the other general partner who filed the motion on behalf of the Partnership had standing to recover under Section 303(i). In re Fox Island is not controlling authority on this Court, and it preceded In re Miles. Furthermore, as SIG correctly notes, In re Fox Island is distinguishable from the context of a shareholder like Vibe Micro purporting to represent the interests of a corporation. Because individual partners are liable for the obligations of a partnership, it may make sense to allow a general partner to represent the partnership in bankruptcy and to recover fees, but it does not follow that shareholders have a right to act on behalf of a corporation in litigation. Such shareholders are liable for the obligations of the corporation. The Court thus finds that In re Fox is not controlling, and that to the extent it differs from In re Miles, the Court must

follow the holding of Miles. The Court agrees that the legal posture of a general partner is distinguishable from that of a shareholder in a corporation, for purposes of acting on behalf of the corporation in a bankruptcy proceeding.

Vibe Micro also argues that SIG waived its argument that Vibe Micro did not have standing to seek statutory remedies, by failing to challenge its rights to appear on behalf of 8Speed8 in the underlying proceeding. SIG did argue, in the underlying proceeding, that Vibe Micro lacks standing to collect damages under Section 303(i). SIG argues that standing for purposes of contesting the involuntary bankruptcy is distinct from statutory standing to seek damages under Section 303(i). Any interested party can seek dismissal of an involuntary bankruptcy. See, e.g., In re MacFarlane Webber Assoc., 121 B.R. 694, 700-01 (Bankr. S.D.N.Y. 1990) (holding any party in interest may move for dismissal of a bankruptcy for cause). The Court agrees with SIG, and based on the extensive arguments on record in the underlying bankruptcy proceeding, where SIG maintained that Vibe Micro did not have standing for fees, costs, and damages under 303(i), the Court finds that SIG has not waived the argument.

Finally, Vibe Micro argues, in the alternative, that the Court should find In re Miles wrongly decided, and should find that Vibe Micro has standing to seek fees and costs under Section 303(i). In re Miles is binding authority on this court, and the Court agrees with its statutory analysis.

## V. Conclusion

The Court has not been presented with any controlling or persuasive authority to support the argument that a non-Debtor shareholder has standing to pursue costs, fees, and damages, as the Debtor, under 11 U.S.C. Section 303(i). The Ninth Circuit, in In re Miles, determined that only Debtors have standing to recover costs, fees, and damages under that statute.

Therefore,

IT IS ORDERED that this Court AFFIRMS the ruling of the bankruptcy court below, and finds that Vibe Micro is not entitled to costs, fees, and damages under 11 U.S.C. Section 303(i).

DATED: May 22, 2017.

/s/\_\_\_\_\_.

Richard F. Boulware, II  
United States District Judge

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA (LAS VEGAS)

IN RE:	Case No. 13-20371-led
8SPEED8, INC.	Chapter 7
Debtor	300 Las Vegas Blvd. South Las Vegas, NV 89101
	Monday, September 15, 2014 3:03 p.m.

TRANSCRIPT OF SCHEDULING CONFERENCE  
HEARING RE: CHAPTER 7  
INVOLUNTARY PETITION. FEE AMOUNT 306.  
RE: 8SPEED8, INC.  
FILED BY PETITIONING CREDITOR(S): SIG CAP-  
ITAL, INC.  
(ATTORNEY DAVID A. STEPHENS) [1];  
MOTION TO DISMISS CASE WITH PROPOSED  
ORDER FILED BY DAVID A. STEPHENS ON BE-  
HALF OF SIG CAPITAL, INC. [31]  
BEFORE THE HONORABLE LAUREL E. DAVIS  
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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(Proceedings commence at 3:03 p.m.)

THE CLERK: Please be seated.

THE COURT: 8Speed8, appearances, please?

MR. WALKER: Kirk Walker on behalf of Vibe Micro on behalf of 8Speed8.

MR. PEZOLD: Good afternoon, Your Honor. Eric Pezold on behalf of SIG Capital.

MR. STEPHENS: David Stephens for SIG Capital also, Your Honor.

THE COURT: All right. Thank you. And I'm sorry if I didn't mention it before. Telephone appearances are approved frequently by this Court, so.

This is the date and time set for my verbal ruling with respect to the competing motions to dismiss, as well as the request for an award of attorneys' fees, damages, and costs under 303(i). I am still doing verbal rulings at this point, I think they're more efficient, so I will read my ruling into the record and then the prevailing party at that point would prepare an order

that simply incorporates by reference my findings and conclusions as stated on the record and just contains the language of the order.

The Court has considered the parties' respective motions to dismiss filed at Docket Entry 9 and Docket Entry 31, as well as all declarations and moving papers filed with respect to each motion. The Court has also considered the entire docket of this bankruptcy case.

The Court enters the following findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, which incorporates by reference Rule 52 of the Federal Rules of Civil Procedure. Any finding of fact that should be a conclusion of law is deemed a conclusion of law. Any conclusion of law that should be a finding of fact is deemed a finding of fact.

This Court has jurisdiction over matter relating to the dismissal of an involuntary proceeding and request for damages under Section 303(i), and I cite In re: Miles, 438 [sic] F.3d 1083, a Ninth Circuit decision rendered in 2005.

On December 13th, 2013, SIG Capital, Inc. filed an involuntary Chapter 7 against 8Speed8, Inc. That is reflected as Docket Entry 1.

On January 10th, 2014, Vibe Micro, Inc., hereafter referred to as "VMI," filed a motion on the debtor's behalf requesting either dismissal of or abstention from

the case. That was filed at Docket Entry 9. In the motion, VMI described itself as a 50-percent shareholder of 8Speed8. That is found in Docket Entry 1, Pages 1, Line 16 through 17. I think that's probably Docket Entry 9, not Docket Entry 1

On June 17th, 2014, SIG Capital filed its own motion requesting dismissal of this bankruptcy case. That motion was filed at Docket Entry 31. In its response to SIG Capital's motion, VMI agreed that dismissal was warranted, yet continued to assert a claim for damages under Section 1 303(i). That is contained in Docket Entry 38. VMI's reply stated, in pertinent part, and I quote:

"VMI contends that SIG should pay VMI's attorneys' fees, costs, and possibly punitive damages as a result of this bad-faith suit."

And that is filed at Docket Entry 38, Page 2, Lines 16 through 17.

On July 21st, 2014 VMI filed a motion requesting stay relief for the limited purpose of arbitrating who controls 8Speed8 and who can make litigation and settlement decisions on behalf of 8Speed8. That was filed at Docket Entry 44.

On August 4th, 2014 I denied that motion, however, an order has not been uploaded by the parties for me to sign, which denies the motion.

Both VMI and SIG Capital assert that dismissal is warranted. All that remains for me to decide is whether or not VMI is entitled to recover fees, costs, and damages under Section 303(i).

The case of In re: Miles, 430 F.3d 1083, which was decided by the Ninth Circuit in 2005, the Ninth Circuit specifically held that only the debtor has standing to seek damages under Section 303(i). VMI has cited cases outside of the Ninth Circuit in support of its request for an award of fees, costs, and damages under Section 303(i).

As a bankruptcy judge who sits in the Ninth Circuit, I am bound by the controlling Ninth Circuit precedent. Based upon the Ninth Circuit decision of In re: Miles, I find and conclude that VMI lacks standing as a matter of law. Consequently, the involuntary petition is dismissed with prejudice and VMI's request for fees, costs, and damages under Section 303(i) is denied.

Do counsel have any questions?

MR. WALKER: No, Your Honor.

MR. PEZOLD: No, Your Honor.

THE COURT: All right. Thank you. Court will be in recess.

MR. STEPHENS: Thank you, Your Honor.

THE CLERK: All rise.

(Concluded at 3:08 p.m.)

/s/ \_\_\_\_\_,  
Honorable Laurel E. Davis  
United States Bankruptcy Judge

Entered on Docket  
September 18, 2014

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*Attorneys for Creditors*  
*SIG Capital, Inc. and Luxor Entertainment, LLC*

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

In re

8SPEED8, INC.,

Debtor.

Case No. 13-20371-led  
Chapter 7

ORDER GRANTING  
IN PART AND  
DENYING IN PART  
VIBE MICRO, INC.'S  
MOTION: (1) TO DIS-  
MISS  
INVOLUNTARY  
CASE, OR IN THE  
ALTERNATIVE, FOR  
SUMMARY  
JUDGMENT,  
AND/OR (2) AB-  
STENTTON  
PURSUANT To §  
305(a)(1), AND (3)  
AWARDING DAM-  
AGES TO DEBTOR

Hearing Date: Sep-  
tember 15, 2014  
Hearing Time: 3:00  
p.m.

Hearing Location:  
United States Bank-  
ruptcy Court

Foley Federal Building, Courtroom No.3  
300 Las Vegas Blvd South, Third Floor  
Las Vegas, Nevada 89101

At the above referenced date and time, the Court held a hearing on that certain Motion: (1) To Dismiss Involuntary Case, or in the Alternative, for Summary Judgment, and/or (2) For Abstention Pursuant to § 305(a)(1), and (3) Awarding Damages to Debtor (the "VMI Motion to Dismiss") filed by Vibe Micro, Inc. ("VMI") on January 10, 2014 (Docket No. 9). SIG Capital, Inc. ("SIG"), a creditor and shareholder of 8SPEED8, Inc. ("8S8"), the involuntary debtor herein, opposed the Motion. All appearances were entered on the record.

Having considered the Motion and related pleadings, the record in this case, the arguments of counsel and the findings of fact and conclusions of law as stated on the record at the hearing, and good cause appearing,

IT IS ORDERED that the Motion is granted in part.

IT IS FURTHER ORDERED that the above-captioned case is dismissed with prejudice.

IT IS FURTHER ORDERED that VMI's request for an award of damages in favor of the alleged debtor is denied.

IT IS FURTHER ORDERED that VMI's request for an award of attorneys' fees and costs is also denied.

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In accordance with LR 9021, counsel submitting this document certifies that the order accurately reflects the court's ruling and that (check one):

\_\_\_\_ The court has waived the requirement set forth in LR 9021(b)(1).

\_\_\_\_ No party appeared at the hearing or filed an objection to the motion.

  X   I have delivered a copy of this proposed order to all counsel who appeared at the hearing, and any unrepresented parties who appeared at the hearing, and each has approved or disapproved the order, or failed

to respond, as indicated below [list each party and whether the party has approved, disapproved, or failed to respond to document]:

Approved / Disapproved / Failed to Respond

BAUMANN LOEWE WITT & MAXWELL, PLLC

By: /s/  
Kirk Nevada Walker (NV Bar No. 11315)  
411 E. Bonneville Ave., Suite 100  
Las Vegas, NV 89101  
Tel: (702) 462-6300  
Fax: (702) 462-6303

\_\_\_\_ I certify that this is a case under Chapter 7 or 13, that I have served a copy of this order with the motion pursuant to LR 9014(g), and that no party has objected to the form or content of the order.

Respectfully submitted,

/s/  
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