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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH**

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In re:	)	
STEPHEN M. HARMSSEN	)	Bankruptcy Case No. 03-33637 JAB
	)	(Involuntary Chapter 7)
Debtor	)	
	)	

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**DEBTOR'S MEMORANDUM IN SUPPORT OF MOTION FOR  
RECONSIDERATION**

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Stephen M. Harmsen ("Harmsen" or "Debtor"), hereby submits this Memorandum in Support of Debtor's Motion for Reconsideration of that portion of the Court's April 13, 2004 Memorandum Decision denying Debtor any claim for attorneys' fees and damages, and requests that the Court retain jurisdiction to determine fees and damages at a later date.

**I. INTRODUCTION**

1. On August 9, 2003 The Society of Lloyds ("Petitioner") filed an involuntary Chapter 7 petition against Debtor seeking Debtor's adjudication in an attempt to collect upon a \$235,084.48 judgment.

2. Trial was held upon the involuntary petition on March 11, 2004 and March 12, 2004.

3. Following trial, the Court entered an Order of Dismissal in which it dismissed Petitioner's involuntary petition. The Court also entered its Memorandum Decision containing findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052(a). Based upon the analysis set forth in the Memorandum Decision, the Court concluded that Harmsen was generally paying his debts as such debts became due, and therefore that Petitioner's involuntary petition should be dismissed. However, the Court denied Harmsen any claim for costs or attorneys' fees under § 303(i)(1)(A) and (B), and for damages under § 303(i)(2) on the grounds that Harmsen had not presented evidence sufficient to support such a finding.

4. By this Motion, Harmsen requests that the Court reconsider only that portion of its Memorandum Decision which denied any claim for attorneys' fees and damages, and requests that the Court retain jurisdiction to determine attorneys' fees and damages at a later date.

## II. ARGUMENT

An award of attorneys' fees, costs and damages under § 303(i) is entirely within the discretion of the court. *In re Fox*, 171 B.R. 31 (Bankr. E.D.Va. 1994). When a bankruptcy court dismisses a petition for involuntary bankruptcy, the debtor may, under certain circumstances, recover costs and, in the case of a bad faith filing, it may also recover damages from the petitioning creditor(s). *R. Eric Peterson Constr. Co., Inc. v. Quintek, Inc. (In re R. Eric Peterson Constr. Co., Inc)*, 951 F.2d 1175, 1179 (10<sup>th</sup> Cir. 1991).

Section 303(i) provides in relevant part:

“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).

Thus, the text of the statute makes a damage award contingent on three prerequisites. First, the court must have dismissed the petition. Second, the dismissal must be other than on consent of all petitioners and the debtor. Third, the debtor must not have waived its right to recovery under the statute. Here, Harmsen has satisfied all three prerequisites of the statute.

There is no question that a bankruptcy court has the authority to retain jurisdiction for the purpose of awarding costs, attorneys’ fees and damages under § 303(i) after dismissal of an involuntary bankruptcy proceeding. *In re Glannon*, 153 B.R. 571, 572 (Bankr. D. Kan. 1993); see also *In re Glannon*, 245 B.R. 882, 886-87 (Bankr. D. Kansas 2000) (the court starts from the basic premise that bankruptcy courts clearly retain jurisdiction to consider whether or not to award a debtor § 303(i) damages after the court has dismissed the petition for involuntary bankruptcy); *In re Cooper School of Art, Inc.*, 709 F.2d 1104 (6<sup>th</sup> Cir. 1983) (bankruptcy court did not lose jurisdiction for the purpose of awarding costs and attorney fees when it dismissed creditors’ involuntary petition for failure to join more than three creditors); *In re Godroy Wholesale Co., Inc.*, 37 B.R. 496 (Bankr. D. Ma. 1984) (“the court wishes to make clear that even though it has dismissed the above-captioned proceeding [for failure to satisfy the necessary jurisdictional requirement], it has not lost jurisdiction to

award costs, attorney's fees and other damages sustained by [Debtor]). In fact, the Tenth Circuit has held that a dismissal of the bankruptcy petition is one prerequisite that must be met before the bankruptcy court can make a § 303(i) award. *R. Eric Peterson Constr. Co., Inc. v. Quintek, Inc. (In re R. Eric Peterson Constr. Co., Inc)*, 951 F.2d 1175, 1179 (10<sup>th</sup> Cir. 1991). Here, although the Court dismissed the involuntary petition against Harmsen, it may retain jurisdiction to hear evidence on attorneys' fees and damages. In truth, it would have been impossible for Debtor to present evidence of attorneys' fees before the end of the trial because Debtor could not have known what they were at the time.

If the bankruptcy proceeding involves a right created by the federal bankruptcy law, it is a core proceeding. Section 303(i) proceedings clearly depend on bankruptcy law for their existence. They do not arise unless an involuntary petition is dismissed by the bankruptcy court. Thus, § 303(i) proceedings are core proceedings. Courts hold that even when a bankruptcy case or bankruptcy estate has been closed, the bankruptcy court retains jurisdiction to enforce remedies created by specific sections of the bankruptcy code. *See In re Fox*, 171 B.R. 31, 33 (Bankr. E.D.Va. 1994) (bankruptcy court has jurisdiction to make a § 303(i) determination even after the court dismissed the petition and closed the case by order); *In re Banks-Davis*, 148 B.R. 810, 813 (Bankr.E.D.Va. 1992) (bankruptcy court retains jurisdiction even after a bankruptcy estate is closed when a party is seeking a remedy created by a specific section of the bankruptcy code). Here, Harmsen is seeking a remedy created by a specific section of the Bankruptcy Code, namely, Section 303(i). Thus, the Court retains jurisdiction to

make a § 303(i) determination, even where the Court has dismissed the involuntary petition.

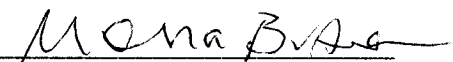
Attorney's fees issues are ancillary matters, which are essentially unrelated to judgments on the merits of cases. When a request is made for attorney's fees, that is not a motion to alter or amend the judgment of the court. *See FCC v. League of Women Voters*, 468 U.S. 364, 373 n. 10 (1984). Here, Harmsen does not seek to alter or amend the Court's dismissal of the involuntary petition. Harmsen merely requests that the Court reconsider that portion of its Memorandum Decision which denied Debtor any claim for attorneys' fees and damages, and requests that the Court retain jurisdiction to determine attorneys' fees and damages at a later date. Clearly the Court has authority to do so.

### III. CONCLUSION

For the reasons set forth above, Harmsen respectfully requests that the Court reconsider that portion of the Court's Memorandum Decision denying Harmsen any claim for attorneys' fees and damages, and requests that the Court retain jurisdiction in this matter to determine these attorneys' fees and damages under § 303(i) at a later date.

Dated: April 23, 2004.

HOLLAND & HART LLP

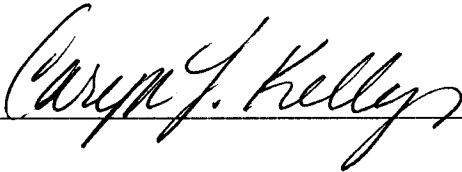
By:   
Mona Lyman Burton  
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Counsel for Stephen M. Harmsen

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 23 day of April, 2004, a copy of DEBTOR'S MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION was sent by mail and facsimile to the following:

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