

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
AMARILLO DIVISION

IN RE: §  
ENERSON USA, L.C.C., § CASE NO. 99-21188-7  
DEBTOR. §

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IN RE: §  
ENERSON S.A. de C.V., § CASE NO. 99-21180-7  
DEBTOR. §

**ORDER ON MOTION FOR JUDGMENT**

EnerSon S.A. de C.V. (EnerSon S.A.) and EnerSon USA, L.L.C. (EnerSon USA)(collectively referred to as EnerSon), the alleged debtors in the above captioned cases, filed their motion seeking judgment against Applied LNG Technologies USA, L.L.C. (ALT) for damages arising from the involuntary petitions filed by ALT against EnerSon. A hearing on the motion was held June 27, 2000. <sup>1</sup>

ALT filed an involuntary petition under Chapter 7 of the Bankruptcy Code against EnerSon S.A. on November 15, 1999, and against EnerSon USA on November 17, 1999. EnerSon S.A. and EnerSon USA moved to dismiss the involuntary petitions for improper venue. On January 26, 2000, the bankruptcy court, the Honorable John C. Akard presiding, conducted an evidentiary hearing on the venue issue and concluded venue was improper. The bankruptcy court therefore dismissed the involuntary petitions.<sup>2</sup>

At the hearing on June 27, much evidence was adduced regarding the relationship between EnerSon and ALT and how the relationship turned sour after EnerSon started experiencing financial difficulties.

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<sup>1</sup>This matter constitutes a core proceeding over which this court has jurisdiction to enter a final order. 28 U.S.C. § 157(b)(2).

<sup>2</sup>In determining whether to dismiss the cases or to transfer them to another forum, Judge Akard found the matter to be essentially a two-party dispute best handled in another, non-bankruptcy forum. The court's order provided for dismissal with prejudice. At the hearing on the motion for judgment, I asked counsel their interpretation of Judge Akard's order, whether ALT is barred from bringing another involuntary regardless of the forum, or is it barred from bringing it in the Amarillo Division. Counsel for EnerSon responded that he interprets the order to mean a refiling is barred in the Amarillo Division. Given the clear wording of the order, I am skeptical of this interpretation.

EnerSon contends that the filing of the involuntary petitions was a business tactic on ALT's part aimed to destroy EnerSon's future business prospects. ALT, on the other hand, contends its relationship with the EnerSon entities was properly terminated, that the EnerSon entities owe it approximately \$750,000.00, and that the involuntary petitions were filed for legitimate reasons. ALT submits that damages should not be awarded because (1) the bankruptcy court erred in deciding venue was improper, (2) the evidence on attorney's fees was heard at the January 26 hearing, and Judge Akard chose not to award attorney's fees, (3) the EnerSon entities have asked the Federal District Court<sup>3</sup> to refer all issues to binding arbitration, and (4) there is no evidence of bad faith on ALT's part; in fact, ALT had a good faith motive in filing the involuntary petitions.

Under § 303(i)(1) of the Bankruptcy Code (11 U.S.C.), if an involuntary petition is dismissed, other than on consent of all petitioners and the debtor, the bankruptcy court may grant a judgment against the petitioners for costs and reasonable attorney's fees. Under § 303(i)(2), if the court finds the petition to have been filed in bad faith, the court may award damages, including punitive damages. An award may be cumulative. *See* § 102(5) (defining "or" as non-exclusive). Whether to award costs, fees, or damages is discretionary with the court. *In re Reid*, 854 F.2d 156, 159 (7th Cir. 1988); *Keiter v. Stracka*, 192 B.R. 150 (S.D. Tex. 1996).

As stated above, these cases were dismissed by Judge Akard before reaching the merits of the involuntary petitions. This does not, however, prevent the court from entertaining a claim for damages under § 303(i). *R. Eric Peterson Construction Co., Inc. v. Quintek, Inc., et al (In re R. Eric Peterson Construction Co., Inc.)*, 951 F.2d 1175, 1180 (10<sup>th</sup> Cir. 1991).

It is not disputed that EnerSon was indebted to ALT. When EnerSon was unable to pay ALT, ALT terminated its agreement with EnerSon. EnerSon does not contend the termination was improper. And, while EnerSon argues that the filing of the involuntaries was a tactical move on ALT's part, there is no

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<sup>3</sup>EnerSon and ALT are parties to a lawsuit pending before the United States District Court, Amarillo, Texas, styled *Golden Spread Energy, Inc., Ken Kelley, and Applied LNG Technologies, L.L.C. v. National Offshore Supply Co., Matthew W. Bence, Joseph Michael Hamil, Ener-Son USA, Inc., and Ener-Son S.A. de C.V.*, Cause No. 2-00-CV-0018-J.

evidence, other than conclusory statements, to prove the filings actually hindered EnerSon's continued business operations. Moreover, when the agreement with ALT was terminated, EnerSon steered its customers to ALT for future gas deliveries.

Mr. Hamil testified that EnerSon had incurred \$8,000 to \$10,000 in fees; no evidence was presented regarding the reasonableness of such fees. There was also no evidence of costs incurred by EnerSon.

At most, the evidence establishes that there are indeed hard feelings between the principals of EnerSon and the principals of ALT. Judge Akard was of the opinion that this is a two-party dispute not properly litigated before the bankruptcy court. The evidence does not establish that one side has acted with any greater degree of bad faith than has the other. The parties are best left to sort out their dispute in federal district court.

Therefore, it is

ORDERED that the relief requested by EnerSon's motion for judgment is denied; it is further

ORDERED that this order shall not be construed to prevent EnerSon from seeking damages if subsequent involuntary petitions are filed and dismissed.

SIGNED this 4<sup>th</sup> day of August, 2000.

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Robert L. Jones  
UNITED STATES BANKRUPTCY JUDGE