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7 UNITED STATES BANKRUPTCY COURT
8 EASTERN DISTRICT OF CALIFORNIA
9 FRESNO DIVISION

10 In re) Case No. 10-19194-B-12
11 Richard Forrest,) DC No. HAR-3
12 Debtor.)
13 _____)

14 **MEMORANDUM DECISION REGARDING**
15 **MOTION TO CONFIRM CHAPTER 12 PLAN**

16 This disposition is not appropriate for publication. Although it may be cited for
17 whatever persuasive value it may have (see Fed.R.App.P.32.1), it has no
18 precedential value. See 9th Cir. BAP Rule 8013-1.

19 Hilton A. Ryder, Esq., of McCormick, Barstow, Sheppard, Wayte & Carruth,
20 LLP, appeared on behalf of the debtor, Richard Forrest.

21 René Lastreto, Esq., of Lang, Richert & Patch, appeared on behalf of Sun Valley
22 Raisins, Inc.

23 Robert Craig Iseley, Esq., appeared on behalf of Spartan Mortgage Services, Inc.

24 David R. Jenkins, Esq., appeared on behalf of Sterling Pacific Lending, Inc., The
25 Foundation Fund, LLC, and Generation Leasing.

26 M. Nelson Enmark, Esq., appeared in his capacity as the chapter 12 trustee.

27 Before the court is a motion to confirm a chapter 12 plan (the “Motion”)
28 filed by the debtor, Richard Forrest (the “Debtor”).

Sun Valley Raisins, Inc. (“Sun Valley”), a raisin packing company,
provided crop financing for the Debtor’s farming operation. The parties executed
various security documents (the “Loan Documents”) in connection with the loan.

1 At the commencement of this case, Sun Valley was owed \$210,000. The
2 Debtor's chapter 12 plan (the "Plan") proposes to surrender his 2010 raisin crop
3 to Sun Valley in satisfaction of its secured claim and treat the remainder of the
4 claim as unsecured. The Plan will be funded with, *inter alia*, proceeds of the
5 2011 crop. Sun Valley objects to its treatment in the Plan and contends that the
6 Loan Documents created, not a security interest in the 2010 crop and future crops
7 and their proceeds, but an absolute assignment of those crops. Based on Sun
8 Valley's interpretation of the Loan Documents, the Debtor has no right to the
9 2011 crop or its proceeds and the Plan cannot be confirmed. For the reasons set
10 forth below, the Motion will be granted and the Plan will be confirmed.

11 This memorandum contains the court's findings of fact and conclusions of
12 law required by Federal Rule of Civil Procedure 52(a), made applicable to this
13 contested matter by Federal Rule of Bankruptcy Procedure 7052. The
14 bankruptcy court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334
15 and 11 U.S.C. § 1225¹ and General Orders 182 and 330 of the U.S. District Court
16 for the Eastern District of California. This is a core proceeding as defined in 28
17 U.S.C. 157(b)(2)(A) & (L).

18 **Background and Findings of Fact.**

19 This bankruptcy was filed under chapter 12 on August 12, 2010. Richard
20 Forrest is a family farmer who produces raisin grapes on property which he owns.
21 Beginning in 2009, Sun Valley Raisins, a raisin packer, has provided crop
22 financing to the Debtor and has had an exclusive right to pack the Debtor's
23 raisins. Sun Valley filed a secured claim in the amount of \$ 210,000 in the
24 Debtor's bankruptcy case and now objects to confirmation of the Debtor's Plan

25
26 ¹Unless otherwise indicated, all bankruptcy, chapter, code section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules
28 of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated after October
17, 2005, Pub.L.109-8, Apr. 20, 2005, 119 Stat.23.

1 because it does not provide for payment in full of its claim (the “Objection”).

2 In September 2008, the Debtor executed the four documents which
3 constitute the Loan Documents: the Discretionary Draw Promissory Note
4 (Objection, Exhibit 1); the Security Agreement (Exhibit 2); the Agreement
5 Regarding Assignment of Crops and Crop Proceeds (Objection, Exhibit 3; the
6 “Assignment Agreement”); and the Deed of Trust with Assignment of Rents as
7 Additional Security (Objection, Exhibit 4; the “Deed of Trust”), each of which
8 bear the same date.

9 The Deed of Trust was recorded in May 2009. Exhibit “B,” to the Deed of
10 Trust, paragraph 2, and incorporated as part of the Deed of Trust, states: “This
11 Deed of Trust and Assignment of Rents is also for *the purpose of securing*
12 *payment of all fees, loans . . . and payment of all amounts advanced . . .* pursuant
13 to the Exclusive Delivery Contract and Promise to Make Raisins and/or
14 Promissory Note and/or Security Agreement and/or Agreement Regarding
15 Assignment of Crops and Crop Proceeds.” (Objection, Exhibit 4, p. 4, emphasis
16 added.) On May 26, 2009, Sun Valley filed a U.C.C. Financing Statement which
17 recites the Debtor’s agreement to deliver all present and future crops and crop
18 proceeds to Sun Valley, “*until all debts and obligations owed by Debtor to [Sun*
19 *Valley] are paid in full . . .*” (Objection, Exhibit 5, p. 1, emphasis added.)

20 Resolution of Sun Valley’s Objection turns on the character of the
21 transaction between the parties. The Debtor contends that the Loan Documents
22 created a security interest in the 2010 and future crops and their proceeds, and
23 that Sun Valley’s interest in the future crops terminated upon commencement of
24 the bankruptcy case by operation of § 552(a).²

25
26 ² 11 U.S.C. § 552(a) provides in pertinent part: “Except as provided in
27 subsection (b) of this section, property acquired by the estate or by the debtor after the
28 commencement of the case is not subject to any lien resulting from any security

1 Sun Valley contends that the transaction was an absolute sale of all future
2 crops to Sun Valley, meaning that the future crop proceeds needed to fund the
3 Plan never became part of the bankruptcy estate. In support of its contention,
4 Sun Valley points to the language in the Assignment Agreement which reads, in
5 pertinent part:

6 Whereas, [Debtor] has granted [Sun Valley] a security
7 interest in any and all crops now or hereafter located or growing or
8 to be grown on the Property as security for repayment of all
9 amounts due under the Promissory Draw Note executed by
10 [Debtor] to [Sun Valley]
11

12 [T]he parties hereby agree as follows:

- 13 1. [Debtor] hereby irrevocably assigns all of [his] right, title
14 and interest in and to all proceeds of all crops produced on
15 the Property to [Sun Valley] for a period beginning on the
16 date hereof and *ending on the date upon which the balance
17 of principal and interest due under the Promissory Draw
18 Note shall equal zero. . . .*
- 19 2. [Debtor] agrees that [Sun Valley] shall apply all crop
20 proceeds of [Debtor] received by [Sun Valley] in the
21 following manner. All crop proceeds received by [Sun
22 Valley] pursuant to this Agreement shall be applied in
23 reduction of: First the amount due [Sun Valley] of accrued
24 but unpaid interest under the Promissory Draw Note; Second
25 the amount due [Sun Valley] as unpaid principal balance of
26 the Promissory Draw Note; *and then to return to [Debtor]
27 any proceeds received in excess of such amounts.*

28 Objection, Exhibit 2, p. 1, emphasis added.

Early in the course of the bankruptcy case, the Debtor needed funding for
the 2011 crop and brought a motion for the use of Sun Valley's cash collateral,
the 2010 crop and proceeds (the "Cash Collateral Motion"). The Debtor
explained, in his declaration in support of that motion, that Sun Valley provided
his crop financing and "acquired an interest in Debtor's raisin crop for 2009 and
future crops. . . ." Sun Valley "entered into an agreement in 2008 for the

agreement entered into by the debtor before the commencement of the case."

1 exclusive right to pack my raisins. The agreement included a *security agreement*
2 *in my raisin crop to insure performance and to secure any advances on the*
3 *crop.*” (Cash Collateral Motion, 11/24/10, Decl., Dkt. No. 75, 1:22-25, emphasis
4 added.) The Debtor proposed that Sun Valley be granted a “replacement lien in
5 Debtor’s 2011 and all future crops in the amount of the cash collateral used”
6 (*Id.*, 2:16-17.)

7 Sun Valley had the opportunity to comment on the proposed order and did
8 not object to the Cash Collateral Motion. (*See* Dkt. No. 121, filed 2/24/2011.)

9 The unopposed order was approved by the court and reads, in pertinent part:

10 The secured claim of Sun Valley on the future crops of Debtor shall
11 be fixed in the amount of the gross 2010 proceeds less the cost of
harvest

12 It is further ordered that Sun Valley shall be granted a
13 replacement lien in Debtor’s 2011 crop and subsequent crops to the
extent of the cash collateral utilized.

14 Objection, Exhibit 7, 2:1-6.

15 The Debtor did not sell the 2010 crop and so did not use Sun Valley’s cash
16 collateral. Under the terms of the Plan, Sun Valley will receive delivery of the
17 2010 raisin crop and the balance of its claim will be treated as an unsecured
18 claim.

19 In November of 2010, the Debtor brought a motion to value the collateral
20 of Spartan Mortgage Services, holder of the mortgage on his real property. By
21 virtue of the Deed of Trust, which is junior to that of Spartan Mortgage Services,
22 Sun Valley was a respondent to the motion. The court granted the unopposed
23 motion which valued at \$0 any interest of Sun Valley in that real property.

24 **Issue Presented.**

25 The court must determine whether Sun Valley holds an ownership interest
26 in the Debtor's post-petition raisin crops and the proceeds. If Sun Valley owns
27 the Debtor’s future crops then the Objection must be sustained and confirmation
28

1 of the Plan must be denied. If, however, Sun Valley's interest is other than an
2 ownership interest, the Objection must be overruled and the Plan may be
3 confirmed.

4 **Analysis and Conclusions of Law.**

5 **Article 2, California Uniform Commercial Code.** There is no dispute
6 that the California Uniform Commercial Code applies to the subject transaction.
7 The Article 2 applies to sales of goods, and Article 9 applies to security interests
8 and to sales which necessarily involve a security interest. The Uniform
9 Commercial Code³ does permit creditors to take a security interest in after-
10 acquired property. *In re S & Z Intern. Management, Inc.*, 10 B.R. 580,
11 (Bankr.Fla., 1981).⁴ The commencement of a bankruptcy case, however, cuts off
12 those interests as of the date of filing. § 552(a).

13 The legislative history of the Bankruptcy Code demonstrates that
14 the *purpose of § 552 is to prevent the attachment, under such a*
15 *clause, of a creditor's pre-petition security interest to entirely new*
property acquired by the estate or by the debtor in bankruptcy.

16 *Id.* 10 B.R. at 582 (citations omitted).

17 It is the Debtor's position that § 552 operates to terminate Sun Valley's
18 security interest in future crops and the proceeds of those crops. It is Sun
19 Valley's position, however, that § 552(a) does not apply to its claim because the

21 ³The property and parties are in California, and California law applies. It is
22 proper to refer to decisions from other states construing the common text of the UCC.
In re Schwalb, 347 B.R. 726, 738 (Bankr.D.Nev.,2006).

23 ⁴ A security interest in future crops must be distinguished from the security
interest in the *proceeds* of crops in existence at the time.

24 "Proceeds" under the UCC are a particular type of collateral, and are not
25 to be confused with after-acquired property. The distinction is preserved
26 by § 552(b), which excepts proceeds from the effect of § 552(a).
27 Subsection (b) is consistent with the overall treatment of security
interests under the Bankruptcy Code. It essentially retains the priorities
in proceeds as set forth in the UCC, even for proceeds which were
28 received after commencement of the case. *Id.*

1 transaction did not create a security interest, but constituted a sale of the 2010
2 crop and *of all future crops* grown by the Debtor on his property, until its claim is
3 satisfied. Sun Valley places great weight on the specific terms used in the Loan
4 Documents. However, the use of the words “transfer” and “assignment” do not
5 define the agreement as a transfer of ownership. The Cal. Com. Code does not
6 define these terms as relating solely to either, the sale of an interest in goods, or
7 the creation of a security interest in collateral. Cal. Com. Code § 9102, Comment
8 26, explains:

9 In numerous provisions, this Article refers to the “assignment” or
10 the “transfer” of property interests. These terms and their
11 derivatives are not defined. This Article generally follows common
12 usage by using the terms “assignment” and “assign” to refer to
13 transfers of rights to payment, claims, and liens *and other security*
14 *interests*. It generally uses the term “transfer” to refer to other
15 transfers of interests in property. Except when used in connection
16 with a letter-of-credit transaction (*see* Section 9-107, Comment 4),
17 no significance should be placed on the use of one term or the
18 other. *Depending on the context, each term may refer to the*
19 *assignment or transfer of an outright ownership interest or to the*
20 *assignment or transfer of a limited interest, such as a security*
21 *interest.*

22 (Emphasis added.)

23 The Assignment Agreement uses terms that are consistent with an absolute
24 sale of the crops. It also uses terms consistent with the creation of a security
25 interest in those crops. Nevertheless, the Loan Documents could not transfer the
26 ownership of the Debtor’s future crops. Pursuant to the Cal. Com. Code, the
27 Loan Documents could only create either, a contract for the sale of the future
28 crops, or, a security interest in the future crops. Cal. Com. Code § 2105(1)
29 defines growing crops as “goods.” A contract for the sale of growing crops
30 which does not include the land itself is a contract for the sale of goods and

1 subject to Article 2.Cal. Com. Code § 2107(2).⁵ However, a purported sale of
2 future crops is, instead, a *contract for* the sale of goods, and not a *present sale* of
3 goods.

4 Goods must be both existing and identified before any interest in
5 them can pass. Goods which are not *both existing and identified* are
6 “future” goods. A purported present sale of future goods or of any
interest therein operates as a *contract to sell*.

7 *Id.* (2), (emphasis added).

8 If the Loan Documents are construed to constitute a contract for the sale of
9 future goods, then Sun Valley may have a breach of contract claim against the
10 Debtor based on his rejection of that contract. However, Sun Valley has not
11 asserted a breach of contract claim. When the Loan Documents are considered as
12 a whole, as they must be, the court is persuaded that the Loan Documents created
13 a security interest in the Debtor’s 2011 crop and his future crops and proceeds.⁶

14 The case, *In re Berry*, 189 B.R. 82 (Bankr.D.S.C.,1995), illustrates both
15 the interpretation of the term “assignment” and the necessity that goods be both
16 identified and existing at the time of the agreement. In *Berry*, a chapter 13 debtor
17 assigned his rights in future renewal commissions to a bank as security for a note.
18 The trustee moved to avoid the assignment of the commissions on the grounds
19

20 ⁵These contract documents may be recorded in the same manner as a deed of
21 trust in order to put others on notice of the buyer's rights under the contract for sale, *id.*,
(3), which was done in this case.

22 ⁶Neither party submitted post-execution evidence of intent. Therefore, the court
23 reviews only the Loan Documents to determine the parties’ intent. The Loan
24 Documents constitute an integrated written contract. While the UCC rejects the
25 *presumption* that a written contract sets forth the parties’ entire agreement, it does not
26 allow the use of evidence of prior or contemporaneous oral agreements to vary or
27 contradict the terms of an *integrated written contract*. Cal. Com. Code § 2202. The
28 Security Agreement contains, at section 9, an integration clause. The Security
Agreement was executed contemporaneously with the Discretionary Draw Promissory
Note and the Agreement Regarding Assignment of Crops and Crop Proceeds. The Deed
of Trust with Assignment of Rents as Additional Security was drafted that same day as
well.

1 that the bank's security interest was unperfected.⁷ The bank argued
2 unsuccessfully that it was not required to file a UCC Financing Statement
3 because the debtor's future commissions had been absolutely transferred to the
4 bank. The words used in that agreement were not dissimilar to those used in the
5 Loan Documents between Sun Valley and the Debtor. The debtor in *Berry* did
6 "hereby sell, assign, transfer, set over and deliver to [the bank] all of the right,
7 title and interest of the undersigned in and to any of the renewal commissions
8" *Id.* at 85.

9 The *Berry* court listed the factors that should be considered in the
10 determination of whether an assignment is an absolute transfer of ownership or
11 grant of security:

- 12 1. A security interest is indicated where the assignee retains a right to a
13 deficiency on the debt.
- 14 2. A security interest is also indicated when the assignee acknowledges
15 that his rights in the assigned property would be extinguished if the debt
16 owed were to be paid through some other source.
- 17 3. ... A security interest is indicated if the assignee must account to the
18 assignor for any surplus received from the assignment over the amount of
19 the debts.
- 20 4. Evidence that the assignor's debt is not reduced on account of the
21 assignment is also evidence that the assignment is intended as security.
- 22 5. Finally, the contract language itself may express the intent that the
23 assignment is for security only. In contrast, assignments have been found
24 to be absolute transfers where the assignment operates to discharge the
25 underlying debt.

26 *In re Berry*, 189 B.R. at 87 (citations omitted).

27 Applying the *Berry* factors to the case at hand, the Loan Documents

28 ⁷The court concluded that the reason the bank did not file a UCC Financing
Statement was because it had relied on the mistaken assumption that the debtor's
commissions were wages and so that perfection was not required. However, the Debtor
was an independent contractor and not an employee of the agency which distributed the
commissions.

1 clearly show that the Debtor's obligation under the Assignment Agreement, to
2 grow and deliver crops and turn over crop proceeds to Sun Valley, was to
3 continue as long as, and *only as long as*, the Debtor's debt to Sun Valley
4 remained unpaid. In addition, the Assignment Agreement provided that any
5 amount Sun Valley received in excess of the debt must be returned to the Debtor.
6 Finally, there is no indication that the Assignment Agreement in any way reduced
7 the Debtor's obligation to Sun Valley, as would have been the case if this had
8 been an actual transfer of ownership. The court is therefore persuaded that Sun
9 Valley had a security interest, in the Debtor's 2010 crop and in his future crops,
10 that was terminated by the operation of § 552 as of the date the case was filed.

11 **Judicial Estoppel.**

12 The court has the discretion to invoke the doctrine of judicial estoppel, "an
13 equitable doctrine that precludes a party from gaining an advantage by asserting
14 one position, and then later seeking an advantage by taking a clearly inconsistent
15 position." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 82 (9th
16 Cir.2001). In determining whether a party is subject to judicial estoppel, the
17 court considers: "(1) whether a party's later position is 'clearly inconsistent' with
18 its original position; (2) whether the party has successfully persuaded the court of
19 the earlier position; and (3) whether allowing the inconsistent position would
20 allow the party to 'derive an unfair advantage or impose an unfair detriment on
21 the opposing party.'" *United States v. Liquidators of European Fed. Credit*
22 *Bank*, 630 F.3d 1139, 1148 (9th Cir.2011) (citations omitted).

23 It appears from the record that Sun Valley's argument, that the Loan
24 Documents created a sale of the Debtor's post-petition crops, did not arise until
25 late in the case. Sun Valley's proof of claim was filed for "money loaned,"
26
27
28

1 secured by real estate, in the amount of \$210,000.⁸ The proof of claim is not
2 consistent with Sun Valley's current contention that it owns the post-petition
3 crops. Sun Valley cannot have both, a claim for \$210,000, *and* ownership of the
4 crops for which it now claims the \$210,000 was paid.

5 When the court initially approved the Debtor's Cash Collateral Motion,
6 that order also recognized and protected Sun Valley's security interest in the
7 2010 crop. In addition, by virtue of Sun Valley's recorded Deed of Trust, it was
8 a party with a right to object to the Debtor's motion to value the real property.
9 Sun Valley's current contention, that it actually owns the 2010 crop and the
10 Debtor's future crops, is inconsistent with Sun Valley's original position as
11 represented in its proof of claim, its silent acquiescence to the Motion for Cash
12 Collateral, and its asserted security interest in the Debtor's real property that was
13 created by the Deed of Trust.

14 Finally, Sun Valley allowed the Debtor to incur the cost of drafting the
15 Plan which provides for Sun Valley's claim *exactly as it was filed by Sun Valley*.
16 Sun Valley's subsequent objection to the Plan, on grounds inconsistent with its
17 proof of claim, imposes "an unfair detriment" on the Debtor in his attempt to
18 reorganize his family farming operation. As the court said, in *Rockwell Intern.*
19 *Corp. v. Hanford Atomic Metal Trades Council*, 851 F.2d 1208 (9th Cir.1988),

20 Unlike collateral estoppel, res judicata, and equitable estoppel,
21 judicial estoppel focuses exclusively on preventing the use of
22 inconsistent assertions that would result in an "affront to judicial
23 dignity" and "a means of obtaining unfair advantage." The
24 doctrine is intended to protect against a litigant playing "fast and
25 loose with the courts" by asserting inconsistent positions.

26 *Id.* at 1210, emphasis added.

27 ⁸ Sun Valley recorded its interest in the Debtor's crops. Cal. Com. Code
28 § 2107(3) provides: "[T]he contract for sale may be executed and recorded in the same
manner as a document transferring an interest in land and shall then constitute notice to
third parties of the buyer's rights under the contract for sale."

1 Sun Valley is judicially estopped from asserting a position that it now
2 owns the Debtor's crops. The court relied on, and was persuaded by, Sun
3 Valley's evidence of a security interest in the crops and based thereon awarded
4 Sun Valley a replacement lien against the Debtor's future crops. In addition, the
5 Debtor is unfairly prejudiced by the change in Sun Valley's position.

6 **Conclusion.**

7 Based on the foregoing, the court finds and concludes that Sun Valley
8 does not own the Debtor's future crops. Sun Valley had a security interest in the
9 future crops that terminated as of the date the petition was filed. Any transfer of
10 ownership was limited by law to the crops already in existence at the time the
11 petition was filed. The Plan provides for the delivery to Sun Valley of that crop.
12 In addition, Sun Valley is barred by judicial estoppel from asserting a position
13 inconsistent with its prior position which was relied upon by the court and under
14 which it received a benefit. Therefore, the Objection will be overruled and the
15 Plan will be confirmed. The Debtor shall submit an appropriate confirmation
16 order.

17 Dated: December 16, 2011

18
19 /s/ W. Richard Lee
20 W. Richard Lee
21 United States Bankruptcy Judge
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