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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF
OHIO, AKRON

IN RE:)	CASE NO. 04-55888
)	
MARKETING AND CREATIVE SOLUTIONS, INC.,)	CHAPTER 7
)	
)	JUDGE MARILYN SHEA-STONUM
)	
INVOLUNTARY DEBTOR)	ORDER GRANTING
)	INVOLUNTARY PETITION FOR
)	CHAPTER 7 RELIEF

This matter is before the Court on the Involuntary Petition for chapter 7 relief [docket #1] filed against Marketing and Creative Solutions, Inc., ("MACS") by creditors Scripps Howard Broadcasting Co. d/b/a WEWS News Channel 5; Plain Dealer Publishing Co. d/b/a The Plain Dealer; and WKYC-TV. Inc., ("WEWS," "PDP," and "WKYC" individually, or collectively, the "Petitioning Creditors") on October 28, 2004. MACS filed an answer on November 23, 2004 [docket # 5]. After the completion of discovery, an evidentiary hearing was held on March 2, 2005. The Court requested additional briefing of legal questions due on March 18, 2005, at which point the Court took the matter under advisement.

FINDINGS OF FACT

Based on review of the involuntary petition, the stipulations, and other pleadings filed in this case, and the testimonial and documentary evidence admitted at the hearing on this matter, the Court makes the following findings of fact.

1. MACS is a for-profit corporation organized under Ohio law in April 1993 and operated as an advertising agency, with its business office at 122 Western Ave., Akron, Ohio. (Stip. ¶ 2, 3)
2. Stuart Moss is the statutory agent for MACS and was its president through June 30, 2004, at which point the company ceased doing business. (Stip. ¶ 4, 12.)
3. MACS was an advertisement agent for various Spitzer Auto Stores ("Spitzer") through June 30, 2004, whereby it created, designed, and placed both print and television broadcast advertising for Spitzer. (Stip. ¶ 9, 10.)
4. The Petitioning Creditors all have business offices in Cleveland, Ohio and are all owners and operators of printing or television broadcast media in the Cleveland, Ohio market. (Stip. ¶ 5-8.)
5. All Petitioning Creditors either aired Spitzer television advertisements or carried Spitzer

print advertisements that were placed with the individual creditor by MACS. (Stip. ¶ 11.)

6. MACS was the advertising agency of record for Spitzer and the party with whom WEWS interacted for the purchase and payment of Spitzer television advertisements. Ms. Willis stated that WEWS did not have a contract signed by MACS, and that until MACS closed its operations in June 2004, the conduct between the parties was such that MACS paid the invoices billed to it for television advertisements MACS had placed for Spitzer. (Pet. Ex.1; testimony of Terri Willis, WEWS credit manager.)
7. On July 31, 2003, MACS applied for credit with PDP. (Stip. ¶ 14.) Carol Moss, Treasurer of MACS, signed the application acknowledging that MACS would receive the billing for and be responsible for the payment of print advertisements MACS placed with PDP. (Stip. Ex. B). Mr. Moss issued a memo to PDP that same day affirming MACS's obligation to pay PDP for Spitzer advertisements. (Pet. Ex. 2.)
8. PDP and MACS operated in the manner prescribed by the credit agreement and Mr. Moss's memo, and until May 2004, MACS paid PDP in response to its invoices for Spitzer print advertisements. (Testimony of Cheryl Stewart, credit representative for PDP.)
9. On September 10, 2003, Carrie Samolenki, MAC's receptionist, signed a written contract on behalf of MACS with PDP for print advertisement rates. (Pet. Ex. 3). This contract served as the basis for the rates PDP charged MACS for subsequent print advertisements MACS placed for Spitzer, for which MACS paid PDP. Ms. Samolenki was not an officer of MACS.
10. There was no written contract between MACS and WKYC. WKYC regularly billed MACS for Spitzer television advertisements and MACS regularly paid until June, 2004. The dealings between MACS and WKYC were consistent with how the industry typically operates. WKYC did attempt to get advertising agencies to sign contracts making them expressly liable for the advertisements they placed, but there is not always a contract between the agency and the media provider. (Testimony of Scott Andriani, business manager for WKYC.)
11. On September 20, 2004 Stuart Moss directed a letter to WKYC, where he acknowledged outstanding payment obligations MACS owed to WKYC for advertisements it placed for Spitzer. (Stip. Ex. A.)
12. On July 21, 2004, Spitzer paid MACS \$112,210.98 (check #13086) for two invoices related to television advertisements MACS placed with WEWS and WKYC. The invoices totaled \$75,258.00. (Stip. ¶ 15, 16, Stip. Ex. D-F). MACS did not pay WEWS or WKYC for either invoice for which it had received payment from Spitzer. (Stip. ¶ 16.)

13. The involuntary petition lists WEWS, PDP, and WKYC as holding a claims in the amount of \$43,284.25, \$113,319.38, and \$12,962.50 respectively.

CONCLUSION OF LAW

Proceeding from the above-stated findings of fact, the Court now makes the following conclusions of law.

1. Section 303(b) of the Bankruptcy Code allows for the commencement of an involuntary chapter 7 proceeding:
 - (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 . . . if such claims aggregate at least \$12,300 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims; [or]
 - (2) if there are few than 12 such holders . . .by one or more holders that hold in the aggregate at least \$12,300 of such claims.
2. The issue before the Court is whether the three petitioning creditors have claims that are the subject of a bona fide dispute.
3. This Court's decision is controlled by, *inter alia*, *In re Eastown Auto Co.*, 215 B.R. 960 (6th Cir. 1998). The burden of proof is on the petitioning creditors to demonstrate that their claims are not contingent as to liability or the subject of a bona fide dispute. *Id.* at 968. Once a petitioning creditors meets its burden establishing that no bona fide dispute exists, the burden then shifts to the debtor to prove otherwise. *Id.* "[I]f there is either a genuine issue of material fact that bears upon the debtor's liability, or a meritorious contention as to the application of law to undisputed facts, then the petition must be dismissed." *Id.* at 966. In determining whether a claim is subject to a bona fide dispute, the bankruptcy court must not resolve any genuine issues of fact or law. *Id.*
4. MACS's assertion that, in the absence of a signed contract between MACS and any of the Petitioning Creditors that would make MACS primarily liable on the obligations due and owing, MACS is not liable on the obligation because it was acting as an agent for Spitzer, who, as a disclosed principal, is primarily liable under agency principles. This assertion ignores existing Sixth Circuit precedent interpreting Ohio law on this very point:

First, an agent may be held personally liable when he has manifested an intention to bind or contract for himself. Second, an agent is not protected from personal liability when the third party's motivation for

entering into the contract is based solely and exclusively on the credit of the agent.

Soberay Mach. & Equip. Co. v. MFR Ltd., Inc., 181 F.3d 759, 768 (6th Cir. 1999).

5. In determining whether a party has manifested an intent to bind or contract for himself, the court considers the facts associated with the transaction, including custom and usage in the industry and between the parties. Restatement (Third) of Agency § 6.01 (T.D. No. 4, 2003). In the present case, while a written agreement articulating the terms between the parties might not exist, each of the Petitioning Creditors presented credible witnesses who testified that the course of conduct between the parties was generally such that MACS placed orders with the Petitioning Creditors for television or print advertisements, the Petitioning Creditors subsequently invoiced MACS for the advertisements that were run, and MACS in turn paid the Petitioning Creditors according to the invoice. The testimony was supported with documentary evidence, including: monthly invoices and payments between MACS and WEWS; a credit application completed by MACS with a memorandum agreeing to accept billings from PDP, and established billing rates with subsequent payments based on those rates between MACS and PDP; and correspondence between MACS and WKYC that evidences the customary dealings between the parties whereby MACS affirmed its intent to reimburse WKYC for outstanding invoices, consistent with the parties historical interactions. This alone is sufficient evidence of an intent to be bound based on the parties dealings. See *WUPW TV-36 v. Direct Results Marketing, Inc.*, 591 N.E. 2d 1345 (Ohio App. 10 Dist 1990), *Clark Advertising Agcy. v. Avco Broadcasting*, 383 N.E.2d 353, 355 (Ind. App 1978).
6. In *WUPW TV-36 v. Direct Results Marketing, Inc.*, the plaintiff-television station aired advertisements for the defendant-advertising agency who had ordered the airtime for its advertiser. Though the television station and the advertising agency exchanged a contract which imposed liability for payment upon the advertising agency, neither party ever signed it. The advertising agency ordered the airtime, was billed for the time it ordered, and paid the invoices directly to the television station. The court looked to the terms of the unsigned contract and the lack of any affirmative evidence that those terms were altered, and that the advertising agency failed to present any evidence in support of its assertion that principal-agent relationship between it and the advertiser. *Id.* at 1352. The court concluded that there was an “established industry custom that television stations hold advertising agencies liable for the purchase of air time unless the television station receives specific notice of nonliability, even though the television station is aware that the advertising agency is acting for a disclosed principal.” *Id.* The evidence presented by the Petitioning Creditors was nearly identical to what occurred in the *WUPW TV-*

36 case and is consistent with the exceptions to a disclosed principal's liability adopted by the Sixth Circuit. In the case at bar, however, there was evidence presented by MACS that they were acting as an agent for Spitzer, so the applicability of the agency-principle tenets is unquestionable, as is the fact that the historical course of conduct between the parties and the custom of dealing prevalent in the industry support a finding of liability against MACS under Ohio law.

7. Furthermore, in this case, not only does the course of conduct between MACS and the Petitioning Creditors serve as a adequate basis for finding MACS liable for the outstanding obligations, but the parties have stipulated to the fact that Spitzer has previously paid MACS \$112,210.98 for invoices from WEWS and WKYC, as to which MACS failed to then remit payment to the parties who had submitted those invoices.
8. The Court does not make any conclusions of law with respect to the ultimate amount of the creditors' claims, but does conclude that the petitioning creditors claims amounts are sufficient to meet the statutory threshold of \$12,300 provided in 11 U.S.C. §303 (b).

CONCLUSION

For the foregoing reasons, the Court finds that the Petitioning Creditors have met the burden of proof that their claims are not contingent as to liability nor the subject of a bona fide dispute. Therefore, the Court will enter a separate judgment order granting relief upon the involuntary petition.

IT IS SO ORDERED.


MARILYN SHEA-STONUM
Bankruptcy Judge



CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of MAY, 2005, the foregoing Order was sent via regular U.S. Mail to:

/s/ Stephanie Norman

Clerk

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