

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

June 7, 2022 at 1:30 PM

1.	<u>22-20007</u>-E-13 WANDA MOORE <u>EAT-1</u> Peter Macaluso WILMINGTON TRUST, NATIONAL ASSOCIATION VS.	CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY 2-3-22 [28]
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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.

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, Debtor’s Attorney, Chapter 13 Trustee, and Office of the United States Trustee on February 3, 2022. By the court’s calculation, 40 days’ notice was provided. 28 days’ notice is required.

The Motion for Relief from the Automatic Stay 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 Motion for Relief from the Automatic Stay is xxxxxxx
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WILMINGTON TRUST, NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE FOR MFRA TRUST 2016-1 (“Movant”) seeks relief from the automatic stay with respect to Wanda Lynette Moore’s (“Debtor”) real property commonly known as **918 Shadywood Circle**, Suisun City, California (“Property”). Movant has provided the Declaration of Lindsey Dallmer to introduce evidence to authenticate the documents upon which it bases the claim and

the obligation secured by the Property.

Movant argues Debtor has not made any payments since October 31, 2021. Declaration, Dckt. 30. Additionally, Debtor is due for the July 1, 2020 monthly mortgage payment. *Id.* Movant's Proof of Claim 3-1, filed February 10, 2022, states \$28,800.78 is necessary to cure Debtor's default.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on March 1, 2022. Dckt. 43. Debtor's counsel states that Debtor has new renters with more ability to make the plan payment. Debtor also states they have not been using the bankruptcy case to "delay, hinder, or otherwise seek to interfere with Movant's ability to enforce it's state law remedies". In the alternative, Debtor requests a voluntary sale rather than granting this Motion for Relief.

While Debtor's counsel filed an opposition stating various "facts," missing is any testimony by Debtor opposing the Motion. While Debtor's counsel discusses "facts" (for which no testimony in opposition is filed, no discussion is provided as to why and how when Debtor could not afford make the plan payments due to alleged tenant breaches and being unable to evict the defaulting tenant due to COVID eviction restrictions, Debtor did not move to sell one of her properties.

This failure to act as the defaults grew is stated in light of the counter plea that Debtor would want to now, facing this Motion, to have a voluntary sale if this (as opposed to all of the prior cases over the past thirteen (13) years) Chapter 13 Plan is not performed.

Debtor did provide her Declaration in support of her request to have the court extend the stay as the Debtor as provided in 11 U.S.C. § 362(c)(3)(B). In it Debtor affirmatively states that all is now economically well and that her financial challenges; including having to support other family members, repairs to rental property, and COVID protected defaulting tenants. Dckt. 17. This testimony under penalty of perjury includes (identified by Declaration paragraph number):

2. I am refiling bankruptcy due to financial hardship. Due to the hardship of COVID-19, I was not receiving rental income and my bills increased. I experienced an increase in vehicle maintenance causing me to get behind. . . . I became delinquent in my payment doing repairs to my rental property that was damaged from the tornadoes. I had to help my family due to my brother's sickness and subsequent death on October 3, 2021, which caused financial hardship

3. Since my previous case was dismissed, my circumstances have changed. Since my brother's death, things have begun to return to normal and I will be returning to California soon.

7. I am pleading that my case be accepted in order that I may stay protected under bankruptcy laws and reorganize my debts, keep my homes and vehicle, and pay my creditors to the best of my ability.

Dckt. 17.

The court extended the stay as to the Debtor (which is the portion of the stay that would

terminate as provided in 11 U.S.C. § 362(c)(3)(A)). As stated in the Civil Minutes, the court had reservations about Debtor's conduct in her cases and good faith, stating in the Ruling on that Motion to Extend Stay:

At the hearing, the court addressed with counsel for the Debtor some **serious issues concerning the Schedules and Statement of Financial Affairs**. These included **Debtor not disclosing the income and expenses relating to her investment property**, but only stating a net number (and not under the proper paragraph of Schedule I for business and rental income) on Schedule I.

While having serious concerns over this repeat filing Debtor and her ability to prosecute the case and a plan in good faith, granting or denying the motion is not of significant issue in light of the plan language used by Congress in 11 U.S.C. § 362(c)(3) to terminate the stay only as to the Debtor personally, and not as to any property of the Bankruptcy Estate.

The court afford[s] Debtor and her counsel (who has represented her in prior cases) **one final chance to prosecute and perform a Chapter 13 plan**.

Civil Minutes; Dckt. 26 (emphasis added).

TRUSTEE'S NONOPPOSITION

On March 1, 2022 Trustee filed a nonopposition stating the Debtor is delinquent \$3,300.00 in plan payments (1 plan payment). Dckt. 45. Trustee requests the court grant this Motion.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$319,670.53 (Declaration, Dckt. 30), while the value of the Property is determined to be \$530,000.00, as stated in Schedules A/B and D filed by Debtor.

11 U.S.C. § 362(d)(1): Grant Relief for Cause

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

The court has confirmed Debtor's Chapter 13 Plan, which provides for payments to Movant. As discussed below and in the Civil Minutes for the hearing on the Motion to Confirm, Debtor has promised in, and has failed to perform, multiple plans in multiple cases, and has failed to perform multiple plans in multiple prior cases, which were dismissed, over more than a decade prior to the filing of this case. Therefore, rather than denying or dismissing the present Motion, the court continues the hearing.

11 U.S.C. § 362(d)(4)

Prospective Relief from Future Stays

11 U.S.C. § 362(d)(4) allows the court to grant relief from the stay when the court finds that the petition was filed as a part of a scheme to delay, hinder, or defraud creditors that involved either (I) transfer of all or part ownership or interest in the property without consent of the secured creditors or court approval or (ii) multiple bankruptcy cases affecting particular property. 3 COLLIER ON BANKRUPTCY ¶ 362.07 (Alan n. Resnick & Henry H. Sommer eds. 16th ed.).

Certain patterns and conduct that have been characterized as bad faith include recent transfers of assets, a debtor's inability to reorganize, and unnecessary delays by serial filings. *Id.* Here, Movant is seeking to proceed with foreclosure on the subject Property. A foreclosure sale was scheduled for January 6, 2022, however, Debtor filed this bankruptcy case on January 3, 2022. This is Debtor's sixth (6th) bankruptcy case filed since 2009. A summary of these six bankruptcy cases set forth in the table below (the default in Plan Payments amounts are that stated in Motion to Dismiss and does not include any other subsequent defaults):

Chapter Case No. 09-24810	Representation: Same Counsel as in Present Case	
Filed.....March 19, 2009		
Case Dismissed for Failure to Make Plan Payments. Delinquency.....(\$7,405.73) Plan Payment.....\$3,700/Month		
Dismissed....September 4, 2009		
	Representation: Same Counsel as in Present Case	Chapter 13 Case No. 13-26191
	May 3, 2013.....Filed	
	Case Dismissed for Failure to Make Plan Payments (\$3,720.00).....Delinquency \$1,910.....Plan Payment	
	January 25, 2016.....Dismissed	
Chapter Case No. 16-22863	Representation: Same Counsel as in Present Case	
Filed.....May 2, 2016		

Case Dismissed for Failure to Make Plan Payments. Delinquency.....(\$5,257.47) Plan Payment.....\$1,752/Month		
Dismissed July 28, 2017		
	Representation: Same Counsel as in Present Case	Chapter 13 Case No. 18-20052
	January 4, 2018.....Filed	
	November 21, 2018.....Dismissed (Debtor elected to dismiss the case)	
Chapter Case No. 18-27246	Representation: Same Counsel as in Present Case	
Filed.....November 17, 2018		
Case Dismissed for Failure to Make Plan Payments. Delinquency.....(\$4,816.03) Plan Payment.....\$2,416.03/Month		
Dismissed October 20, 2021		
	Representation: Same Counsel as in Present Case	Current Chapter 13 Case No. 22-20007
	January 3, 2021.....Filed	

Though Debtor has now existed in bankruptcy doing a five (5) year Chapter 13 plan reorganizing her finances for thirteen (13) years, the court also reviews what Debtor has paid in these prior cases (information from the Chapter 13 Trustee's final reports and Chapter 13 plans).

- a. 09-24810 - Six Months From Filing to Dismissal
 - i. Total paid by Debtor.....\$7,400
 - ii. Disbursements
 - (1) Debtor's Counsel.....\$1,206.43 (in addition to \$1,000 paid pre-petition)
 - (2) Trustee.....\$ 696.43
 - (3) Creditor Mortgage Payments
 - (a) Current.....\$3,864.00

- (b) Arrearage.....\$1,139.00
 - (4) Other Secured Claims.....\$ 100.00
 - (5) Unsecured Claims.....\$ 0.00
- b. 13-26191 - Thirty-Two Months From Filing to Dismissal
 - i. Total paid by Debtor.....\$51,0000
 - ii. Disbursements
 - (1) Debtor's Counsel.....\$1,912.07 (in addition to \$1,000 paid pre-petition)
 - (2) Trustee.....\$2,538.05
 - (3) Creditor Mortgage Payments
 - (a) Current.....\$38,468.29
 - (b) Arrearage.....\$ 3,475.39
 - (4) Other Secured Claims.....\$ 4,886.20
 - (5) Unsecured Claims.....\$ 0.00
- c. 16-22863 - Sixteen (16) Months From Filing to Dismissal
 - i. Total paid by Debtor.....\$18,071.99
 - ii. Disbursements
 - (1) Debtor's Counsel.....\$775.53 (in addition to \$1,500 paid pre-petition)
 - (2) Trustee.....\$1,144.66
 - (3) Creditor Mortgage Payments
 - (a) Current.....\$14,051.29
 - (b) Arrearage.....\$ 1,291.35
 - (4) Other Secured Claims.....\$ 0.00
 - (5) Unsecured Claims.....\$ 0.00
- d. 18-20052 - Eleven (11) Months From Filing to Dismissal

- i. Total paid by Debtor.....\$15,780.00
 - ii. Disbursements
 - (1) Debtor's Counsel.....\$600.00 (in addition to \$1,500 paid pre-petition)
 - (2) Trustee.....\$ 975.00
 - (3) Creditor Mortgage Payments
 - (a) Current.....\$11,052.81
 - (b) Arrearage.....\$ 2,374.84
 - (4) Other Secured Claims.....\$ 777.35
 - iii. Unsecured Claims.....\$ 0.00
- e. 18-27246 - Thirty-Six (36) Months From Filing to Dismissal
- Final Report Not Filed by Trustee. Data From Motion to Dismiss and Ruling
- i. Total paid by Debtor.....\$60,800.87
 - ii. Disbursements
 - (1) Debtor's Counsel.....\$600.00 (in addition to \$1,500 paid pre-petition)
 - (2) Trustee.....\$ 975.00
 - (3) Creditor Mortgage Payments
 - (a) Current.....\$11,052.81
 - (b) Arrearage.....\$ 2,374.84
 - (4) Other Secured Claims.....\$ 777.35
 - iii. Unsecured Claims.....\$ 0.00

Proof of Claim 3-1 filed by Movant lists the total amount of the claim is \$319,127.86, with the pre-petition arrearage is stated to \$28,80078.

When the first bankruptcy case was filed in 2009, Proof of Claim 3-1 filed for the secured claim by Debtor's residence, the amount of the claim was stated to be \$411,888.31, with an arrearage of \$14,039.19. 09-24810. Through the more than a decade of bankruptcy, the total debt has been reduced,

but the arrearage has doubled.

Debtor provided no testimony explaining what has occurred since this case was filed to cause defaults since this case was filed. Her prior testimony in the Declaration in support of the Motion to Extend the Stay filed in January 2022 states that “all is well, the financial disruptions are in the rearview mirror. Notwithstanding those assurances under penalty of perjury, the Trustee reports that Debtor is in default in Plan payments in the amount of \$3,300.00, which is one monthly payment. Dckt. 45. This was filed by the Trustee on March 1, 2022, and as of that time, only one monthly plan payment had come due (that being on February 25, 2022).

CONTINUANCE OF HEARING

Debtor has now confirmed a Chapter 13 Plan in which she promises to pay Creditor on its claim and cure the arrearage. Debtor has in multiple prior cases made the same promised, defaulted, had the prior cases dismissed, and then filed a new bankruptcy case after dismissal.

Due to the repeated failures in performing her duties under a Chapter 13 plan – properly funding and performing the plan – and Movant expressed concerns of this time, after more than a decade, Debtor will really perform and not allow the defaults to increase.

Debtor’s counsel argued that Debtor understands this is the “last chance” and is focused on performing the Plan. The court commented, and the Debtor’s counsel and Movant’s counsel could stomach the court continuing the hearing on this Motion and the Motion of the Chapter 13 Trustee to dismiss because of Debtor having been in default in the Plan payments in this case (which default has been cured).

Request for Attorneys’ Fees

A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages. FED. R. CIV. P. 54(d)(2)(A); FED. R. BANKR. P. 7054, 9014.

No other or additional relief is granted by the court.

Debtor’s Status Report

On May 31, 2022, Debtor filed a status report (Dckt. 66) indicating they have paid Trustee an amount **sufficient to cure the post-petition arrears to the lender. Additionally, their Plan was confirmed April 14, 2022. Dckt. 57.**

June 7, 2022 Hearing

At the hearing, **XXXXXXXXXX**

The court shall issue an 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 for Relief from the Automatic Stay filed by WILMINGTON TRUST, NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE FOR MFRA TRUST 2016-1 (“Movant”) 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 for Relief from the Automatic Stay is
XXXXXXX.

2.	<u>20-24123</u> -E-11 FWP-36	RUSSELL LESTER Tom Willoughby	CONTINUED SCHEDULING CONFERENCE VOLUNTARY PETITION 8-27-20 [1]
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JUNE 7, 2022 STATUS CONFERENCE

First Northern Bank of Dixon (“FNB”) has filed Updated Status Reports in this Bankruptcy Case and related Adversary Proceeding (22-2016). The court summarizes points in the Updated Status Report (as summarized by the court unless noted in “quotation marks”), which include:

- A. Though three properties have been sold under the confirmed Plan, the sale of the Conservation Easement has not been concluded by the March 31, 2022 deadline. The Plan provides for the sale of the McCune and Carrion Properties if the sale of the Conservation Easement was not timely closed.
- B. Significant efforts have been invested (as well as related litigation) in trying to have the sale of the Conservation Easement completed after the expiration of the deadline.
- C. FNB asserts that there has been a *de facto* modification of the Plan due to the court not enforcing the Plan deadline for the McCune and Carrion Properties to be transferred to the Special Purpose Entity for the prompt marketing and sale by December 31, 2022.
- D. Though the Parties have worked hard to get the sale of the Conservation Easement sold, FNB can no longer agree to further delay, and that it is time for the McCune and Carrion Properties to be transferred to the Special Purpose Entity for marketing and sale.

At this juncture, the court notes that FNB has the junior liens on property, behind the Prudential secured claims, to secure FNB’s claims. While the Parties have worked in good faith, being in the junior lien

position creates real financial issues for such a creditor.

- E. While FNB has received monthly debt service payments under the confirmed plan, there has been no other debt reduction payments made to it. No proceeds from the sale of the other properties in this Case have been disbursed to FNB (though they did go to reduce the debt on the claim secured by the senior liens of FNB's collateral).
- F. In conclusion, FNB seeks to have the confirmed Plan performed, the McCune and Carrion Properties transferred to the Special Purpose Entity and the trustee thereof immediately start marketing and then sell these two properties.

FNB Updated Status Report; Dckt. 866; ADV. 22-2016, Dckt. 41.

No other Party has filed an updated status report.

At the Status Conference, **XXXXXXX**

3. [20-24123](#)-E-11 **RUSSELL LESTER**
22-2016 FWP-1 Tom Willoughby

LESTER V. FIRST AMERICAN TITLE
COMPANY ET AL

CONTINUED MOTION FOR
TEMPORARY RESTRAINING ORDER
AND/OR MOTION
FOR PRELIMINARY INJUNCTION
3-22-22 [7]

The Motion for Preliminary Injunction is XXXXXXX
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JUNE 7, 2022 HEARING

First Northern Bank of Dixon ("FNB") has filed Updated Status Reports in this Bankruptcy Case and this Adversary Proceeding. The court summaries points in the Updated Status Report (as summarized by the court unless noted in "quotation marks"), which include:

- A. Though three properties have been sold under the confirmed Plan, the sale of the Conservation Easement has not been concluded by the March 31, 2022 deadline. The Plan provides for the sale of the McCune and Carrion Properties if the sale of the Conservation Easement was not timely closed.
- B. Significant efforts have been invested (as well as related litigation) in trying to have the sale of the Conservation Easement completed after the expiration of the deadline.
- C. FNB assets that there has been a *de facto* modification of the Plan due to the court

not enforcing the Plan deadline for the McCune and Carrion Properties to be transferred to the Special Purpose Entity for the prompt marketing and sale by December 31, 2022.

- D. Though the Parties have worked hard to get the sale of the Conservation Easement sold, FNB can no longer agree to further delay, and that it is time for the McCune and Carrion Properties to be transferred to the Special Purpose Entity for marketing and sale.

At this juncture, the court notes that FNB has the junior liens on property, behind the Prudential secured claims, to secure FNB's claims. While the Parties have worked in good faith, being in the junior lien position creates real financial issues for such a creditor.

- E. While FNB has received monthly debt service payments under the confirmed plan, there has been no other debt reduction payments made to it. No proceeds from the sale of the other properties in this Case have been disbursed to FNB (though they did go to reduce the debt on the claim secured by the senior liens of FNB's collateral).
- F. In conclusion, FNB seeks to have the confirmed Plan performed, the McCune and Carrion Properties transferred to the Special Purpose Entity and the trustee thereof immediately start marketing and then sell these two properties.

FNB Updated Status Report; Dckt. 866; ADV. 22-2016, Dckt. 41.

No other Party has filed an updated status report.

At the Status Conference, **XXXXXXX**

MAY 12, 2022 HEARING

Counsel for the Reorganized Debtor began the hearing with the suggestion that this Motion and the Adversary Proceeding could be dismissed in light of the ongoing good faith discussions and work to get the conservation easement in place. Counsel for First Northern Bank suggested that keeping the preliminary injunction in place would reduce the potential for argument and litigation over whether First American Title was improperly concluding that the instructions for recording the deed were ineffective, the time for such to have been given having expired.

In light of the ongoing hard work of all parties and their counsel, the importance of getting the conservation easement in place - for the Debtor, Creditors, and the environment – and it appearing that the finish line was within eyesight, the parties agreed to having the preliminary injunction extended through and including June 10, 2022, and to have this hearing continued to 1:30 p.m. on June 7, 2022 (Specially Set Day and Time).

APRIL 7, 2020 HEARING

Counsel for the Reorganized Debtor reported that a meeting was held on April 5, 2022, with

the land trust to address the process. It has been confirmed that the money has been granted to purchase the conservation easement, and the land trust is still waiting for its parties to approve the final documents.

Prudential's counsel states that the tweaks are ones that were sent to the land trust in March 2022, in response to the drafts at that time. The federal funders for the purchase have rejected the easement. Counsel for FNB reported that everyone agrees that the conservation easement is important and its closing.

The Reorganized Debtor concurs in the view of the various parties presented.

At the hearing the Parties could not agree to extend the Temporary Restraining Order for a sufficient period to allow for either a consensual resolution or litigating the issuance of a preliminary injunction in this Adversary Proceeding.

At the April 7, 2022 hearing, counsel for First Northern Bank of Dixon ("FNB") explained that he had not obtained authorization to extend the Temporary Restraining Order for as long a period as the court determined necessary, so could not consent to the extension beyond the twenty-eight days permitted under Federal Rule of Bankruptcy Procedure 65 and Federal Rule of Bankruptcy Procedure 9024.

As the court stated on the Record, and which is incorporated herein, an extension of the stay pending further discussions and briefing is in the best interests of all parties.

As the court determined at the prior hearing, if this matter was not resolved and some additional time was required, the court would either extend the Temporary Restraining Order with the agreement of the parties or issue a temporary or interim preliminary injunction to maintain the status quo while allowing for briefing on whether a preliminary injunction should be issued. No bond is required for the temporary or interim preliminary injunction, which shall continue in full force and effect what is ordered in the Temporary Restraining Order.

The court shall enter a Temporary/Interim Preliminary Injunction pending final hearing on the Motion for Preliminary Injunction, continuing in full force and effect of stay imposed by the Temporary Restraining Order which:

[r]estrains that for the period from the date of the issuance of this Order through and including April 15, 2022,

(1) First American Title Company, and its agents and representatives, shall not deliver to be recorded, record, transfer any deeds, or take other action, or allow such to be done by any person, which is authorized or as provided in the Irrevocable Escrow Instructions/Conservation Easement, Escrow No. NCS-977917-CC (20-24123; Exhibit A, Dckt. 826), a copy of which is attached hereto as Addendum A, for the real properties known as the Carrion Ranch and McCune Ranch, and each of them, and

(2) The court stays during the period of the Temporary Restraining Order said Irrevocable Escrow Instructions identified above and any provisions of the Chapter 11 Plan requiring any action to be taken thereon relating to the Carrion Ranch and McCune Ranch properties, and

each of them, pending expiration of this Temporary Restraining Order.

Order, Dckt. 16. The Temporary/Interim Preliminary Injunction shall be in full force and effect through 11:59 p.m. on May 20, 2022.

No bond for the Temporary/Interim Preliminary Injunction is required given the respective security interests protecting each of the Parties and the alternative relief under the Plan for the sale of the property at issue.

The briefing schedule for the final hearing on the Motion for Preliminary Injunction is:

1. The Plaintiff-Reorganized Debtor shall file and serve any supplemental pleadings in support of Motion for Preliminary Injunction on or before April 14, 2022.
2. Oppositions, if any, to the Motion shall be filed and served on or before April 29, 2022.
3. Replies, if any, to the Oppositions shall be filed and served on or before May 5, 2022.

The final hearing on the Motion for Preliminary Injunction shall be conducted at 11:00 a.m. on May 12, 2022.

The Temporary/Interim Preliminary Injunction expires at 11:59 p.m. on May 20, 2022, unless terminated soon or extended by further order of the court.

MARCH 24, 2022 HEARING

On March 21, 2022, Russell Lester, the Reorganizing Debtor under his confirmed Chapter 11 Plan (“Plaintiff-Debtor”) filed a Complaint naming First American Title Company and Russ Lester, LLC as defendants. Dckt. 1. The Complaint seeks a judgment for a preliminary injunction. *Id.*; First Claim for Relief. No other relief is sought in the Complaint. On March 22, 2022, Plaintiff-Debtor filed a Motion for Issuance of Temporary Restraining Order and Preliminary Injunction. Dckt. 7. The grounds stated with particularity in the Motion (Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007) state the grounds for the Motion “are more fully set forth in the complaint. . .” *Id.*, ¶ 4. The Motion also states that there are ambiguities in the confirmed Plan, that Plaintiff-Debtor has been delayed in obtaining a conservation easement due to governmental review, and that the Plan appears to cause the Plaintiff-Debtor to automatically lose real property if the conservation easement is not completed by March 31, 2022. *Id.*, ¶¶ 5b-5e. The Plaintiff-Debtor has also requested the court conduct a Status Conference in the related Bankruptcy Case, which the court has set and will conduct at 10:30 a.m. on March 24, 2022 (specially set to the Modesto Division Courthouse - Telephonic Appearances Permitted).

The entry of a temporary restraining order was requested on an *ex parte* basis. The court having set the Status Conference for March 24, 2022, and knowing that Movant’s counsel and most major “players” in the Bankruptcy Case would be in attendance, the court set this request for a hearing on March 24, 2022, as well.

At the hearing, all parties in interest engaged in a constructive, productive discussion of their respective interests and issues. The consensus is that they are working to find agreement to allow for the prompt closing of the conservation easement and minimize the negative financial consequences for all parties in interest.

The court grants the motion for temporary restraining order, imposing to through and including April 15, 2022, the court finding cause existing to extend the time beyond fourteen days, and within the twenty-eight day maximum as provided in Federal Rule of Civil Procedure 65(b)(2).

The court shall conduct the initial hearing for issuance of a preliminary injunction at 11:30 a.m. on April 7, 2022. No further pleadings will be filed regarding the issuance of a preliminary injunction, with the court using the April 7, 2022 to issue a “temporary preliminary injunction” if warranted, and the parties in interest do not agree to extend the twenty-eight maximum allowed for a temporary restraining order.

As discussed with the parties in interest, the court uses this procedure to allow them to focus on the issue of extending the time to close the sale of the conservation easement and allowing the parties to avoid expending time and expense on pleadings that may well be unnecessary in light of the good faith work of all parties in interest demonstrated in this case and shown at the March 24, 2022 hearing for the Temporary Restraining Order.

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

**TEMPORARY/INTERIM PRELIMINARY INJUNCTION
AND
ORDER SETTING FINAL HEARING ON MOTION FOR PRELIMINARY INJUNCTION**

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing and on the Record at the April 7, 2022 hearing.

Declaration of Robin K. Klomprens

On April 14, 2022, Ms. Klomprens filed a declaration (Dckt. 25) stating Prudential’s suggested revisions may delay the sale of the Conservation Easement. Ms. Klomprens states any and all delays are due to factors outside of the Reorganized Debtor’s control. If no further changes are made to the subordination or conservation easement agreements, there is no reason the conservation easement sale will not close on or before May 31, 2022.

Plaintiff’s Brief/Memorandum in Support of Motion

On April 14, 2022, the Reorganized Debtor filed a Supplemental Brief in support of the Motion for Preliminary Injunction. Dckt. 26. The Reorganized Debtor states the Conservation Easement is 98% of the way towards completion. The Reorganized Debtor argues there are inconsistencies in the Plan surrounding a cure period before recordation which warrants modification of the Plan. Additionally, Reorganized Debtor states the delay in sale is due to Prudential’s additional revisions to the subordination and conservation agreements.

The Reorganized Debtor states they will face irreparable harm if the Grant Deed is recorded

before the Conservation Easement Sale closes. The Reorganized Debtor argues it will cause a change in grantor and will require further approvals from various state and federal agencies, resulting in delay in the sale and possibly, a complete loss. If the sale is lost, and Carrion Ranch and McCune Ranch are transferred to SPE and sold, the Reorganized Debtor's ability to make Plan payments will be harmed because they will have less income due to a loss in crop production.

June 7, 2022 Hearing

At the hearing, XXXXXXXXXXXX

The court shall issue an order in substantially the following form:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing and on the Record at the June 7, 2022, hearing.

The Motion for Preliminary Injunction filed by Russell Lester, the Reorganized Debtor under the confirmed Chapter 11 Plan, having been presented to the court, the Court having issued an Interim Preliminary Injunction (Order, Dckt. 24) (titled as a "Temporary/Preliminary Injunction"), the Parties stating on the record at the May 12, 2022 hearing their consent to the extension of the Interim Preliminary Injunction and continuance of the hearing, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Preliminary Injunction is
XXXXXXXXXXXXXXXXXXXX

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. If the court's tentative ruling becomes its final ruling, then the court will make the following findings of fact and conclusions of law:

The Order to Show Cause was served by the Clerk of the Court on Debtor (*pro se*) on May 27, 2022, U.S. Trustee on May 26, 2022, Arizona Chapter 13 Trustee on May 27, 2022, and California Chapter 13 Trustee on May 26, 2022 as stated on the Certificate of Service. The court computes that 11 and 12 days' notice have been provided.

The court issued an Order to Show Cause based on the Bankruptcy Judge's Order in Arizona Bankruptcy Court Case 21-bk-08632-SHG barring Debtor from commencing a bankruptcy case.

The Order to Show Cause is XXXXXXX
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The court issued this Order to Show Cause in this case relating to an order barring Rodney Martensen, the Debtor, from commencing a bankruptcy case for a specified time.

On May 24, 2022, Rodney Louis Martensen, the Debtor, commenced this voluntary Chapter 13 Bankruptcy Case ("Current Chapter 13 Case") in *pro se*. Debtor has filed the Petition (Dckt. 1), Verification of Master Address List (which is unsigned) (Dckt. 4), and Statement About Your Social Security Numbers (Dckt. 5). Debtor has not filed Schedules, Statement of Financial Affairs, a proposed Chapter 13 Plan, or other documents required with the commencement of the Chapter 13 Case. The Clerk of the Court has issued a Notice of Incomplete Filing and Notice of Intent to Dismiss the Chapter 13 Case if the missing documents are not filed, with the Debtor being given a deadline of June 6, 2022, to file the missing documents.

On the Master Mailing list three persons are identified, who are:

Newrez c/o PHH Mortgage Services
PO Box 5452
Mt. Laurel, NJ 08054-5452

PHH Mortgage Services
P.O. Box 66002
Lawrenceville, NJ 08648

PHH Mortgage Services
PO Box 5436
Mt. Laurel, NJ 08054

Dckt. 4. No other parties in interest or creditors are listed.

A review of the court's files does not disclose any prior bankruptcy cases filed by Debtor in this District.

**Order Barring Commencing Bankruptcy Cases
Issued in the District of Arizona Bankruptcy Court**

In conducting the standard review of the national data base for orders barring or restricting a person's ability to commence a bankruptcy case, the Clerk's Office noted an order issued by the Bankruptcy Court for the District of Arizona.

In Arizona Bankruptcy Case 21-bk-08632-SHG, a Chapter 13 case filed by Rodney Martensen, the court issued an order dated April 13, 2022, which prohibits Debtor from commencing another bankruptcy case during the 180 day period after April 13, 2022, stating:

IT IS FURTHER ORDERED that because the debtor willfully failed to file appropriate and required documents as required under the Bankruptcy Code, pursuant to 11 U.S.C. §109(g), the debtor is prohibited from filing further bankruptcy petitions for 180 days from the date of this Order;. . .

Ariz Bkey Court Case 21-bk-08632; Order, Dckt. 39. The Civil Minutes for the hearing on the Motion to Dismiss and Bar Filing of Another Case state:

Mr. Martensen filed the bankruptcy and there is only on issue involved which is the house. He fell behind in payments and ended up on unemployment. His is now retired and receiving social security. He can make the payments on the underlying note but the arrearages are the issue.

The Court explains that the Debtor's failure to make payments, not file required documents, and allow past cases to be dismissed and then re-filing new ones does not fulfill the obligation by the Debtor to keep the bankruptcy case moving forward to completion.

Mr. Morris ^{FN.1.} argues that there have been repeated filings in which the Debtor has taken no steps in an attempt to move the cases forward. It is a waste of judicial resources for the Chapter 13 Trustee's office and it has thwarted the efforts of the creditor to complete foreclosure. There had been an earlier loan modification in 2016 but there have been no mortgage payments made since May 2019.

FN.1. Mr. Morris appears to be Craig Morris, Esq., attorney for the Chapter 13 Trustee in the Arizona case.

Mr. Martensen responds that he had filed a prior bankruptcy with counsel and filed *pro se* thinking it would be simpler than he anticipated. After the note was modified he was on time with the payments. The lender will not accept payments

under the bankruptcy. He would like to get the underlying note current with the monthly payments and deal with the arrearages. Every time he has been contacted by phone, e-mail or in writing he has responded.

COURT: THE COURT RENDERS THE LEGAL AND FACTUAL BASIS FOR ITS RULING. FOR THE REASONS STATED ON THE RECORD, IT IS ORDERED n THE CASE IS DISMISSED. IT IS FURTHER ORDERED THE DEBTOR IS PROHIBITED FROM FURTHER FILING A FURTHER BANKRUPTCY CASE FOR 180 DAYS PURSUANT TO 11 U.S.C. §109(g). IT IS FURTHER ORDERED THAT THE CLERK IS DIRECTED TO ASSIGN FOR HEARING BY THIS COURT ANY SUBSEQUENT MOTION ASSERTING THE DEBTOR VIOLATED THE TERMS OF ITS ORDER. THE TRUSTEE IS DIRECTED TO SUBMIT A PROPOSED FORM OF ORDER CONSISTENT WITH THE COURT'S RULING

Id.; Dckt. 33.

Debtor commenced Arizona Bankruptcy Case 21-bk-08632-SHG on November 23, 2021. In the Petition filed in this Arizona Bankruptcy case, Debtor states that he lives in Tucson, Arizona, and has lived in Arizona for the majority of the time in the 180 days preceding the filing of that case. *Id.*; Petition, ¶ 6, Dckt. 1. On the Docket for this Arizona case, there is a November 23, 2021 Docket Entry stating the prior bankruptcy cases by the Debtor in Arizona and their conclusions:

Notice of Debtor's Prior Filings for debtor RODNEY L MARTENSEN Case Number 14-16648, Chapter 13 filed in Arizona Bankruptcy Court on 11/06/2014 , Dismissed for failure to make plan payments on 04/08/2015; Case Number 20-01629, Chapter 13 filed in Arizona Bankruptcy Court on 02/18/2020 , Dismissed for failure to pay filing fee and to file information on 03/04/2020; Case Number 15-05713, Chapter 13 filed in Arizona Bankruptcy Court on 05/08/2015 , Dismissed for failure to make plan payments on 09/12/2015; Case Number 21-07670, Chapter 13 filed in Arizona Bankruptcy Court on 10/12/2021 , Dismissed for failure to pay filing fee and to file information on 10/28/2021; Case Number 10-22138, Chapter 7 filed in Arizona Bankruptcy Court on 07/15/2010 , Standard Discharge on 12/20/2010; Case Number 14-06979, Chapter 13 filed in Arizona Bankruptcy Court on 05/08/2014 , Dismissed for failure to make plan payments on 10/23/2014; Case Number 11-02015, Chapter 13 filed in Arizona Bankruptcy Court on 01/26/2011 , Dismissed for failure to make plan payments on 04/26/2013.(Admin) (Entered: 11/24/2021)

Id. This identifies six prior Chapter 13 cases filed by Debtor during the period October 12, 2021, through January 1, 2011. There is also a Chapter 7 case filed in 2010 in which Debtor received his discharge.

In the Petition filed in the Current Chapter 13 Case, Debtor states that he lives in Sacramento, California, and has a mailing address in Vallejo, California. Petition, ¶ 5; Dckt. 1. He also states that he has resided in the Eastern District of California for the majority of the time in the 180 days preceding the May 24, 2022 filing of the Current Bankruptcy Case. This would include 179 days during which

Arizona Bankruptcy Case was pending.

At the hearing, **XXXXXXXXXX**

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

The Order to Show Cause 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 Order to Show Cause is **XXXXXXXXXX**

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).

Local Rule 9014-1(f)(4) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Office of the United States Trustee on May 26, 2022. The court set the hearing for June 7, 2022. Dckt. 44.

The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(4). Debtor, creditors, 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, -----.

The Motion to Employ is XXXXXXXXXX.

Eagle Ledge Foundation, Inc. ("Debtor") seeks to employ the law firm of Bush Ross, P.A. as Counsel for the Debtor ("Counsel") pursuant to 11 U.S.C. §§ 327(a), 328, 329 and Federal Rules of Bankruptcy Procedure 2014(a), 2016. And 5002, and Local Bankruptcy Rule 2014-1.

Debtor seeks the employment of Counsel to provide legal advice, prepare court documents on behalf of Debtor in Possession, appear before the court, assist with negotiations with creditors, represent the Debtor in Possession in this case, and perform any other legal services required.

Debtor argues that Counsel's appointment and retention is necessary for administration of its Chapter 11 case. Debtor has agreed to compensate Counsel based on their firm's prevailing rates, which range from \$225.00 to \$500.00 per hour for attorneys and from \$125.00 to \$145.00 per hour for paralegals. Debtor states the lead counsel will be Kathleen DiSanto, whose current hourly rate is \$375.00 per hour. Any additional compensation will be requested in accordance with the Bankruptcy Code.

Ms. Disanto testifies the firm does not represent or hold any interest adverse to Debtor or to

the Estate and that they have no connection with creditors, the U.S. Trustee, any other party in interest, or their respective attorneys. However, Ms. Disanto does inform the court that Randy Sterns, an attorney and shareholder at the firm, is the manager and sole member of C3 Servants, LLC, and thus serves as the collateral agent for the certificate holders, who are creditors of Debtor in Possession. However, because the firm does not represent C3 Servants, LLC, and because Counsel will screen themselves off the issue if any dispute arises between Debtor in Possession and C3 Servants, LLC, Ms. DiSanto does not believe there is any actual conflict of interest.

APPLICABLE LAW

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

The Motion expressly states that the request for employment is as an attorney for the Debtor and not the Debtor in Possession exercising the rights and power of a trustee, and having the fiduciary obligations to the bankruptcy estate of a trustee.

Congress provides in 11 U.S.C. § 327 for the employment of professionals by a bankruptcy trustee, which authorization to employ may be exercised by the Debtor in Possession in a Chapter 11 case. 11 U.S.C. § 1107. With respect to employment of a professional by a Debtor in Possession pursuant to 11 U.S.C. § 327, Congress provides in 11 U.S.C. § 1107(c) that (emphasis added):

(b) Notwithstanding section 327(a) of this title, a person **is not disqualified for employment under section 327** of this title **by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.**

Definition of Debtor and Debtor in Possession

It is the Debtor who seeks authorization to employ counsel. Congress has specifically defined the term "debtor" as follows:

(13) The term "debtor" means person or municipality concerning which a case under this title has been commenced.

11 U.S.C. § 101(13). In this case the "Debtor" is Eagle Ledge Foundation, Inc. Upon the filing of this case, all rights, interests, and property of the "Debtor" become property of the bankruptcy estate. 11 U.S.C. § 541(a). In a Chapter 11 case, the "Debtor" does not have control over or the right to use

property of the bankruptcy case, but the Chapter 11 trustee does. 11 U.S.C. §§ 1106(a)(1), 704(a).

However, if a trustee is not appointed, the “Debtor in Possession” may exercise right and duties, and perform all functions and duties of a trustee (with certain enumerated exceptions). 11 U.S.C. § 1107. It is the “Debtor” who serves as the “Debtor in Possession.” Serving as the “Debtor in Possession” is akin to that of being a trustee of a trust, a fiduciary position separate from the individual “Debtor” and the individual “Debtor’s” rights and interests.

Statutory Authority Cited by Proposed Counsel for Debtor

11 U.S.C. § 327 provides for the trustee, with court approval, to employ professionals. In a Chapter 11 case where no trustee has been appointed, it is the Debtor in Possession, not the Debtor, who may employ a professional pursuant to 11 U.S.C. § 1107.

11 U.S.C. § 328 does not provide a legal basis for the court authorizing a Debtor to employ a professional. Rather, it states limitations on compensation for professionals authorized to be employed pursuant to 11 U.S.C. § 327 by the Debtor in Possession (or a creditors’ committee as provided in 11 U.S.C. § 1103).

11 U.S.C. § 329 does not provide a legal basis for the court authoring a Debtor to employ a professional. Rather, it creates a federal law basis for the court to review compensation of an attorney representing a Debtor, and to disallow amounts in excess of reasonable compensation.

As noted in 3 Collier on Bankruptcy, ¶ 327.05[3] with the enactment of the Bankruptcy Reform Act of 1994, the attorney for the Debtor cannot be compensated from property of the bankruptcy estate. This was stated by the United States Supreme Court in *Lamie v. United States*, 540 U.S. 526, 538, 540-541, (2004), holding:

Adhering to conventional doctrines of statutory interpretation, we hold that § 330(a)(1) does not authorize compensation awards to debtors' attorneys from estate funds, unless they are employed as authorized by § 327.

...

Amendment 1645, viewed in its entirety, gives further reason to think Congress may have intended the change. The amendment added a new section that authorizes fee awards to debtors' attorneys in chapter 12 and 13 bankruptcies. 140 Cong. Rec., at 8383 (setting out new 11 U.S.C. § 330(a)(4)(B) [11 USCS § 330(a)(4)(B)]). Since the amendment's deletion of "or the debtors [sic] attorney" from the original proposed draft affected chapter 12 and 13 debtors' attorneys as much as chapter 7 debtors' attorneys, § 330(a)(4)(B) shows a special intent to authorize the formers' fee awards in the face of the new, broad exclusion.

At the hearing, **XXXXXXXXXX**

Disclosed Conflict

In the Motion, attorneys Dennis Miller and Kathleen DiSanto disclose, acknowledge, and apparently admit that a conflict of interest exists between the BR Law Firm and the Bankruptcy Estate in this case, stating:

18. In the interests of full disclosure, Randy Sterns, an attorney and shareholder at Bush Ross, is the manager and sole member of C3 Servants, LLC, a Florida limited liability company, which serves as the collateral agent (the "Collateral Agent") for the certificate holders, who are creditors of the Debtor, pursuant to the Certificates of Participation Standby Holder Representative and Security Agreement (the "Holder Representative Agreement"). The Holder Representative Agreement was approved by the certificate holders prior to the Petition Date.

The Certificate is filed as Exhibit A in support of this Motion. Dckt. 15. It defines the Collateral Agent, the LLC of which a BR Law Firm shareholder is the manager and sole member, is defined to mean:

"Collateral Agent" means the entity, person or persons appointed by the Foundation to serve as the agent and secured party under this Agreement. In the event of default by the Foundation under the Certificates, the Holders are entitled to elect a Representative that will replace Legal Servants, LLC, as Collateral Agent.

Exhibit A, p. 2; Dckt. 13. In the Certificate, it states that Debtor is issuing \$20,000,000 in certificates for which the "Collateral Agent," the BR Law Firm Shareholder's LLC, is the "secured party."

For the "Required Documentation," the notes issued for the \$20,000,000 in certificates by the Debtor, the note and allonge is to make those notes for which the Debtor is the payor, are made to pay to the order of the BR Law Firm Shareholder's LLC. Id., p. 4.

This required document section continues requiring all of the "documentation" which would be provided to a creditor for monies borrowed, to be made with the BR Law Firm Shareholder's LLC in the position of the "creditor."

In § 4.07 of Exhibit A, it states that all collateral given to the BR Law Firm Shareholder, LLC shall be for the benefits of the creditors who have obtained certificates from Debtor.

In § 4.07(c) it states that the liens on collateral securing the Debtor's obligations shall be perfected in the name of the BR Law Firm Shareholder's LLC.

In § 4.07(d) it states that in the event of a default by Debtor in paying the obligations to the BR Law Firm Shareholder's LLC, then the LLC has the right to enforce and collect all monies for rents, mortgages, or sales proceeds.

In § 5.04 of Exhibit A, it provides that in the event of a default, upon the request of the BR Shareholder's LLC, Debtor would then cure the default. If the default is not cured, then the BR Law Firm Shareholder's LLC has the obligation to the creditors to assign the rights and interest to another representative of the creditors.

In § 601 of Exhibit A, the duties of the BR Law Firm Shareholder's LLC (and the shareholder as the sole member and managing member) are stated to be:

Section 6.01. Duties of Collateral Agent.

(a) If an Event of Default has occurred and is continuing, the Collateral Agent shall exercise its rights and powers and use the same degree of care and skill in their exercise as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.

(b) If an Event of Default has occurred and is continuing, the Holders of a Majority in Interest of the principal amount of the Certificates may remove the Collateral Agent and substitute the Holder Representative to take any and all actions authorized under this Agreement for the benefit of the Holders.

(c) Except during the continuance of an Event of Default:

(I) The Collateral Agent need perform only those duties that are specifically set forth in this Agreement and no others. No implied covenants or obligations shall be read into this Agreement against the Collateral Agent. The Collateral Agent shall not be required to take any action or exercise any judicial remedy to protect the interests of the Holders and its duties shall be limited to holding the Collateral for the benefit of the Holders. Once an Event of Default occurs and the Foundation fails to timely cure such default, the Collateral Agent shall be authorized to assign, transfer and deliver the Collateral and any claims thereunder to the Holder Representative appointed by the Holders pursuant to Section 5.11 herein.

(ii) In the absence of bad faith on its part, the Collateral Agent may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon certificates, reports, statements, documents or opinions furnished to the Collateral Agent and conforming to the requirements of this Agreement. The Collateral Agent, however, shall examine the certificates and opinions to determine whether or not they conform to the requirements of this Agreement.

(d) The Collateral Agent may not be relieved from liability for its own gross negligent action, its own negligent failure to act, or its own willful misconduct in each case, as finally adjudicated by a court of law, except that:

(I) This paragraph does not limit the effect of paragraph (c) of this Section.

(ii) The Collateral Agent shall not be liable for any error of judgment made in good faith by, unless it is proved that the Collateral Agent was negligent in ascertaining the pertinent facts.

(iii) The Collateral Agent shall not be liable with respect to any action it takes or omits to take in good faith in accordance with a direction received by by [sic] a Majority in Interest of the Holders pursuant to this Agreement.

(e) Every provision of this Agreement that in any way relates to the Collateral Agent is subject to paragraphs (a), (c) and (d) of this Section.

(f) The Collateral Agent may refuse to perform any duty or exercise any right or power unless it receives indemnity satisfactory to it against any loss, liability or expense. No provision of this Agreement shall require Collateral Agent to expend or risk its own funds or incur an liability.

Id., p. 19 (emphasis added).

This "simple" 27 page agreement by which the BR Law Firm Shareholder, acting as the managing member of his sole owned LLC, includes disclosing:

- A shareholder of BR Law Firm,
- Is the manager and member of an LLC which serves as the "collateral agent,"
- For creditors of the Debtor, which creditors have claims in this Bankruptcy Case,
- For which the LLC Is to receive monies for and has obligations to the creditors of Debtor, and
- In the event of a default by Debtor, the LLC is required to take certain actions to protect the interests of creditors.

At the hearing, **XXXXXXXXXXXX**

The court shall issue an 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 Employ filed by Eagle Ledge Foundation ("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 to Employ is **XXXXXXXXXXXXXXXXXXXX**

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.

Local Rule 9014-1(f)(4) Motion–Hearing Required

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Office of the United States Trustee on May 26, 2022. The court set the hearing for June 7, 2022. Dckt. 44.

The Motion to Employ was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(4). Debtor, creditors, the, 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, -----
-----.

The Motion to Employ is XXXXXXXXXXXXX.
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Eagle Ledge Foundation, Inc. (“Debtor”) seeks to employ Lubin Olson & Niewiadomski, LLP (“Counsel”) pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Debtor seeks the employment of Counsel to assist in the administration of the estate, including preparing schedules and statement of financial affairs, reviewing monthly operating reports, responding to creditor inquiries, evaluating claims and such other service as are generally undertaken by counsel for a Chapter 11 debtor. Counsel will not perform or undertake auditing or investigating Debtor’s affairs, accounting or tax advice, advice on how to increase income and decrease expenses, expert advice such as real estate valuations, and litigation the Debtor may assert outside of bankruptcy.

Debtor argues that Counsel’s appointment and retention is necessary to assist in the administration of the estate including: preparing schedules and statement of financial affairs, reviewing monthly operating reports, responding to creditor inquiries, evaluating claims, and general Chapter 11 case administration. Counsel and Debtor’s fee arrangements are set forth in Exhibit 1 to the Declaration of Dennis D. Miller.

“Motions, notices, objections, responses, replies, declarations, affidavits, other documentary evidence, exhibits, memoranda of points and authorities, other supporting documents, proofs of service, and related pleadings shall be filed as separate documents.” LOCAL BANKR. R. 9004-2(c)(1). Counsel is reminded of the court’s expectation that documents filed with this court comply as required by Local Bankruptcy Rule 9004-1(a). Failure to comply is cause to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

These document filing rules exist for a very practical reason. Operating in a near paperless environment, the motion, points and authorities, declarations, exhibits, requests for judicial notice, and other pleadings create an unworkable electronic document for the court (some running hundreds of pages). It is not for the court to provide secretarial services to attorneys and separate an omnibus electronic document into separate electronic documents that can then be used by the court.

Counsel has received a retainer of \$30,000.00 of which \$1,738.00 was used to pay the filing fee.

Dennis D. Miller, a Partner of Lubin Olson & Niewiadomski, LLP, testifies that he and the firm do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

APPLICABLE LAW

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee’s duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

The Motion expressly states that the request for employment is as an attorney for the Debtor and not the Debtor in Possession exercising the rights and power of a trustee, and having the fiduciary obligations to the bankruptcy estate of a trustee.

Congress provides in 11 U.S.C. § 327 for the employment of professionals by a bankruptcy trustee, which authorization to employ may be exercised by the Debtor in Possession in a Chapter 11 case. 11 U.S.C. § 1107. With respect to employment of a professional by a Debtor in Possession pursuant to 11 U.S.C. § 327, Congress provides in 11 U.S.C. § 1107(c) that (emphasis added):

(b) Notwithstanding section 327(a) of this title, a person **is not disqualified** for **employment under section 327** of this title **by a debtor in possession** solely because of such person’s employment by or representation of the debtor before the commencement of the case.

Definition of Debtor and Debtor in Possession

It is the Debtor who seeks authorization to employ counsel. Congress has specifically defined the term “debtor” as follows:

(13) The term “debtor” means person or municipality concerning which a case under this title has been commenced.

11 U.S.C. § 101(13). In this case the “Debtor” is Eagle Ledge Foundation, Inc. Upon the filing of this case, all rights, interests, and property of the “Debtor” because property of the bankruptcy estate. 11 U.S.C. § 541(a). In a Chapter 11 case, the “Debtor” does not have control over or the right to use property of the bankruptcy case, but the Chapter 11 trustee does. 11 U.S.C. §§ 1106(a)(1), 704(a).

However, if a trustee is not appointed, the “Debtor in Possession” may exercise right and duties, and perform all functions and duties of a trustee (with certain enumerated exceptions). 11 U.S.C. § 1107. It is the “Debtor” who serves as the “Debtor in Possession.” Serving as the “Debtor in Possession” is akin to that of being a trustee of a trust, a fiduciary position separate from the individual “Debtor” and the individual “Debtor’s” rights and interests.

Statutory Authority Cited by Proposed Counsel for Debtor

11 U.S.C. § 327 provides for the trustee, with court approval, to employ professionals. In a Chapter 11 case where no trustee has been appointed, it is the Debtor in Possession, not the Debtor, who may employ a professional pursuant to 11 U.S.C. § 1107.

11 U.S.C. § 328 does not provide a legal basis for the court authorizing a Debtor to employ a professional. Rather, it states limitations on compensation for professionals authorized to be employed pursuant to 11 U.S.C. § 327 by the Debtor in Possession (or a creditors’ committee as provided in 11 U.S.C. § 1103).

11 U.S.C. § 329 does not provide a legal basis for the court authoring a Debtor to employ a professional. Rather, it creates a federal law basis for the court to review compensation of an attorney representing a Debtor, and to disallow amounts in excess of reasonable compensation.

As noted in 3 Collier on Bankruptcy, ¶ 327.05[3] with the enactment of the Bankruptcy Reform Act of 1994, the attorney for the Debtor cannot be compensated from property of the bankruptcy estate. This was stated by the United States Supreme Court in *Lamie v. United States*, 540 U.S. 526, 538, 540-541, (2004), holding:

Adhering to conventional doctrines of statutory interpretation, we hold that § 330(a)(1) does not authorize compensation awards to debtors' attorneys from estate funds, unless they are employed as authorized by § 327.

...

Amendment 1645, viewed in its entirety, gives further reason to think Congress may have intended the change. The amendment added a new section that authorizes fee awards to debtors' attorneys in chapter 12 and 13 bankruptcies. 140 Cong. Rec., at 8383 (setting out new 11 U.S.C. § 330(a)(4)(B) [11 USCS § 330(a)(4)(B)]). Since the amendment's deletion of "or the debtors [sic] attorney"

from the original proposed draft affected chapter 12 and 13 debtors' attorneys as much as chapter 7 debtors' attorneys, § 330(a)(4)(B) shows a special intent to authorize the formers' fee awards in the face of the new, broad exclusion.

June 7, 2022 Hearing

At the hearing, XXXXXXXXXXXX

The court shall issue an 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 Employ filed by Eagle Ledge Foundation, Inc. (“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 to Employ is XXXXXXXXXXXXXXXXXXXX

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.

Local Rule 9014-1(f)(4) 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 June 3, 2022. By the court's calculation, 4 days' notice was provided. The court set the hearing for June 7, 2022. Dckt. 42.

The Motion to Pay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(4). Debtor, creditors, 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 -----.

The Motion to Pay is XXXXXXXX

Eagle Ledge Foundation, Inc., as the Debtor in Possession in this Chapter 11 Case, seeks authorization to pay outstanding pre-petition wages, salaries, compensation, benefits, and related taxes to certain of Debtor's officers for the period May 1-31, 2022; and to allow post-petition payments thereof as well. The grounds stated in the Motion are summarized as follows:

- A. Debtor commenced this Chapter 11 Case on May 18, 2022.
- B. The Debtor in Possession is operating the business and properties of the Debtor that are now property of the Bankruptcy Estate in this Case (11 U.S.C. § 541(a)).
- C. The business of Debtor in the Bankruptcy Estate is one that provides loans to small local churches. The business of the Estate raises monies by selling certificate to individuals and then makes and manages the loans.
- D. The Debtor in Possession seeks authorization to pay the following pre-petition salaries of Officers of Debtor who is serving as the Debtor in Possession:

1. Chester Reid (“Dr. Reid”), as President and Chairman of the Debtor.
 - a. Dr. Reid is to oversee and handle the administrative responsibilities of the Debtor in Possession in this Chapter 11 Case.
 - b. Dr. Reid has agreed to reduce his annual salary to \$12,000.00, to be paid \$1,000.00 a month, exclusive of payroll and other taxes and withholdings.
 - c. No benefits or additional amounts are provided to Dr. Reid.
 - d. Dr. Reid is owed \$580.65 for the prorated compensation for the month of May 2022.
2. Thomas Fontana, as the Chief Executive Officer and Managing Principal of Debtor.
 - a. Mr. Fontana responsible for developing, implementing, and promoting the Debtor’s spiritual and faith-based mission of providing funding to sustain small local churches. Mr. Fontana is also involved with the Debtor’s day-to-day operations in overseeing TMI Trust Company’s servicing of the loan portfolio, management of the Debtor’s investment portfolio, and has expertise in real estate investment and management.
 - b. Mr. Fontana’s pre-petition salary and benefits were:
 - (1) \$24,000 salary
 - (2) \$36,000 minister housing benefit
 - (3) Medical and dental benefits, which were terminated at the end of 2021.
 - c. For post-petition compensation, Mr. Fontana is to be provided:
 - (1) \$2,000.00 a month salary, exclusive of taxes and withholding which are stated to be an additional \$122.00.
 - (2) \$3,000.00 a month minister housing benefit.
 - d. For pre-petition compensation Mr. Fontana is owed gross salary of \$2,903.23 (the prorated compensation for the month of May 2022), with a net payment of \$2,781.22.

The Motion states that the services of both are necessary for the administration and

prosecution of this case by the Debtor in Possession.

The Debtor in Possession requests the authorization to pay the prorated obligations for May 2022, and then monthly post-petition for the services rendered.

No evidence is presented in support of this Motion or to establish the facts alleged in the Motion.

REVIEW OF SCHEDULES AND STATEMENT OF FINANCIAL AFFAIRS (“SOFA”)

Statement of Financial Affairs; Dckt. 23.

For the 2020-2021 Fiscal Year, Debtor states having gross revenues of \$308,364. SOFA, Part 1. Two pending and one concluded legal actions are identified. *Id.*, Part 3.

Schedules; Dckt. 24

On Schedule A/B Debtor lists having real property with a value of \$1,500,000 and personal property with a value of \$1,402,423. Stmt Fin Affairs., Part 1. On Schedule A/B, Debtor lists having \$761,165 in deposit accounts. Sch. A/B, Part 1. Debtor lists having an additional \$625,346 in Loan Portfolio, Church Bonds, and Cash Equivalents. *Id.*, Part 4.

Debtor lists owning real property in Chicago, Illinois having a value of \$1,500,000. *Id.*, Part 9.

For Secured Claims, on Schedule D, Debtor lists only C3 Servants, LLC, as a “Collateral Agent for Certificate Holders.” *Id.*; Schedule D, Part 1. Debtor states that the amount of this secured claim(s) is “Unknown.

On Schedule F, Debtor lists it’s Certificate Holders as having unsecured claims, though listing on Schedule D that the Certificate Holders’ claims are secured by “All cash, liquid securities, and mortgage loan investments.” Thus, it appears that all of the property of the estate, except for the real property is encumbered by the Certificate Holders secured claims.

From a review of Schedules D, E, and F, the vast majority of Debtor’s creditors, both in claim and amount, are the Certificate Holders with secured claims.

JUNE 7, 2022 HEARING

At the June 7, 2022 Hearing, **XXXXXXX**

The court shall issue an 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 Pay filed by Eagle Ledge Foundation, Inc (“Debtor in Possession”) 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 **XXXXXXXXXXXXXXXXXX**

8. <u>22-90160</u> -E-11 EAGLE LEDGE FOUNDATION,	INC.	MOTION TO MAINTAIN EXISTING
<u>DDM-4</u>	Dennis Miller	CASH MANAGEMENT SYSTEM WITH
		LOAN SERVICING AGENT O.S.T.
		6-1-22 <u>[33]</u>

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.

Local Rule 9014-1(f)(4) 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 June 1, 2022. The court set the hearing for June 7, 2022. Dckt. 42.

The Motion to Maintain Existing Cash Management System with Loan Servicing Agent was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(4). Debtor, creditors, 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 -----.

<p>The Motion to Maintain Existing Cash Management System with Loan Servicing Agent is XXXXXXXXXXXX</p>

Eagle Ledge Foundation, Inc., the Debtor, in this Chapter 11 case seeks (as the Debtor, not the Debtor in Possession), seeks to maintain its Cash Management System with its Loan Servicing

Agent. Dckt. 33. TMI Trust Company is identified as the loan servicing agent who maintains the Cash Management System.

In the Motion, the following information is provided about TMI Trust Company and the services it provided to the Debtor pre-petition and is to provide to the Bankruptcy Estate post-petition (identified by paragraph number in the Motion and emphasis added):

8. The Loan Servicing Agreement can be summarized as follows:³

a. Loan Servicing Practices: TMI has agreed to service and administer loans on behalf of ELF, in a manner consistent with good lending practices, utilizing loan procedures recommended by TMI and approved by ELF.

b. Scope of Services Provided: Among other things, TMI provides **loan collection services**, issues payment **coupons or monthly statements to borrowers**, issues **payoff information** to borrowers, keeps ELF and the Collateral Agent apprised of defaults by borrowers, **provides reporting to ELF, and invests loan proceeds for the benefit of ELF**.

c. Loan Servicing Fees: In exchange for providing the loan servicing, TMI charges a set-up fee of \$250.00 for each new loan, and an **annual loan servicing fee of .20%, based on the principal amount outstanding on loans administered by TMI, subject to a minimum fee of \$750.00 per month**. The fee is calculated monthly, with one-twelfth to be paid monthly from cash held by TMI for the benefit of ELF. **On average, the monthly fees are approximately \$1,500.00**. Actual out-of-pocket expenses are billed at 110% of cost to ELF.

3 The above summary is provided solely for the convenience of the Court, creditors, and parties in interest. The summary should not be deemed an admission of the Debtor, nor is it intended to in any way alter or modify the terms of the Loan Servicing Agreement. In the event of any discrepancy between this Motion and terms of the TMI Agreements, the terms Agreement shall prevail.

10. Currently, the **Debtor has five active loans**, and as of the Petition Date, the **total outstanding principal balance owed by the borrowers is approximately \$719,394.36 in the aggregate**. **TMI receives and processes the loan payments** from the borrowers, utilizing the loan procedures to make determinations regarding the application of such amounts to principal, interest, fees, expenses, or any other charges or escrows. **The funds are held in an interest-bearing account for the benefit of the Debtor** and are reflected as cash or cash equivalents in the monthly reporting provided to the Debtor. Upon request of the Debtor, and not more than two times per month, the Debtor may request a disbursement of all amounts of principal, interest, or fees collected under the Loans, less the amount of TMI's servicing fees. To the extent a disbursement request is not made by the Debtor, TMI's servicing fees are deducted on a monthly basis from the Debtor's cash. As of the Petition Date, **TMI was holding cash and equivalents of approximately \$82,473.82 for the Debtor (the "Cash Proceeds")**. TMI provides the Debtor with monthly accounting reports by the

tenth business day of each month.

11. TMI also manages the Debtor's church bond portfolio, which had a value of approximately **\$529,701.62 as of the Petition Date** (the "Bond Portfolio" and, together with the Cash Proceeds, the "Servicing Account"). These bonds are only purchased at the express direction of the Debtor, and the Debtor is not actively purchasing and does not intend to purchase additional bonds. However, **there is no active market to sell the bonds currently held by the Debtors. The majority of the bonds will mature in 3 to 4 years and, if retained**, are projected to generate a far better return than if the Debtor attempted to cash out the bonds immediately, which will ultimately inure to the benefit of the bankruptcy estate and its creditors.

No information is provided about who and what TMI Trust Company is for employment by the Bankruptcy Estate. Also, it is not identified whether such services require such employment to be authorized pursuant to 11 U.S.C. § 327.

A quick, internet search first turns up a website for TMI Trust Company, with a website at www.tmico.com. The information provided under the "About" tab discloses that TMI was purchased by Reliance Finance Corporation, which has a subsidiary providing services to churches and nonprofits.

It then states that Reliance Finance Corporation was acquired by FIS Global in 2014, and then TMI Trust Company was "spun off and once again became an independent trust company."

A review of the California Secretary of State's website and search of businesses registered to do business in California returned a result that no entity named TMI Trust Company is registered to do business in California.

No declarations, documentary evidence, copies of contracts, or other evidence was filed in support of this Motion.

JUNE 7, 2022 HEARING

At the June 7, 2022 Hearing, **XXXXXXX**

The court shall issue an 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 Maintain Existing Cash Management System with Loan Servicing Agent filed by Eagle Ledge Foundation, Inc ("Debtor in Possession") 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 **XXXXXXXXXXXXXXXXXXXX**

9. [22-90160-E-11](#) [DDM-5](#) EAGLE LEDGE FOUNDATION, INC.
Dennis Miller MOTION TO USE CASH COLLATERAL AND/OR MOTION TO GRANT REPLACEMENT LIENS, MOTION FOR ADEQUATE PROTECTION, AND MOTION/APPLICATION TO APPROVE DIP BUDGET
6-1-22 [35]

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.

Local Rule 9014-1(f)(4) 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 June 1, 2022. The court set the hearing for June 7, 2022. Dckt. 42.

The Motion to Use Cash Collateral and/or Motion to Grant Replacement Liens, Motion for Adequate Protection, and Motion/Application to Approve DIP Budget O.S.T. was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(4). Debtor, creditors, 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 -----.

The Motion to Use Cash Collateral and/or Motion to Grant Replacement Liens, Motion for Adequate Protection, and Motion/Application to Approve DIP Budget is XXXXXXXXXXXXXXXXXX.

Eagle Ledge Foundation, Inc., as the "Debtor" (not the Debtor in Possession) seeks to use cash collateral, provide adequate protection, grant replacement liens, and get an operating budget approved. This Motion is not filed by Eagle Ledge Foundation, Inc. as the debtor in possession in this case. Throughout the Motion it is only the Debtor, not the debtor in possession seeking to use property of the Bankruptcy Estate.

APPLICABLE LAW

Pursuant to 11 U.S.C. § 1101, a debtor in possession serves in the place of a bankruptcy trustee as the fiduciary to the bankruptcy estate in the Chapter 11 case when so qualified under 11 U.S.C. § 322. As a debtor in possession, the debtor in possession can use, sell, or lease property of the estate pursuant to 11 U.S.C. § 363. In relevant part, 11 U.S.C. § 363 states:

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease—

(I) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Federal Rule of Bankruptcy Procedure 4001(b) provides the procedures in which a trustee or a debtor in possession may move the court for authorization to use cash collateral. In relevant part, Federal Rule of Bankruptcy Procedure 4001(b) states:

(b)(2) Hearing

The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

DISCUSSION

The Bankruptcy Estate includes the Debtor's pre-petition business and property. Debtor states that there are currently five active loans which total in the aggregate \$719,394.36. Motion, p. 4:14-15; Dckt. 35.

Upon receiving payments on these loans, the monies are deposited in interest bearing accounts, after deducting servicing fees, "for the benefit of the Debtor." *Id.*, p. 4:16-22.

Not more than two times per month, Debtor can request disbursements from the accounts.

The Motion then states:

16. The Debtor believes the funds held by TMI and that will be collected on a postpetition basis by TMI may constitute cash collateral, and that the Collateral Agent may assert an interest in such funds for the benefit of the Certificate Holders, as such amounts represent proceeds of the mortgages held by the Debtor and the notes payable to the Debtor.

Id., ¶ 16. In a footnote, Debtor states that it does not admit any lien or secured claim. However, on the Schedules Debtor states that the Certificate Holders have claims secured by all of Debtor's assets, excluding the real property.

It is then further asserted that only the Collateral Agent is a person who can assert an interest in the property constituting cash collateral. It appears that this "Collateral Agent" is asserting the liens of the Certificate Holders.

Adequate Protection

In the Motion Debtor states having \$761,165.00 in its Operating Account. Debtor does not believe that these monies are subject to Creditor liens. The source of these monies is not identified in the Motion. However, on Schedule D, it is stated that the Collateral Agent for the Certificate Holders has a lien in all "cash, liquid security, and mortgage loan investments" of the Debtor.

To provide adequate protection for the Certificate Holders having claims (as stated on Schedule F for which its Collateral Agent has a lien to secure their claims) totaling (\$4,043,001) (computed by deleting out the non Certificate creditors listed on Schedule F), Debtor states in the Motion:

24. As adequate protection of any interest the Collateral Agent may have in the loan proceeds collected on a post-petition basis, the Debtor proposes provide the Collateral Agent with monthly written reporting as to the status of collections and disbursements, in addition to complying with the reporting requirements under the Bankruptcy Code and Bankruptcy Rules (such as monthly operating reports).

25. To provide further adequate protection of the interests of any secured creditor, the Debtor proposes to open a third debtor-in-possession account (the "Collateral Account") and to the extent the balance of the Cash Proceeds in the Servicing Account exceeds \$75,000.00 on the last business day of the month, the Debtor, on or before the tenth day of next month, will direct TMI to transfer the funds in excess of \$75,000.00 to the Collateral Account.

However, it appears that the "adequate protection" is to merely a report of the status of the collateral and to transfer some of the existing collateral to the Collateral Agent.

Looking at Debtor's non-real property assets, it appears that the (\$4,043,001) is secured by personal property having a value, as stated by Debtor, of \$1,402,423. The purported adequate protection is to just hold part of the existing collateral as the collateral is reduced. Summary of Assets, Part 1; Dckt. 24.

Filed as Exhibit A in support of the Motion is an unauthenticated document titled Debtor's Proposed Budget. Dckt. 36. The Budget is stated to be:

	May 2022	June 2022	July 2022	August 2022	Sept 2022	Oct 2022	
	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6	TOTAL
Beginning Balance ¹	625,318.00	621,523.00	613,478.00	606,183.00	598,888.00	591,593.00	19,000.00
Cash Receipts ²	3,500.00	3,500.00	3,500.00	3,500.00	3,500.00	3,500.00	21,000.00
Rental Income	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Other Income	0.00	0.00	0.00	0.00	0.00	0.00	0.00
TOTAL SOURCES	628,818.00	625,023.00	616,978.00	609,683.00	602,388.00	595,093.00	40,000.00
Expenses							
Bank Fees	50.00	50.00	50.00	50.00	50.00	50.00	300.00
Copies/Postage	100.00	100.00	100.00	100.00	100.00	100.00	600.00
Insurance	0.00	500.00	0.00	0.00	0.00	0.00	500.00
Officer Salaries/ Payroll Taxes	6,145.00	6,145.00	6,145.00	6,145.00	6,145.00	6,145.00	36,870.00
Office Supplies	50.00	50.00	50.00	50.00	50.00	50.00	300.00
Property Management Fees		1,500.00	1,500.00	1,500.00	1,500.00	1,500.00	7,500.00
TMI Loan Servicing and Escrow Fees	950.00	950.00	950.00	950.00	950.00	950.00	5,700.00
U.S. Trustee Fees	0.00	250.00	0.00	0.00	0.00	250.00	0.00
Legal	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00
Accounting Fees	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00	1,000.00
TOTAL USES	7,295.00	11,545.00	10,795.00	10,795.00	10,795.00	11,045.00	53,770.00
ENDING BALANCE	621,523.00	613,478.00	606,183.00	598,888.00	591,593.00	584,048.00	-13,770.00

Reviewing this Budget, Debtor projects receiving \$3,500.00 in cash receipts, which appear to be the payments on the loan that are the collateral for Certificate Holders, which total \$21,000.00. For the period May 2022 through October 2022, Debtor projects spending (\$53,770.00).

Footnote 2 to the Budget states that Debtor's cash receipts are generated from collection of borrower loan payments. Thus, for that period Debtor projects losing \$32,770.00 from its operations (which appears to be a reduction in the Certificate Holder's collateral).

No Declarations or other authenticated documentary evidence is provided by Debtor.

JUNE 7, 2022 HEARING

At the June 7, 2022 hearing, **XXXXXXX**

The court shall issue an 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 for Authority to Use Cash Collateral filed by Eagle Ledge Foundation, Inc ("Debtor in Possession") 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 **XXXXXXXXXXXXXXXXXXXX**