

**UNITED STATES BANKRUPTCY COURT**  
**Eastern District of California**

**Honorable Ronald H. Sargis**  
**Chief Bankruptcy Judge**  
**Modesto, California**

**April 8, 2021 at 2:00 p.m.**

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<b>1.</b>	<b><u>20-90210</u>-E-11</b>	<b>JOHN YAP AND IRENE LOKE</b>	<b>APPROVAL OF PROPOSED COMBINED PLAN OF REORGANIZATION AND DISCLOSURE STATEMENT FILED BY JOINT DEBTORS 2-17-21 <a href="#">[175]</a></b>
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**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor's Attorney, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on February 17, 2021. By the court's calculation, 50 days' notice was provided. 42 days' notice is required.

Movant provided service pursuant to a Court Creditor Matrix dated April 4, 2020. Dckt. 177. The mailing matrix indicates lists 19 recipients. The court generated such a matrix for this case in preparation of this pre-hearing disposition. As of March 31, 2021, the Court Creditor Matrix lists 30 recipients. At the hearing **xxxxxxx**

Moreover, the Certificate of Service indicates that electronic transmission of documents was caused to be served to "All registered CM/ECF participants. Movant does not list who these "registered" participants are and what participants Movant certifies were served electronically. At the hearing **xxxxxxx**

The Confirmation of Plan of Reorganization has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f) and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that

disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

**The Motion to Approve Disclosure Statement is XXXXX.**

## REVIEW OF THE DISCLOSURE STATEMENT

Case filed: March 17, 2020

Background: This Chapter 11 case was filed on March 17, 2020 in order to stop the attempted non-judicial foreclosure sales of two investment properties they owned, identified as 1006 Lovell Avenue, Campbell, California, and 1032 Deena Way, Nevada.

Debtor owns five real properties in total. Three of them are located in California; two are in Nevada. All of them are underwater regarding either the first and/or second lienholders. The subject Chapter 11 was filed to help the Debtor reorganize the debts attached to the properties, and there are junior liens (including judgments) that must be addressed in order to clear property titles.

Debtor, John Hst Yap, suffers from serious health issues, including chronic neurodegenerative disease, and would like to reorganize his finances via the instant Chapter 11 case in order to protect his family in the period after he passes away.

Creditor/Class	Treatment	
<b>Class 1A:</b> The Bank of New York Mellon (lender) / Nationstar Mortgage LLC dba Mr. Cooper (loan servicer)  (Proof of Claim # 2)	<b>Claim Amount</b>	Not Stated
	<b>Impairment</b>	Not Impaired - Property to be Surrendered
	Collateral: 1032 Deena Way, Fallon, NV 89406 Property to be surrender on the effective date of the plan.	
<b>Class 1B:</b> U.S. Bank, National Association (lender) c/o Nationstar Mortgage, LLC dba Mr. Cooper (loan servicer)  (Proof of Claim # 3) (Sr. Mortgage)	<b>Claim Amount</b>	Not Stated
	<b>Impairment</b>	Not Impaired - No Change in Obligation Terms
	Collateral: 7400 Chantilly Way, Hughson, CA 95326 Creditors' Rights Remain Unchanged.	

<b>Class 1C:</b> U.S. Bank National Association (lender) / PHH Mortgage Corporation (loan servicer)  (Proof of Claim # 9) (Sr. Mortgage)	<b>Claim Amount</b>	Not Stated
	<b>Impairment</b>	Not Impaired - No Change in Obligation Terms
	Collateral: 1102 Sarah Belle Lane Fallon, NV 89406 Creditors' Rights Remain Unchanged.	
<b>Class 1D:</b> The Bank of New York Mellon (lender) / Nationstar Mortgage LLC dba Mr. Cooper (loan servicer)  (Proof of Claim # 5)  (Please see Order on Motion to Value Collateral at Dkt. 128)  (Sr. Mortgage)	<b>Claim Amount</b>	\$301,324.00 11 U.S.C. § 506(a) Valuation Order, Dckt. 128
	<b>Impairment</b>	Interest Rate: 3% (this is the current fixed note interest rate) Monthly Payment: \$1,270.39 Escrow: \$230.38 <b>PITI: \$1,500.77</b> Term: 30 years
	Collateral: 2412 6th St., Hughson, CA 95326	
<b>Class 1E:</b> Real Time Resolutions, Inc. / (loan servicer) for the Bank of New York Mellon (lender)  (Proof of Claim # 14)  (2nd Mortgage)	<b>Claim Amount</b>	\$60,576.26
	<b>Impairment</b>	Interest Rate: 0.00 (note rate as well) Monthly Payment: \$168.27 Term: 30 years
	Collateral: 1102 Sarah Belle Lane Fallon, NV 89406	

<b>Class 1F:</b> The Bank of New York Mellon (lender) / NewRez LLC (loan servicer)  (Motion to Value at Dkt. 33, and a corresponding loan modification / stipulation to claim treatment [a loan modification] that was granted on January 14, 2021 at Dkt. 165.)	<b>Claim Amount</b>	\$1,002,247.57
	<b>Impairment</b>	Interest Rate: 3% (this is the current fixed note interest rate) Monthly Payment: \$5,380.28 Escrow: \$1,134.50 <b>PITI:</b> \$6,514.78 Term: 30 years
	Collateral: 1006 Lovell Ave., Campbell, CA 95008	
<b>Class 2: General Unsecured Claims</b>		
Persolve  (Proof of Claim # 1)	<b>Claim Amount</b>	\$53,535.09
	<b>Impairment</b>	5% dividend = \$2,676.75 Monthly Payment: \$22.31
Merrick Bank / Resurgent Capital Services  (Proof of Claim # 4)	<b>Claim Amount</b>	\$1,743.53
	<b>Impairment</b>	5% dividend = \$87.18* (*Debtor will likely pay this claim off in full on the Effective Date if funds are available) Monthly Payment: \$0.73
American Express National Bank c/o Becket and Lee LLP  (Proof of Claim # 6)	<b>Claim Amount</b>	\$12,978.10
	<b>Impairment</b>	5% dividend = \$648.91 Monthly Payment: \$5.41

American Express National Bank c/o Becket and Lee LLP  (Proof of Claim # 7)	<b>Claim Amount</b>	\$2,631.09
	<b>Impairment</b>	5% dividend = \$2,676.75 Monthly Payment: \$1.10
Real Time Resolutions  (Proof of Claim # 10)  (For a foreclosed property / former junior lien that did not mature or get accelerated)	<b>Claim Amount</b>	\$114,078.83
	<b>Impairment</b>	5% dividend = \$5,703.94 Monthly Payment: \$47.53
Veripro Solutions Inc. (Proof of Claim # 11)	<b>Claim Amount</b>	\$37,282.38
	<b>Impairment</b>	N/A
	According to Debtor, this 2006 loan was refinanced in 2008 and the claim should accordingly be withdrawn.	
Cit Bank, National Association / Countrywide (Junior or 2nd lien on Debtor's home at 7400 Chantilly Way in Hughson that was ordered wholly unsecured per docket # 69 [full text] and 72 [summary order])  (No claim filed)	<b>Claim Amount</b>	\$131,152.00
	<b>Impairment</b>	5% dividend = \$6,557.60 Monthly Payment: \$54.65

Lomarey, Inc. (Judicial lien on Debtor's home at 7400 Chantilly Way in Hughson that was ordered wholly unsecured per docket # 69 [full text] and 72 [summary order])  (No claim filed)	<b>Claim Amount</b>	\$480,148.00
	<b>Impairment</b>	5% dividend = \$24,007.40 Monthly Payment: \$200.06
The Bank of New York Mellon (lender) / Nationstar Mortgage LLC dba Mr. Cooper (loan servicer)  (Proof of Claim # 5, please see Order on Motion to Value Collateral at Dkt. 128)  (UNSECURED PORTION of Senior Mortgage)	<b>Claim Amount</b>	\$104,097.01
	<b>Impairment</b>	5% dividend = \$5,204.85 Monthly Payment: \$43.37
Collateral Financing Group, LLC (Junior or 2nd lien on Debtor's property at 2412 6th Street in Hughson that was ordered wholly unsecured per docket # 128)  (No claim filed)	<b>Claim Amount</b>	\$94,421.00
	<b>Impairment</b>	5% dividend = \$4,721.05 Monthly Payment: \$39.34

First Horizon Home Loan Corporation (Wholly unsecured junior mortgage lien on Debtors' surrendered property located at 1032 Deena Way, Fallon, NV 89406)  (No Claim Filed)  (See Order on Motion to Value Collateral at Dkt. 137.)	<b>Claim Amount</b>	\$44,700.00
	<b>Impairment</b>	5% dividend = \$2,235.00 Monthly Payment: \$18.63
The Bank of New York Mellon (lender) / Nationstar Mortgage LLC dba Mr. Cooper (loan servicer)  (Proof of Claim # 5)  (Please see Order on Motion to Value Collateral at Dkt. 128)  (UNSECURED PORTION of Sr. Mortgage)	<b>Claim Amount</b>	\$104,097.00
	<b>Impairment</b>	5% dividend = \$5,204.85 Monthly Payment: \$43.37
The Bank of New York Mellon (lender) / NewRez LLC (loan servicer)  (Proof of Claim # 12)  (Motion to Value at Dkt. 33)  (UNSECURED PORTION of Senior Mortgage per Stipulation / Loan Modification re: 1006 Lovell)	<b>Claim Amount</b>	\$78,867.00
	<b>Impairment</b>	5% dividend = \$3,943.35 Monthly Payment: \$32.86

The PNC Financial Services Group, Inc./ Dreambuilder Investments, LLC  (No Claim Filed)  (Motion to Value at Docket # 33 with a Stipulation at docket # 139 for a \$900,000.00 valuation)	<b>Claim Amount</b>	\$154,950.00
	<b>Impairment</b>	5% dividend = \$7,747.50 Monthly Payment: \$64.56

#### A. C. WILLIAMS FACTORS PRESENT

Y Incidents that led to filing Chapter 11

Y Description of available assets and their value

N Anticipated future of Debtor

Y Source of information for D/S

Y Disclaimer

Y Present condition of Debtor in Chapter 11

Y Listing of the scheduled claims

Y Liquidation analysis

N Identity of the accountant and process used

N Future management of Debtor

Y The Plan is attached

*In re A. C. Williams Co.*, 25 B.R. 173 (Bankr. N.D. Ohio 1982); *see also In re Metrocraft Pub. Servs., Inc.*, 39 B.R. 567 (Bankr. N.D. Ga. 1984).

#### **APPLICABLE LAW**

Before a disclosure statement may be approved after notice and a hearing, the court must find that the proposed disclosure statement contains “adequate information” to solicit acceptance or rejection of a proposed plan of reorganization. 11 U.S.C. § 1125(b).



“Adequate information” means information of a kind, and in sufficient detail, so far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor’s books and records, that would enable a hypothetical reasonable investor typical of the holders of claims against the estate to make a decision on the proposed plan of reorganization. 11 U.S.C. § 1125(a).

Courts have developed lists of relevant factors for the determination of adequate disclosure. *E.g.*, *In re A. C. Williams, supra*.

There is no set list of required elements to provide adequate information per se. A case may arise where previously enumerated factors are not sufficient to provide adequate information. Conversely, a case may arise where previously enumerated factors are not required to provide adequate information. *In re Metrocraft Pub. Servs., Inc.*, 39 B.R. 567 (Bank. N.D. Ga. 1984). “Adequate information” is a flexible concept that permits the degree of disclosure to be tailored to the particular situation, but there is an irreducible minimum, particularly as to how the plan will be implemented. *Official Comm. of Unsecured Creditors v. Michelson*, 141 B.R. 715, 718–19 (Bankr. E.D. Cal. 1992).

The court should determine what factors are relevant and required in light of the facts and circumstances surrounding each particular case. *In re East Redley Corp.*, 16 B.R. 429 (Bankr. E.D. Pa. 1982).

The court begins its analysis with the statutory requirements of 11 U.S.C. § 1125 for a disclosure statement. Solicitation of an acceptance or rejection of a plan may be made with a written disclosure statement which was approved by the court. The disclosure statement must provide “adequate information.” The term “adequate information” is defined in 11 U.S.C. § 1125(a)(1) to be,

(1) “adequate information” means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor’s books and records, including a discussion of the potential material Federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan and in determining whether a disclosure statement provides adequate information, the court shall consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information;...

Determination of whether there is “adequate information” is a subjective determination made by the bankruptcy court on a case by case basis. *In re Texas Extrusion Corp.*, 844 F.2d 1142 (5th Cir. 1988), *cert. denied* 488 U.S. 926 (1988). Non-bankruptcy rules and regulations concerning disclosures do not govern the determination of whether a disclosure statement provides adequate information. 11 U.S.C. § 1125(d); *Yell Forestry Products, Inc. v. First State Bank*, 853 F.2d 582 (8th Cir. 1988).

## DISCUSSION

An review of the Disclosure Statement shows that Debtor’s obligations under the plan are different with respect to each class of creditors. Class 1A, creditor with a secure claim, provides for the

surrender of the property on the effective of the plan with any deficiency on this claim treated as unsecured claim. Class 1B-1C creditors, which lists creditor with secured claims, will remain unchanged where Debtor's plan does not change the terms of the contract with the creditors. Thus, these creditors are not entitled to a vote.

Class 1D through 1F are entitled to vote on the confirmation of the Plan on the basis that although Debtor's proposed plan will pay the claim in full, it will alter the original contractual terms. Debtor will pay the entire amount contractually due with interest.

Class 2 claims, those creditors with general unsecured claims, will be paid a 5% dividend. These claims total \$1,414,681.03 and the dividend should provide \$68,651.20 to be divided among all of the allowed claims of general unsecured. This class being impaired by the proposed plan, it is entitled to vote.

Based on the facts of this case, the court finds that Debtor has provided sufficient information of a kind and in sufficient detail through this disclosure statement. Debtor's case was filed in order to prevent foreclosure of two properties Debtor John wishes to keep and reorganize his debts before he passes away due to a chronic illness. This particular reorganization focuses on reorganizing all of Debtor's debt related to real estate. In light of this history, the treatment seems practicable and will allow the creditors involved make a decision when voting for confirmation. Additionally, each class provides the details as to how the plan will be implemented.

The Disclosure Statement is approved. The court shall issue an order approving the Disclosure Statement, which shall also set the following dates and deadlines:

- A. John Hst Yap and Irene Laiwah Loke, the "Plan Proponent" Debtor in Possession, shall serve the approved disclosure statement, proposed plan, notice of confirmation hearing, a copy of this order approving the disclosure statement, and ballot on or before **xxxxx, 2021**.
- B. Ballots shall be returned to counsel for the Plan Proponent on objections to confirmation, if any, filed and served on or before **xxxxx, 2021**.
- C. The Ballot Tabulation Summary, evidence in support of confirmation, and Responses to objections to confirmation, if any, shall be filed and served on or before **xxxxx, 2021**.
- D. The Confirmation Hearing shall be conducted at **11:30 a.m.** on **xxxxx, 2021**.

2. [20-90710-E-12](#)      **LESLIE JENSEN**  
[21-9002](#)  
**OSMERS (MASELLIS) V. JENSEN ET**  
**AL**

**STATUS CONFERENCE RE:**  
**COMPLAINT**  
**2-1-21 [\[1\]](#)**

Plaintiff's Atty: Michael J. Dyer  
Defendant's Atty: unknown

Adv. Filed: 2/1/21  
Answer: none

Nature of Action:  
Dischargeability - false pretenses, false representation, actual fraud  
Dischargeability - fraud as fiduciary, embezzlement, larceny  
Dischargeability - willful and malicious injury  
Declaratory judgment

Notes:

## **SUMMARY OF COMPLAINT**

The Complaint filed by Krista Osmers (Masellis) ("Plaintiff"), Dckt. 1, filed on February 1, 2021, begins with the statement that Leslie Jensen ("Defendant-Debtor") and L&L Investments, LLC filed a Petition for Relief under the Bankruptcy Code on October 29, 2020, Case No. 20-90710. That is the Chapter 12 bankruptcy case for Defendant-Debtor, but is not a bankruptcy case for L&L Investments, LLC ("Defendant LLC").

Plaintiff asserts having a claim arising from a marriage dissolution, with Plaintiff having been represented by Defendant-Debtor. It is asserted that when the representation was undertaken, Defendant-Debtor represented that she has sufficient errors and omissions insurance for the legal services to be provided.

The Complaint identifies specific conduct of Defendant-Debtor which is asserted to be improper and not providing Plaintiff with proper representation. Plaintiff identifies an action Plaintiff commenced against Defendant-Debtor. Plaintiff states that she obtained a substantial judgment against Defendant-Debtor. After obtaining the judgment, it is alleged that Defendant LLC was created five days after the jury verdict came down in favor of Plaintiff and that Defendant-Debtor began transferring her assets into Defendant LLC.

Plaintiff alleges that her judgment against Defendant-Debtor has been affirmed on appeal and said judgment is now final, the California Supreme Court denying Defendant-Debtor's request to have the Supreme Court review the judgment.

Plaintiff alleges that Defendant-Debtor failed to properly tender Plaintiff's claim to her E&O carrier, and as such, has caused Plaintiff to be unable to seek payment for the judgment from such insurance.

It is alleged that Defendant LLC was fraudulently formed as a shield for Defendant-Debtor to protect her assets from creditors.

Plaintiff seeks to have the obligations owed by Defendant-Debtor be determined nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(B) and 11 U.S.C. § 523(a)(4). Compensatory and punitive damages are sought.

### **SUMMARY OF ANSWER**

No Answers have been filed.

### **SERVICE OF SUMMONS AND COMPLAINT**

The Certificate of Service filed, Dckt. 6, indicates that the Complaint (but does not identify the summons) was served on persons appearing on the Master Mailing List in Defendant-Debtor's bankruptcy case. The court cannot identify Defendant LLC as having been served.

The Summon is dated February 2, 2021. Dckt. 3. Though no answer has been filed and the time to respond expired March 2, 2021, the entry of default has not been requested.

### **APRIL 8, 2020 STATUS CONFERENCE**

No status report has been filed by Plaintiff. In reviewing Defendant-Debtor's bankruptcy case, 20-90720, the court notes that a plan has been filed and a Motion to Confirm is set for hearing on April 29, 2021.

At the Status Conference, **XXXXXXX**

3. [15-90811-E-7](#) ASSN., GOLD STRIKE  
[16-9002](#) HEIGHTS HOMEOWNERS  
FARRAR V. MASSELLA ET AL

CONTINUED STATUS CONFERENCE RE:  
COMPLAINT  
1-13-16 [\[1\]](#)

**DISMISSED 3/31/21**

**Final Ruling:** No appearance at the April 8, 2021 Status Conference is required.  
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Plaintiff's Atty: Clifford W. Stevens; Ricardo Z. Aranda  
Defendant's Atty: James L. Brunello

Adv. Filed: 1/13/16  
Answer: 2/23/16 [Robinson Enterprises Profit Sharing Plan]  
2/23/16 [Johnny Massella; Mary Massella]  
Counterclaim Filed: 2/23/16 [Robinson Enterprises Profit Sharing Plan]  
Answer: None  
Counterclaim Dismissed 5/2/16  
Counterclaim Filed: 2/23/16 [Johnny Massella; Mary Massella]  
Answer: None  
Counterclaim Dismissed 5/2/16

Nature of Action:  
Validity, priority or extent of lien or other interest in property

Notes:  
Continued from 1/28/21. Plaintiff-Trustee counsel reporting that Plaintiff-Trustee had not had an opportunity to meet and confer with Defendants and Defendants' counsel since the 10/14/20 denial of the Motion to Reconsider. Also, that the appeal in the latest case has been concluded.

Status Conference Statement (Trustee) filed 3/25/21 [Dckt 104]; AMENDED Status Conference Statement (Trustee) filed 3/30/21 [Dckt 106]

Stipulation for Dismissal filed 3/30/21 [Dckt 108]; Order approving filed 3/31/21 [Dckt 109]

**The Adversary Proceeding having been dismissed, the Status Conference is removed from the Calendar.**

The Clerk of the Court may close the file for this Adversary Proceeding.

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).**

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Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 25, 2021. By the court's calculation, 14 days' notice was provided. The court set the hearing for April 8, 2021. Dckt. 117.

The Motion to Incur Debt was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Chapter 13 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing -----.

<b>The Motion to Incur Debt is granted.</b>
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Piotr Gabriel Reysner and Celestial Olivia Reysner ("Debtor") seeks permission to purchase real property commonly known as 101 Pinnacles Cir., Sacramento, California, with a total purchase price of \$475,000 and monthly payments of \$3,077.58 to Caliber Home Loans over 30 years with a 3.25% fixed interest rate.

#### **Trustee's Response**

Trustee filed a Response on March 30, 2021 requesting the court take into consideration that Debtor's budget may be cause for concern seeing as the monthly mortgage payment will be \$3,077.58 (Schedule J lists the expense at \$3,071) and notes that Debtor's budget is "tight" with a monthly net income of \$274.00 and a plan payment of \$282.00, which would result in a total shortage of \$14.58. Dckt. 122. Trustee also notes that Debtor's son has gifted Debtor the down payment on the house and testifies under penalty of perjury, that he will help his parents in any given month so that they can pay the plan payments and mortgage. *Id.* Thus, Trustee concludes Debtor may need to set and include an amount for monthly family support so that Debtor is successful in this case.

## DISCUSSION

A motion to incur debt is governed by Federal Rule of Bankruptcy Procedure 4001(c). *In re Gonzales*, No. 08-00719, 2009 WL 1939850, at \*1 (Bankr. N.D. Iowa July 6, 2009). Rule 4001(c) requires that the motion list or summarize all material provisions of the proposed credit agreement, “including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions.” FED. R. BANKR. P. 4001(c)(1)(B). Moreover, a copy of the agreement must be provided to the court. *Id.* at 4001(c)(1)(A). The court must know the details of the collateral as well as the financing agreement to adequately review post-confirmation financing agreements. *In re Clemons*, 358 B.R. 714, 716 (Bankr. W.D. Ky. 2007).

The court finds that the proposed credit, based on the unique facts and circumstances of this case, is reasonable. Debtor has addressed Trustee’s concerns regarding the mortgage payment being higher than their current rent payment in the various declarations provided. First, Debtor testifies that Debtor Celestial, who works for the State of California, is scheduled or expects to receive a 10% raise based on having consistently received such raises. Declaration, ¶ 13, Dckt. 111. Moreover, Debtor Piotr testifies that he is working for Bankruptcy Attorney Steele Lanphier, who has informed Debtor Piotr that he is likely to receive a salary increase once pandemic restrictions are lifted and an increase of bankruptcy filings begins.

Additionally, Debtor’s son provides testimony under penalty of perjury that due to having received an inheritance he will be gifting the down payment to his father (with the check already having been authorized to be sent to escrow) and is able to commit to helping his parents make their Chapter 13 plan payments and/or mortgage payments in the event that they need such assistance in any given month. Dckt. 112.

However, the court believes Trustee’s request that the Debtor set and include an amount for family support is not unreasonable. At the hearing xxxxxxxx

There being no opposition from any party in interest and the terms being reasonable, the Motion is granted.

~~The court shall issue a minute order substantially in the following form holding that:~~

~~Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.~~

~~The Motion to Incur Debt filed by Piotr Gabriel Reysner and Celestial Olivia Reysner (“Debtor”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Motion is granted, and Piotr Gabriel Reysner and Celestial Olivia Reysner is authorized to incur debt pursuant to the terms of the agreement, Exhibit B and C, Dckt. 113.~~

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).**

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Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Creditors, and Office of the United States Trustee on November 26, 2020. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion for Sanctions for Violation of the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 11 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

<p><b>The Motion for Sanctions for Violation of the Automatic Stay is <b>XXXX</b>.</b></p>
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### **December 10, 2020 Hearing**

The hearing on this Motion has been set pursuant to an order of the court (Dckt. 257). On December 8, 2020, debtors Alexandrino and Durvalina Vasconcelos filed an Amended Notice, unilaterally changing the date and time of the hearing from that ordered by the court to January 14, 2021.

Continuing hearings once set to the court's calendar are addressed in Local Bankruptcy Rule 9014-1(j), which states:

(j) Continuances. Continuances of hearings must be approved by the Court. A request for a continuance may be made orally at the scheduled hearing or in advance of it if made by written application. A written application shall disclose whether all other parties in interest oppose or support the request for a continuance. Failure to



comply with this provision may be grounds for denial of the motion without prejudice.

The court has not approved the continuance of the hearing on this Motion that has been set for December 10, 2020, at the express request of the two Debtors. The court not having continued the hearing, it was addressed at the scheduled December 10, 2020 hearing.

### **REVIEW OF MOTION**

Alexandrino and Durvalian Vasoncelos, the Debtors, commenced this voluntary Chapter 11 case on May 18, 2012. They confirmed their Chapter 11 Plan (December 19, 2013 Order, Dckt. 198) and the Debtors obtained their discharge on April 22, 2019 (Dckt. 236, 237).

On November 23, 2020, the Debtor had this case reopened and filed a Motion seeking relief for alleged violations of the automatic stay and the discharge injunction. Motion, Dckt. 248. This relates to the claim secured by real property commonly known as 745 W. Olive Avenue, Turlock, California (the "Property"). Debtor asserts that attempts have been made to pay the secured claim in full, but that the creditor has refused, and demanded payment of a discharged unsecured claim as well as a condition of accepting a final payment and removing its encumbrance from the Property.

The Motion identifies various persons concerning the relief requested, but Debtor is unable to identify the person(s) identified as "Respondents" who are asserted to be engaging in the alleged improper conduct.

### **Overview of the Plan and Claim Treatment**

The claim secured by the Property is provided for in Class 2.2 of the confirmed Chapter 11 Plan, and identifies Wells Fargo Bank, N.A. as the creditor with the secured claim. Confirmation Order, with Plan attached as an exhibit, Plan, p. 2:20-25; Dckt. 198. The treatment of this secured claim is provided in the confirmed Chapter 11 Plan, which states:

- A. Value of the Secured Claim is \$170,000, as stipulated by the creditor and Debtor. Plan, p. 7:11; *Id.* The Plan references to Docket Entry 178 for the Stipulation. *Id.* The Stipulation as to value of the secured claim found at Docket Entry 178 provides:
  - 1. It is between Wells Fargo Bank, N.A., as the creditor with the secured claim, and Debtor.
  - 2. Wells Fargo Bank, N.A. and Debtor stipulate to the following treatment of the Wells Fargo Bank Claim, which is set forth in Proof of Claim No. 3, as follows:
    - a. The secured claim is in the amount of \$170,000.00, which is to be paid in monthly installments over 30 years, with 5.25% interest. Stipulation, ¶ 2; Dckt. 178.
    - b. Debtor shall also provide as part of the regular monthly payment an escrow amount for property taxes, insurance, and any post-petition shortage created by Debtor's failure to pay such amounts. *Id.*, ¶3.

- c. The balance of the Wells Fargo Bank, N.A. claim is a general unsecured claim. *Id.*, ¶ 4.
- d. The “avoidance of the unsecured portion” of the Wells Fargo Bank, N.A. claim is contingent upon the completion of Debtor’s plan and the entry of Debtor’s Chapter 11 discharge. *Id.*, ¶ 5. This “avoidance” appears to be referencing the lien to the extent it secures any amount in excess of the \$170,000 secured claim.

The Chapter 11 Plan incorporates by copying the terms of the Stipulation into the Plan. Plan, p. 5:12-28, 6:1-28, 7:1-28, 8:1-3; Dckt. 198.

- 3. For the general unsecured claim of Wells Fargo Bank, N.A., the Plan provides:

Class 2.2 Wells Fargo Bank  
Wells Fargo Account #4826  
Unsecured, \$149,500; of the \$238 total payment to unsecured, 55% goes to Wells Fargo Bank. Their payment is \$131 per month for 25 years.

Plan, p. 12:11-14; *Id.* For the unsecured claim, it appears that the payments are to total \$39,300.00 (\$131 x 12 months x 25 years).

The Motion asserts that Debtor began making the Plan payments after confirmation. The servicing of this secured claim and unsecured claim were turned over to Rushmore Loan Management (from Wells Fargo Home Mortgage) in 2014.

In July of 2018, Thomas Gillis, then Debtor’s attorney, contacted Rushmore Loan Management to obtain a payoff balance for the secured claim. From the information provided to Mr. Gillis, a \$157,042.04 cashier’s check was sent to Rushmore Loan Management to pay off the secured claim. That check was returned, with no explanation other than “pay-off short.” <sup>FN.1.</sup>

-----  
FN. 1. The court notes that in July of 2018, Debtor had not completed the confirmed Plan and had not yet been granted a discharge, which are stated to be conditions of “avoidance of the unsecured portion” of the Wells Fargo Bank, N.A. claim.  
-----

In September 2018, Mr. Gillis was mailed a pay-off statement showing two principal balances: a \$304,176.79 “principle balance” and a \$147,293 “2<sup>nd</sup> principal balance.” A copy of the Payoff Statement communicating these balances is filed as Exhibit G in support of the Motions. Dckt. 254 at 11. The Payoff Statement states that the Principal Balance of \$301,998.79 includes the 2<sup>nd</sup> Principal Balance of \$147,193.03.

Debtor asserts that the actual full payoff balance under the confirmed plan was \$156,983.95 in August 2018 and that the tender of the \$157,042.04 cashier’s check was a tender of payment in full.

In May 2019, after Debtor obtained the bankruptcy discharge, Mr. Gillis again requested a payoff balance for the secured claim and provided Rushmore Loan Management with a copy of the discharge order issued by this court. It is asserted that Rushmore Loan Management failed to respond to the payment balance request.

In September of 2019, Rushmore Loan Management issued a Payoff Statement, stating that the unpaid Principal Balance was \$299,603.92, which included a 2nd Principal Balance of \$147,193.03. Exhibit N, Dckt. 254.

Filed as Exhibit O is a letter sent by Mr. Gillis to Rushmore Loan Management making demand that Rushmore Loan Management and its creditor client cease demanding payment of the discharged portion of the unsecured claim. *Id.* Rushmore Loan Management informed Mr. Gillis that Fay Servicing, LLC had taken over the servicing of the obligation and they were awaiting a response from the new servicer.

By a Notice dated January 7, 2020, Fay Servicing issued a Notice of Default for the claim, asserting that there was an \$111,851.56 arrearage. Exhibit T, *Id.* Fay Servicing then sent a Mortgage Statement dated September 10, 2020 to Debtor stating that the total amount due was \$318,016.31. Exhibit V, *Id.*

Then by letter dated September 21, 2020, Mr. Gillis (now acting as a paralegal for Mark J. Hannon, Esq.) communicated to Fay Servicing, transmitting a payoff check of \$172,315.85 for the secured claim under the Plan. Exhibit W; *Id.* Fay Servicing rejected and returned the check, stating “The amount tendered is less than the amount required to pay off the loan.” Exhibit Y; *Id.*

Mr. Gillis, as a paralegal working for Mark Hannon, Esq., communicated with ZBS Law, LLP, which identified itself as the foreclosure trustee and not counsel for Fay Servicing (Exhibit AA, *Id.*), in which Mr. Gillis explained the Chapter 11 Plan and the “cram down” of the secured claim to \$170,000.00, with the \$147,193.10 “deferred balance” identified by Fay Servicing being a general unsecured claim.

Fay Servicing and ZBS Law, LLP responded by setting a nonjudicial foreclosure sale to be conducted on December 14, 2020. Exhibit CC; *Id.*

## **Relief Requested**

Debtor first requests that the court issue an injunction prohibiting Fay Servicing and ZBS Law, LLP, and other non-specified “Respondents” from conducting the nonjudicial foreclosure sale. Motion, p. 9:26-27; Dckt. 248.

Second, the court make a finding that the balance owing on the secured claim is \$156,983.95.

Then issue an order that the present owner (unidentified) of the note and deed of trust issue and record a reconveyance of the deed of trust upon receipt of the \$156,983.95. (This sounds in the nature of a mandatory injunction.) *Id.*, p. 10:3.5-5.5.

Fourth, determine that pursuant to California Civil Code § 150 any interest, penalties, or other amounts asserted after August 2, 2018, are void, Debtor having tendered the full payoff amount at that time.

Fifth, find that the following persons have violated either the automatic stay or discharge injunction:

1. Rushmore Loan Management Services, LLC;
2. Fay Servicing, LLC;
3. WFG National-Default Services;
4. ZBS Law, LLP;
5. Wilmington Savings Fund Society dba Chirstianna Trust, as Trustee for NYMT Loan Trust; and
6. “Other offending parties.”

Sixth, award Debtor attorney’s fees and costs.

Seventh, award Debtor punitive damages against the persons found to violate either the automatic stay or discharge injunction.

Eight, award Debtor actual damages.

### **Debtor’s Points and Authorities**

Debtor’s points and authorities cite the court to California Civil Code § 1504 and § 1512, and California Code of Civil Procedure § 2076 and § 1515. Debtor also cites several cases for the legal assertion that if a creditor fails to negotiate a payment that is tendered, this is deemed to be refusing a valid tender of such payment.

Debtor’s points and authorities do not address the application of the automatic stay to these post-confirmation events or the exercise of the court’s contempt power when a creditor violates the terms of a plan or demands payment of a discharged debt.

### **General Overview of Enforcement of Plan Terms**

Though not addressed by Debtor, Congress provides in 11 U.S.C. § 1142 the statutory basis for the bankruptcy court addressing issues concerning performance under the confirmed Chapter 11 plan:

#### **§ 1142. Implementation of plan**

(a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.

(b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

This section focuses on the debtor or other party performing the plan. Collier on Bankruptcy provides an discussion of this provision.

¶ 1142.03 Authority of Court to Direct Compliance with a Confirmed Plan; § 1142(b)

Section 1142(b) empowers the court to direct any necessary party, including the debtor, to perform acts necessary for consummation of the plan. The statute effectively streamlines the substantive and procedural requirements that might otherwise constrain a plan proponent from obtaining affirmative injunctions, as may be necessary to cause plan implementation. For example, courts can order specific performance of plan provisions under section 1142 without having to weigh the adequacy of monetary damages.

[1] Broad Scope of Section 1142(b); Authority of Court to Issue Orders Necessary for Plan Implementation

Section 1142(b) grants courts authority to compel parties to take actions considerably broader than merely ministerial acts. Pursuant to section 1142(b), the court may issue any order necessary for the implementation of the plan.

Compliance orders that may be issued under section 1142(b) include those compelling:

- (1) lenders to execute and deliver loan documents required under the plan, clarify provisions of loan documents in accordance with the terms of the plan and supply commercially reasonable terms and conditions to loan documents where such terms were not otherwise addressed;
- (2) execution of documents extinguishing a lien that is released by the plan;
- (3) an investor to advance committed funds necessary to consummate the plan;
- (4) a change in corporate control or governance;
- (5) distributions on claims as required by the plan;
- (6) principals of the debtor to submit to examinations under Bankruptcy Rule 2004 to determine the extent to which they have acted in conformance with the plan; and
- (7) execution of instruments enabling asset transfers, enforcement mechanics or other agreements contemplated by the plan.

In addition to directing parties to take actions, the court may order parties to refrain from taking actions if those actions interfere with implementation of the plan.

[2] Limitations on Court's Authority to Issue Orders under Section 1142(b)

While phrased broadly, section 1142(b) has limits. Courts should not use section 1142(b) to authorize the debtor to avoid a law or regulatory requirement regarding public health and safety. Courts also should refrain from issuing orders directing or authorizing third parties to take action unless the action specifically is called for by the terms of the plan or is necessary to implement the plan. For example, the U.S. Bankruptcy Court for the Southern District of New York recognized that section 1142(b) does not operate on a stand-alone basis or confer any substantive rights beyond what is provided for in a plan. Accordingly, the court ruled that section 1142(b) did not permit a plan administrator to retroactively issue preferred stock where the plan did not expressly authorize it and the terms of the debtor's amended charter and amended bylaws, which prohibited the issuance of securities, were incorporated into the plan. Additionally, section 1142(b) does not authorize a court to order parties to execute an agreement where there is no agreement on the terms or if the terms are uncertain.

The authority of the court to act under 1142(b) also is constrained by limitations periods. Although section 1142(b) does not specify a limitations period, the Supreme Court has recognized that, "courts do not ordinarily assume that Congress intended that there be no time limit on actions at all" and so must borrow "the most suitable statute or other rule of timeliness from some other source." In considering the correct limitations period for an action under section 1142, the Bankruptcy Court for the Southern District of Florida concluded that while a confirmed chapter 11 plan often is compared to a state law contract, it is "a creature of the Bankruptcy Code, a comprehensive federal statute" and so obligations arising under a confirmed plan "are necessarily federal in nature."

8 Collier on Bankruptcy P 1142.03 (16th 2020). The term "judgment" as used in the Bankruptcy Rules is defined to mean "any appealable order." Fed. R. Bankr. P. 9001. See also Federal Rule of Bankruptcy Procedure 7054, which incorporates Federal Rule of Civil Procedure 54(a) that defines the word "judgment" to include "[a] decree and any order from which an appeal lies" for adversary proceeding.

The Supreme Court provides in Federal Rule of Bankruptcy Procedure 3020(d) that notwithstanding the entry of the order of confirmation, the bankruptcy court may issue any order necessary to administer the estate.

In Federal Rule of Bankruptcy Procedure 7001, the Supreme Court specifies the types of relief that must be requested through an adversary proceeding, which include (identified by paragraph number used in Rule 7001):

- (2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, but not a proceeding under Rule 3012 or Rule 4003(d);
- ...
- (7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;
- ...

(9) a proceeding to obtain a declaratory judgment relating to any of the foregoing; .

..

Confirmation of the Chapter 11 plans works as a modification of the pre-petition obligations of the parties, binding the debtor and creditors to such modified terms. 11 U.S.C. § 1141(a).

### **Supplemental Points and Authorities Filed by Debtor**

On December 6, 2020, Debtor filed a Supplemental Points and Authorities addressing issues raised by the court in the order shortening time. Dckt. 258.

### **Alleged Post-Confirmation Violation of the Automatic Stay**

One issue identified by the court was the basis for asserting that the automatic stay was violated post-confirmation. In the Supplemental Pleading Debtor cites to 11 U.S.C. § 362(c)(2)(c) which provides that the automatic stay, other than as it exists for property that is property of the bankruptcy estate, continues in a Chapter 11 case until the time a discharge is granted.

It is asserted that the demands for payment from the Debtor and inaccurate billings pre-discharge constitute violations of the automatic stay. Thus, though the confirmed Plan revested the property back into the Debtor upon confirmation, thereby making it no longer property of the bankruptcy estate for purposes of 11 U.S.C. § 362(c)(1), it is not the attempt to foreclose that appears to be the asserted violative conduct.

### **Why Has the Debtor Not Sued For Specific Performance and Damages**

Debtor responds that bankruptcy core jurisdiction exists to enforce the terms of the plan and violations of the automatic stay and discharge injunction. Debtor appears to believe the issue the court identified related to a judicial belief that the Debtor should have commenced an action in state court.

While “clear” in the court’s mind, the issue identified was not clearly presented to Debtor. The issue is not the want of post-confirmation federal court jurisdiction, but as discussed above, the correct procedural method by which injunctive relief and a determination of the extent, validity, and priority of a lien, and to recover money or property. The Supreme Court provides that such relief shall be sought through an adversary proceeding, not a contested matter. Fed. R. Bankr. P. 7001.

### **DISCUSSION**

It appears that the Chapter 11 Plan and prior order of the court, as stipulated to by the then creditor on the secured claim and Debtor, has fixed the amount of the secured claim. Pursuant to 11 U.S.C. § 506(a) the claim has been bifurcated into two parts - the secured claim for \$170,000 and the general unsecured claim to be paid \$39,300.00 over 25 years. Plan, Class 2.2 Claim, p. 12:11-14; Dckt. 198.

In obtaining the order for entry of discharge, Debtor testified “2. We have completed all of our plan payments.” Declaration, ¶ 1; Dckt. 232. It is not clear whether that includes the \$39,300 to be paid over 25 years, or whether the remaining balance of that amount is being paid as part of paying off the balance of the secured claim.

At the hearing, Counsel for the Debtor stated the parties stated that the hearing should be continued to allow the parties to address these issues. The court continues this matter to 10:30 a.m. on February 11, 2021, for a Status and Scheduling (if necessary) Conference. The parties shall file (jointly or severally) a Status Conference report on or before February 4, 2021.

## **STATUS CONFERENCE STATEMENT**

The parties filed a Joint Status Conference Statement on February 3, 2021. Dckt. 272. The parties report that they actively engaged in settlement discussions and request that the status conference be continued out 30-45 days so that they may continue working on completing the settlement and avoid filing an adversary proceeding.

### **February 11, 2021 Hearing**

At the hearing, counsel for the Movant reported that if this matter should not be settled, at 2:00 p.m. on April 8, 2021, it is likely that he will dismiss this motion and proceed through an adversary proceeding to address the title issues. The court continues the hearing to conduct a Status Conference as to any settlement, or failure of achieving a settlement, with no further pleadings to be filed and no issues to be adjudicated at the continued Status Conference. If there are further proceedings to be conducted, the court will issue a scheduling order.

Additionally, if the matter is fully resolved so no status conference is required or the Movant is to proceed through an adversary proceeding, all counsel agreed that counsel for Movant may dismiss this Contested Matter without prejudice, no further order of the court required.

### **April 8, 2021 Hearing**

As of the court's April 7, 2021 review of the Docket, no updated status reports have been filed. At the hearing, **XXXXXXX**



Plaintiff's Atty: Charles L. Hastings  
Defendant's Atty: Peter G. Macaluso

Adv. Filed: 8/20/20  
Answer: 10/8/20

Nature of Action:  
Objection/revocation of discharge

Notes:  
Scheduling Order -  
Initial disclosures by 10/31/20  
Disclose experts by 12/31/20  
Exchange expert reports by 12/31/20  
Close of discovery 1/31/21  
Dispositive motions heard by 3/12/21  
Defendant's Pretrial Statement filed 3/31/21 [Dckt 21]

### **SUMMARY OF COMPLAINT**

The Complaint, Dckt. 1, filed by Jane Wright, Ron Skrbina, Christina Tripp, and Gaylord Skrbina ("Plaintiff"), asserts claims for the denial of the Defendant-Debtor's discharge in his bankruptcy case. It is alleged that as of the filing of this case, the Defendant-Debtor owned a partnership interest of no less than 23.2558% in the Estate of Walter F. Swartz, a General Partnership.

It is alleged that Defendant-Debtor failed to disclose his partnership interest on Schedule A/B filed in this case, and such is a false oath done to hinder, delay, and defraud the Trustee and creditors. The First Cause of Action seeks to have Defendant-Debtor's discharge denied pursuant to 11 U.S.C. § 727(a)(2) for the concealment of property of the bankruptcy estate. The Second Cause of Action seeks to have Defendant-Debtor's discharge denied pursuant to 11 U.S.C. § 727(a)(4) for having made a false oath.

### **SUMMARY OF ANSWER**

Thomas Swartz ("Defendant-Debtor") has filed an Answer (Dckt. 11), admitting and denying specific allegations.

### **FINAL BANKRUPTCY COURT JUDGMENT**

Plaintiffs Jane Wright, Ron Skrbina, Christina Tripp, and Gaylord Skrbina allege in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b)(2), 11 U.S.C. § 727, and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J). Complaint ¶¶ 4, 5, Dckt. 1. In the Answer, Defendant Thomas Swartz admit the allegations of jurisdiction

and that this is a core proceeding. Answer ¶¶ 4, 5; Dckt. 11. To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued in this Adversary Proceeding are “related to” matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

The court shall issue an Trial Setting in this Adversary Proceeding setting the following dates and deadlines:

- A. Evidence shall be presented pursuant to Local Bankruptcy Rule 9017-1.
- B. **Plaintiff** shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -----, **2021**.
- C. **Defendant** shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -----, **2021**.
- D. The Parties shall lodge with the court, file, and serve Hearing Briefs and Evidentiary Objections on or before -----, **2021**.
- E. Oppositions to Evidentiary Objections, if any, shall be lodged with the court, filed, and served on or before -----, **2021**.
- F. The Trial shall be conducted at ----**x.m.** on -----, **2021**.

The Parties in their respective Pretrial Conference Statements, Dckts. 23, 21, and as stated on the record at the Pretrial Conference, have agreed to and establish for all purposes in this Adversary Proceeding the following facts and issues of law:

Plaintiff(s)

Defendant Thomas Swartz

<p>Jurisdiction and Venue:</p> <p>Plaintiffs Jane Wright, Ron Skrbina, Christina Tripp, and Gaylord Skrbina allege in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b)(2), 11 U.S.C. § 727, and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J). Complaint ¶¶ 4, 5, Dckt. 1. In the Answer, Defendant Thomas Swartz admit the allegations of jurisdiction and that this is a core proceeding. Answer ¶¶ 4, 5; Dckt. 11. To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued in this Adversary Proceeding are “related to” matters, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.</p>	
<p>Undisputed Facts:</p> <p>1. Creditors are individuals residing</p>	<p>Undisputed Facts:</p> <p>1. Creditors are individuals residing within the geographical region of the Eastern</p>

	within the geographical region of the Eastern District of California.		District of California.
2.	Swartz is a resident of the County of Calaveras, State of California.	2.	Swartz is a resident of the County of Calaveras, State of California.
3.	This is an adversary proceeding within the meaning of the Federal Rules of Bankruptcy Procedure, Rule 7001 ( 4).	3.	This is an adversary proceeding within the meaning of the Federal Rules of Bankruptcy Procedure, Rule 7001(4).
4.	This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(J).	4.	This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(J).
5.	This Court has a jurisdiction over this adversary proceeding and complaint pursuant to 28 U.S.C. 151, 157, and 1334, 11 U.S.C. 105 and 727, as well as the applicable local rules.	5.	This Court has jurisdiction over this adversary proceeding and Complaint pursuant to 28 U.S.C. 151, 157 and 1334, 11 U.S.C. 105, and 727, as well as the applicable local rules.
6.	Venue for this adversary proceeding properly lies in the Eastern District of California pursuant to 28 U.S.C. 1408 and 1409 because the Debtor resides within this district and because the underlying Chapter 7 case, in re Thomas Patrick Swartz, case number 20-90373 was filed by the Debtor in the district.	6.	Venue for this adversary proceeding properly lies in the Eastern District of California pursuant to 28 U.S.C. 1408 and 1409 because the Debtor resides with this district and because the underlying Chapter 7 case, in re Thomas Patrick Swartz, case number 20-90373 was filed by the Debtor in this district.
7.	Creditors are the holders of a state court Judgment against the Debtor in the approximate sum of \$370,000.00.	7.	Creditors are the holders of a state court Judgment against the debtor in the approximate sum of \$370,000.00.
8.	In 2001, Debtor filed a Voluntary Chapter 11 in this Court, case #2001-32978 where he scheduled his interest in the general Partnership of the Estate of Walter Swartz with a value of debtor's interest of \$1,500,00. That case was dismissed April 15, 2002.	8.	Creditors are the only creditors that the Debtor listed in his schedules.
9.	Creditors are the only creditors that the Debtor listed in his schedules.	9.	The initial meeting of creditors pursuant to 11 U.S.C. 341 ("341 Meeting") convened on May 28, 2020.
10.	The initial meeting of the creditors pursuant to 11 U.S.C. 341 ("341 Meeting") convened on May 28, 2020.	10.	Swartz appeared in person and testified under oath.
		11.	The remaining general partners of the Partnership are Debtor's siblings.
		12.	The Partnership owns interests in many parcels of real estate located in Calaveras County, CA, the purchase of which was

11.	Swartz appeared in person and testified under oath.	arranged by Debtor himself.
12.	The remaining general partners of the Partnership are Debtor's siblings.	13. On 10/8/20, the court filed an order substituting Peter Macaluso, Esq., in as counsel for the Debtor (who filed this case in pro se).
13.	Prior to the filing of the underlying Chapter 7 case, Swartz held an interest in the general Partnership, the Estate of Walter F. Swartz, a general Partnership.	14. On 10/12/20, an Amended Schedule A/B was filed by Debtor.
14.	The Debtor's interest in that Partnership is no less than 23.2558%.	15. On Schedule A/B Debtor lists 100% ownership in real property described as "Parcel Land- 60 yr. Old tin roof home, west point-pine grove."
15.	Swartz has been a general partner of the Partnership for many years.	16. Debtor states the value of the property is \$483,000, but that the current value of his portion is only \$115,920 (24% of the stated value).
16.	The Partnership owns interests in many parcels of real estate located in Calaveras County, California.	
17.	In Debtor's initial schedules filed on June 9, 2020, he did not disclose his ownership in the Partnership.	
18.	On September 3, 2020, Debtor filed an Amended Schedule A/B where he listed a 25% interest in "Estate of Walter F. Swartz a +or- 40 acre parcel of land Rural & Remote 6 miles East of Rail Road Flat on Summit Level Road 3 miles paved 3 miles Dirt." "This parcel is 1 of a+ or - 50 illegally created parcels created by Debtor's brother, Don Swartz. This Parcel originally had a mobile home but was burnt on 12/24/2008. No public water or sewer, but has phone and power, with 60 year old tin Roof; 20'x20' garage & old damaged tin roof barn. The town of Rail Road Flat has a Post Office, General Store, Community Club, and a recently shuttered Grammar School. Nearest gas station and Grammar School are in West Point 15 miles away. Nearest High School, Hospital,	

	<p>Doctors, and Modern Retail Shopping is 30 minutes away. Partnership Agreement expired 6/11/1990 General Partners have no standing." Debtor claimed the value of his interest to be \$120,000.</p>	
19.	<p>On September 24, 2020, Debtor filed an Amended Schedule C where he claimed an exemption in the amount of \$30,000 of his "Partnership Interest".</p>	
20.	<p>On October 12, 2020 Debtor filed an Amended Schedule A/B where he listed interest in "Parcel Land - 60 yr. Old tin roof home, west point-pine grove" and that. "Partnership owns 75% interest in 278.02 acres, valued between \$600-\$800; \$700k @ 75% - \$525k -less 8% cost of sale \$42k = \$483k, of which the Debtors owns 23.2558."</p>	
21.	<p>On October 12, 2020 Debtor filed an Amended Schedule A/B where he answered "no" to question 19 of Schedule B regarding having any interests in partnerships.</p>	
22.	<p>On October 12, 2020 Debtor filed an Amended Schedule C where he claimed exemption in the amount of \$120,750 of his \$115,920 interest in "Parcel Land- 60 yr. Old tin roof home, west point-pine grove Rail Road Flat, CA 95665 Calaveras County Partnership owns 75% interest in 278.02 acres, valued between \$600-\$800; \$700k @ 75% - \$525k -less 8% cost of sale \$42k = \$483k, of which the Debtors owns 23.2558."</p>	
23.	<p>On October 15, 2020, Debtor filed an Amended Schedule C where he claimed exemption in the amount of \$30,825 of his \$81,360.00 interest in "Partnership Interest, Debtor resides on the property, in outbuilding, for many years,</p>	

<p>Partnership Owners of Real Property of 278.02 acres at 500k at 75% is \$375, less 8% cost of sale - \$36k = \$339k 23.2558%".</p> <p>24. On October 30, 2020 Debtor filed an Amended Schedule C where he claimed an exemption in the amount of \$30,000 of his "Partnership Interest."</p>	
<p>Disputed Facts:</p> <ol style="list-style-type: none"> <li>1. That Debtor failed to list the interest in his multiple Schedule A/B which he filed with the Court.</li> <li>2. That Debtor did not disclose his ownership interest in the Partnership.</li> <li>3. That Debtor made a false oath.</li> <li>4. That Debtor concealed property of the estate.</li> <li>5. That Debtor's testimony on May 28, 2020 was false.</li> <li>6. That Debtor had the intent to hinder, delay, or defund [sic] Creditors and the Trustee.</li> <li>7. The Partnership owns an interest in seven (7) parcels totaling 259 acres of land in Calaveras County, California.</li> </ol>	<p>Disputed Facts:</p> <ol style="list-style-type: none"> <li>1. Creditors allege the Partnership owns an interest in approximately fifty (50) 40-acre parcels of real estate located in Calaveras County ("Parcels").</li> <li>2. That those Parcels are unencumbered.</li> <li>3. That Swartz failed to list the interest in his Schedule A/B which he filed with the Court.</li> <li>4. That Swartz did not disclose his ownership interest in the Partnership.</li> <li>5. That Swartz made a false oath.</li> <li>6. That Swartz concealed property of the estate.</li> <li>7. That Swartz's testimony on May 28, 2020 was false.</li> <li>8. That Swartz had the intent to hinder, delay or defraud Creditors and the Trustee.</li> <li>9. That Swartz's interest is in roughly seven (7) acres.</li> <li>10. That Swartz's testimony is that the acre has a value \$2,000.00 per acre.</li> <li>11. That Swartz's brother owns an adjoining six parcels of land of 250 acres in which Debtor has no interest.</li> </ol>
<p>Disputed Evidentiary Issues:</p> <ol style="list-style-type: none"> <li>1. None Identified</li> </ol>	<p>Disputed Evidentiary Issues:</p> <ol style="list-style-type: none"> <li>1. None Identified</li> </ol>
<p>Relief Sought:</p> <ol style="list-style-type: none"> <li>1. Denial of Defendant-Debtor's discharge.</li> </ol>	<p>Relief Sought:</p> <ol style="list-style-type: none"> <li>1. Granting of the Defendant-Debtor's</li> </ol>

	discharge.
Points of Law: 1. 11 U.S.C. § 727(a)(2)  2. 11 U.S.C. § 727(a)(4)	Points of Law: 1. 11 U.S.C. § 727(a)(2)  2. 11 U.S.C. § 727(a)(4)
Abandoned Issues:  1. None Identified	Abandoned Issues:  1. None Identified
Witnesses: 1. Jane M. Wright  2. Ron R. Skrbina  3. Christina Tripp  4. Gaylord W. Skrbina  5. Thomas Patrick Swartz	Witnesses: 1. Jane M. Wright  2. Ron R. Skrbina  3. Christina Tripp  4. Gaylord W. Skrbina  5. Thomas Patrick Swartz  6. Susan L. Swartz  7. Donald E. Swartz  8. William F. Swartz  9. Wilma Rossetti  10. Gary Farrar, Ch. 7 Trustee
Exhibits:  1. Debtor's Schedules and Amendments in case #20-903 73  2. Debtor's Schedules filed in case #01-92978.  3. 2004 Examination Transcript of Thomas Patrick Swartz, Debtor.  4. Tax Returns filed by the Estate of	Exhibits:  1. 2004 Examination Transcript of Thomas P. Swartz, Debtor  2. Real Estate Purchase and Receipt for Deposit  3. Debtor's Schedules and Amendments in case #20-90373.  

<p>Walter F. Swartz for the years 2016, 2017, 2018 and, 2019.</p> <p>5. Joint Venture Agreement for the Estate of Walter F. Swartz.</p> <p>6. Calaveras County Tax Assessor's Records of Ownership of Property held by the Partnership.</p>	
<p>Discovery Documents:</p> <p>1. 2004 Examination Transcript of Thomas Patrick Swartz, Debtor.</p>	<p>Discovery Documents:</p> <p>1. None Identified</p>
<p>Further Discovery or Motions:</p> <p>1. None Identified</p>	<p>Further Discovery or Motions:</p> <p>1. None Identified</p>
<p>Stipulations:</p> <p>1. None Identified</p>	<p>Stipulations:</p> <p>1. None Identified</p>
<p>Amendments:</p> <p>1. None Identified</p>	<p>Amendments:</p> <p>1. None Identified</p>
<p>Dismissals:</p> <p>1. None Identified</p>	<p>Dismissals:</p> <p>1. None Identified</p>
<p>Agreed Statement of Facts:</p> <p>1. None Identified</p>	<p>Agreed Statement of Facts:</p> <p>1. None Identified</p>
<p>Attorneys' Fees Basis:</p> <p>1. None Identified</p>	<p>Attorneys' Fees Basis:</p> <p>1. None Identified</p>
<p>Additional Items</p>	<p>Additional Items</p>



1. None Identified	1. None Identified
Trial Time Estimation: One (1) Day	Trial Time Estimation: Three (3) Days

SUBCHAPTER V

**Final Ruling:** No appearance at the April 8, 2021 Status Conference is required.

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Debtor's Atty: David C. Johnson

Notes:  
Continued from 1/14/21

U.S. Trustee Report at 341 Meeting lodged 2/5/21

[DCJ-2] Debtor in Possession's Motion for Approval of Agreement to Modify Automatic Stay filed 2/18/21 [Dckt 46]; Order granting filed 3/16/21 [Dckt 59]

Plan of Reorganization for Small Business Under Chapter 11 / Primo Farms, LLC's Plan of Reorganization Dated March 3, 2021 filed 3/3/21 [Dckt 53]; Order setting confirmation hearing and deadlines filed 3/7/21 [Dckt 54]

**The Status Conference is continued to 2:00 p.m. on April 29, 2021, to be conducted in conjunction with the confirmation hearing in this case.**

**APRIL 8, 2021 STATUS CONFERENCE**

On April 1, 2021, the Debtor/Debtor in Possession filed an Updated Status Report. Dckt. 60. Debtor/Debtor in Possession reports that the confirmation hearing for the proposed Plan in this case is set for April 29, 2021. The Debtor/Debtor in Possession believes that the Plan is likely to be confirmed, and is continuing to work with creditors to iron out modest revisions to the proposed Plan.

Debtor/Debtor in Possession requests that the Status Conference be continued to April 29, 2021, to be conducted in conjunction with the confirmation hearing.

**JANUARY 14, 2021 STATUS CONFERENCE**

Debtor commenced this Subchapter V case on December 3, 2020 and serves as the Debtor in Possession. Walter Dahl is the Subchapter V Trustee appointed in this case.

The Debtor/Debtor in Possession filed a Status Report on December 31, 2020. Dckt. 41. Debtor/Debtor in Possession reports that the plan in this case is "quite simple" – the Debtor/Debtor in Possession will renovate the three real properties of the bankruptcy estate to net sales proceeds of

approximately \$1,000,000. With these proceeds and existing loan funds, the plan will include the construction of three new homes.

At the Status Conference, counsel for the Debtor/Debtor in Possession reported that the Debtor is not a farming business, but a real estate purchase and flip business. The property of the estate includes three lots in Santa Rosa on which the former homes were lost in the forest fires.

The Debtor/Debtor in Possession intends to get the three existing homes sold. There is some minor fix up work to be done, and the three homes are ready to sell.

Walter Dahl, the Subchapter V Trustee, stated that he has reviewed the case with counsel for the Debtor/Debtor in Possession. At the meeting of creditors the information indicated that there may not be sufficient value in the Santa Rosa properties to obtain construction loans and build homes, so they may have to be sold as vacant lots.

Counsel for the creditors having claims secured by the three homes reported that they just want to see the homes sold. Counsel for the U.S. Trustee is still awaiting documentation of the insurance for the properties.

Item 8 thru 9

**Final Ruling:** No appearance at the April 8, 2021 Status Conference is required.

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Debtor's Atty: Pro Se

Notes:

Continued from 2/11/21. The Parties having stipulated to address this dispute through the Bankruptcy Dispute Resolution Program requested a continuance for approximately 45 days.

**The Status Conference is continued to 2:00 p.m. on May 20, 2021, with the parties scheduled for BDRP mediation on April 20, 2021.**

#### **APRIL 8, 2021 STATUS CONFERENCE**

On April 1, 2021, Ajay Sood, the Petitioning Creditor, filed an Updated Status Report. Dckt. 34. The BDRP mediation is set for April 29, 2021, and Petitioning Creditor requests, consistent with the prior joint requests of the parties in interest, that this matter and the Status Conference be continued to 2:00 p.m. on May 20, 2021.

#### **FEBRUARY 11, 2021 STATUS CONFERENCE**

On February 5, 2021, a Stipulation for Referral to Bankruptcy Dispute Resolution Program ("BDRP") was filed by Ajay Sood, the Petitioning Creditor; Navdeep Bali, the Involuntary Debtor; and creditors asserting secured claims Cary Hahn and Kanwal Singh. Dckt. 25.

#### **Petitioning Creditor Status Report**

Petitioning Creditor Ajay Sood filed an Updated Status Report on February 5, 2021. Dckt. 26. It is reported that the reported possible resolution referenced in the November 19, 2020 Status Conference, and the then represented optimism at the continued Status Conference on December 17, 2020, that resolution could be achieved through a BDRP, has now led to the February 5, 2021 filing of a Stipulation to participate in a BDRP mediation. A proposed order appointing J. Russell Cunningham as a BDRP mediator was lodged with the court on February 8, 2021.

petitioning Creditor suggests that the Status Conference and the Motion to Set Trial Date be continued approximately 45 days to allow the Parties to put their efforts into the BDRP process.

At the hearing the Parties agreed to the continuance to April 8, 2021.

**Final Ruling:** No appearance at the April 8, 2021 hearing is required.  
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**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.  
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Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), creditors, parties requesting special notice, and Office of the United States Trustee on December 9, 2020. By the court's calculation, 64 days' notice was provided. 28 days' notice is required.

The Motion to Set Trial Date has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

**The hearing on the Motion to Set Trial Date is continued to 2:00 p.m. on May 20, 2021, with the parties scheduled for BDRP mediation on April 20, 2021.**

Ajay Sood, the Creditor having filed this involuntary Chapter 7 petition ("Creditor"), against Navdeep Bali ("Debtor"), moves the court for an order setting a trial date pursuant to 11 United States Code § 303(h) and Federal Rules of Bankruptcy Procedure 1013(a) in response to the court's Notice requiring that a motion to set trial and a notice of hearing on such motion was issued on November 19, 2020.

#### **Review of the Notice**

The court issued a Notice to Petition Creditor(s) on November 19, 2020. Dckt. 14. The Notice states the following:

In reviewing the Court's records, it appears that an answer or response to your Involuntary Petition has been filed. In order for this case to proceed, a Motion to Set Trial Date and a Notice of Hearing with the date and time filled in must be received by the Clerk of the U.S. Bankruptcy Court, by mail to the Sacramento Division

Office located at Robert T. Matsui United States Courthouse, 501 I Street, Suite 3-200, Sacramento, CA 95814, or in person at the divisional office indicated below, within twenty-one (21) days from the date of this notice with the date and time filled in. Self-set calendar procedures and available hearing dates are posted under Court Calendars on the Court's web site ([www.caeb.uscourts.gov](http://www.caeb.uscourts.gov)).

THIS IS THE ONLY REMINDER YOU WILL RECEIVE. If you fail to file the required document(s) within twenty-one(21) days of the date of this notice, the Court will issue a Notice of Intent or Order to Show Cause re Dismissal for failure to prosecute this case.

If you have already complied with the above, please disregard this notice.

Notice, Dckt. 14.

A review of the docket for this case shows that Debtor filed an Involuntary Answer on November 12, 2020. Dckt. 9.

## **DISCUSSION**

Creditor refers to the November 19, 2020 status conference where Creditor, Debtor and a foreclosing creditor “expressed optimism that a resolution could be reached,” and the parties agreed to continue the status conference to December 17, 2020. The hearing having occurred on the same and the civil minutes having been added to the docket on November 20, 2020, it seems that the Notice was automatically issued once Debtor filed the Involuntary Answer.

The Civil Minutes for the November 19, 2020 Status Conference reflect that the parties have been actively working on a settlement to resolve this involuntary bankruptcy case and requested the Status Conference be continued. Civil Minutes, Dckt. 15, at 3. At the continued hearing on December 11, 2020 the court explained that:

The Order issued by the court to file a motion to set a trial date was generated by the left hand at the court, while the right hand was continuing the Status Conference for the Parties to continue in the good faith discussions.

Civil Minutes, Dckt. 21, at 2. At the hearing, Creditor also reported that the parties prefer to handle the matter over BDRP rather than litigating the issues and the court continued the hearing to February 11, 2020. *Id.*

In response to the Notice, Creditor filed this motion despite the update given at the Status Conference to set a trial date. Creditor also requests the court to order Debtor to comply with Federal Rules of Bankruptcy Procedure 1003(b) and 1008 immediately, completely, and under oath so additional creditors may be given the opportunity to join in the petition as contemplated by Rule 1003(b).

Lastly, Creditor requests the court order commencement of discovery pursuant to Rule 1018. At the Status Conference, Creditor had expressed that he is ready to proceed with discovery now that Debtor had filed an Answer.

Rule 1018 provides in part that the rules regarding discovery are applicable in an involuntary petition, specifically Rule 7026, Rule 7028 through Rule 7037.

### **Stipulation for BDRP**

On February 5, 2021, a Stipulation for Referral to Bankruptcy Dispute Resolution Program (“BDRP”) was filed by Ajay Sood, the Petitioning Creditor; Navdeep Bali, the Involuntary Debtor; and creditors asserting secured claims Cary Hahn and Kanwal Singh. Dckt. 25.

### **Petitioning Creditor Status Report**

Petitioning Creditor Ajay Sood filed an Updated Status Report on February 5, 2021. Dckt. 26. It is reported that the reported possible resolution referenced in the November 19, 2020 Status Conference, and the then represented optimism at the continued Status Conference on December 17, 2020, that resolution could be achieved through a BDRP, has now led to the February 5, 2021 filing of a Stipulation to participate in a BDRP mediation. A proposed order appointing J. Russell Cunningham as a BDRP mediator was lodged with the court on February 8, 2021.

Petitioning Creditor suggests that the Status Conference and the Motion to Set Trial Date be continued approximately 45 days to allow the Parties to put their efforts into the BDRP process.

### **APRIL 8, 2021 CONTINUED HEARING**

On April 1, 2021, Ajay Sood, the Petitioning Creditor, filed an Updated Status Report. Dckt. 34. The BDRP mediation is set for April 29, 2021, and Petitioning Creditor requests, consistent with the prior joint requests of the parties in interest, that this matter and the Status Conference be continued to 2:00 p.m. on May 20, 2021, to be conducted with the continued Status Conference and Motion to Set Trial.

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)©.**

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Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 11 Trustee, Creditor, creditors, parties requesting special notice, and Office of the United States Trustee on April 1, 2021. By the court's calculation, 7 days' notice was provided. The court set the hearing for April 8, 2021. Dckt. 514.

A Proof of Service states that the Notice on the hearing for this Motion was served on Debtor, Debtor's Attorney, Chapter 11 Trustee, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on March 31, 2021. By the court's calculation, 8 days' notice was provided.

The Motion to Approve Settlement, Restructuring, and Lock-Up Agreement was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Chapter 11 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing -----.

<b>The Motion for Approval of Compromise is <span style="color: red;">XXXXX</span>.</b>
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Russell Wayne Lester, an individual, dba Dixon Ridge Farms, the Debtor in Possession, ("Movant") requests that the court approve the Settlement, Restructuring, and Lock-Up Agreement ("Agreement") between Movant and Prudential Insurance Company of America ("Prudential"). The claims and disputes to be resolved by the proposed settlement are Prudential's secured claim ("Prudential Claim")



in this bankruptcy case and setting forth a mutually agreed upon treatment of Prudential's Claim (Proof of Claim No. 2-1) under an Amended Plan which shall be filed no later than July 31, 2021.

Movant and Prudential have negotiated and reached an agreement on the treatment of the Prudential Claim under a proposed Amended Plan, the settlement terms for this treatment are incorporated via a Term Sheet, filed as part of Exhibit A. *See* Dckt. 522. Although the Term Sheet contains many settlement provisions, Movant does not seek final approval of all those provisions. Motion at ¶ 12.

The instant motion seeks approval of the cooperation provisions between Movant and Prudential for how the parties will cooperate to obtain final approval for the settlement provisions pursuant to a Chapter 11 plan confirmation process. *Id.* If the Amended Plan is not confirmed, the settlement provisions will not reach final approval and will remain subject to dispute. *Id.*

Additionally, this Motion seeks immediate approval of the Lock-Up Provisions, summarized below. *Id.* at ¶ 13.

Movant and Prudential have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Agreement are set forth in the Agreement filed as Exhibit A in support of the Motion, Dckt. 522):

#### **Agreement to Cooperate**

- A. Movant and Prudential agree to resolve the Prudential Claim on the terms contained in the Agreement.
- B. Movant will propose, and Prudential will support, an Amended Plan that will include, but is not limited to, the terms summarized in the Instant Motion and set forth below as Summary of Primary Terms Consistent with Settlement and Summary of the Lock-up Provisions.

Motion at ¶¶ 12, 15.

Specifically, as further explained by Movant in the Memorandum of Points and Authorities filed in support of the instant Motion, through this Agreement to cooperate Debtor in Possession and Prudential will use commercially reasonable efforts to assist in obtaining and defending confirmation of the Amended Plan file pleadings and motions necessary to confirm the Amended Plan, participate in related hearings, and effect the terms of the Plan. The parties also agree not to take actions that would negatively affect the confirmation of the Amended Plan.

#### **Summary of Primary Terms Consistent with Settlement**

Movant's Memorandum of Points and Authorities ("MPA") highlights the following primary terms and conditions consistent within the settlement which are not subject to approval through this Motion (The full terms of the Agreement are set forth in the Agreement filed as Exhibit A in support of the Motion, Dckt. 522):

- a. The sale of Gordon Ranch, MacQuiddy Ranch, and the Conservation Easement by December 31, 2021.

- b. The sale of Oda Ranch by March 31, 2022.
- c. Paydown of Prudential debt to \$6,500,000 by July 1, 2022.
- d. Restructuring of the remaining Prudential balance.
- e. Creation of an independently managed, bankruptcy remote entity (the “SPE”), into which Prudential Collateral will be transferred to provide protection for Prudential, First North Bank of Dixon (“FNB”), and General Unsecured Creditors.
- f. An agreed reduction of the default interest rate from 18 percent to 12 percent.
- g. An agreed reduction of prepayment penalties of 50 percent for prepayments of interest through December 31, 2022, subject to certain conditions.

MPA at ¶ 5, Dckt, 519.

### **Summary of the Lock-up Provisions**

The court summarizes the Lock-up Terms as follows (The full terms of the Agreement are set forth in the Agreement filed as Exhibit A in support of the Motion, Dckt. 522):

- i. Debtor in Possession is required to file an Amended Plan on or before April 1, 2021, reflecting the terms of the Agreement.
- ii. Debtor in Possession, Prudential and Kathleen Lester are required to take certain acts in promotion of confirmation of the Amended Plan.
- iii. Debtor in Possession, Prudential and Kathleen Lester are to refrain from certain acts to hinder or oppose confirmation of the Amended Plan.
- iv. The Amended Plan is to be confirmed by July 31, 2021, with an Effective Date on or before September 7, 2021.

*Id.* at ¶ 6.

### **Term Sheet**

The Agreement incorporates a Term Sheet that contains many settlement provisions for treatment of Prudential’s Claim under a proposed Amended Plan. This motion does not seek final approval for all those settlement provisions. The court stops short of the terms themselves as these are terms to be included on the Amended Plan which are to be set forth for confirmation, subject to creditors’ objections, and to be reviewed by the court once the Amended Plan has been set for confirmation.

### **DISCUSSION**

Though the present Motion does not seek to have the court approve a compromise or alter, limit, or change rights and interests of the Parties, the court considers this Motion in the established compromise framework.

### **Approval of Compromise**

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;
2. Any difficulties expected in collection;
3. The complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it; and
4. The paramount interest of the creditors and a proper deference to their reasonable views.

*In re A & C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1986); *see also In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

### **Probability of Success**

Movant argues this factor is in favor of settlement because it would be difficult to predict the outcome of litigation due to the numerous issues that would need to be decided. If the parties belief that Creditor is over secured is correct, other issues that would need to be determined are:

1. Appropriate post-petition interest rate;
2. Whether the contract default rate is enforceable;
3. If enforceable, whether the court should prescribe a different rate due to equitable considerations;
4. Whether contract prepayment premiums are unenforceable as “disguised penalties;”
5. If enforceable, whether the court should prescribe different premiums due to equitable considerations; and
6. Whether proposed treatment in the Plan is “fair and equitable.”

Given that many of the issues allow the Court to use its discretion, it is difficult to predict the outcome. Additionally, the determination of some issues would require expert opinions that are not known at this time. The agreement is the parties attempt to establish an agreed path forward and when the monetary

benefits are considered and the cost to litigate potential disputes are calculated, the total benefit to the estate could exceed \$2,500,000.

### **Difficulties in Collection**

Movant argues this factor is not relevant to this matter.

### **Expense, Inconvenience, and Delay of Continued Litigation**

Movant argues this factor weighs heavily in favor of settlement because litigation in this matter would be expensive and complex. The issues relevant to Probability of Success apply with equal weight here. Their numerosity and complexity involves issues of federal and state law, as well as a potential battle of the experts.

### **Paramount Interest of Creditors**

Movant argues this factor strongly favors settlement because the additional expenditure of disputing the issues involved does not benefit creditors for the estate due to the time and expense to litigate legal and factual disputes. The agreement reduces the default interest rate from 18% to 12% and reduces prepayment premiums to 50% through December 31, 2022 without expensive litigation. Additionally, the settlement provides a path to confirmation of a plan that will allow continued operation of Debtor in Possession's business and full payment to creditors.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the cooperation agreement is in the best interest of the creditors and the Estate because the Agreement avoids potential litigation by Debtor in Possession over the largest creditors (Prudential) objections to confirmation of a plan. The litigation avoided by the Agreement would carry risk that a plan would not be confirmed, or confirmation would be delayed, and would require the expenditure of significant time and expense. The Motion is granted. <sup>FN.1.</sup>

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FN. 1. The court is a bit confused, and bemused, at being presented a thirty-seven page agreement which merely provides the handshake terms by which the Debtor in Possession and Prudential will in good faith work to prosecute a plan. The Parties and their counsel are well aware that the court will not, and cannot, pre-confirm plan terms for Prudential. Further, the court will not issue an order that binds the court to having to rubber stamp confirmation of a plan on the terms of a pre-confirmation agreement.

The Debtor in Possession makes it clear that the terms are not binding, stating in the Motion:

12. The Debtor in Possession respectfully submits that the Settlement Restructuring and Lock-Up Agreement is slightly different from a typical settlement agreement. Like a normal settlement agreement, the Settlement Restructuring and Lock-Up Agreement incorporates a Term Sheet that contains many settlement provisions, but this motion does not seek final approval for all those settlement provisions. Instead, **this Motion seeks approval for the cooperation provisions by and between Prudential and the Debtor in Possession for how the parties will work together** to obtain final approval for the settlement provisions pursuant to a Chapter 11 plan

confirmation process (i.e., the Lock-Up Provisions). If the Amended Plan is not confirmed, the settlement provisions will not be finally approved and will remain subject to dispute.

13. The Motion does seek immediate approval for the Lock-Up Provisions.

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The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Approve Compromise filed by Russell Wayne Lester, an individual, dba Dixon Ridge Farms, the Debtor in Possession, (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Approve Settlement, Restructuring Agreement, and Lock-Up Agreement between Movant and Prudential Insurance Company of America (“Prudential”) is granted to the extent it provides for the cooperation and prosecution of a proposed plan consistent with the terms stated in the Agreement, filed as Exhibit A in support of the Motion (Dckt. 522). The court does not “pre-approve” or “pre-confirm” any terms for a Plan in this case.

Item 4 thru 5

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

-----

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Notice of the Hearing were served on Debtor, Debtor's Attorney, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on December 17, 2020. By the court's calculation, 49 days' notice was provided. 42 days' notice is required. FED. R. BANKR. P. 2002(b) (requiring twenty-eight days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion to Approve Disclosure Statement has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

<p><b>The Motion to Approve Disclosure Statement is <span style="color: red;">XXXX</span>.</b></p>
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**Request for Continuance  
and Interim Extension of Exclusive Period**

On March 16, 2021, the parties filed a Stipulation agreeing that the hearing on this matter be continued to April 8, 2021. Dckt. 453. The parties inform the court that the additional time would allow for further negotiations to settle disputes related to Debtor's Plan and keep professional fees in this case to a minimum to maximize the return to creditors.

The parties have also agreed to extend the deadline for the Debtor in Possession to file and serve proposed amendments to the Plan of Reorganization and Disclosure Statement from March 16, 2021 to March 25, 2021. *Id.*

## **Request for Continuance**

On March 16, 2021, the Parties filed a Stipulation to further extend the hearing on this matter in light of the ongoing mediation. Dckt. 453. The Court granted the request.

## **April 8, 2021 Hearing**

On Thursday April 1, 2021, an Amended Disclosure Statement and an Amended Plan were filed. Dckts. 525, 526.

On April 5, 2021, Creditor Oliveira Enterprises, Inc. filed an Objection to Confirmation of the Plan (for which no disclosure statement has yet been approved and for which no confirmation hearing and voting has been set). Dckt. 530. Citing to 11 U.S.C. § 1325(b)(1), Creditor argues that the Plan should not be confirmed.

On April 7, 2021, the Debtor in Possession filed a Reply to the First Northern Bank of Dixon prior filed objections. These seventeen pages of Objections (Dckt. 17) are summarized as follows:

- A. “Here, the DIP has proposed a complicated plan (at least complicated at this point due to a lack of information) that entails the creation, documentation, and implementation (apparently) of a number of entities involved in the proposed reorganization.”
- B. “Yet the DIP has failed to provide any detail in his DS about those entities or any documentation detailing specifically what they will be authorized to do, who will be authorized representatives of those entities, when actions will or may be taken by the managers of those entities, what the consequences of default by those entities may be, and similar details.”
- C. “Other key objections discussed below include the lack of a capital gains tax analysis, the lack of historical and projected farming, processing and sales information, inadequate information concerning real property asset valuations and marketing strategy, the overall feasibility of the DIP’s plan from both a farming / business operations standpoint and regarding the proposed sales of real property, and the shortcomings in the DIP’s liquidation analysis.”
- D. “Initially, the Bank asserts that the DIP should accurately state what the creditors’ claims are and how they are secured, by what collateral, and the value of that collateral. By simply jumping to the DIP’s proposed treatment of creditor claims without providing adequate information about the present state of those claims, the collateral for the claims, and the possible value of such collateral, the information is misleading at best.”
- E. “The DIP fails to clearly inform creditors that the Bank’s claims, with prepetition interest, attorneys’ fees and other expenses to which the Bank is entitled, total approximately \$10,000,000 as of the petition date.”
- F. “In this section, the DIP provides only the approximate principal amounts owing to his creditors. While the DIP admits doing this, it is misleading, incomplete and inaccurate

because the DIP knows full well that the claims of at least some of his creditors are, at present, substantially greater.”

- G. “In this portion of his DS, at pages 2-4 thereof, the DIP provides only three paragraphs of narrative – a total of eight sentences. The DIP provides no historical information concerning his business successes and difficulties.”
- H. “The DIP fails to discuss, however, how significantly the DIP’s projections have varied from his actual performance. In addition to the significant crop production and sales variances referenced above, the DIP should also provide in his DS information related to his payment of expenses. Here, the DIP appears to be deferring substantial expenses due to the lack of revenues with which to pay those expenses.”
- I. “As noted above, however, the DIP fails to inform creditors and the court about the substantial administrative expense that the estate has incurred to date (subject to allowance by the court) and what those expenses may be on a going-forward basis.”
- J. “The DIP promotes the narrative that his business was shut down by a receivership. Yet the DIP does not state the basic underlying facts leading up to the Solano County Superior Court’s imposition of a receiver. Those facts include the DIP’s material defaults under the two largest loans the DIP has with the Bank, which total approximately \$8,000,000.”
- K. “The DIP also should provide meaningful information for creditors and the court to evaluate the impact on walnut sales from the continuing pandemic and what the DIP refers to as the “weak trade war market.” What personal knowledge does the DIP have as to the experiences of other growers and processors? What industry information can the Debtor in Possession provide regarding the impacts of these factors?”
- L. “The DIP provides information as to the value of his other properties that are based on what he calls Prudential’s internal appraisals. The Bank does not know, of course, whether those are the values arrived at by Prudential on its internal appraisals. Of note, however, is that the DIP does not state the dates of those appraisals, nor any additional information as to possible changes in those values since they were performed.”
- M. “At page 9 of his DS, the DIP provides a table of assets that includes what he calls an “an estimated value of the Debtor in Possession’s assets in an orderly wind down in Chapter 7 liquidation case.” The DIP further states in this lead-in to his liquidation analysis as follows: “If the Chapter 7 Trustee closes the business and conducts a forced liquidation, the Debtor in Possession believes the recoveries would be significantly lower.

There are a number of issues here. First, why does the DIP provide in this section the purported valuations of assets from Prudential, the Bank and the Receiver previously appointed by the Solano County Superior Court? These are not the DIP’s valuations of the assets per his Schedules filed under penalty of perjury, nor is there any evidence that they are the valuations of Prudential, the Bank or the Receiver in a chapter 7 orderly wind-down. In fact, the DIP in his own proposed plan proposes an



orderly wind-down / liquidation of much of his assets. Thus, how do these “estimated” values differ from his own?”

- N. “In the former “estimated” analysis, the DIP appears to provide a discount for selling costs and other market deductions without addressing administrative expenses in bankruptcy, both in chapter 11 and 7, UST fees, and capital gains taxes to name a few.”
- O. “At the top of page 11, why does the DIP state conclusively that \$5,000,000 or so in prepayment penalties and default interest must be paid to Prudential in a chapter 7 liquidation whereas they (presumably) need not be paid through a chapter 11 plan? Again, there is simply no discussion of this big-ticket item.”
- P. “At page 11, the DIP states that there is a risk a trustee will not be able to achieve the appraised values in selling the DIP’s real properties. The DIP does not similarly state, however, that there is a risk the DIP will not achieve those values in selling through a chapter 11 plan.”
- Q. Lack of information concerning reductions in staff, the changes in the walnut processing business, and the restructured business operation.
- R. “As discussed above, the Debtor suffered staggering operating losses of \$1,315,990 in 2017, \$2,186,967 in 2018, and \$2,595,175 in 2019, all before the COVID-19 pandemic. Presumably, the operating loss in 2020, which was impacted by the COVID-19 pandemic, will also be substantial. Yet the Debtor makes no effort in the DS to discuss the operating losses incurred in 2020 and prior years, and more importantly, how he intends to return to profitability.”
- S. “As noted above, with the “devil being in the details” here, the DIP must provide the proposed Trust and SPE organizational and operational documents to creditors and the court now, rather than at some speculative point in the future. Who are going to be the trustees under the Trust? What will their powers and duties be? Who will the beneficiaries be? What will the Trust own? Will its ownership of assets change over time? Who will manage the SPE? What will his/her/its powers and duties be? When will the manager of the SPE be entitled to take actions and what actions will they be? Who, if anyone, will oversee the SPE manager?”
- T. More information on preservation of claims and defenses.
- U. “However, the DIP has not provided adequate information in his DS to support his apparent projections for full payment to creditors under his plan of liquidation. On what are these projections based? Whose projections are they and what was done to arrive at them?”
- V. Information regarding tax consequences.

- W. “The DIP fails in his DS to state that he proposes to take \$120,000 in salary for each of the next three years. He does not say what this proposed salary is based upon or whether the DIP’s operations can support it.”
- X. “ From his reporting thus far in this case, it appears the DIP has not taken any compensation (at least in the form of salary) in exchange for his services. How has the DIP managed to go without salary?”
- Y. “Does the DIP intend to contribute any of his and his non-debtor wife’s other financial assets (approximately \$300,000 per the DIP’s Schedule AB filed September 10, 2020? The DIP has not offered to use these funds to date in connection with his continuing business operations. Similarly, it does not appear he proposes to contribute those funds to support his reorganization plan. The DIP should clarify these issues.”
- Z.

Debtor in Possession asserts that those issues have been addressed as follows:

- A. The Amended Disclosure Statement includes the following key additions:
1. A comprehensive summary of Plan Treatment, including estimated principal and collateral, interest rate, payment terms, and maturity date (see Amended Disclosure Statement, Table 1 at pp. 4-5);
  2. Substantive descriptions regarding historical operational cash flow as well as postpetition events such as Plan mediation resulting in the Prudential Term Sheet with Prudential (see Amended Disclosure Statement at p. 10);
  3. A detailed explanation of the Debtor in Possession’s means for implementation of the Plan (see Amended Disclosure Statement at p. 11);
  4. An explanation regarding creation of the SPE and the Lester Family Trust which provides that the Independent SPE Manager will manage all sales of the SPE Designated Properties (see Amended Disclosure Statement at pp. 11-12);
  5. Additional information regarding the required sales of real property pursuant to the Plan (see Amended Disclosure Statement at p. 12);
  6. Further discussion regarding compensation of the SPE Independent Manager and Reorganized Debtor (see Amended Disclosure Statement at p. 12);
  7. Details regarding potential Avoidance Actions to recover transfers from Insiders including the Prepetition Debtor’s children (see Amended Disclosure Statement at p. 13);

8. Further discussion of the Three-Year Pro-Forma budget attached to the Amended Disclosure Statement as Exhibit 1 (see Amended Disclosure Statement at p. 15);
9. A completely revised summary of projected recovery after liquidation which lists FNB's and Prudential's real property collateral and equity value realizable from an orderly liquidation (see Amended Disclosure Statement at pp. 16-17);
10. Further explanation of the Conservation Easement sale issues (see Amended Disclosure Statement at p. 17);
11. A schedule of FNB's personal property collateral and equity value after orderly liquidation (see Amended Disclosure Statement at p. 18);
12. Schedules of estimated total allowed secured claims and unsecured claims (see Amended Disclosure Statement at pp. 19-21);
13. A schedule of estimated capital gain taxes on asset sales as well as a discussion of tax consequences to the Reorganized Debtor and General Unsecured Creditors (see Amended Disclosure Statement at pp. 21-22, 26);
14. Estimated chapter 11 professional fees, the Debtor in Possession's estimated exemptions, and estimated chapter 7 fees and expenses (see Amended Disclosure Statement at pp. 22-23);
15. A fully revised liquidation analysis (see Amended Disclosure Statement at pp. 23-24); and
16. A discussion regarding Plan protection for General Unsecured Creditors from an uncured Plan Default and Plan protection from an unlikely future bankruptcy case (see Amended Disclosure Statement at p. 25).

Reply, p. 2:16-26, 2:1-28; Dckt. 547.

The Reply also suggests that the court set the following time line for getting the Plan out, votes submitted, issues briefed, and a confirmation hearing:

- A. **April 22, 2021:** Serve Ballots, Amended Plan, Amended Disclosure Statement, and other solicitation documents (the "Plan Solicitation Documents");
- B. **May 13, 2021:** File Plan Supplement (Seven days prior to Opposition and Ballot date);

With respect to the Debtor in Possession filing a "Plan Supplement" to the Plan and Disclosure Statement, at the hearing the Debtor in Possession explained **XXXXXXX**

- C. **May 20, 2021:** Oppositions (including evidence) and Ballots Due (28 days after service of Plan Solicitation Documents per Bankruptcy Rule 2002(b)(1));

If Creditors have from April 22, 2021 service until May 20, 2021 to file oppositions and ballots, such time period appears reasonable. However, if there is a “Plan Supplement” sprung on Creditors with substantially different terms or information, then a one week window would not be reasonable. At the hearing, **XXXXXXX**

- D. **May 27, 2021:** Plan Confirmation Brief, Tabulation of Ballots and Replies (7 days prior to Plan Confirmation Hearing);

The date would have to be keyed off of when the Oppositions are really, really due.

- E. **June 3, 2021:** Plan Confirmation Hearing (request to set on Modesto Plan Confirmation Calendar at 2:00 p.m.).

Given the contentious nature of this case, while the court has been solicitous to the parties and allowed the eve of hearing filing of briefs/replies to afford them the maximum opportunity to negotiate in good faith and exhibit the best in good faith Chapter 11 economic litigation, having the Debtor in Possession’s replies dropped on the court on May 27, 2021, the Thursday before a three day holiday weekend and then expect the court to have a well reasoned analysis and tentative ruling done by 10:00 a.m. on Wednesday June 2, 2021 (with Monday May 31, 2021 being the Memorial Day holiday) is not reasonable. At the hearing, **XXXXXXX**

1.

**Tentative Ruling:** Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

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Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, creditors holding the twenty largest unsecured claims, creditors, parties requesting special notice, and Office of the United States Trustee on September 2, 2020. The initial emergency hearing was conducted on August 31, 2020, and the final hearing set by order of the court for September 17, 2020.

**The Motion to Use Cash Collateral is XXXX.**

**Request for Continuance  
and Interim Extension of Exclusive Period**

On February 18, 2021, the parties filed a Stipulation agreeing that the hearing on this matter be continued to a date to be determined at the February 23, 2021 hearing. Dckt. 415. The parties informed the court that they have agreed to vacate the briefing schedule for all the hearings scheduled in this case related to the Motion to Use Cash Collateral (FWP-2), the Motion for Extension of Exclusive Period (FWP-17), the Motion to Terminate Exclusivity (NRM-1), and the Approval of the Disclosure Statement (FWP-14).

The parties have also agreed to an interim cash collateral order authorizing use of cash collateral in the amounts and for the purposes as stated in the present cash collateral budget attached as Exhibit A to this court's Fifth Interim Order on the Motion (Docket No. 306), through the week of a subsequent hearing date to be determined by the court provided that such subsequent hearing date is within thirty (30) days of the February 23 Hearing on cash collateral. *Id.*

The parties also agreed to extend the exclusivity period through the date of the continued hearing determined at the February 23, 2021 hearing. *Id.*

The Court authorized the Seventh Interim Use of Cash Collateral through and including March 26, 2021, and Extended Exclusivity for the Debtor in Possession pursuant to the Stipulation of the Debtor in Possession, The Prudential Insurance Company of America, and First Northern Bank of Dixon through and including March 26, 2021. Order, Dckt. 430.

At the hearing, Prudential Life Insurance, First Northern Bank, and the Debtor in Possession reported that they have a further agreement for the interim use of cash collateral. FNB stipulates to the use of cash collateral through April 8, 2021, with FNB to have until April 5, 2021 to oppose further relief, and the Debtor in Possession until midnight on April 7, 2021 to reply. Debtor in Possession to prepare and lodge order, approved as to counsel.

Counsel for the Debtor in Possession shall prepare and lodge with the court, after being approved as to form by the respective counsel for Prudential Life Insurance and First Northern Bank, the order authorizing the further use of cash collateral and setting the April 8, 2021 continued hearing at 2:00 p.m.

#### **APRIL 8, 2021 FINAL HEARING**

On April 7, 2021, the Debtor in Possession filed an updated Status Report. Dckt. 553. The Debtor in Possession reports that First Northern Bank filed its supplemental opposition on April 5, 2021.

The fifteen page Opposition, Dckt. 532, which opposition to the final request begins on page 6 of the Opposition (the prior five pages covering the history of this case). For the 13 week period covered by the final request is for an additional \$765,105 in cash collateral, as compared to the \$1,090,169 that was authorized for the prior thirty-week period.

In the Opposition, page 8, First Northern Bank summarizes the areas of increases, which are identified as:

Labor and Related	16% Increase
Farming	189% Increase
Processing	26% Increase
Administrative	178% Increase
Other Operating	190,147% Increase

First Northern Bank argues that no basis for such substantial increases has been shown by the Debtor in Possession.

The Bank also argues that there is not sufficient evidence that ti si adequately protected. It is asserted that for the replacement liens First Northern Bank has been given, the Debtor in Possession's Plan is a plan for diverting the value of the replacement collateral to other creditors.

For the Putah Creek Collateral, First Northern Bank projects that the property has a value of \$5,650,000 and the Bank's claims secured by it total (\$5,152,249), thus there is no significant recoverable value from any liquidation of the property.

First Northern Bank notes that the Debtor in Possession has monies of the estate that are not cash collateral that can be used to fund the Debtor in Possession's efforts to reorganize the business operations. The Bank computes these to total \$389,000 in nonretirement monies, stocks, and mutual funds.

## DEBTOR IN POSSESSION REPLY

Debtor in Possession begins with noting that First Northern Bank's AG Production Loan and AG Asset Based Line of Credit total approximately \$8,000,000, and were secured only by personal property, and for which replacement liens have been granted. Debtor in Possession cites to First Northern Bank's \$5.65M appraisal of the Putah Creek Ranch Property having a \$5.65M value, which is subject to First Northern Bank's Real Estate and HELOC loans that total approximately \$2M - thus providing \$3,000,000 of replacement lien value (without taking into account costs of sale).

The Debtor in Possession takes a "swipe" at First Northern Bank's creditor strategy, noting that rather than negotiating cross collateralization prior to the filing of bankruptcy to get real estate to secure the AG loans, it instead obtained the appointment of a receiver to press its rights. Debtor in Possession concludes that this resulted in First Northern Bank being in its current situation as an "under secured creditor." Reply, ¶ 3; Dckt. 549.

Debtor in Possession argues that since the plan has not yet been confirmed, First Northern Bank has not obtained a lien on the Putah Creek Ranch property.

Debtor in Possession argues that even if there was not the \$3M in equity for the replacement lien (which is only for diminution in value of the pre-petition collateral, 11 U.S.C. § 552, due to the use of the cash collateral), First Northern Bank could also assert a super-priority claim as provided in 11 U.S.C. § 507(b). Debtor in Possession argues that First Northern Bank should not be worried because of the large equity cushions in the various properties of the bankruptcy estate.

For the budget increases, the Reply directs First Northern Bank and the court to read the Debtor in Possession's supplemental declaration.

In his Declaration, the Debtor in Possession testifies with respect to the 13 week budget for use of cash collateral that has caught First Northern Bank's opposition:

9. I have reviewed the Opposition and initially have a first overriding comment. The "new" thirteen-week cash collateral budget now is the "Plan" 3-year Proforma (the "Plan Budget"). It includes 2021, 2022, and 2023. The current cash collateral budget contains thirteen weeks of the Plan budget. It is my understanding that FNB has had an earlier version of this Plan Budget since early February.

10. While reviewing the FNB opposition documents, I made notes, which I attach as Exhibit A to the Exhibit Document filed herewith and incorporated herein by this reference.

Declaration, ¶¶ 9, 10; Dckt. 550. In the Notes, which the Debtor in Possession states are incorporated into the Declaration, the additional information includes:

These are some of the additional expenses that were not in the budget for the previous Quarter:

Contract Labor	\$8,000	Grafting the young trees and increasing the collateral and future production value. Done after the tree starts to grow
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Fertilizer	\$42,000	Normal cultural practice done in spring
Fuel	\$5,000	Tractors are not used much in the winter
Irrigation Parts	\$1,500	Repairs and replacement parts needed after winter
Spraying	\$10,000	Normal cultural practice. After the tree starts to grow
Electricity	\$50,000	Irrigation Pumps and for freezers that use more when hot
Admin	\$70,000	Property Taxes due but not in Q1
Admin	\$10,000	Accountant Tax Returns but not in Q1
Packaging	\$5,000	Increased sales require increased packaging supplies
Capital Imp.	\$50,000	To Insulate Freezer to maintain inventory quality and decrease electricity use this summer when it's hot
Capital Imp.	\$25,000	Fire System for Safety and collateral risk reduction
Labor	\$12,000	Longer Hours
<hr/>		
Total for Qt.	\$288,500	about \$22,000 per week

Dckt. 551 at 4.

The “notes” include a statement that through \$1,150,000 of inventory has been sold, the value for the remaining portion has increased due to processing. *Id.*

The (\$7,900,000) of identified “additional Net Operating Losses” includes the prior estimated (\$4,255,330). *Id.* at 5. These are asserted to not be “normal losses,” but include pre-payment penalties, default interest payments, administrative expenses, taxes, and other “massive expenses” associated with bankruptcy. These loss number were generated by the Debtor in Possession’s tax attorney and not the Debtor in Possession. *Id.*

## **REQUESTED USE OF CASH COLLATERAL**

The Cash Collateral Budget for the period March 26, 2021 through June 25, 2021 is provided in Exhibit A, Dckt. 487, which states:



	APRIL BUDGET			MAY BUDGET		
	April Forecast	March 23, 2021 Budget April	April Variance	May Forecast	March 23, 2021 Budget May	May Variance
<b>OPERATING STATISTICS</b>						
Walnuts Harvested (lbs)	-	-	-	-	-	-
In-Shell Shipped (lbs)	500	500	-	400	400	-
Meats Shipped (lbs)	75,000	75,000	-	80,000	80,000	-
<b>SALES (INVOICES)</b>						
In-Shell	825	825	-	500	500	-
Processed Meats	300,000	300,000	-	240,000	240,000	-
Custom Work/Wire Cords/Late Charges/Other	-	-	-	-	-	-
Total	300,825	300,825	-	240,500	240,500	-
<b>UNIT SALES PRICES (\$/LB)</b>						
In-Shell	\$ 1.25	\$ 1.25	\$ -	\$ 1.25	\$ 1.25	\$ -
Processed Meats	\$ 4.00	\$ 4.00	\$ -	\$ 4.00	\$ 4.00	\$ -
<b>ACCOUNTS RECEIVABLE</b>						
Beginning Balance	\$ 493,551	\$ 493,551	\$ -	\$ 524,345	\$ 524,345	\$ -
Add: Invoices	\$ 300,825	\$ 300,825	\$ -	\$ 240,500	\$ 240,500	\$ -
Less: Receipts	\$ (259,832)	\$ (259,832)	\$ -	\$ (215,885)	\$ (215,885)	\$ -
Ending Balance	\$ 524,345	\$ 524,345	\$ -	\$ 548,979	\$ 548,979	\$ -
<b>CASH RECEIPTS</b>						
TOTAL CASH RECEIPTS	\$ 278,488	\$ 278,488	\$ -	\$ 222,788	\$ 222,788	\$ -
<b>CASH DISBURSEMENTS</b>						
Labor & Related	Total \$ 145,500	\$ 145,500	\$ -	\$ 97,000	\$ 97,000	\$ -
Farming	Total \$ 30,217	\$ 30,217	\$ -	\$ 24,048	\$ 24,048	\$ -
Processing	Total \$ 40,162	\$ 40,162	\$ -	\$ 32,130	\$ 32,130	\$ -
Administrative	Total \$ 48,808	\$ 48,808	\$ -	\$ 48,882	\$ 48,882	\$ -
Other Operating	Total \$ 33,848	\$ 33,848	\$ -	\$ 23,077	\$ 23,077	\$ -
Financing	Total \$ 153	\$ 153	\$ -	\$ 122	\$ 122	\$ -
Professional (Restructuring)	Total \$ 10,000	\$ 10,000	\$ -	\$ 5,000	\$ 5,000	\$ -
TOTAL CASH DISBURSEMENTS	\$ 308,685	\$ 308,685	\$ -	\$ 278,058	\$ 278,058	\$ -
<b>NET CASH FLOW</b>						
NET CASH FLOW	\$ (30,201)	\$ (30,201)	\$ -	\$ (5,270)	\$ (5,270)	\$ -
<b>CASH (BOOK) BALANCE</b>						
Beginning Book Balance	\$ 251,885	\$ 251,885	\$ -	\$ 221,885	\$ 221,885	\$ -
Add: Net Cash Flow	\$ (30,201)	\$ (30,201)	\$ -	\$ (5,270)	\$ (5,270)	\$ -
ENDING BOOK BALANCE	\$ 221,685	\$ 221,685	\$ -	\$ 216,615	\$ 216,615	\$ -

At the hearing, **XXXXXXX**

	JUNE BUDGET			MARCH 23, 2021 BUDGET 13 WKS – MARCH 26 THRU JUNE 25		
	June Forecast	March 23, 2021 Budget June	June Variance	8th Interim Forecast	8th Interim Budget	Variance to 8th Interim Budget
<b>OPERATING STATISTICS</b>						
Walnuts Harvested (lbs)	-	-	-	-	-	-
In-Shell Shipped (lbs)	400	400	-	1,300	1,300	-
Meats Shipped (lbs)	80,000	80,000	-	195,000	195,000	-
<b>SALES (INVOICES)</b>						
In-Shell	500	500	-	1,625	1,625	-
Processed Meats	240,000	240,000	-	780,000	780,000	-
Custom Work/Wire Costs/Late Charges/Other	-	-	-	-	-	-
<b>Total</b>	<b>240,500</b>	<b>240,500</b>	<b>-</b>	<b>\$ 781,625</b>	<b>\$ 781,625</b>	<b>\$ -</b>
<b>UNIT SALES PRICES (\$/LB)</b>						
In-Shell	\$ 1.25	\$ 1.25	\$ -	\$ 1.25	\$ 1.25	\$ -
Processed Meats	\$ 4.00	\$ 4.00	\$ -	\$ 4.00	\$ 4.00	\$ -
<b>ACCOUNTS RECEIVABLE</b>						
Beginning Balance	\$ 548,979	\$ 548,979	\$ -	\$ 493,551	\$ 493,551	\$ -
Add: Invoices	\$ 240,500	\$ 240,500	\$ -	\$ 781,625	\$ 781,625	\$ -
Less: Receipts	\$ (215,885)	\$ (215,885)	\$ -	\$ (701,562)	\$ (701,562)	\$ -
<b>Ending Balance</b>	<b>\$ 573,614</b>	<b>\$ 573,614</b>	<b>\$ -</b>	<b>\$ 573,614</b>	<b>\$ 573,614</b>	<b>\$ -</b>
<b>CASH RECEIPTS</b>						
<b>TOTAL CASH RECEIPTS</b>	<b>\$ 222,788</b>	<b>\$ 222,788</b>	<b>\$ -</b>	<b>\$ 724,052</b>	<b>\$ 724,052</b>	<b>\$ -</b>
<b>CASH DISBURSEMENTS</b>						
Labor & Related						
Farming						
Processing						
Administrative						
Other Operating						
Financing						
Professional (Restructuring)						
<b>TOTAL CASH DISBURSEMENTS</b>	<b>\$ 228,368</b>	<b>\$ 228,368</b>	<b>\$ -</b>	<b>\$ 785,155</b>	<b>\$ 785,155</b>	<b>\$ -</b>
<b>NET CASH FLOW</b>						
<b>NET CASH FLOW</b>	<b>\$ (5,572)</b>	<b>\$ (5,572)</b>	<b>\$ -</b>	<b>\$ (41,043)</b>	<b>\$ (41,043)</b>	<b>\$ -</b>
<b>CASH (BOOK) BALANCE</b>						
Beginning Book Balance	\$ 218,415	\$ 218,415	\$ -	\$ 251,885	\$ 251,885	\$ -
Add: Net Cash Flow	\$ (5,572)	\$ (5,572)	\$ -	\$ (41,043)	\$ (41,043)	\$ -
<b>ENDING BOOK BALANCE</b>	<b>\$ 210,843</b>	<b>\$ 210,843</b>	<b>\$ -</b>	<b>\$ 210,843</b>	<b>\$ 210,843</b>	<b>\$ -</b>

