

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF )  
 )  
HOLCO CAPITAL GROUP, INC., ) CASE NO. 10-30006 HCD  
 ) CHAPTER 7  
 ) INVOLUNTARY PETITION  
ALLEGED DEBTOR. )

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IN THE MATTER OF ) CASE NO. 10-32233 HCD  
 ) CHAPTER 7  
HOLCO CAPITAL GROUP, INC., )  
 )  
 )  
DEBTOR. )

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Appearances:

Mark A. Kaiser, Esq., counsel for debtor, Post Office Box 632, Painesville, Ohio 44077;

Mark J. Adey, Esq., counsel for Kukui Gardens Corporation, Barnes & Thornburg LLP, 600 1st Source Bank Center, 100 North Michigan Street, South Bend, Indiana 46601;

Sarah Quinn Kuhny, Esq., counsel for Kukui Gardens Corporation, Barnes & Thornburg LLP, 600 1st Source Bank Center, 100 North Michigan Street, South Bend, Indiana 46601;

Paul Edgar Harold, Esq., counsel for Travelers Casualty and Surety Company, LaDue Curran & Kuehn LLC, 200 First Bank Building, 205 West Jefferson Boulevard, South Bend, Indiana 46601;

James R. Byron, Esq., counsel for Trustee, Thorne, Grodnik LLP, 228 West High Street, Elkhart, Indiana 46516; and

Alexander L. Edgar, Esq., Assistant United States Trustee, One Michiana Square, Fifth Floor, 100 East Wayne Street, South Bend, Indiana 46601.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 29, 2011.

Before the court are two motions: the Motion to Dismiss the Involuntary Petition, filed in Case Number 10-30006 by the alleged debtor, Holco Capital Group, Inc. ("Holco"), and the Motion to

Consolidate, filed in Case Number 10-32233 by unsecured creditor Kukui Gardens Corporation (“Kukui”). A hearing on both matters was held, and post-hearing briefs and responses were filed by the parties. The court, having received documentary evidence and having heard sworn testimony and the arguments of counsel, then took the matters under advisement. For the reasons presented in this Memorandum of Decision, the motion of Holco to dismiss the involuntary petition is denied and the motion of Kukui to consolidate the voluntary chapter 7 case into the involuntary chapter 7 case is granted.<sup>1</sup>

### BACKGROUND

On October 15, 2009, the United States District Court for the District of Hawaii entered its *Order Granting Plaintiff’s Motion for Partial Summary Judgment on Count II of the First Amended Complaint as against Defendant Holco Capital Group* (“Summary Judgment Order”). That Order granted judgment in the amount of \$2,703,561.77 in favor of Kukui and against Holco. In the Joint Pre-Trial Order in this bankruptcy proceeding, *see* R. 33, the parties stipulated to the Hawaii District Court’s ruling. The following underlying facts, which are undisputed, are taken from the Hawaii District Court’s decision. *See* R. 28, Ex. A (“Summary Judgment Order”).

In 1969, Kukui, a Hawaii non-profit corporation, constructed a multifamily apartment housing complex in Honolulu, Hawaii, for low and moderate income families, using a loan from the Ford Foundation, evidenced by a note (“Note”) secured by a mortgage (“Mortgage”) that was insured by the Department of Housing and Urban Development (“HUD”). HUD required Kukui to establish and maintain two accounts for the property, a “Replacement Reserve Fund” and “Residual Receipts Fund.” *See id.* at 3-4.

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<sup>1</sup> The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

In 1997, Kevin C. Horton (“Horton”) formed Holco Capital Group, Inc., an Indiana corporation, and Holco took assignment of all the assets of HC Mortgage, which had purchased Kukui’s Mortgage through a HUD auction. Beginning in 1998, Holco serviced the Note and Mortgage for Kukui.

Prior to December 2007, Kukui entered into a purchase and sale agreement with two purchasers. Holco submitted Kukui’s request for a prepayment termination to HUD, and Kukui obtained approval. Kukui then asked Holco to release the Mortgage, based on HUD’s authorization. Closing on the sale was scheduled for December 18, 2007. On December 12, 2007, Horton (on behalf of Holco) sent an email to Kukui’s attorney requesting over \$4 million for obtaining HUD’s approval to allow prepayment of the Note and for servicing the Mortgage for twenty-one years, in exchange for the release of the Mortgage. The following day, Kukui sent a letter to Horton, on behalf of Holco, rejecting the proposal and demanding release of the mortgage without any payment so that the title could be cleared. The sale of the property closed on December 18, 2007, despite Kukui’s inability to obtain a release of the Mortgage, after Kukui placed \$1.8 million in escrow.

On May 25, 2008, in the Hawaii District Court, Kukui filed a 7-count Complaint against Holco, Horton, and others, alleging failure to meet the statutory requirements for release of mortgage, wrongful conversion of Kukui property, fraud, breach of fiduciary duties, and other charges. *See* R. 28, Ex. A. After an extensive presentation of the factual basis of the dispute, the district court found that the material facts were not in dispute. *See id.* at 15-17. The court listed the parties’ many significant points of agreement, and then set forth the four claims argued by Horton (on behalf of Holco) concerning Holco’s entitlement to the reserve funds at issue. *See id.* at 18-19. The district court presented its analysis of the arguments:

The Court finds no merit in any of Defendants’ [Holco’s and Horton’s] positions. First, . . . Defendants have admitted through correspondence that the Replacement Reserve and Residual Receipts funds belong to Plaintiff [Kukui]. . . . Moreover, defendants have admitted Plaintiff’s ownership of the . . . funds. . . . Second, the Court also notes that HUD has directed Defendants to transfer the . . . funds to Plaintiff. Third, Defendants’ Servicing Agreement provides that the reserve funds will be invested on behalf of the mortgagor. Fourth, the Regulatory Agreement, HUD Handbook, and 2001 HUD Legal Opinion further clarify that the . . . funds belonged to the mortgagor. Fifth, case law establishes that said reserve funds belong to the mortgagor.

*Id.* at 19-20. The district court combed through the Regulatory Agreement and Servicing Agreement governing Kukui, the HUD Regulations defining the trust relationship between mortgagor and servicing mortgagee, and the HUD Guidelines regarding Multifamily Asset Management Project Servicing. It then reviewed the case law and the HUD 2001 Legal Opinion addressing the issue. The Court concluded:

[E]very source the Court has examined unequivocally confirms that the Replacement Reserve Fund and Residual Receipts Account are assets of the mortgagor and upon prepayment of the mortgage must be returned to the mortgagor. Moreover, these sources do not present even the slightest suggestion that the Defendants may be entitled to the reserve funds.

*Id.* at 31 (emphasis in original). It then found that “Plaintiff is the proper owner of the Replacement Reserve Fund and Residual Receipts Fund amounting to \$2,703,561.77 after offsetting the final mortgage payment.”

*Id.* In its Order of October 15, 2009, therefore, the Hawaii District Court granted Kukui’s Motion for Partial Summary Judgment on Count II as to Holco. *Id.* at 34.

On January 4, 2010, petitioning creditor Kukui filed an involuntary chapter 7 petition for relief against Holco.<sup>2</sup> *See* R. 1. On May 7, 2010, Holco filed a separate voluntary chapter 7 petition, and also filed its Motion to Dismiss the involuntary petition, listing reasons for its dismissal. *See* R. 20. Kukui responded to the Motion by addressing each reason for dismissal and by justifying its status as petitioning creditor. *See* R. 28. The Trustee and Travelers Casualty and Surety Company joined Kukui’s position opposing Holco’s Motion to Dismiss.<sup>3</sup> Kukui also filed, in Case No. 10-32233, a Motion to Consolidate the voluntary and involuntary Holco cases into the first-filed involuntary case. A hearing was held on both the Motion to Dismiss and the Motion to Consolidate, and the parties were allowed to file post-hearing briefs and responses. The court begins its analysis with the alleged debtor’s Motion to Dismiss.

## DISCUSSION

### A. Motion to Dismiss

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<sup>2</sup> Holco had filed a voluntary chapter 7 petition on October 22, 2009, but it was dismissed a month later.

<sup>3</sup> Travelers Casualty and Surety Insurance, with a claim in excess of \$1.8 million against Holco, met the requirements set forth in 11 U.S.C. § 303(b)(2) to qualify as a petitioning creditor in the involuntary bankruptcy. Holco did not dispute its status as another petitioning creditor at the hearing or in its brief.

A bankruptcy court must dismiss an involuntary case for lack of jurisdiction if the petitioning creditor fails to meet the requirements for an involuntary petition set forth in § 303 of the Bankruptcy Code. *See Draiman v. Multiut Corp.*, 2008 WL 904778 at \*3 (N.D. Ill. March 31, 2008) (*citing In re Busick*, 831 F.2d 745, 749-50 (7th Cir. 1987)). The pertinent requirements are set forth in § 303(b):

(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 \$14,425 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 . . . , by one or more of such holders that hold in the aggregate at least \$14,425 of such claims[.]

11 U.S.C. § 303(b)(1), (2). A creditor filing an involuntary petition bears the burden of establishing each of the elements found under § 303(b). *See In re Downstate News Group, Inc.*, 2006 WL 1520267 at \*1 (Bankr. C.D. Ill. May 31, 2006).

In its Motion to Dismiss, Holco raised seven reasons for dismissal of the petition, based upon the criteria of § 303(b):

1. The petition was commenced by less than three creditors, in contravention of 11 U.S.C. § 303(b)(1).
2. There is a bona fide dispute as to whether Holco owes Kukui any money. Holco asserted a counterclaim that remains pending against Kukui in a proceeding in the United States District Court for the District of Hawaii, Case No. CV 08-00049. Therefore, the involuntary petition is predicated on a claim that is subject to dispute as to amount.
3. Although the court granted Kukui partial summary judgment against Holco for \$2,700,000.00, that judgment is contingent as to liability, since Holco asserted an affirmative defense of set-off. Therefore, the Kukui claim is predicated on a dispute as to liability.
4. Kukui does not qualify as an appropriate holder of a claim herein, since its claim is contingent as to liability or subject of a bona fide dispute as to liability or amount under § 303(b)(1).
5. Kukui is an unsecured creditor that cannot commence an involuntary petition.

6. Holco filed a voluntary bankruptcy petition under chapter 7, naming Kukui as one of its creditors. It is entitled to an automatic stay under 11 U.S.C. § 362, “and the involuntary petition is thus rendered nugatory” by its filing.

7. Kukui cannot prove that Holco is generally not paying its debts as they become due.

R. 20 at 2-3.

Kukui responded to Holco’s Motion to Dismiss, refuting Holco’s arguments and demonstrating that it qualified as a petitioning creditor under § 303(b). *See* R. 48 at 3-4. It also pointed out that, at the hearing, Holco failed to introduce any evidence or legal argument concerning five of the original seven reasons for dismissal. At the hearing, the only witness to testify was Kevin C. Horton, Holco’s president and sole shareholder. He focused on only two reasons for dismissing the involuntary petition: that Kukui’s claim was subject to a bona fide dispute, and that the involuntary case should be dismissed in favor of the voluntary case. Kukui insisted that Holco, by not developing those dismissal arguments, had waived them.

The court finds that Kukui met its burden of dispelling Holco’s unargued reasons for dismissal and demonstrating that it fulfilled the elements of § 303(b). *See* R. 48 at 4. Holco failed to prove either that Kukui did not qualify as a petitioning creditor or that its counterclaim demonstrated the existence of a bona fide dispute. Holco’s denials of Kukui’s eligibility as a petitioning creditor were presented only briefly, without argument, in its Motion to Dismiss, and Horton presented no evidence or argument at trial of the criteria under § 303(b). (His claim that there was a bona fide dispute is discussed below.) Based upon clear statutory and case law development under § 303(b), therefore, the court makes the following findings:

1. The involuntary petition was properly filed by only one creditor because Holco has admitted to having fewer than 12 creditors. *See* § 303(b)(2).
2. Kukui’s claim under the Summary Judgment Order was not dependent on some future event and therefore was not contingent. *See In re Seko Inv., Inc.*, 156 F.3d 1005, 1008 (9th Cir. 1998), *cert. denied*, 526 U.S. 1066 (1999) (concluding that insurance company’s claim did not contemplate a future event and thus was not contingent as to liability).
3. Kukui qualified as an appropriate holder of the claim under the Summary Judgment Order, which granted judgment to Kukui against Holco in the amount of \$2,703,561.77.
4. As an unsecured creditor, Kukui was entitled to file an involuntary petition under § 303(b)(1). *See In re Fox*, 1994 WL 484596 at \*3 (N.D. Ill. Sept. 2, 1994) (stating that “the description of

a qualified holder in section 303(b) is clearly broad enough to encompass fully secured, partially secured, and unsecured creditors”).

5. Holco’s filing of a voluntary chapter 7 bankruptcy petition on October 22, 2009 (which was dismissed a month later) and on May 7, 2010, constituted its admissions that Holco was not paying its debts when due. *See In re Premier General Holdings, Ltd.*, 427 B.R. 592, 600 (Bankr. W.D. Tex. 2010) (adopting the rule that “the filing of a voluntary petition while an involuntary petition is pending will result . . . in the entry of an order for relief in the involuntary case”).

The court now turns to the one § 303(b) argument made by Holco. In its brief and at the hearing, Holco asserted that Kukui’s debt was subject to a bona fide dispute because Holco had a counterclaim pending against Kukui in the Hawaii District Court which exceeded the \$2.7 million judgment. *See R. 49* at 14.

The Bankruptcy Code does not define the term “bona fide dispute.” In *In re Busick*, 831 F.2d 745 (7th Cir. 1987), this circuit set forth an objective test for determining whether a debt is subject to a bona fide dispute:

Under this standard, the bankruptcy court must determine whether there is an objective basis for either a factual or a legal dispute as to the validity of debt. However, “[t]he statute does not require the court to determine the outcome of any dispute, only its presence or absence. Only a limited analysis of the claims at issue is necessary.” *Busick*, 65 B.R. at 637.

*Id.* at 750. According to the Seventh Circuit’s standard, the court is to ascertain whether a genuine dispute exists, but it is not to resolve the dispute. It was Kukui’s initial burden to show that its claim was not the subject of a bona fide dispute, and then Holco’s burden to demonstrate that the debt was validly disputed.

Kukui asserted that its claim arose out of the Summary Judgment Order issued by the Hawaii District Court. That court granted summary judgment in the amount of \$2,703,561.77 in favor of Kukui and against Holco, and specifically held that Holco’s counterclaim was not available as a defense to Kukui’s claim.<sup>4</sup> It is clear that Kukui has met its burden of demonstrating that its claim is not subject to a bona fide

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<sup>4</sup> The Summary Judgment Order of the Hawaii District Court stated:

Notably, whether the Defendants maintain a claim based on quantum meruit principles does not affect the outcome of the instant motion because the Court finds that this claim has no merit . . . . Further, Defendants have asserted that they are “entitled to compensation for this work under the (continued...)

dispute. This court determines that the Summary Judgment Order established that Kukui holds a valid claim against Holco that is not disputed as to amount (exactly \$2,703,561.77) or as to liability (Holco is liable on a judgment debt owed to Kukui).

The burden then shifted to Holco to demonstrate that a bona fide dispute exists. *See In re Downstate News Group, Inc.*, 2006 WL 1520267 at \*1. Holco did not challenge the validity, amount, or merits of the judgment awarded to Kukui in the Summary Judgment Order. Instead, it relied solely upon the argument that Holco’s counterclaim, filed in the Hawaii District Court action, subjected Kukui’s claim to a bona fide dispute because the counterclaim exceeded the amount of the judgment. *See* R. 49 at 14.

The court finds this argument unavailing. The existence of pending litigation, of affirmative defenses, or of a counterclaim is insufficient to establish the existence of a bona fide dispute. *See In re Vortex Fishing Systems, Inc.*, 277 F.3d 1057, 1066 (9th Cir. 2002) (citing cases); *Rezko v. Sirazi*, 2009 WL 1507660 at \*3 (N.D. Ill. May 29, 2009) (stating that “the *Busick* standard does not require that the bankruptcy court dismiss an involuntary petition simply because the debtor has raised affirmative defenses”). The Ninth Circuit Court of Appeals in *In re Seko Investment, Inc.*, 156 F.3d 1005 (9th Cir. 1998), presented a cogent explanation why an alleged debtor’s assertion of a counterclaim against a petitioning creditor does not establish that the creditor’s claim is the subject of a bona fide dispute.

Seko claims that it has raised a bona fide dispute because it has a separate claim against Chicago Title that, if found to be valid, would completely offset Chicago Title’s claim against it. But the statute [§ 303(b)] is not concerned with who ultimately owes money to whom; rather, it is concerned with whether the creditor’s claim is disputed. Although there may be a dispute regarding who ultimately owes money to whom, Seko has not really disputed the validity of the *claim* filed by Chicago Title. Instead, it contends that the counterclaim against Chicago Title, if successful, could yield enough money to cancel out its debt on the notes. . . . We therefore hold that the existence of a counterclaim against a creditor does not automatically render the creditor’s

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<sup>4</sup>(...continued)

doctrine of quantum meruit.” . . . [T]he Court is unpersuaded by Holco’s quantum meruit claim as the HUD Handbook specifically states that a servicing mortgagee may be compensated by a mortgagor for its services only if there is a separate agreement detailing the terms of the compensation agreement.

R. 48 at 5 (quoting Summary Judgment Order, p. 19, n.15) (emphasis in original).

claim the subject of a “bona fide dispute.” So long as the petitioning creditor has established that there is no dispute regarding the debtor’s liability on the creditor’s claim, the creditor has standing under section 303(b) to bring a petition.

*Id.* at 1008. In this case, as well, the creditor has failed to show any dispute regarding the validity or merits of the original Summary Judgment Order won by Kukui or the validity of Holco’s liability under that judgment. Holco’s counterclaim is not evidence of the existence of a bona fide dispute. *See also In re Ransome Group Investors I, LLLP*, 424 B.R. 547, 552 (Bankr. M.D. Fla. 2009); *In re Hentges*, 350 B.R. 586, 601 (Bankr. N.D. Okla. 2006). Nor can an alleged debtor establish a bona fide dispute “merely by reiterating the same argument the state court had rejected without producing any evidence” that would contradict the creditor’s evidence of the debt. *Rezko*, 2009 WL 1507660 at \*4 (citing *In re Byrd*, 357 F.3d 433, 440 (4th Cir. 2004)).

Holco’s reliance on *In re Henry*, 52 B.R. 8 (Bankr. S.D. Ohio 1985), is misplaced. The *Henry* court was interpreting the legislative comments underlying the new 1984 legislation creating the Bankruptcy Code. That court found that liability clearly existed, since the petitioning creditors held judgments against the alleged debtor. Nevertheless, it determined, based upon Senator Baucus’s comments in the Congressional Record, that the existence of a countervailing claim in state court created a bona fide dispute and disqualified the creditors from being petitioners in the bankruptcy court. A few years after *Henry* was decided, however, the Seventh Circuit established its objective test in *In re Busick*, and the subsequent case law has made clear that “the *Busick* standard does not require that the bankruptcy court dismiss an involuntary petition simply because the debtor has raised affirmative defenses” such as the counterclaim raised by Holco in the Hawaii District Court. *Rezko v. Sirazi*, 2009 WL 1507660 at \*3. This court is not persuaded by a twenty-five year-old case from another circuit, with no precedential value to this court and with dissimilar facts. Furthermore, as Kukui pointed out, the question in *Henry* was whether the alleged debtor would become an involuntary debtor; the question in this case is “in which bankruptcy case will Holco become” a debtor. R. 51 at 9. Holco is a chapter 7 debtor, voluntarily and involuntarily. *Henry* is simply inapposite.

Holco raised one last argument in its brief. In cursory fashion, it asserted that the creditor had filed the involuntary petition in bad faith, knowing that Holco had raised a counterclaim and attempting to avoid that counterclaim at the trial. R. 49 at 19. “Bad faith can be shown by a creditor filing an involuntary petition when it knows that it cannot meet the requirements of § 303(b)(1).” *In re Paczesny*, 282 B.R. 646, 649 (Bankr. N.D. Ill. 2002); *see also Draiman v. Multiut Corp.*, 2008 WL 904778 at \*5 (N.D. Ill. March 31, 2008). Holco did not claim, however, that Kukui had continued to prosecute this case knowing that it was not an eligible creditor under § 303(b). Indeed, the court has found that Kukui has met its burden of proving the statutory requirements under § 303(b). It also has found that the existence of Holco’s counterclaim against Kukui does not make a creditor ineligible or render its claim the subject of a “bona fide dispute.” There has been no evidence of bad faith; the court declines to find it in any of Kukui’s conduct or actions.

In its brief and at the hearing, Holco raised many arguments previously brought before the Hawaii District Court. Kukui, in an abundance of caution, responded to them. However, this court will not relitigate matters that Holco had a full and fair opportunity to litigate in the Hawaii District Court. Before this bankruptcy court is Holco’s Motion to Dismiss the Involuntary Petition filed against Holco. The court determines that Kukui, the petitioning creditor, fully met the requirements for commencing an involuntary case under § 303(b) of the Bankruptcy Code. Holco, the alleged debtor, failed, when the burden of proof shifted to it, to demonstrate that Kukui did not establish those § 303(b) elements and was not qualified to be a petitioning creditor. Nor did Holco show that its counterclaim demonstrated the existence of a bona fide dispute. Accordingly, the court denies Holco’s Motion to Dismiss the Involuntary Petition.

#### B. Motion to Consolidate

The second motion before the court is Kukui’s Motion to Consolidate Current Voluntary Case With and Into First-Filed Involuntary Case. The Trustee and Travelers Casualty and Surety Company joined Kukui’s Motion. Kukui brings the request for consolidation pursuant to Federal Rule of Bankruptcy Procedure 1015(a), which provides, in relevant part:

(a) CASES INVOLVING SAME DEBTOR. If two or more petitions by, regarding, or against the same debtor are pending in the same court, the court may order consolidation of the cases.

Fed. R. Bankr. P. 1015(a). The rule permits but does not require consolidation. *See In re Telluride Income Growth Ltd. P'ship*, 311 B.R. 585, 592 n.5 (Bankr. D. Colo. 2004). In its discretion, therefore, the court determines whether it is appropriate in the circumstances before it to consolidate the two chapter 7 Holco proceedings. *See In re Kosenka*, 104 B.R. 40, 42-43 (Bankr. N.D. Ind. 1989).

The court finds that the elements of the rule are satisfied: There are two petitions pending in this court, each involving Holco as the debtor. It also notes that both cases are chapter 7 cases; there are no potential reorganization efforts to disrupt, for example. The goal of liquidation and the protections accorded to a chapter 7 debtor will remain intact if the two cases are consolidated. The court reviewed the case law to see what circumstances caused courts to consolidate and to choose to proceed under a voluntary or involuntary case. In one case, when the voluntary petition was filed within hours of the involuntary petition, consolidating and proceeding with the voluntary case was considered appropriate, because there was no prejudice demonstrated to the petitioning creditors. *See In re Westover Hills, Ltd.*, 46 B.R. 300 (Bankr. D. Wy. 1985). But when there is a longer time lapse between the filings, some courts required the petitioning creditors to show they would be prejudiced by the dismissal of the involuntary petition. *See, e.g., In re Harper-Elder*, 184 B.R. 403, 408 (Bankr. D.D.C. 1995). However, nothing in the Bankruptcy Code suggests that creditors must show prejudice to prevent dismissal of an involuntary case after a voluntary petition is filed. *See In re Premier General Holdings, Ltd.*, 427 B.R. 592, 599 (Bankr W.D. Tex. 2010).

In this case, Holco filed no response to Kukui's Motion to Consolidate in Case No. 10-32233. It presented no reasons for the court not to consolidate, or for the court to choose to proceed with Holco's later-filed voluntary case rather than with Kukui's earlier filed involuntary case. The court sees no prejudice to Holco if the consolidation occurred and either chapter 7 case continued.

Kukui asserted that consolidation into the earlier chapter 7, the involuntary case, would serve the best interests of the creditors because the earlier filing date for the involuntary petition (January 4, 2010)

would ensure the maximum look-back period for avoidance actions and prevent any potential prejudice to creditors. On the other hand, Kukui suggested, if the later filing date of the voluntary petition (May 7, 2010) were established for deadlines, Holco could preclude any pursuit of certain avoidance claims.

On these issues the court is persuaded by the thoughtful, thorough reasoning set forth in *In re Premier General Holdings, Ltd.*, 427 B.R. 592 (Bankr. W.D. Tex. 2010). It answered the question “What should a court do with an involuntary petition when a later voluntary petition is filed?” *Id.* at 594. The court reviewed the cases considering consolidation under Rule 1015(a) and made this initial determination:

The fact that Rule 1015(a) contemplates the consolidation of two cases involving the same debtor lends support to a different rule – that the filing of a voluntary petition while an involuntary petition is pending ought to be treated as the functional equivalent of an admission by the debtor that an order for relief should be entered in the involuntary case, with the two matters then being consolidated under the first filed case, thereby maximizing the look-back period for purposes of chapter 5 avoidance actions, and minimizing the possibility of wrongful transactions between the filing of the two cases. That is the rule adopted here[.]

*Id.* at 599-600. The court gave a historical perspective on the issues as they were viewed under the Bankruptcy Act and then the Bankruptcy Code. It presented cogent reasons for not requiring petitioning creditors to show prejudice in order to prevent dismissal of an involuntary petition, and rejected “the facile conclusion that the filing of a voluntary petition ought in the usual case to result in the dismissal of the involuntary petition.” *Id.* at 599. Nevertheless, the court stated that it would honor the debtor’s choice of chapter. (In the case before this court, the debtor, like the petitioning creditors, filed a chapter 7 petition.) The Texas bankruptcy court then set forth a procedure to employ with consolidation. *See id.* at 602.

This court concurs in the analysis for consolidation set forth so clearly in *Premier*. Accordingly, in this case, the court grants Kukui’s Motion to Consolidate the two chapter 7 cases in which Holco is the debtor. An order for relief pursuant to 11 U.S.C. § 303(h)(1) will be entered in the first-filed involuntary case, and both cases will be consolidated pursuant to Federal Rule of Bankruptcy Procedure 1015(a) under the first-filed case number, Number 10-30006.

CONCLUSION

For the reasons set forth in this Memorandum of Decision, the court denies Holco's Motion to Dismiss the Involuntary Petition. The court grants Kukui's Motion to Consolidate the two chapter 7 cases in which Holco is the debtor. An order for relief pursuant to § 303(h)(1) is entered in the first-filed involuntary case and both cases are consolidated pursuant to Rule 1015(a) under the first-filed case number, Number 10-30006.

SO ORDERED.

/s/ HARRY C. DEES, JR.  
HARRY C. DEES, JR., JUDGE  
UNITED STATES BANKRUPTCY COURT