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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
May 7, 2014
Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE WYO. COUNTRY BUILDERS, LLC, Debtor.	BAP No. WY-13-060
MELANIE M. PETERSON, Appellant, v. WYO. COUNTRY BUILDERS, LLC, Appellee.	Bankr. No. 12-21046 Chapter 7 OPINION*

Appeal from the United States Bankruptcy Court
for the District of Wyoming

Before THURMAN, Chief Judge, CORNISH, and MICHAEL, Bankruptcy Judges.

THURMAN, Chief Judge.

This appeal arises from counter awards granted under 11 U.S.C. § 303(i),[1] which provides protection from inappropriate involuntary filings. Melanie M. Peterson ("Appellant") obtained an award for attorney's fees and costs under § 303(i) against Wyo. Country Builders, LLC ("WCB"), after it had filed an involuntary petition against her that was dismissed. When Appellant's efforts to

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

[1] All future references to "Code," "Section," and "§" are to title 11, United States Code, unless otherwise specified.

use that award as leverage in state court against WCB failed, she filed an involuntary petition against WCB. The Bankruptcy Court concluded that Appellant had filed the involuntary petition against WCB in bad faith, awarded punitive damages in WCB's favor, and determined that attorney's fees and costs would be awarded upon WCB's attorneys' filing a bill of costs. Upon receipt of WCB's attorneys' fee application and after a hearing, the Bankruptcy Court granted the fee application and ordered Appellant to pay WCB's attorneys $7,110.25 within thirty days from the entry of the order. On appeal, Appellant, proceeding *pro se*, argues that the Bankruptcy Court erred by 1) awarding fees and costs to the wrong person; 2) failing to consider what was described by the Bankruptcy Court as game-playing by the alleged debtor; and 3) failing to offset the two § 303(i) awards. Finding no error, we AFFIRM the Bankruptcy Court's § 303(i) award against Appellant.

I. FACTUAL BACKGROUND

The parties have a litigious history. Appellant and her husband, Kirby Peterson, have been litigating with WCB in state court since 2007. Three months prior to the scheduled trial in the state court case, WCB filed an involuntary petition against each of the Petersons on June 17, 2009 (the "First Involuntary Case").[2] The parties promptly filed a flurry of motions. On February 5, 2010, the Bankruptcy Court dismissed both involuntary petitions because the Petersons had more than twelve creditors and the three-petitioning-creditors-standing requirement had not been met.[3]

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[2] Ex. D, Voluntary Petitions, *in* Appellants' (sic) Amended Appendix ("App.") at 15-18 (*In re Melanie M. Peterson*, Bankr. Case No. 09-20567, and *In re Kirby D. Peterson*, Bankr. Case No. 09-20566).

[3] *See* Ex. H, Memorandum Opinion on Application For Compensation For Attorney Fees and Costs, Entitled "Bill of Fees and Costs" Filed by Applicant Ken McCartney of the Law Office of Ken McCartney, P.C. ("First Fee Order")at 3, 6, *in* App. at 28, 31.

On March 10, 2010, the Bankruptcy Court held an evidentiary hearing on the Petersons' request for sanctions and post-dismissal motion for certain protections. At this hearing, WCB's attorney, Vance Countryman, advised the Bankruptcy Court that Tim Lookingbill, WCB's owner, had assigned his claim to his sister, Cynthia Van Vleet ("the Assignment"), and that "Van Vleet [] is now the party in interest with regard to this matter."[4] No documentation regarding the Assignment was ever subsequently presented. The Bankruptcy Court later described the Assignment as "game-playing."[5]

On April 21, 2010, the Petersons, through their attorney, Ken McCartney, applied for attorney's fees in each of their involuntary case under § 303(i). On May 3, 2011, the Bankruptcy Court entered the First Fee Order, granting the fee application (after deductions for unreasonable requests) in the amount of $13,300.10 against WCB in *In re Kirby Peterson*, but denied the fee application in *In re Melanie Peterson* as duplicative.[6] No one appealed the First Fee Order.

On August 27, 2012, McCartney assigned the First Fee Order to Frank D. Peasley, who then assigned it to the Petersons.[7] On October 17, 2012, Appellant filed an involuntary petition against WCB (the "Second Involuntary Case").[8] In her Rule 1003(a) statement, she stated:

> That this claim was acquired as a result of a bankruptcy proceeding Case No. 09-20566 Chapter 11, and was an award for reimbursement for partial payment of the attorneys fees that were incurred.
>
> That the [First Fee Order] was, erroneously, granted to the attorney representing me in the bankruptcy proceedings instead of myself, who was the party incurring the cost of defense of the matter;

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4 Ex. F, Partial Transcript of Mar. 10, 2010 at 4, *ll.* 15-17, *in* App. at 22.

5 First Fee Order at 9, *in* App. at 34.

6 *Id.* at 14-15, *in* App. at 39-40.

7 Ex. K, Assignments of Judgment, *in* App. at 46-48.

8 Ex. B, Involuntary Petition, Bankr. Case. No. 12-21046, *in* App. at 4-5.

> That, during the fifteen (17) (sic) months prior to the date of the Assignment, no payments were made by the Debtor on the [First Fee Order];
>
> That my bankruptcy attorney agreed to assign the [First Fee Order] to Mr. Peasley in hopes that it could be used as leverage and/or partial settlement of the pending litigation in Fremont Court, WyoCountry Builders has refused to consider the [First Fee Order] in settlement negotiations in the civil action.
>
> That said claim was not transferred to the undersigned for the purpose of commencing an Involuntary Petition in Bankruptcy action.[9]

WCB sought dismissal of the involuntary petition against it, arguing that Appellant's claim was subject to a bona fide dispute because she failed to present WCB with a demand for payment and failed to establish that WCB was not paying its bills as they become due. On March 7, 2013, the Bankruptcy Court dismissed the involuntary petition against WCB, concluding "Ms. Peterson improperly filed the involuntary petition after her attempt to use the [First] Fee Order in settlement discussions in the state court litigation failed and as a substitute for collection" (the "Dismissal Order").[10] The Bankruptcy Court also determined that attorney's fees and costs would be awarded upon review of a bill for attorney's fees and costs.[11] Finally, it awarded $2,000 in punitive damages against Appellant for filing the involuntary petition in bad faith.[12]

Collin Hopkins and Cynthia Van Vleet of the law firm Hopkins & Van Vleet, LLC ("Applicants") represented WCB in the Second Involuntary Case.[13] On April 7, 2013, pursuant to the Dismissal Order, they filed an application for

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9 Statement, *in* App. at 49-50.

10 Ex. C, Dismissal Order at 6, *in* App. at 11.

11 *Id.* at 7, *in* App. at 12.

12 *Id.* at 8, *in* App. at 13.

13 *But see* Ex. L and the docket sheet for Bankr. No. 12-21046, *in* App. at 51 and (i) (both listed Cynthia Van Vleet of Wind River Law Center PC as the attorney of record for WCB).

professional compensation, requesting $6,330 for attorney's fees and $780.25 for expenses, for a total of $7,110.25.[14] Appellant objected to the application, seeking reductions based on excessiveness and lack of necessity.[15] On June 26, 2013, after a telephonic hearing, the Bankruptcy Court overruled Appellant's objections, granted the request of $7,110.25, and ordered Appellant to pay Applicants within thirty days from the entry of the order (the "Second Fee Order").[16]

On July 10, 2013, Appellant filed a single notice of appeal, appealing both the Dismissal Order and the Second Fee Order. On August 19, 2013, this Court construed that notice as two notices of appeal, dismissed the appeal of the Dismissal Order (BAP No. WY-13-051) as untimely, and assigned the appeal of the Second Fee Order as BAP No. WY-13-60 (this case).

II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit Court of Appeals ("Tenth Circuit") geographical area unless one of the parties elects to have the district court hear the appeal.[17] In this case, Appellant timely filed a notice of appeal from the Second Fee Order, which is a final order for purposes of appeal.[18] The parties have also consented to this Court's jurisdiction

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[14] Ex. N, Cover Sheet for Application for Professional Compensation, *in* App. at 57-66.

[15] Ex. M, Petitioning Creditors Response to Debtors Application for "Professional Compensation of Attorneys Fees and Costs," *in* App. at 52-56.

[16] Second Fee Order, *in* App. at 1-3. A transcript of the telephonic hearing on June 18, 2013, was not provided to this Court.

[17] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-3.

[18] *See In re Dewey*, 237 B.R. 783, 787 n.3 (10th Cir. BAP 1999) (fee order from final fee request was final for purposes of appeal because it ended the

(continued...)

by not electing to have the appeal heard by the United States District Court for the District of Wyoming. This Court, therefore, has appellate jurisdiction over this appeal.

III. ISSUE AND STANDARD OF REVIEW

The sole issue on appeal is whether the Bankruptcy Court erred in awarding attorney's fees and costs against Appellant pursuant to §303(i). We review a bankruptcy court's decision to award attorney's fees and costs under §303(i) for abuse of discretion.[19] Under that standard, this Court will affirm unless it has "a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances."[20]

IV. DISCUSSION

A. Section 303(i) In General

Section 303(i) provides:

> 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 –
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> (1) against the petitioners and in favor of the debtor for –
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> (A) costs; or
> (B) a reasonable attorney's fees; or
>
> (2) against any petitioner that filed the petition in bad faith, for –
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> (A) any damages proximately caused by such filing; or

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[18] (...continued)
litigation on the merits and left nothing for the court to do but execute the judgment).

[19] *In re Maple-Whitworth*, 556 F.3d 742, 745 (9th Cir. 2009); *Adell v. John Richards Homes Bldg. Co., L.L.C. (In re John Richards Homes Bldg. Co., L.L.C.)*, 439 F.3d 248, 265 (6th Cir. 2006).

[20] *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (internal quotation marks omitted).

(B) punitive damages.[21]

Section 303(i) is permissive, it leaves the assessment of fees, costs, and damages to the court's discretion.[22] When an involuntary petition is dismissed on some ground other than consent of the parties and the debtor has not waived the right to recovery, a motion under § 303(i)(1) raises a rebuttable presumption that reasonable fees and costs are authorized.[23] Most courts determining whether to award costs and fees under §303(i) have adopted a "totality of the circumstances" test.[24] They review the following factors: 1) the merits of the involuntary petition; 2) the role of any improper conduct on the part of the alleged debtor; 3) the reasonableness of the action taken by the petitioning creditors; 4) the motivation and objective behind filing the petition; and 5) other material factors the court deems relevant.[25]

B. The Bankruptcy Court did not abuse its discretion in awarding attorney's fees and costs against Appellant.

Appellant raises three main arguments on appeal: 1) the Bankruptcy Court erroneously awarded fees and costs to the wrong person; 2) the Bankruptcy Court failed to consider the alleged debtor's "game-playing"; and 3) the Bankruptcy Court abused its discretion in failing to offset the two § 303(i) awards.[26] We

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21 11 U.S.C. § 303(i).

22 *In re Silverman*, 230 B.R. 46, 50 (Bankr. D. N.J. 1998).

23 *Higgins v. Vortex Fishing Sys., Inc.*, 379 F.3d 701, 707 (9th Cir. 2004).

24 *Id.*

25 *Id.* at 707-08.

26 Appellant also made a one-sentence argument that the amount of the fees awarded was excessive in the conclusion section of her opening brief. We deem an argument raised in a perfunctory manner waived. *In re Taylor*, 737 F.3d 670, 682 n.9 (10th Cir. 2013) (argument deemed waived where entire argument was encompassed within one sentence); *United States v. Berry*, 717 F.3d 823, 834 n.7 (10th Cir.), *cert. denied*, 134 S.Ct. 495 (2013) (arguments raised in a perfunctory manner, such as in a footnote, are waived).

begin by noting that Appellant raised some issues and facts that are irrelevant to this appeal, which we will not consider.[27] Likewise, we will not consider any arguments or attacks against the First Fee Order or the Dismissal Order as they are untimely.[28]

1. The Bankruptcy Court did not award attorney's fees and costs to the wrong person.

Appellant argues that the Bankruptcy Court erred in granting the Second Fee Award to Van Vleet, instead of WCB. Appellant misunderstands the Bankruptcy Court's rulings in the Second Involuntary Case. The Second Fee Order provided that "Applicants' request for attorneys' fees in the . . . total [amount] of $7,110.25 is granted; and . . . that Peterson shall pay Applicants . . . within 30 days from the entry of this order."[29] Although worded as though it was awarding fees and costs to Applicants, when read in conjunction with the Dismissal Order, it is clear that the Bankruptcy Court awarded attorney's fees and costs to WCB. The Dismissal Order stated:

> IT IS FURTHER ORDERED that attorney fees and costs shall be awarded upon WCB's attorneys filing a bill for fees and costs. WCB shall file, within 30 days from the entry of this order, a bill for fees and costs with supporting documents[.][30]

We interpret the above language as an award to WCB, upon its attorneys filing a

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[27] Appellant's references to the state proceeding, the amount of attorney's fees she incurred defending the state case, and the eighteen-month delay caused by the filing of the First Involuntary Case are not relevant to whether fees and costs should be awarded against her for improperly filing an involuntary petition against WCB.

[28] No one appealed the First Fee Order and it is now too late to argue that the Bankruptcy Court should have assessed the First Fee Order against Van Vleet, instead of WCB. *See also* Order Construing Notice of Appeal as Two Notices of Appeal, Dismissing This Appeal, And Directing the Clerk to Set Deadlines in Second Appeal, entered Aug. 19, 2013, in *In re Wyo. Country Builders, LLC*, BAP No. WY-13-051 (appeal of Dismissal Order dismissed as untimely).

[29] Second Fee Order at 3, *in* App. at 3.

[30] Dismissal Order at 8, *in* App. at 13-14.

bill of costs. The Second Fee Order simply quantified the amount and provided a deadline to pay. This interpretation is also consistent with the plain language of § 303(i), which limits awards to the debtor.[31] Thus, the Bankruptcy Court did not erroneously award attorney's fees and costs to the wrong person.

2. The alleged debtor's improper conduct did not preclude the Bankruptcy Court from awarding attorney's fees and costs against Appellant.

Appellant argues the Bankruptcy Court abused its discretion in granting attorney's fees and costs against her because it allowed WCB and Van Vleet to manipulate the judicial process. She contends that the Bankruptcy Court improperly allowed WCB to assign its interest to Van Vleet. She also claims that Van Vleet misled the Bankruptcy Court by claiming WCB was her client and using Collin Hopkins to hide that she was the true debtor in this case, all in an effort to prevent an offset of the previous uncollected judgment.[32] These arguments are unavailing.

First, the doctrine of judicial estoppel precludes Appellant from arguing that Van Vleet was the debtor in this case.[33] Appellant initiated the Second Involuntary Case, naming WCB the alleged debtor. "Judicial estoppel is an equitable doctrine designed to protect the integrity of the court system."[34] The Tenth Circuit defines judicial estoppel as follows:

> [W]here a party assumes a certain position in a legal

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[31] 2 Collier on Bankruptcy ¶ 303.33 at 303-103 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011) ("An interesting question arises over whether sanctions may be recovered by parties other than the debtor. Because section 303(i) does not, on its face, cover such a situation, most courts restrict recovery to the debtor.").

[32] Amended Brief of Appellant ("Appellant's Brief") at 9-10.

[33] *See New Hampshire v. Main*, 532 U.S. 742, 749 (2001) (judicial estoppel prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase).

[34] *In re Riazuddin*, 363 B.R. 177, 185 (10th Cir. BAP 2007).

> proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.[35]

For judicial estoppel to apply: 1) a party's later position must be clearly inconsistent with its earlier position; 2) the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and 3) the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.[36] All three elements are present here. Appellant took an inconsistent position by first positing that WCB was the alleged debtor in the involuntary petition signed by her, and now argues Van Vleet is the alleged debtor. Second, the Bankruptcy Court accepted the first position in entering judgment for WCB in the Second Involuntary Case. Third, Appellant would derive a benefit to the extent it provides her with grounds to set aside the judgment or support her claim for setoff.

Even if judicial estoppel did not preclude Appellant from arguing that Van Vleet was the debtor in this case, the record does not support Appellant's factual contentions. The Bankruptcy Court did not previously "allow" or "recognize" the transfer of interest to Van Vleet.[37] In fact, the Bankruptcy Court noted that the Assignment lacked documentation, described it as "game-playing," and essentially considered it as a basis to award fees and costs against WCB in the

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[35] *Johnson v. Lindon City Corp.*, 405 F.3d 1065, 1069 (10th Cir. 2005) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)).

[36] *Johnson,* 405 F.3d at 1069.

[37] *See* Appellant's Brief at 7-8.

First Involuntary Case.[38] Accordingly, Appellant misunderstands the Bankruptcy Court's treatment of the Assignment.

Likewise, nothing in the record supports Appellant's contention that Van Vleet misled the court as to her role as WCB's counsel. The fact that Van Vleet did not speak at any of the hearings does not prove she was the alleged debtor. When a party is represented by more than one attorney, it is common for only one attorney to speak on that party's behalf at hearings. The bankruptcy docket reflects Van Vleet was WCB's attorney of record. Thus, the Bankruptcy Court's finding that "there [was] no confusion regarding Ms. Van Vleet's role as counsel for [WCB]" is not clearly erroneous.[39]

Finally, even if the Bankruptcy Court failed to take into account WCB's "game-playing," Appellant has not demonstrated that the Bankruptcy Court exceeded the bounds of permissible choice in the circumstances. WCB's game-playing occurred in the First Involuntary Case, not in the Second Involuntary Case.[40] Thus, it was not beyond the bounds of permissible choice for the Bankruptcy Court to not weigh it or to accord it little weight in determining whether to award attorney's fees and costs against Appellant in the Second Involuntary Case. WCB's previous misconduct does not excuse Appellant's improper filing of an involuntary petition. Indeed, Appellant's action was more egregious since she chose to use the same door the Bankruptcy Court previously slammed against WCB.[41] We conclude that the Bankruptcy Court did not abuse

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[38] First Fee Order at 9, *in* App. at 34.

[39] *In re Tahah*, 330 B.R. 777, 785 (10th Cir. BAP 2005) (court reviews the trial court's factual findings under the clearly erroneous standard).

[40] First Fee Order at 9, *in* App. at 34.

[41] Appellant's [] Reply Brief at 4, ¶ 4 ("I decided that the Judge would somehow correct this and the only way I knew how to get the matter back before him was through the same door used by Appellee.").

its discretion in awarding attorney's fees and costs against Appellant.

3. The issue of setoff was not raised below and will not be considered.

On appeal, Appellant argues that the Bankruptcy Court erred by failing to offset the two § 303(i) awards. Appellant, however, never raised setoff as an issue before the Bankruptcy Court. Appellate courts generally do not consider issues not passed upon by the trial court.[42]

In *Richison v. Ernest Group, Inc.*,[43] the Tenth Circuit examined when legal theories not raised below may be the basis for reversal on appeal, which reasoning is persuasive here. Its analysis began with determining whether the new theory was waived or forfeited below. It stated:

> If the theory was intentionally relinquished or abandoned in the district court, we usually deem it waived and refuse to consider it. By contrast, if the theory simply wasn't raised before the district court, we usually hold it forfeited. Waiver is accomplished by intent, but forfeiture comes about through neglect.[44]

The long-standing practice in the Tenth Circuit has been to review newly raised (but not waived) legal arguments only if there is plain error.[45] "To show plain error, a party must establish the presence of (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings."[46] The plain error rule is a reformulation of prior case law holding that appellate courts "will reverse on the basis of a legal theory not previously presented to the district court when the correct resolution of that theory is beyond a reasonable doubt and the failure to

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42 *Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir. 1992) (general rule is that appeals courts do not consider issues not considered by the trial court); *In re Cozad*, 208 B.R. 495, 498 (10th Cir. BAP 1997).

43 634 F.3d 1123 (10th Cir. 2011).

44 *Id.* at 1127-28 (citations and internal quotation marks omitted).

45 *Id.*

46 *Id.*

intervene would result in a miscarriage of justice."[47]

Appellant offers no explanation for not raising setoff to the Bankruptcy Court. Nothing in the record, however, indicates that Appellant intentionally relinquished the legal theory of setoff. Rather, it appears the failure to raise setoff was due to neglect, making the plain error rule applicable.

Appellant's only argument that comes close to arguing satisfaction of the plain error rule is her assertion that the Second Fee Order produced an absurd result, *i.e.*, that she holds a worthless judgment against a defunct corporation, while Van Vleet holds a judgment against her.[48] As stated earlier,[49] contrary to Appellant's assertion, WCB holds the Second Fee Order against her, not Van Vleet. We also disagree with Appellant's characterization of the result. While the result may seem unfair to Appellant, the result is not absurd. The Bankruptcy Court's awards under § 303(i) were consistent. Both parties improperly filed involuntary cases and both were punished for it. Given that there is no facial inconsistency between the awards, Appellant has failed to establish that an error has even occurred. Moreover, the alleged error here affects only the rights of these parties, thus Appellant has failed to establish the fourth element. Because Appellant never raised setoff below and has not shown plain error, we decline to consider the issue.[50]

C. WCB's request for attorney's fees and cost pursuant to Federal Rule of Appellate Procedure 38.

In its response brief, WCB argued that this appeal is frivolous and requested an award of attorney's fees and costs pursuant to Rule 38 of the Federal

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47 *Id.*

48 Appellant's Brief at 7, 10.

49 *See* discussion *supra* IV.B.1 at 8-9.

50 *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1141 (10th Cir. 2007).

Rules of Appellate Procedure.[51] Rule 38 requires a separately filed motion or notice from the court and a reasonable opportunity to respond. Because WCB did not file its request by separate motion, we deny the request.[52]

V. CONCLUSION

Appellant has failed to either identify a factual basis or present a sufficient argument from which this Court could conclude that the Bankruptcy Court abused its discretion in awarding attorney's fees and costs against her under § 303(i). Accordingly, we AFFIRM the Second Fee Order.

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[51] Fed. R. App. P. 38 states: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." *See also* Fed. R. Bankr. P. 8020 ("If a [] bankruptcy appellate panel determines that an appeal from an order, judgment, or decree of a bankruptcy judge is frivolous, it may, after a separately filed motion or notice from the [] bankruptcy appellate panel and reasonable opportunity to respond, award just damages and single or double costs to the appellee.").

[52] *Perea v. Sandoval (In re Sandoval)*, BAP No. CO-10-012, 2010 WL 3155256 (10th Cir. BAP Aug. 10, 2010).