No. _____

In The
Supreme Court of the United States

NATIONAL MEDICAL IMAGING, LLC;
NATIONAL MEDICAL IMAGING HOLDING CO., LLC,

Petitioners,

v.

U.S. BANK, N.A.; LYON FINANCIAL SERVICES, INC., d/b/a U.S. Bank Portfolio Services; DVI RECEIVABLES XIV, LLC; DVI RECEIVABLES XVI, LLC; DVI RECEIVABLES XVII, LLC; DVI RECEIVABLES XVIII, LLC; DVI RECEIVABLES XIX, LLC; JANE FOX; ASHLAND FUNDING, LLC,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

ERWIN CHEMERINSKY
Counsel of Record
UNIVERSITY OF CALIFORNIA
BERKELEY SCHOOL OF LAW
215 Law Building
Berkeley, CA 94720
echemerinsky@
law.berkeley.edu
(510) 642-6483

STEVEN M. COREN
KAUFMAN, COREN & RESS, P.C.
2001 Market Street, Ste 3900
Philadelphia, PA 19103
scoren@kcr-law.com
(215) 735-8700

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Section 303 of the Bankruptcy Code governs involuntary bankruptcy cases. 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 and must adhere to strict statutory requirements. 11 U.S.C. §303(b). Section 303(i) provides that if an involuntary bankruptcy petition is dismissed, the debtor may recover attorney's fees, costs, and damages, including punitive damages, from the creditors. In this case, an involuntary bankruptcy proceeding was brought against National Medical Imaging. Although the involuntary bankruptcy petition was dismissed, the district court in a summary judgment order denied National Medical Imaging both compensatory and punitive damages.

This case presents important issues concerning damages that frequently arise when there is the dismissal of an involuntary bankruptcy proceeding.

1. Whether punitive damages are to be awarded once it is shown that an involuntary bankruptcy petition was filed in "bad faith," as the plain language of the statute requires and as several Circuits and lower courts have held, or whether more than bad faith is required as the Third Circuit held in this case.

2. Whether the Seventh Amendment requires a jury trial to determine the availability of compensatory and punitive damages when there is a dispute as to the facts concerning the bad faith of an involuntary bankruptcy filing and the harms that it has caused.

PARTIES TO THE PROCEEDING

National Medical Imaging, LLC
National Medical Imaging Holding Co., LLC
U.S. Bank, N.A.
Lyon Financial Services, Inc., d/b/a U.S. Bank Portfolio Services
DVI Receivables XIV, LLC
DVI Receivables XVI, LLC
DVI Receivables XVII, LLC
DVI Receivables XVIII, LLC
DVI Receivables XIX, LLC
Jane Fox
Ashland Funding, LLC

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner National Medical Imaging discloses the following: There is no parent or publicly held company owning 10% or more of Petitioner's stock.

RELATED CASES

United States Court of Appeals for the Third Circuit
Docket Nos. 19-3057, 19-3058, 19-30599, 19-3254, 19-3255
National Medical Imaging, U.S. Bank N.A.
Date of entry of judgment: August 25, 2020

United States District Court for the Eastern District of Pennsylvania
Docket No. Civil Action 16-5044
National Medical Imaging v. U.S. Bank N.A.
Date of entry of judgment: August 28, 2019

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

National Medical Imaging, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The decision of the United States District Court for the Eastern District of Pennsylvania, is unreported, and is found at Appendix (App.) at 32. The initial opinion of the United States Court of Appeals for the Third Circuit is found at 814 F.App'x 691 (3d Cir. 2020), and is at App. at 17. The revised opinion of the Third Circuit is found at 818 F.App'x 129 (3d Cir. 2020), and is at App. at 1. The denial of rehearing and rehearing *en banc* is found at App. at 69.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The United States Court of Appeals for the Third Circuit entered judgment, affirming the District Court's judgment. App. at 1. The Third Circuit denied rehearing and rehearing *en banc* on September 22, 2020. App. at 69. This Petition therefore is timely under Rule 13.1 and 29.2 of this Court.

CONSTITUTIONAL PROVISION

United States Constitution, Seventh Amendment:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATUTORY PROVISION

11 U.S.C. §303(i).

"(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"

STATEMENT OF THE CASE

National Medical Imaging ("NMI") operated centers that provided medical imaging services, such as MRI, CT, and PET scanning. The company ran into financial difficulties that Maury Rosenberg, the managing owner of NMI, attributed to the Deficit Reduction Act of 2005 Pub. L. 109-171, 120 Stat. 4 (2006), which affected the amounts that Medicare would pay for imaging services. *See* 42 U.S.C. §1395w-4. From 2005 through 2007, NMI experienced a decline in the volume of scans by 16%. During 2007, there was a decline of 19%.

Involuntary bankruptcy petitions and their dismissal

Litigation over a debt was ongoing between U.S. Bank and NMI in Bucks County, Pennsylvania. Frustrated with the pace of that litigation and to litigate the matter aggressively, on November 7, 2008, U.S. Bank filed three identical Chapter 7 (liquidating) involuntary bankruptcy petitions against National Medical Imaging National and Medical Imaging Holding Company (together "NMI"), and their principal, Maury Rosenberg—to collect the single debt that was already being litigated in a Pennsylvania state court. All three petitions for involuntary bankruptcy had the same petitioners, same attorney of record, and Respondent Jane Fox as signatory. JA 657–62.

After the involuntary bankruptcy petitions were filed, the action against Rosenberg was moved to the

United States District Court for the Southern District of Florida, where he resides. That involuntary bankruptcy petition was dismissed in August 2009. *In re Rosenberg*, 414 B.R. 826, 843, 848 (Bankr. S.D. Fla. 2009), *aff'd*, 472 F.App'x 890 (11th Cir. 2012).

Ignoring this adverse ruling, Defendants prosecuted their identical involuntary bankruptcy petitions against NMI in the United States District Court for the Eastern District of Pennsylvania for another four months, during which time NMI was forced to close its doors. *See* JA 820 (chart showing NMI centers closing through November 2009). On December 28, 2009—after thirteen months of U.S. Bank defending its petitions—the Pennsylvania bankruptcy court applied collateral estoppel based on the Florida decision and dismissed the involuntary bankruptcy petitions against NMI. *In re Nat'l Med. Imaging, LLC*, 439 B.R. 837, 851–54 (Bankr. E.D. Pa. 2009). Both the dismissals against Rosenberg and against NMI were upheld on appeal. *In re Rosenberg*, No. 11-14823, 472 F.App'x 890, 891 (11th Cir. Jul. 6, 2012); *Nat'l Med. Imaging v. Ashland Funding, LLC*, 648 F.App'x 251, 252 (3d Cir. 2106).

Rosenberg's damages suit against U.S. Bank and other defendants

When a bankruptcy court dismisses an improperly filed involuntary bankruptcy petition, §303(i)(2) of the Bankruptcy Code provides a remedy for the alleged debtor to seek judgment: "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)(2).

Rosenberg and NMI asserted claims under §303(i)(2). Rosenberg's claim proceeded ahead of NMI's and was tried to a jury in the United States District Court for the Southern District of Florida. JA 844. During Rosenberg's three-week jury trial, substantial evidence of bad faith by the defendants was presented. The jury found bad faith on the part of the defendants in bringing the involuntary bankruptcy proceeding and awarded a total of $6.12 million in damages.

NMI's damages suit against U.S. Bank and other defendants

Meanwhile, NMI pursued its action under §303(i)(2) against the creditors in the Eastern District of Pennsylvania. It is this litigation that has led to this Petition for a Writ of Certiorari.

NMI, in its own motion for partial summary judgment seeking collateral estoppel on the issue of bad faith (which was denied) and in opposing the defendants' motions for summary judgment, presented all of the evidence of bad faith that led the Florida jury to award damages. Additionally, during discovery in NMI's case, a third party—not U.S. Bank—produced concrete evidence of defendants' intent to use the filing of the involuntary bankruptcy claims for a wrongful purpose. Specifically, U.S. Bank, in an email directed its lawyers, told them to not "sit back and let things

just go through the [state] court systems," but act like "street fighter[s]" and "outfile" Rosenberg. *See* JA 560; JA 593–94. Sent in September 2008, long before Rosenberg informed defendants that he planned to close some of NMI's centers, the email provides ample evidence of pretext in the defendants' expressed motivation for filing the involuntary petitions.

Despite all of this evidence, the district court granted summary judgment against NMI, holding that "no reasonable jury" could award damages under §303(i)(2). The district court held that "[t]here are limited indicia of bad faith, which preclude any determination on that issue as a matter of law. . . . Yet, the evidence relating to bad faith does not rise to a level that would merit punitive damages, especially considering NMI's severe financial distress." *Nat'l Med. Imaging, LLC v. U.S. Bank, N.A.*, No. CV 16-5044, 2019 WL 4076768, at *4 (E.D. Pa. Aug. 28, 2019) ("*SJ Opinion*"). App. at 53 54. The district court stressed that punitive damages were not available because of the absence of evidence of malice. It also held that NMI was not entitled to compensatory damages because "the record establishes that NMI's financial difficulties were caused by factors independent of the involuntary bankruptcy petitions, and thus there is no genuine dispute of material fact on the issue of proximate cause." *Id.*

The United States Court of Appeals for the Third Circuit affirmed, App. at 42. The Court held that bad faith alone was legally insufficient to support a punitive damages award and agreed with the district court

that "malice" or "egregious" conduct was required. App. at 53.

A petition for rehearing was filed and granted. The Third Circuit vacated its earlier opinion and issued a new opinion again ruling against NMI. The Third Circuit said, "even if those facts are taken at face value and as indicating bad faith, we cannot say that the District Court erred in concluding, in effect and in light of the totality of the circumstances and the policy surrounding §303(i)(2) that no reasonable jury would grant punitive damages." App. at 12.

Another petition for rehearing and rehearing *en banc* was then filed. On September 22, 2020, the United States Court of Appeals for the Third Circuit denied the second petition for rehearing and rehearing *en banc*. App. at 69.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. This Court Should Grant Review to Resolve a Conflict Among the Lower Courts as to the Legal Standard for Compensatory and Punitive Damages When an Involuntary Bankruptcy Proceeding Is Dismissed.

It long has been recognized that "the filing of an involuntary [bankruptcy] 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," regardless of whether the petition ends up heard or dismissed. *In re Reid*, 773 F.2d 945, 946 (7th Cir. 1985). There are potentially enormous consequences to the filing of an involuntary bankruptcy petition: "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. It is also obvious that the use of the bankruptcy court as a routine collection device would quickly paralyze this court." *In re SBA Factors of Miami, Inc.*, 13 B.R. 99, 101 (Bankr. S.D. Fla. 1981). In short, "[a]n involuntary petition is a powerful weapon and therefore the Code and Federal Rules of Bankruptcy Procedure include numerous requirements and restrictions to curtail misuse and to insure that the remedy is sought only in appropriate circumstances." *In re Murray*, 543 B.R. 484, 496–97 (Bankr. S.D.N.Y. 2016); Joan Feeney, et al., 2 Bankruptcy Law Manual §14:1 (5th ed. 2020). "[T]he bankruptcy court cannot properly be employed as a rented battlefield, to achieve ends for which it never was intended, and as a collection mechanism" for single creditors with state court remedies available. *In re Murray*, 543 B.R. at 495–96 (Bankr. S.D.N.Y. 2016), *aff'd*, 565 B.R. 527 (S.D.N.Y. 2017), *aff'd*, 900 F.3d 53 (2d Cir. 2018). Allowing creditors to subvert the strict requirements of Section 303 and "exploit[] the bankruptcy system for non-bankruptcy-related reasons . . . would divert the valuable resources and attention of specialized bankruptcy courts to matters intended to be

addressed in state court . . . ". *In re Murray*, 900 F.3d 53, 63 (2d Cir. 2018).

Because involuntary petitions are seen as a last resort remedy for creditors that have severe ramifications for the debtor, the Bankruptcy Code sets forth serious consequences for creditors who file an involuntary bankruptcy petition that results in dismissal. Section 303(i) establishes that:

> (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.

The issue of how to determine "bad faith" and when punitive damages are appropriate is one that has caused a split among the Circuit courts that has continued unresolved for many years. Joan Feeny, et al., "Liability of petitioning creditors for wrongful involuntary petitions," 2 Bankruptcy Law Manual §14:32 (5th

ed.) (updated December 2020); *In re CNG Foods LLC*, No. 16-43278-NHL, 2020 WL 4219679, at *10–12 (Bankr. E.D.N.Y. July 13, 2020) (discussing the different bad faith tests used by the Circuits). Indeed, the Circuits use a number of different approaches in deciding whether there has been bad faith justifying the award of punitive damages. As the United States Court of Appeals for the Third Circuit explained in *In re Forever Green Athletic Fields, Inc.*, 804 F.3d 328, 335–36 (3d Cir. 2015):

> At the outset, we must decide on the standard for evaluating bad faith, which is not defined in the Code. On this issue, courts have applied a dizzying array of standards, mostly with regard to post-dismissal motions for damages under §303(i)(2). *See In re Bayshore*, 209 F.3d at 105–06 (reviewing different standards); *Gen. Trading Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1501–02 (11th Cir. 1997) (same). Some courts, for instance, apply an "improper use" test, which asks whether a "petitioning creditor uses involuntary bankruptcy procedures in an attempt to obtain a disproportionate advantage for itself, rather than to protect against other creditors obtaining disproportionate advantages, particularly when the petitioner could have advanced its own interest in a different forum." *In re K.P. Enter.*, 135 B.R. 174, 179 n. 14 (Bankr. D. Me. 1992) (internal quotation marks omitted). Other courts apply an "improper purpose" test, which looks to whether the filing "was motivated by ill will, malice, or a

> desire to embarrass or harass the alleged debtor." *In re Bayshore*, 209 F.3d at 105. Still others apply an "objective test," which assesses what a reasonable person would have believed and what a reasonable person would have done in the creditor's position. *In re Wavelength, Inc.*, 61 B.R. 614, 620 (9th Cir. BAP 1986). And yet other courts have applied a broad 'totality of the circumstances' standard, which effectively combines all the tests and looks to both subjective and objective evidence of bad faith. *In re John Richards*, 439 F.3d at 255 n. 2.

In *Forever Green*, the Third Circuit ultimately selected the "totality of the circumstances" test from the various approaches to determine bad faith—and hence an award of punitive damages—after the dismissal of the involuntary bankruptcy proceedings. 804 F.3d at 336.

Even in this case, two different standards were used in deciding whether punitive damages were appropriate: one by the District Court and by the Court of Appeals in its initial opinion, and another by the Court of Appeals in its revised opinion. The District Court in this case ruled that "punitive damages requires more than bad faith." App. at 53. The District Court held that punitive damages "are only warranted when the evidence shows that a defendant acted 'with intentional malice' or that its conduct was 'particularly egregious.'" *Id*. The United States Court of Appeals for the Third Circuit affirmed and agreed, stating: "In considering whether to award punitive damages, a court should consider whether the petitioner in question's

conduct was malicious and vengeful." App. at 26 (citations omitted).

But then, in response to a petition for rehearing, the Third Circuit withdrew this opinion and adopted a new, though more amorphous standard. It said that even assuming U.S. Bank's conduct was in bad faith—the only textual requirement of §303(i)(2)—the bank's conduct "was not . . . bad enough to warrant an award of punitive damages." App. at 9. In other words, the Court of Appeals explicitly said that more than bad faith is required, though it no longer articulated a requirement for malice.

There are many problems with the standard used by the Third Circuit. Its ambiguity gives little guidance as to what is "bad enough" to warrant punitive damages. The Third Circuit's standard conflicts with the language of the statute, which requires only "bad faith" for the award of punitive damages; the Third Circuit's requirement for more than that has no statutory basis. And the Third Circuit's approach directly conflicts with that of other Circuits.

It is telling that the Eleventh Circuit did not overturn the punitive damage award in favor of Rosenberg based on these facts. *In re Rosenberg*, 779 F.3d 1254 (11th Cir. 2015). Had the NMI petition been resolved in that Circuit, NMI likely would have recovered punitive damages. Also, the Third Circuit's approach conflicts directly with that of courts which have found that filing an involuntary bankruptcy to gain a strategic advantage in litigation meets the definition of "bad faith."

See In re Anmuth Holdings LLC, 600 B.R. 168, 193 (Bankr. E.D.N.Y. 2019) ("Where . . . a petition is filed as a litigation tactic, solely to avoid the consequence of an adverse state court decision, bad faith is manifest."); *In re WLB-RSK Venture*, 296 B.R. 509, 515 (Bankr. C.D. Cal. 2003) (finding bad faith where creditor "filed this involuntary petition against the alleged debtor as a litigation tactic").

Moreover and quite significantly, other courts have adopted standards for punitive damages quite different from that used by the Third Circuit in this case. The Ninth Circuit, for example, has held that the "sole precondition" for an award of punitive damages under §303(i)(2) is bad faith. *In re S. California Sunbelt Developers, Inc.*, 608 F.3d 456, 465 (9th Cir. 2010); *see also In re Topfer*, 595 B.R. 52, 57–59 (Bankr. M.D. Pa. 2019); *In re Atlas Mach. & Iron Works, Inc.*, 190 B.R. 796, 805–06 (Bankr. E.D. Va. 1995). Similarly, the Seventh Circuit has held that punitive damages may be withheld when there is bad faith only in "rare circumstances." *In re Reid*, 854 F.2d 156, 160 (7th Cir. 1988). The Third Circuit's approach here flatly conflicts with that of other Circuits and lower courts.

The statutory language of §303(i)(2) is clear that "bad faith" is sufficient for punitive damages when there is an involuntary bankruptcy proceeding. This is because without the threat of punitive damages, creditors neither will be deterred from using involuntary bankruptcy as a collection mechanism nor discouraged from filing bankruptcy actions in bad faith. And with these differing standards, creditors will have the

incentive to forum shop to seek out the most favorable courts to hear their claims.

This Court should grant review to clarify an important issue that frequently arises: what is the standard for punitive damages when an involuntary bankruptcy petition is filed and dismissed and found to be in bad faith? This case is the ideal vehicle for this Court to address and resolve this issue because it was presented and addressed directly by the District Court and in both opinions issued by the Third Circuit.

II. This Court Should Grant Review to Resolve a Conflict Among the Lower Courts as to when the Seventh Amendment Requires that Claims for Compensatory and Punitive Damages Warrant a Jury Trial When an Involuntary Bankruptcy Proceeding Is Dismissed.

Underlying this case, and a central issue before the lower courts in this litigation, was whether a jury trial was appropriate to determine the award of compensatory and punitive damages. This raises an important issue concerning the Seventh Amendment's right to jury trial in civil cases. This Court long has recognized the application of the Seventh Amendment and the availability of jury trials in bankruptcy court proceedings. *See*, *e.g.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

Practically every court to address the issue has held a trial when there is evidence of bad faith in an

involuntary bankruptcy. *See In re Cannon Express Corp.*, 280 B.R. 450, 452 (Bankr. W.D. Ark. 2002) ("Based on the evidence presented at the hearing on February 25–27 . . . "); *In re Atlas Mach. & Iron Works, Inc.*, 190 B.R. 796, 800 (Bankr. E.D. Va. 1995) ("[T]rial on Atlas's motion was conducted on December 1 and 2, 1993. . . ."); *In re Advance Press & Litho, Inc.*, 46 B.R. 700, 701 (Bankr. D. Colo. 1984) ("Trial on [the § 303(i)] matter was concluded on August 31, 1984."); *In re Camelot, Inc.*, 25 B.R. 861, 865 (Bankr. E.D. Tenn. 1982) (noting that evidence and testimony had been adduced before court §303(i) claim); *In re Camelot, Inc.*, 19 B.R. 910, 911–12 (Bankr. E.D. Tenn. 1982) ("This case was then tried on April 13, 1982, and . . . concluded on April 14, 1982."); *In re MicroStructure Techs. Inc.*, No. 08-44074, 2009 WL 2208590, at *2 (Bankr. W.D. Wash. July 17, 2009) ("The evidentiary hearing on Micro-Structure's request for attorneys' fees and damages . . . was held on April 8, April 9, and . . . was concluded on June 18, 2009."); *In re Clean Fuel Techs. II, LLC*, 544 B.R. 591, 595 (Bankr. W.D. Tex. 2016) ("The Court admitted certain exhibits into evidence at the trial on the Counterclaim. . . ."); *In re Tarasi & Tighe*, 88 B.R. 706, 708 (Bankr. W.D. Pa. 1988) (explaining that the bankruptcy court conducted a trial and heard testimony before deciding §303(i) claim); *In re TPG Troy, LLC*, No. 12-14965, 2013 WL 3789344, at *4 (Bankr. S.D.N.Y. July 18, 2013) ("The Court held a hearing on the [§303(i)] Motion on June 28, 2013."); *In re Bayshore Wire Prods. Corp.*, 209 F.3d 100, 102 (2d Cir. 2000) ("Trial was held in December 1995."); *In re Quantum Cool, LLC*, No. 12-00260-8-SWH, 2013 WL 3733182, at

*1, 12 (Bankr. E.D.N.C. July 15, 2013) ("The motion was heard . . . on April 30 and May 1, 2013."); *In re TRED Holdings, L.P.*, No. 10-40749, 2010 WL 3516171, at *2 (Bankr. E.D. Tex. Sept. 3, 2010) (noting that the court held days-long evidentiary hearing on issue of damages).

When a party in a bankruptcy proceeding invokes its right to a jury trial and the district court concludes the party has a constitutional right to a jury trial under *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989)—as was the case here—the district court cannot eviscerate that jury trial right on summary judgment simply because the case originated in the bankruptcy court. As *Granfinanciera* made clear, "the aid of juries is not only deemed appropriate but is required by the Constitution itself," "legal claims are not magically converted into equitable issues by their presentation to a court of equity," and Congress cannot "conjure away the Seventh Amendment by mandating that traditional legal claims be brought there or taken to an administrative tribunal [such as the bankruptcy court]." *Granfinanciera*, 492 U.S. at 51–55 (quotation marks and citations omitted). Like any other case involving a constitutional right to a jury trial, the Seventh Amendment requires that a jury (not the court) decide issues of material fact in dispute—especially with regards to a party's intent.

But the District Court and the Third Circuit used a very different approach in this case. The District Court acknowledged that there was conflicting evidence concerning bad faith: "There is some conflicting

evidence as to Defendants' level of diligence in inquiring into the facts and law before filing the involuntary bankruptcy petitions . . . There is also conflicting evidence as to Defendants' ultimate goal, or purpose, for filing the petitions, which precludes summary judgment on the issue of bad faith." App. at 54. The District Court recognized that there was evidence that the involuntary bankruptcy was filed "in order to gain a tactical advantage in the pending litigation" in Pennsylvania state court. *Id*. at 56. It noted that there was a factual dispute over whether the "Defendants improperly used the involuntary bankruptcy petition as a means to collect a debt." App. at 60. In other words, the District Court acknowledged genuine factual issues that go to the very heart of both bad faith and punitive damages.

In light of this, the Seventh Amendment required that this matter be resolved by a jury (as the Florida involuntary proceedings were), not by the district court on summary judgment. Nonetheless, the district court denied a jury trial and granted summary judgment because of its erroneous assumption that "malice" was required for punitive damages. But this error does not explain its denial of a jury trial for compensatory damages given the conflicting evidence and the requirements of the Seventh Amendment.

The Third Circuit compounded this problem when it held: "even if those facts are taken **at face value** and as indicating bad faith, we cannot say that the District Court erred in concluding, in effect and in light of the totality of the circumstances and the policy surrounding § 303(i)(2) that no reasonable jury would grant

punitive damages." App. at 15 (emphasis added). In its revised opinion, it articulated a new legal test for punitive damages: "bad enough" to warrant punitive damages. But the Seventh Amendment requires that the case then be remanded to the district court for a jury trial as to whether this legal standard had been met. Instead, the Third Circuit substituted its judgment for that of the jury and said that "no reasonable jury" would award punitive damages. But in light of the facts of this case, and the conflicting evidence identified by the District Court, there is no basis for this conclusion—especially when viewed in the light most favorable to NMI as the party opposing summary judgment. Given a triable issue as to bad faith and a statutory standard which permits the award of punitive damages upon a finding of bad faith, the Third Circuit erred when it held that no reasonable jury could find that NMI is entitled to relief under §303(i)(2).

The Third Circuit denied compensatory damages by concluding: "Indeed, there can be little doubt that NMI was on the brink of failure when the involuntary bankruptcy petition was filed. . . . Because the involuntary bankruptcy petition was filed when NMI was already in irreversible decline—by all appearances on the precipice of complete collapse—the petition was not the proximate cause of the business's failure. A reasonable jury could not find otherwise." App. at 15.

In coming to this conclusion, the Third Circuit took the facts in the light most favorable to the defendants and ignored the evidence that a jury could have used to conclude that the involuntary bankruptcy

caused NMI substantial harms. NMI was a going concern (like many companies facing an involuntary bankruptcy) and continued to operate after the involuntary petitions were filed. More importantly, the jury would have considered the extent to which the involuntary bankruptcy proceeding contributed to NMI's ultimate failure. "The filing of an involuntary bankruptcy petition has devastating consequences for the putative debtor," and could serve as "a fatal blow to [it as] a going concern," thereby warranting an award of both compensatory and punitive damages. *In re Landmark Distributors, Inc.*, 189 B.R. 290, 316 (Bankr. D.N.J. 1995).

Moreover, "[e]ven when a corporation is insolvent, its corporate property may have value," and compensable damages are available to remedy the extent to which the corporation's assets and value are diminished or destroyed. *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 349–50 (3d Cir. 2001).

All of this should have gone to a jury for a determination of whether damages were appropriate and the amount to be awarded. In other courts around the country, this is exactly what would have occurred. This Court should grant review to decide the important issue concerning the Seventh Amendment and the availability of jury trials in involuntary bankruptcy proceedings. Again, this case is the ideal vehicle for

addressing this issue because it was clearly presented and directly ruled on by the lower courts.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ERWIN CHEMERINSKY
Counsel of Record
UNIVERSITY OF CALIFORNIA
BERKELEY SCHOOL OF LAW
215 Law Building
Berkeley, CA 94720
echemerinsky@
law.berkeley.edu
(510) 642-6483

STEVEN M. COREN
KAUFMAN, COREN & RESS, P.C.
2001 Market Street, Ste 3900
Philadelphia, PA 19103
scoren@kcr-law.com
(215) 735-8700