UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

June 14, 2022 at 1:30 p.m.

1.	**22-21314-E-13** **KSR-1**	**NADIA ZHIRY** **Peter Macaluso**	**MOTION TO EXCUSE TURNOVER AND/OR MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY** **5-31-22 [12]**

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)(2) 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, on May 31, 2022. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Excuse Turnover and Confirm Exemption from Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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, **----------**.

The Motion to Excuse Turnover and Confirm Exemption from Automatic Stay is xxxxx.

Gerard F. Keena II ("Movant-Receiver") moves the court for an order confirming that the ongoing receivership for real properties commonly known as 1039 and 1049 Claire Ave, Sacramento, California (the "Properties") deemed a public nuisance is excused from the automatic stay in effect in this case pursuant to 11 U.S.C. § 362(b)(4). Movant-Receiver also requests they should be excused from turnover under 11 U.S.C. § 543.

In the Motion, the grounds stated with particularity (Fed. R. Bankr. P. 9013) include the following (as summarized by the court unless shown in "quotation marks"):

A. The Receiver was appointed in the State Court Action based on the properties being a public nuisance.

B. The Properties were littered with trash and debris. There were numerous vehicles in various states of dismantling.

C. The Properties appeared to be an automotive scrap yard.

D. The Debtor was making hazardous, unpermitted construction and renovations on the Property.

E. Debtor had excessive animals on the Properties in violation of local law, and appears to have been attempting to run a breading business

F. The Receiver was appointed "over a year ago", but have been unable to "fully rehabilitate the Properties while the Properties are subject to the jurisdiction of the Bankruptcy Court.

G. The current Bankruptcy Case was filed one week after the abandonment and the day before the hearing on the Receiver's plan in the State Court Nuisance Action.

H. The Trustee seeks to proceed to fulfill his duties in the State Court Nuisance Action.

Motion; Dckt. 12

In Movant-Receiver's Memorandum of Points and Authorities (Dckt. 19), Movant-Receiver states the Properties will likely be sold subject to State Court approval to fund and carry about their abatement. Dckt. 19 at 14. Movant-Receiver can only abate the nuisances once they receive authorization from the State Court approving their proposed receivership plan, however, Movant-Receiver can only move forward with the State Court action if they are granted relief from the automatic stay. *Id.* at 15.

Prior Bankruptcy Case

On June 29, 2021, Debtor Nadia Zhiry commenced a Chapter 7 bankruptcy. Case No. 21-22759. There, Movant-Receiver filed a Motion for relief from the automatic stay from real properties. *Id.*, Dckt. 67. Movant-Receiver's Motion was made pursuant to 11 U.S.C. § 362(b)(4) to continue the enforcement of a receivership order and abatement of a nuisance on the Properties. The Motion was granted on September 16, 2021. *Id.*, Order, Dckt. 67. The Movant-Receiver's Order granting relief in

the prior case was entered seven months prior to the commencement of the Current Chapter 13 case.

Debtor received a discharge in the prior the Chapter 7 case on April 20, 2022. *Id.*, Dckt. 85. In the prior

This Chapter 13 Case was filed on May 25,2022. The prior Chapter 7 Case has not yet been closed. A review of the Docket for the prior Chapter 7 Case discloses that on May 17, 2022 the court entered an order abandoning the Properties. *Id.*; Order, Dckt. 96. However, the Order does not state to whom the Properties have been abandoned.

Debtor's Opposition

Debtor filed an opposition to this motion on June 7, 2022 (Dckt. 24). Debtor states the following to be disputed material facts:

1. The subject property is not in the same condition as the time of Receivership/Court Order on May 3, 2021.

2. There are not 13-24 vehicles on either property.

3. There are no illegal apartments on either property.

4. There are no cages nor kennels on either property.

5. The Receiver has rejected any plan to address the deficiencies and has opposed correction by the debtor.

6. The Receiver's Motion to exercise control of subject property.

Debtor states there is substantial equity in the property to remedy the issues at hand and that there is more than enough equity to pay claims by the Receiver and the City. Debtor also states the Movant is a person and not a governmental unit and therefore cannot take advantage of the police and regulatory exception. In support of the proposition that a State Court appointed receiver to address a public nuisance is a person and the provisions of 11 U.S.C. § 362(b)(4), Debtor cites to *In re Commonwealth Oil Ref. Co*, 805 F.2d 1175 (5th Cir. 1986), (without quoting the decision or providing a pin cite) which states in relevant part:

> This case presents the question of whether a debtor, who has filed a petition under Chapter 11 of the Bankruptcy Code, can be forced to comply with federal and state environmental laws designed to protect the public health and safety, before that debtor has filed its plan of reorganization.
> . . .
> We agree with the conclusion of the bankruptcy court and the district court that the automatic stay does not apply to the EPA's actions in this case. The EPA has the authority to enforce its regulatory power, that is, to require CORCO to comply with the federal and state environmental laws and regulations at issue in this case. The enforcement actions of the EPA in this case do not come within the ambit of § 362(a)(1) because they are actions to enforce police and regulatory powers,

> thus falling within the § 362(b)(4) exception to the automatic stay. The EPA's actions are not an attempt to enforce a money judgment, proscribed by § 362(b)(5), notwithstanding the fact that CORCO will be forced to expend funds in order to comply.
>
> The exception from the automatic stay for proceedings to enforce police and regulatory powers is not, as appellants suggest, limited to those situations where "imminent and identifiable harm" to the public health and safety or "urgent public necessity" is shown. The words of §§ 362(b)(4) and 362(b)(5) allow for no such reading. The language of these exceptions is unambiguous -- it does not limit the exercise of police or regulatory powers to instances where there can be shown imminent and identifiable harm or urgent public necessity.
> . . .
> We turn now to the question of whether, under the facts of this case, the bankruptcy court abused its discretion in refusing to issue a stay of EPA proceedings under 11 U.S.C. § 105.
> . . .
> The district court agreed with the bankruptcy court's conclusion that CORCO had failed to establish the prerequisites for a § 105 stay, since "they concede they cannot prevail on the merits by their admissions that no Plan B has been filed and no groundwater monitoring system exists." 17Link to the text of the note Slip op. at 3.

In re Commonwealth Oil Refining Co., 805 F.2d 1175 at 1171, 1183-1184, 1188, 1189.

With respect to the Receiver being a person, in the State Court Action, the Plaintiff is the City of Sacramento. Exhibit A, Order Appointing Receiver; Dckt. 14. The City obtained the appointment of a receiver to, under court supervision and providing Debtor with a forum to enforce her rights, to undertake the acts necessary to address the asserted nuisance.

Also, Debtor disputes the fact that the public nuisance is no longer at issue they believe the action should be dismissed. Additionally, Debtor states that a Chapter 13 Plan has been filed which seeks to remedy all issues through a comprehensive review plan that will allow the family to repair the home. [Fn.1.]

FN. 1. Neither in the Opposition or the Declaration in Support does Debtor address why Debtor is not in the State Court Action, demonstrating that there is no nuisance, that Debtor and Debtor's family has "seen the light," corrected some of the problems, and that the duties of a receiver to abate the nuisance will not be required, though the receiver could document Debtor and Debtor's family complying with the orders of the State Court to complete certain actions.

Evidence Presented in Opposition

Vera Zhiry, identified as the daughter of Debtor, provides her personal knowledge testimony (Fed. R. Evid. 601, 602) in a Declaration in Opposition to the Motion. Dec. Dckt. 25. In her Declaration, Vera Zhiry testifies (identified by paragraph number in the Declaration):

3. We have removed all the cars from the property.

The "we" is not identified, how this was accomplished is not explained, and where these cars have either been disposed of or relocated is not stated.

4. There are no illegal apartments on the property.

Vera Zhiry provides the court with her legal conclusion that there are no "illegal apartments" on the "property" (testifying in the singular). No information is provided as to what corrective acts were taken, whether they were done in compliance with a State Court order or violation notice from the City of Sacramento.

5. There are no Cages and there are no kennels on the property.

No explanation is given as to what happened to cages, kennels, and dogs on the property. How they were re-homed, or merely "temporarily relocated" and likely to return in short order.

No other evidence is provided in Opposition to the Motion.

Statement of Disputed Facts

Debtor has also provided a Statement of Disputed Facts as part of the Opposition. In looking at these "Disputed Facts," they generally appear to be "Facts" within the province of the State Court Judge in whether that Judge's receivership order should continue in force and effect, as well as whether the Receiver's proposes plan in State Court should be ordered by the State Court Judge, of should Debtor's plan of action be ordered (Debtor and Debtor's family having demonstrated that they have corrected many of the "ills" that led to the appointment of the Receiver and that such "intervention" to complete the abatement of any nuisance is no longer necessary.

The fifth stated Material Disputed Fact is that, "The Receiver Has rejected any plan to address the Properties' deficiencies" with Debtor's Counsel, and has opposed ANY corrections by the Debtor." Dckt. 26. The Receiver is not operating as an omnipotent sovereign, but only to the extent as authorized by the State Court Judge in the State Court Receivership Action. Debtor does not offer any explanation as to why Debtor and her family do not have the "access to justice" in the State Court Action by presenting any such disputes to the State Court Judge.

APPLICABLE LAW

No Existence of Automatic Stay
Under 11 U.S.C. § 362(b)(4)

The court begins with considering the provisions of 11 U.S.C. § 362(b)(4) which excepts actions and proceedings from the automatic stay to enforce police or regulatory powers of a governmental unit. 3 COLLIER ON BANKRUPTCY ¶ 362.05[5] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). This includes the enforcement of certain judgments other than money judgments, except those pursuant to § 362(a)(2). *Id.* at [5][a].

Legislative history indicates enforcing environmental laws is a permissive use of a

governmental unit's police or regulatory powers. 3 Collier on Bankruptcy P 362.05 (16th 2022) (citing S. Rep. No. 989, 95th Cong., 2d Sess. 52 (1978)). Collier on Bankruptcy goes in detail with this approach:

> In [*Penn Terra Ltd. v. Department of Environmental Resources*], the debtor had operated its coal mines in violation of state environmental protection laws. After the debtor commenced a bankruptcy case, the state Department of Environmental Resources sought an injunction directing the debtor to comply with a prebankruptcy consent order requiring it to clean up the environmental damage on its property. The debtor maintained that the action was stayed because it was in essence an attempt to enforce a money judgment. According to the debtor, because the action would require the debtor to spend money to remediate the environmental problems, the state was merely seeking to have the debtor finance the cleanup so the state would not have to do so. The court rejected that argument, finding that there is a difference between an equitable action to require or prevent particular behavior and a legal action to recover a money judgment. The court found that when the state sought an injunction requiring certain action, it was not seeking money, but rather was seeking performance.
>
> On the other hand, in *Ohio v. Kovacs* the Supreme Court held that an action by the State of Ohio to require an individual debtor to clean up environmental damage was a "claim" and the debtor's cleanup obligation was a "debt" that could be discharged in bankruptcy. The court found that the state did not expect the debtor to engage in the cleanup himself; rather it expected the debtor to expend funds to effect the cleanup. Since the debtor's obligation could be satisfied by the payment of funds, the state's action was a claim that could be discharged.
>
> At first blush, *Kovacs* seems at odds with *Penn Terra*. After all, *Kovacs* found that a debtor's cleanup obligation was a debt because the obligation could be satisfied by payment of money. *Penn Terra* found that an order requiring a cleanup was not a monetary judgment, even though presumably the order could be satisfied by the payment of money to finance a cleanup.
>
> Yet it is important to remember the different contexts in which the cases arose. Clearly, if the debtor's obligation can be satisfied by the payment of money, it is a claim under the definition of that term in section 101 and, therefore, is a dischargeable debt. Nevertheless, former section 362(b)(5), under which the case was decided, does not bar enforcement of a "claim"; instead, it bars enforcement of a money judgment. Thus, it would appear that the cases can be reconciled by recognizing that the state can enforce a judgment or order against the debtor requiring the expenditure of funds but that the debtor's obligation may be discharged in bankruptcy and, in any event, the state may not enforce the obligation by requiring the debtor to pay money damages for breach of the obligation.

3 Collier on Bankruptcy P 362.05 (16th 2022) (distinguishing *Penn Terra, Ltd. v. Dep't of Envtl. Res.*, 733 F.2d 267 (3d Cir. 1984) from *Ohio v. Kovacs*, 469 U.S. 274 (1985)).

Under the current provisions of 11 U.S.C. § 362(b)(4), the fact an action may have economic consequences on a debtor is not determinative. *In re Basinger*, No. 01-02386, 2002 Bankr. LEXIS 1925, at *12 (Bankr. D. Idaho Jan. 31, 2002). Rather, two tests have been developed to determine whether the judgment will be enforced: the pecuniary purpose test and the public policy test.

Under the pecuniary purpose test, the court asks whether the governmental unit is acting pursuant to a matter of public safety and welfare rather than a governmental pecuniary interest. *Id.*; *In re Berg,* 230 F.3d 1165 (9th Cir. 2000); *In re First All. Mortg. Co.*, 264 B.R. 634 (C.D. Cal. 2001); See *generally PBGC v. LTV Corp.*, 496 U.S. 633 (1990).

Under the public policy test, the court asks whether the government action is designed to effectuate public policy rather than to adjudicate private rights. *Id.*; *Lockyer v. Mirant Corp*., 398 F.3d 1098 (9th Cir. 2005); *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 942 (6th Cir. 1986). Actions that advantage a discrete and identifiable set of individuals would fail the public interest test. *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005); *City & Cty. of San Francisco v. PG & E Corp*., 433 F.3d 1115 (9th Cir. 2006).

Prior cases have recognized environmental enforcement actions do not interfere with pecuniary purpose or public policy tests. *Basinger*, 2002 Bankr. LEXIS 1925, at *29; *Dykes v. TD Dev., LLC,* No. HHD-CV206126173S, 2021 Conn. Super. LEXIS 2097, at *7 ([T]he purpose of the County's wetland permitting laws, as well as the injunctive and enforcement proceedings pursuant thereto, are for the purpose of deterring the Debtor's ongoing environmental misconduct.); *In re Fernandez*, 22 Fla. L. Weekly Fed. B 367 (U.S. Bankr. S.D. Fla. 2010) ([P]laintiff, acting in her official capacity as commissioner of a governmental unit, is exercising her duty to protect the environment and Connecticut's natural resources . . . and . . . the public safety and welfare . . . ."); *Diaz v. Tex. (In re Gandy)*, 327 B.R. 796, 805 (Bankr. S.D. Tex. 2005) ("The action meets the pecuniary interest test because the governmental units were pursuing a matter of public safety and welfare through injunctive relief rather than seeking a monetary award. . . . The action also satisfies the public policy test because the purpose of the proceeding is to further public policy instead of adjudicating private rights.").

The current enforcement action at issue was brought by the City of Sacramento under California Health and Safety Code. Memorandum of Points and Authorities, Dckt. 19 at 11:11-12. The Movant-Receiver was appointed to abate the nuisances in accordance with California Health and Safety Code § 17980.7. It is more than clear to this court that the city, as a governmental unit for purposes of 11 U.S.C. § 362(b)(4), is seeking to use enforce their police and regulatory power.

At the time the enforcement action commenced, Movant-Receiver describes the Properties in:

> [D]eplorable condition, littered with trash, junk, and debris. Numerous vehicles in various states of dismantling lay about the Properties, as Debtor appears to be using (or allowing her family members to use) the Properties as an unauthorized automotive scrap yard in violation of local zoning ordinances. Debtor has also continued with hazardous, unpermitted construction and renovations at the Properties. Finally, Debtor houses excessive animals in violation of local law in gross, inhumane conditions, in what appears to be attempts to breed them.

Motion, Dckt. 12 at 2:11-18. Movant-Receiver describes the Properties presently as continuing to deteriorate and become a greater hazard to the community. Additionally, Movant-Receiver states the

action is to "abate the public nuisances for the health and safety of the community, not to preserve the private pecuniary interests of any creditors or government entity." *Id.* at 2-3.

Similar to the environmental enforcement actions, here, the purpose of the nuisance enforcement action is clearly for the purpose of public safety, welfare, and policy, rather than a pecuniary purpose or adjudicating private rights. The enforcement action falls squarely into a governmental unit's police and regulatory powers. The Properties as described are not only an eye sore, but were presented in the State Court Action to present grave public health and safety concerns that should be remedied. Therefore, the enforcement action is clearly excused from the automatic stay under 11 U.S.C. § 362(b)(4).

Movant-Receiver Not a Custodian
Under 11 U.S.C. § 543

Movant-Receiver additionally contends they are not a "custodian" under 11 U.S.C. § 543. 11 U.S.C. § 543 requires a custodian with knowledge of the commencement of a case to deliver to the trustee any property of the debtor held by or transferred to the custodian.

The Bankruptcy Code defines custodian as a receiver or trustee of any property of the debtor appointed in a case or proceeding not under this title, which Congress states as:

> (11) The term "custodian" means—
>
> (A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title;
>
> (B) assignee under a general assignment for the benefit of the debtor's creditors; or
>
> (C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors.

11 U.S.C. § 101(11). On its face, the first description in § 101(11)(A) uses the simple word "receiver."

Congress provides in 11 U.S.C. § 543 for a "custodian" to turnover property of the bankruptcy estate in the custodian's possession to the trustee (which would include a Chapter 13 debtor exercising the powers, duties, and responsibilities of a trustee) unless such custodian was excused by the court as provided in 11 U.S.C. § 543(d).

In reviewing the cases, a "clear weight of authority" and legislative history establish a custodian under § 101(11) "must be primarily concerned with the prepetition liquidation of a debtor's property or the protection of creditor's rights." *MacMullin v. Poach*, No. CV-08-0768-PHX-FJM, 2009 U.S. Dist. LEXIS 19730, at *5 (D. Ariz. Mar. 4, 2009). The cases and Legislative History cited in *MacMullin v. Poach* include: (1) *Cash Currency Exchange v. Shine* (*In re Cash Currency Exchange*), 762 F.2d 542, 553 (7th Cir. 1985); (2) *In re Camdenton United Super, Inc.*, 140 B.R. 523, 525 (Bankr. W.D. Mo. 1992); (3) *In re Gold Leaf Corp.*, 73 B.R. 146, 148 (Bankr. N.D. Fla. 1987); (4) *In re Kennise*

Diversified Corp., 34 B.R. 237, 244-45 (Bankr. S.D.N.Y. 1983); and H.R. No. 95-595, 95th Cong. 1st Sess. 310 (1977),

> Paragraph (11) [enacted as (10)] defines "custodian." There is no similar definition in current law. It is defined to facilitate drafting, and means a prepetition liquidator of the debtor's property, such as an assignee for the benefit of creditors, a receiver of the debtor's property, or administrator of the debtor's property. The definition of custodian to include a receiver or trustee is descriptive, and not meant to be limited to court officers with those titles. The definition is intended to include other officers of the court if their functions are substantially similar to those of a receiver or trustee.

Here, Movant-Receiver's responsibilities are to correct the various violations of California's Health and Safety Codes. Movant-Receiver's actions are not aimed at pre-petition liquidation of debtor's property nor preserving any creditors rights. *See In re Kennise Diversified Corp.*, 34 B.R. 237, 245 (Bankr. S.D.N.Y. 1983). It is clear to the court that Movant-Receiver is not a custodian under 11 U.S.C. § 543, and therefore, turnover of the Properties are not required.

Review of the Current Chapter 13 Bankruptcy Case

Debtor commenced this Chapter 13 Bankruptcy Case on May 25, 2022. On June 8, 2022, Debtor filed her Schedules and Statement of Financial Affairs. Dckt. 28. In reviewing the Schedules, the court notes the following:

A. The two Properties are stated to have values of $750,000 and $300,000. Schedule A/B, ¶¶ 1.1, 2.1; Dckt. 28.

B. Debtor's cash and bank account balances total $300. *Id*., ¶¶ 16, 17.

C. Debtor's total personal property value is stated to be $6,900. *Id*., ¶¶ 55-62.

D. On Schedule C, Debtor claims a homestead exemption pursuant to California Code of Civil Procedure § 704.730 in two different properties, the 1049 Claire Ave, Sacramento, CA property, and the 1039 Clair Ave, Sacramento, CA property. Schedule C, § 2; *Id*.

E. Debtor lists the two Properties as being cross-collateralized to secure two obligations to JPMorgan Chase Bank; the first in the amount of ($173,244.94) and the second in the amount of ($83,769.34), for total debt of ($257,014.28) being secured by the two Properties. Schedule D, ¶ 2.2, 2.3; *Id*.

F. On Schedule I Debtor states that she is disabled and her only income is Social Security benefits of $505.57 a month. For her Non-Debtor Spouse, while stating that he is employed, no wage or business income is shown for him. The only income for the Non-Debtor Spouse is identified as "SSI" of $1,000.00 a month.

Debtor's aggregate household gross income is $1,505.57 a month. Schedule I; *Id*. at 19-20.

G. On Schedule J, Debtor lists as reasonable and accurate monthly expenses of ($1,005.57) for Debtor and her Non-Debtor Spouse. Schedule J; *Id*. at 21-22. The court notes these monthly expenses include:

1. Mortgage/Rental Expense.....$0.00

2. Homeowner's Insurance.....$0.00

3. Property Taxes.....$0.00

4. Home maintenance and repair.....$0.00

5. Clothing/Laundry.....($10) per month for household

6. Personal care products/services.....($10) per month for household

7. Medical/dental.....($20) per month for household

8. Transportation.....($100) (Debtor listing one vehicle on Schedule A/B)

9. Vehicle Insurance.....($50)

Debtor then concludes that Debtor's household has $500.00 of monthly net income.

On the Statement of Financial Affairs Debtor states that neither Debtor nor Non-Debtor Spouse had any gross income from wages, commissions, or operating a business in 2022, 2021, and 2020. Statement of Financial Affairs, Question 4; *Id*.

Debtor lists having only Social Security income for both Debtor and Non-Debtor Spouse, which totals $7,500 in 2022, $18,200 in 2021, and $18,000 in 2020. *Id*., Question 5.

With respect to payments made within 90 days of filing bankruptcy, Debtor lists payments to JPMorgan Chase Bank, stating that the payments were made by her daughter. *Id*., Question 6.

Chapter 13 Plan Filed

On June 8, 2022, Debtor filed her Chapter 13 Plan. Dckt. 29. Debtor seeks to apply her $500 monthly net income to fund the Plan for 36 months. Plan, ¶¶ 2.01, 2.03. For Administrative Expenses, Debtor is to pay the Trustee's Fees and $2,500 for her attorney's fees. *Id*., ¶ 3.05.

The Plan provides for the following payments to creditors through the Chapter 13 Plan:

1. Class 1 Secured Claims.....$0.00

2. Class 2 Secured Claims.....$0.00

3. Class 3 Secured Claims Surrender.....None

4. Class 4 Secured Claims Paid Directly

    a. JPMorgan Chase Bank to be paid $1,500 and $250 a month by Debtor's daughter.

5. Unsecured Priority Claims.....$0.00

6. General Unsecured Claims, 100% Dividend.....$61,464

To fund the payment of the $61,464 in general unsecured claims, the Additional Provisions, § 7.01 and § 7.02 state that the Debtor's Adult Children shall purchase the "Subject Property" (not a defined term) within eighteen months (of some non-specified date), or in the alternative sell the Property (singular) to a third party.

It further provides that Debtor's children will fund all of the cleanup of some property, intending to have it done within 60 days of filing of the bankruptcy case (July 24, 2022), then have City inspections done, Debtor will obtain permits within six months to do the work for which the inspections are to be done, and Debtor will have all of the corrective work done within twelve months.

Looking back to the prior Chapter 7 Case, Debtor stated having only $505.57 a month in Social Security income, and did not list any income information for her Non-Debtor Spouse. 21-22759; Schedule I; Dckt. 14 at 31-32. On the Statement of Financial Affairs Debtor stated that she was not married. *Id*.; Statement of Financial Affairs, Question 1; Dckt. 14 at 37. On Schedule J in the prior Chapter 7 Case, in 2021 Debtor stated under penalty of perjury that her household monthly expenses included:

1. Home maintenance.....($150)

2. Clothing/laundry.....($50)

3. Personal care products/services.....($75)

4. Transportation.....($150)

In the current Chapter 13 Case, Debtor states that now a year later, the above expenses are substantially lower. It is unclear how such conflicting statements under penalty of perjury can be made by Debtor.

It appears that a serious question exists as to whether Debtor has the financial, physical, and mental ability to engage in the property remedation, hiring the necessary construction professionals, obtaining permits, clearing inspections, and then marketing and selling the Properties in the an eighteen month period.

Debtor and her family has had the opportunity to address the problems with the Properties, deal with the City, then address them in the State Court Action, but could not do so. This raises concerns about the Debtor, her finances, and who has been (or has not been) looking out for Debtor. Debtor's current counsel likely has insights into that situation and any special needs his client may have, or which may need to be addressed.

RULING

The court determines that acts relating to the enforcement action in Sacramento County Superior Court, Case No. 34-2017-00208154, are within the scope of 11 U.S.C. § 362(d)(4) for the police and regulatory powers of the State of California and not the enforcement of a money judgment. Therefore, the automatic stay did not go into effect in the enforcement action.

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 Excuse Turnover and Confirm Exemption from Automatic Stay filed by Gerard F. Keena II ("Movant-Receiver") 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 the court confirms that the automatic stay provisions of 11 U.S.C. § 362 did not go into effect on the enforcement action in Sacramento County Superior Court, Case No. 34-2017-00208154, relating to the real properties commonly known as 1039 and 1049 Claire Ave, Sacramento (the "Properties") upon the filing of this bankruptcy case (No. 22-21314) pursuant to 11 U.S.C. § 362(b)(4).
>
> **IT IS FURTHER ORDERED**, the court determining that the above enforcement action is not subject to (excepted from by operation of law, 11 U.S.C. § 362(b)(4)) the provisions of the 11 U.S.C. § 362(a) automatic stay, no affirmative relief from the stay pursuant to 11 U.S.C. § 362(d) is required.
>
> **IT IS FURTHER ORDERED** that Movant-Receiver is not required to turnover the Properties.

2. **20-24123-E-11** **RUSSELL LESTER** **CONTINUED SCHEDULING CONFERENCE VOLUNTARY PETITION**
FWP-36 **Thomas Willoughby** **8-27-20 [1]**

The Status Conference is xxxxxxxxxxxxxxxxx

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 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 marking 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, the parties reported that the Federal funding for purchasing the easement has been withdrawn. However, the State desires to proceed, but has only 75% of monies for the purchase price. That will require the Debtor to donate the additional 25% of the land, with no money received for that 25%. In effect, the State is obtaining the easement for 75% of the valuation obtained by Debtor.

The Parties expressed their desire to continue to try and make this happen, but once again, there were just a few matters to iron out. FNB advocated for the court to continue this hearing two days and have the Status Conference and hearing on Motion for Preliminary Injunction conducted on Thursday the 9th of June. In effect, that would give only one day for the parties (some located in the Eastern Time Zone) to work on ironing out the "few issues."

The court concluded that such a continuance would not be productive and the court would likely be presented with just another request to continue "a couple more days." While these Parties and their counsel have in good faith attempted to address this easement issue and move the case forward, they have been unable to get that accomplished.

Due to the Debtor, as Plan Administrator, being unable to complete the sale of the easement as required in the Confirmed Plan, Adversary Proceeding 22-2016 was filed on March 21, 2022, and the Motion for Temporary Restraining Order and Preliminary Injunction was filed on March 22, 2022. In the Adversary Proceeding Debtor sought to enjoy First American Title Company from recording the deeds and the Special Purpose Entity under the Plan from obtaining title to certain properties to then be liquidated due to the default in the Plan terms (the failure to close the sale of the easement within the time specified in the Plan).

The court has through a temporary restraining order and interim preliminary injunction (which expires June 10, 2022) has provide the Debtor and creditors with the opportunity to work out their differences and work together to maximize the recovery for everyone. Though they have tried and worked in good faith, they have not yet been able to accomplish the sale of the easement. The March 31, 2022 deadline to close the sale of the easement is now almost three months past due.

In reviewing the Complaint in Adversary Proceeding 22-2016, the only relief requested is the granting of a "preliminary injunction," no permanent or stated duration injunction or other relief is requested. Under the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure, a preliminary injunction is issued pending trial on the real relief requested.

It is clear that the purpose of the Adversary Proceeding was to temporarily stay the transfer of the properties into the Special Purpose Entity while the parties in good faith tried to get the sale of the Easement completed. The need for the action and "preliminary injunction" were necessary because the parties and their counsel, though working in good faith, could not delay such transfer by agreement.

The Debtor has obtained all of the substantive relief Debtor sought, the court putting a hold

on the transfer for almost three months and providing a forum (which has successfully worked in the past) for the parties and their counsel in good faith to confer, identify issues for the court and other parties, and constructively work to resolve disputes to the extent possible.

Debtor's recognition that the Adversary Proceeding legal usefulness has been spent is demonstrated by Debtor, as the Plaintiff, desiring to now dismiss the Adversary Proceeding. Counsel for FNB has argued against dismissal, asserting that the court could use it to issue mandatory injunctions ordering First American Title and the Special Purpose Entity to under take specific acts. That is not possible as the Plaintiff Debtor is not seeking such relief.

Conversely, former counsel for the Debtor asserted that the court could use this Adversary Proceeding to amend the Plan, changing the terms thereon. As with FNB, Debtor's former counsel is incorrect. The court cannot just use this "Preliminary Injunction Adversary Proceeding" as a ticket to the court *sua sponte* ordering whatever it wants and violate multiple provisions of the Bankruptcy Code.

As the court commented at the hearing, and the United States Supreme Court and Ninth Circuit Court of Appeals have clearly held, 11 U.S.C. § 105(a) is not a magic wand for bankruptcy judges to dispense "justice" in whatever form that the judge (effectively acting like a sovereign) believes is proper. The exercise of 11 U.S.C. § 105(a) and the inherent powers of the court have to be done consistent with and in furtherance of the law as written by Congress and provided by the United States Supreme Court in Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure.

The court continues the Status Conference to 1:30 p.m. on June 14, 2022, to allow the parties one final opportunity to, as the court crudely put it at the hearing, To Put Up or To Shut Up with respect to reaching an agreement for the sale of the Conservation Easement.

JUNE 14, 2022 STATUS CONFERENCE

At the status conference, 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 Post-Confirmation Chapter 11 Status Conference having been conducted by the court, the Parties requesting a short continuance to see if they can reach an agreement relating to the sale of the Conservation Easement, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Status Conference is xxxxxxxxxxx

3. **20-24123-E-11** **RUSSELL LESTER**
22-2016 **Thomas Willoughby**
FWP-1

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 xxxxxxxxxxxxx

JUNE 7, 2022 HEARING

First Northern Bank of Dixon ("FNB") has filed Updated Status Reports in this Bankruptcy Case and related Adversary Proceeding (22-2016). 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 marking 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, the parties reported that the Federal funding for purchasing the easement has been withdrawn. However, the State desires to proceed, but has only 75% of monies for the purchase price. That will require the Debtor to donate the additional 25% of the land, with no money received for that 25%. In effect, the State is obtaining the easement for 75% of the valuation obtained by Debtor.

The Parties expressed their desire to continue to try and make this happen, but once again, there were just a few matters to iron out. FNB advocated for the court to continue this hearing two days and have the Status Conference and hearing on Motion for Preliminary Injunction conducted on Thursday the 9th of June. In effect, that would give only one day for the parties (some located in the Eastern Time Zone) to work on ironing out the "few issues."

The court concluded that such a continuance would not be productive and the court would likely be presented with just another request to continue "a couple more days." While these Parties and their counsel have in good faith attempted to address this easement issue and move the case forward, they have been unable to get that accomplished.

Due to the Debtor, as Plan Administrator, being unable to complete the sale of the easement as required in the Confirmed Plan, Adversary Proceeding 22-2016 was filed on March 21, 2022, and the Motion for Temporary Restraining Order and Preliminary Injunction was filed on March 22, 2022. In the Adversary Proceeding Debtor sought to enjoy First American Title Company from recording the deeds and the Special Purpose Entity under the Plan from obtaining title to certain properties to then be liquidated due to the default in the Plan terms (the failure to close the sale of the easement within the time specified in the Plan).

The court has through a temporary restraining order and interim preliminary injunction (which expires June 10, 2022) has provide the Debtor and creditors with the opportunity to work out their differences and work together to maximize the recovery for everyone. Though they have tried and worked in good faith, they have not yet been able to accomplish the sale of the easement. The March 31, 2022 deadline to close the sale of the easement is now almost three months past due.

In reviewing the Complaint in Adversary Proceeding 22-2016, the only relief requested is the granting of a "preliminary injunction," no permanent or stated duration injunction or other relief is requested. Under the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure, a preliminary injunction is issued pending trial on the real relief requested.

It is clear that the purpose of the Adversary Proceeding was to temporarily stay the transfer of

the properties into the Special Purpose Entity while the parties in good faith tried to get the sale of the Easement completed. The need for the action and "preliminary injunction" were necessary because the parties and their counsel, though working in good faith, could not delay such transfer by agreement.

The Debtor has obtained all of the substantive relief Debtor sought, the court putting a hold on the transfer for almost three months and providing a forum (which has successfully worked in the past) for the parties and their counsel in good faith to confer, identify issues for the court and other parties, and constructively work to resolve disputes to the extent possible.

Debtor's recognition that the Adversary Proceeding legal usefulness has been spent is demonstrated by Debtor, as the Plaintiff, desiring to now dismiss the Adversary Proceeding. Counsel for FNB has argued against dismissal, asserting that the court could use it to issue mandatory injunctions ordering First American Title and the Special Purpose Entity to under take specific acts. That is not possible as the Plaintiff Debtor is not seeking such relief.

Conversely, former counsel for the Debtor asserted that the court could use this Adversary Proceeding to amend the Plan, changing the terms thereon. As with FNB, Debtor's former counsel is incorrect. The court cannot just use this "Preliminary Injunction Adversary Proceeding" as a ticket to the court *sua sponte* ordering whatever it wants and violate multiple provisions of the Bankruptcy Code.

As the court commented at the hearing, and the United States Supreme Court and Ninth Circuit Court of Appeals have clearly held, 11 U.S.C. § 105(a) is not a magic wand for bankruptcy judges to dispense "justice" in whatever form that the judge (effectively acting like a sovereign) believes is proper. The exercise of 11 U.S.C. § 105(a) and the inherent powers of the court have to be done consistent with and in furtherance of the law as written by Congress and provided by the United States Supreme Court in Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure.

The court continues the Status Conference to 1:30 p.m. on June 14, 2022, to allow the parties one final opportunity to, as the court crudely put it at the hearing, To Put Up or To Shut Up with respect to reaching an agreement for the sale of the Conservation Easement.

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 of 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. Klomparens

On April 14, 2022, Ms. Klomparens filed a declaration (Dckt. 25) stating Prudential's suggested revisions may delay the sale of the Conservation Easement. Ms. Klomparens 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 14, 2022 Hearing

At the hearing, XXXXXXXXXX

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 xxxxxxxxxxxxxxxx

FINAL RULINGS

4.	**21-23439-E-13** **DPC-2**	**JOLIE/MICHAEL BARKALOW** **Seth Hanson**	**CONTINUED MOTION TO DISMISS CASE** **2-14-22 [26]**

Final Ruling: No appearance at the June 14, 2022 Hearing is required.

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 Debtor, Debtor's Attorney, and Office of the United States Trustee on February 14, 2022. By the court's calculation, 23 days' notice was provided. 14 days' notice is required.

The Motion to Dismiss was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). 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.

The hearing on the Motion to Dismiss is continued to 9:00 a.m. on August 24, 2022, for purposes of the court's case management, unless dismissed earlier by the Chapter 13 Trustee.

The Chapter 13 Trustee, David Cusick ("Trustee"), seeks dismissal of the case on the basis that:

1. Both debtors, Jolie Ann Barkalow and Michael A. Barkalow ("Debtors") are deceased. Debtors Attorney filed a Notice of Death (Dckt. 23) and Certificates of Death (Dckt. 24).

2. Debtors are delinquent in plan payments.

Attorney's Notice of Death

Debtors' Attorney filed a Notice of Death of Debtor for each Debtor. Debtors' Attorney indicates:

no one from the family has responded to counsel's efforts to communicate with

the decedents' family in order to determine whether or not they intend to pursue a motion for substitution as the successor or representative to the deceased.

Dckts. 23, 30.

Review of File for This Bankruptcy Case

The proposed Amended Chapter 13 Plan (Dckt. 20) in this case provided for a Class 1 cure of the claim secured by Debtor's Residence. Plan ¶ 3.07; Dckt. 20. Several other secured claims were provided for, priority taxes, and for general unsecured claims a 0.00% dividend.

On Schedule J, Debtor lists having three minor children. Dckt. 1 at 35.

On Schedule A/B Debtor lists the residence property as having a value of $576,900. *Id*. at 12. Reference is also made to a term life policy. *Id*. at 16. Those appear to be the significant assets of value.

On Schedule D Debtor lists there being two secured claims secured by the Residence, which are stated to total ($300,000). *Id*. at 22. That is consistent with the secured claims filed by the two creditors. POC 3-1 and POC 8-1.

The two death certificates filed indicate an extraordinarily sad and traumatic cause of the almost simultaneous death of the two debtors and the three minor children losing their parents. An internet search (which is not reference as "evidence") discloses that the extended family is acting to address the needs of the minor children.

From what has been presented, it is not clear whether probate or other proceedings concerning the late debtors or for the care of the children (and their interests in the assets of their late parents) have been commenced. It does appear that a Dana Percival, a family member is organizing fund raising events.

On its face, it there would appear to be around $205,000 equity in the Residence after payment of the secured claims. This is an asset that could go to the late Debtor's children. Zillow.com (against not referenced as evidence) gives a value of $604,400 for the Residence, and states that there is an auction of the property pending. It states that the auction is set for April 19, 2022.

In reviewing the file, the court has not granted relief from the stay for such an auction to be conducted. A real property foreclosure search indicates that the Notice of Foreclosure was recorded on September 22, 2021, which was nine days before the September 30, 2022 filing of the Bankruptcy Case.

In light of the substantial assets in this case, before it will be dismissed the court will need a personal representative of the successor to Debtor or one appointed for the late debtors' children to properly adjudicate this Motion.

Through the internet the Trustee and US Trustee can identify family members. They can do a search of the County court files to identify if there are probate, conservatorship, or other proceedings. They can contact Child Protective Services and other County agencies which exist to protect the welfare of minors to see if someone from that office would be appointed to protect a several hundred thousand

dollar assets for the late debtors' children. It may be that the sale of the Residence would be conducted in this bankruptcy case, after which the case could be dismissed.

DISCUSSION

Delinquent

Debtor is $9,300.00 delinquent in plan payments, which represents multiple months of the $3,100.00 plan payment. Before the hearing, another plan payment will be due. Failure to make plan payments is unreasonable delay that is prejudicial to creditors. 11 U.S.C. § 1307(c)(1).

Death of Debtors

Under 11 U.S.C. § 1016, a Chapter 13 case may be dismissed upon death or incompetency of a debtor. This is largely due to Chapter 13 plans being dependent on the debtor's future earnings. 9 Collier on Bankruptcy P 1016.04 (16th 2021). However, if further administration is possible and in the best interest of the parties, the case may proceed and concluded in the same manner, so far as possible, as though death or incompetency had not occurred, with the court appointing a personal representative successor to the late debtor. 11 U.S.C. § 1016.

However, this is a bankruptcy estate with substantial assets and no identifiable person to whom they will be abandoned upon dismissal. The court continues the hearing pending the appointment of a successor representative for the late debtors and has a representative for the three minor children so that their rights and interests are properly addressed.

April 13, 2022 Response

On April 13, 2022, the late-Debtor's Attorney filed a status report stating Sean Percival, brother of Jolie Barkalow, intends to retain Attorney's firm to have him appointed as the successor in interest to the late Debtors. Additionally, Attorney indicates that it will be likely six months before Mr. Percival has authority from the probate court to transfer interest in any real property. If Mr. Percival is appointed as the successor, he will file a modified plan paying all creditors through the sale of the late Debtor's residence.

Attorney requests this hearing be continued sixty (60) days.

April 19, 2021 Hearing

At the hearing, the Trustee reported that Debtor has not confirmed a plan, and that a 341 Meeting has not been able to be conducted.

Counsel for the Debtor reported that Sean Percival, a brother of one of the deceased debtors, who is willing to be the successor party in interest. Then a plan will be filed that provides for the sale of the home. He is hiring a probate attorney to address the family law issues.

The motion for a successor representative is to be filed within two weeks.

Substitution of Parties

June 7, 2022 Hearing

On June 7, 2022, the court and all parties agreed with the substitution of Sean Percival as Debtor for the deceased Debtors.

First Amended Chapter 13 Plan

On June 6, 2022, substituted Debtor filed a First Amended Chapter 13 Plan. Dckt. 50. The Plan states it will be funded through a one-time lump sum payment from proceeds of the sale of real property located at 4421 Arbroath Way, Antelope, California 95843. Debtor states the sale will take place after court approval through separate motion.

The Debtor appearing to actively prosecute this case. The court continues the hearing for case management purposes in light of the unique circumstances of this case.

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 Dismiss the Chapter 13 case filed by The Chapter 13 Trustee, David Cusick ("Trustee"), 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 hearing on the Motion to Dismiss is continued to 9:00 a.m. on August 24, 2022, for purposes of the court's case management, unless dismissed earlier by the Chapter 13 Trustee.