UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

June 29, 2023 at 10:30 a.m.

1.	**23-21098-E-7** **SLH-1**	**CHRISTOPHER WATSON** **Seth Hanson**	**MOTION TO AVOID LIEN OF AMERICAN CONTRACTOR'S INDEMNITY COMPANY** **5-31-23 [16]**

1 thru 2

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 Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on May 31, 2023. By the court's calculation, 29 days' notice was provided. 14 days' notice is required.

The Motion to Avoid Judicial Lien was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 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 Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of American Contractor's Indemnity Company ("Creditor") against property of the debtor, Christopher Douglas Watson ("Debtor") commonly known as 13365 Bell Brook Dr., Auburn, California ("Property"). The court notes, Debtor's Motion indicates the address is located at 13365 Bell Brook Dr., while Debtor's Petition and Schedules indicate the street address is "133365 Bell Brook Rd." Schedule, Dckt. 1. Additionally, the Abstract of Judgment indicates Debtor's address is "13369 Bell Brook Drive." Exhibit B, Dckt. 33. At the hearing, Debtor confirmed the address as XXXXXXX

A judgment was entered against Debtor in favor of Creditor in the amount of $71,623.86. Exhibit B, Dckt. 33. An abstract of judgment was recorded with Placer County on February 23, 2018, that encumbers the Property. *Id*. An application for and renewal of judgment was entered against Debtor in favor of Creditor in the amount of $122,022.06 and was recorded with Placer County on December 31, 2020, that encumbers the Property. Exhibit C, Dckt. 33.

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $569,000.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total $273,463.00 as of the commencement of this case are stated on Debtor's Amended Schedule D. Dckt. 27. Additionally, the Internal Revenue Service has a tax lien of $196,198.74, and Placer County Department of Child Services has a statutory lien of $7,542.00. *Id.* Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of $500,000.00 on Schedule C. Dckt. 1.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of the judicial lien impairs Debtor's exemption of the real property, and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT-DRAFTED ORDER

An order substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Christopher Douglas Watson ("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 judgment lien of American Contractor's Indemnity Company, California Superior Court for Nevada County Case No. P13927, recorded on February 23, 2018, Document No. 2018-0012141-00, and renewed on December 31, 2020, Document No. 2020-0155303-00, with the Placer County Recorder, against the real property commonly known as 13365 Bell Brook Dr., Auburn, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

2.	**23-21098-E-7** **SLH-2**	**CHRISTOPHER WATSON** **Seth Hanson**	**MOTION TO AVOID LIEN OF RAUL CHAVEZ** **5-31-23 [21]**

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—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, parties requesting special notice, and Office of the United States Trustee on May 31, 2023. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Judicial Lien 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Avoid Judicial Lien is granted.

This Motion requests an order avoiding the judicial lien of Raul Chavez ("Creditor") against property of the debtor, Christopher Douglas Watson ("Debtor") commonly known as 13365 Bell Brook Dr., Auburn, California ("Property"). The court notes, Debtor's Motion indicates the address is located at 13365 Bell Brook Dr., while Debtor's Petition and Schedules indicate the street address is "133365 Bell Brook Rd." Schedule, Dckt. 1. At the hearing, Debtor confirmed the address as XXXXXXX

A judgment was entered against Debtor in favor of Creditor in the amount of $37,910.81. Exhibit B, Dckt. 32. An abstract of judgment was recorded with Placer County on June 9, 2022, that encumbers the Property. *Id*.

Pursuant to Debtor's Schedule A, the subject real property has an approximate value of $569,000.00 as of the petition date. Dckt. 1. The unavoidable consensual liens that total $273,463.00 as of the commencement of this case are stated on Debtor's Amended Schedule D. Dckt. 27. Additionally, the Internal Revenue Service has a tax lien of $196,198.74, and Placer County Department of Child Services has a statutory lien of $7,542.00. *Id.* Debtor has claimed an exemption pursuant to California Code of Civil Procedure § 704.730 in the amount of $500,000.00 on Schedule C. Dckt. 1.

After application of the arithmetical formula required by 11 U.S.C. § 522(f)(2)(A), there is no equity to support the judicial lien. Therefore, the fixing of the judicial lien impairs Debtor's exemption of the real property, and its fixing is avoided subject to 11 U.S.C. § 349(b)(1)(B).

ISSUANCE OF A COURT-DRAFTED ORDER

An order substantially in the following form shall be prepared and issued by the court:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Avoid Judicial Lien pursuant to 11 U.S.C. § 522(f) filed by Christopher Douglas Watson ("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 judgment lien of Raul Chavez, California Superior Court for Placer County Case No. S-CV-0045951, recorded on June 9, 2022, with the Placer County Recorder, Document No. 2022-0047919-00, against the real property commonly known as 13365 Bell Brook Dr., Auburn, California, is avoided in its entirety pursuant to 11 U.S.C. § 522(f)(1), subject to the provisions of 11 U.S.C. § 349 if this bankruptcy case is dismissed.

3. 23-90111-E-11 CAE-1 **MICHAEL HOFMANN** **CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 3-20-23 [1]**

3 thru 5

Debtor's Atty: Brian S. Haddix

Notes:
Continued by order filed 6/2/23 [Dckt 97] re Debtor's *Ex Parte* Application filed 5/31/23 [Dckt 95]. To be heard in conjunction with the continued Motion for Relief from Automatic Stay.

The Status Conference is continued to 2:00 p.m. on xxxxxxx , 2023.

JUNE 29, 2023 STATUS CONFERENCE

On June 22, 2023, Michael Hofmann, the Debtor/Debtor in Possession filed his Status Report. Dckt. 108. In it Debtor/Debtor in Possession states his intention to purchase the real property that is the subject of the State Court partition action. As this court has raised in connection with the Subchapter V

Trustee's request to have control of that property removed from the Debtor/Debtor in Possession and given to the Subchapter V Trustee, Debtor/Debtor in Possession's desire to competitively bid on and purchase the real property raises a conflict of interest with respect to his fiduciary duties as the Debtor/Debtor in Possession (exercising the powers of a bankruptcy trustee for the benefit of the Bankruptcy Estate) with respect to him wanting to purchase property of the bankruptcy estate rather than having it sold to someone else.

In the Status Report Debtor/Debtor in Possession states that it is not anticipated that there will be a sale of any property in this case.

A Subchapter V Small Business Plan was filed on June 19, 2023. Dckt. 104. For the Class 2 secured claim of the Brichettos, it states that the Debtor/Debtor in Possession will sell his interest in the farmland pursuant to a sale conducted by the Subchapter V Trustee.

From a review of the Subchapter V Plan, it is not clear how the Debtor/Debtor in Possession is addressing the rights of the co-owners of the real properties.

At the Status Conference, **XXXXXXX**

MAY 18, 2023 STATUS CONFERENCE

Michael Hoffman, the Debtor/Debtor in Possession, commenced this voluntary Chapter 11 Subchapter V case on March 20, 2023. On Schedule A/B Debtor lists having a joint tenant interest in the following properties (the court computes the percentage of Debtor's interest based on the stated dollar value of his interest as a percentage of the stated total dollar value of the property:

13330 Valley Home Road, parcel -049	$42,600	8% Joint Tenant Interest
13330 Valley Home Road, parcel -051	$28,000	8% Joint Tenant Interest
13330 Valley Home Road, parcel -055	$12,000	8% Joint Tenant Interest

Dckt. 32. For personal property, Debtor's assets of significant value are a vehicle, bank account deposits, a setoff against siblings/Trust, and another setoff for non-payment of rent. Debtor also lists having a 49% interest in a business, but that its value is unknown. *Id*.

On Schedule I Debtor lists substantial monthly income, but on Schedule J substantial necessary monthly expenses. Some items of note with respect to Schedule J include:

A. No expense for rent or mortgage.

B. No expense for property taxes or homeowner's/renter's insurance

C. Water, sewer, and garbage expense of $30 a month.

D. Electricity, heat, natural gas expense of $0.00 a month.

E. No expense for phone, cell phone, cable, or satellite services.

F. $2,000 a month for food and housekeeping for a family unit of just the Debtor.

G. Gas, vehicle maintenance, repairs, and registration for his vehicle of $300 a month. If Debtor has purchases a maintenance policy for his Mercedes Benz, after allow $25 a month for registration, that would leave $250 a month for gas. At $4.50 a gallon, that allows Debtor to purchase 55 gallons a month. Assuming an average of 25 miles to the gallon, that give Debtor a driving range of 335 miles a week.

H. An expenses to "LLC" of $4,000 a month.

Schedules I and J; Dckt. 32 at 33-36.

On the Statement of financial affairs Debtor lists substantial gross income for wages/commission for 2022 and 2021, but little for the first three months of 2023. *Id*. at 38-39.

In response to Question 17 on the Statement of Financial Affairs, Debtor discloses having paid Freedom Debt Relief monthly payments in the amount $20,000.00 in the year preceding the filing of this case. (It may be that this is a typo and the monthly payment were less than $20,000.00 and in the aggregate total $20,000.00.) *Id*. at 42.

In response to Question 27 on the Statement of Financial Affairs, Debtor states that he is current an LLC member or LLP member in Valley Home Rice Co. and Acres Verde Foundation. *Id*. at 44. Valley Home Rice Company is listed on Schedule A/B, but Acres Verde Foundation is not.

Notice of Removal

On May 14, 2023, Debtor/Debtor in Possession filed a Notice of Removal removing the pending post-judgment State Court Litigation *Hoffman v. Hoffman, and related Cross complaint, et al,* California Superior, for the County of Stanislaus, Case No. 2200623 to this court. In the removal filings Debtor/Debtor in Possession has provided a copy of the Second Amended Interlocutory Judgment entered in the State Court Action. Exhibit 71, docketing pending in adversary proceeding to be opened.

The Second Amended Interlocutory Judgment includes that it determines the percentage ownership interests in the 13330 Valley Home Road property (8 1/3% for Debtor/Debtor in Possession); a monetary surcharge of ($90,576.81), plus additional interest, for Debtor/Debtor in Possession's occupancy of the residential portion of the Property; against Debtor/Debtor in Possession on his cross complaint against Sharon, Gary, and the Brichettos; judgment in favor of Debtor/Debtor in Possession for the interference of contract claim; judgment for the Brichettos for partition of the Property, with such Property to be sold and the monies divided; Debtor/Debtor in Possession is entitled to a $142,122 credit if he leave the grain tanks on the Property or a $62,269 credit if he removes them; and Sharon, Gary, and the Brichettos are the prevailing parties and costs are awarded, in addition to being awarded attorney's fees to be paid by Debtor/Debtor in Possession. Additional relief is granted between the other parties to the State Court Action that does not directly include Debtor/Debtor in Possession.

Also included is the State Court's detailed thirty-three (33) page Ruling.

In the Notice of Removal Debtor/Debtor in Possession provides information concerning his removal of the post-judgment State Court Action, there remaining the enforcement of the partition of the Property, which includes (identified by paragraph number used in the Notice of Removal):

> 3. Sharon and Gary Hofmann, petitioners in the state court action and creditors in this matter, seek to enforce the final state court judgment by selling estate property while other creditors, one secured, one claiming to be secured, seek to be paid from the proceeds of the sale of estate property.
>
> 4. The claim of the creditor claiming to be secured, Debtor's former spouse, is based on an abstract of judgment for support that is incongruous with an earlier, separate, notarized agreement she entered into with Debtor regarding said claim.
>
> 5. If the matter is remanded back to state court, some creditors will be paid outside the framework of the Bankruptcy Code, thus allowing certain creditors, some with dubious claims, to obtain payment from estate assets to the detriment of other creditors. Removal of this action is, therefore, proper under Section 1442 of Title 28 of the United States Code because a claim in this civil action arises under the Bankruptcy Code.

Debtor/Debtor in Possession Status Report

On May 15, 2023, the Debtor/Debtor in Possession's Supplemental Status Report was filed. Dckt. 67. The Debtor/Debtor in Possession reports that Michael Hudson breached the purchase agreement for the sale of the residence ordered by the State Court judge pursuant to the State Court Judgment.

Then, after this case was filed, other parties moved in the State Court for an Amended Order for the Sale of the Residence.

Debtor/Debtor in Possession asserts that when the buyer for Michael Hudson's property, the sale of which was a condition of the sale of the Residence Property to Michael Hudson, he, as one of the sellers was not given notice thereon and deprived of his right to cancel the sale to Michael Hudson.

Debtor/Debtor in Possession also reports that his former spouse is wrongly asserting a $501,693.31 claim pursuant to a 1998 dissolution judgment, asserting that it is secured by a 2013 abstract of judgment. Debtor/Debtor in Possession asserts that the dollar amount is incorrect and that it is not secured (but does not state why he asserts that a 2013 abstract of judgment does not create a lien on real property that Debtor owns).

4. 23-90111-E-11 DB-1 **MICHAEL HOFMANN** **Brian Haddix** **CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY** **3-23-23 [16]**

GARY HOFMANN, SHARON HOFMANN
VS.

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 in Possession, Debtor/Debtor in Possession's Attorney, Chapter 11 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on March 23, 2022. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

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

The Motion for Relief from the Automatic Stay is xxxxxxxxxx

REVIEW OF MOTION

Sharon and Gary Hofmann ("Movants") seeks relief from the automatic stay with respect to Michael Erich Hofmann's ("Debtor/Debtor in Possession") 8.33% interest in residential real property located at 13330 Valley Home Road, Valley Home, California ("Property"). On the Petition, Debtor/Debtor in Possession lists his residence as 13330 Valley Home Rd, Oakdale, California. In the Motion, this property is identified as being in Valley Home, California. The Supplemental Brief clarifies the discrepancy by stating Valley Home is an unincorporated area in Stanislaus County. Supplemental Brief, Dckt. 47 fn. 3. County assessment records designate the address to be in Valley Home, not Oakdale. *Id.*

At the prior hearing on the Motion, the court allowed for supplemental briefing due to Movants' failure to provide evidence as well as the need of additional briefing for the court to determine the interplay between the Bankruptcy Code, final judgments of a State Court, and property rights under State Law. Civil Minutes, Dckt. 43. Movants have since authenticated their exhibits of state court records through the Declaration of Meghan Baker, Partner at Movants' Counsel's firm. Declaration, Dckt. 40.

Movants argue relief is needed to perform obligations under final state court orders in a partition action of the Property. The State Court Order requires Debtor/Debtor in Possession to sell their 8.33% interest in the Property, as well as requires Movants' to sell their combined 91.66% interests. Exhibit D, Dckt. 22.

Movants' Supplemental Brief, Dckt. 47, provides the court with additional factual grounds for relief, which are summarized as:

> (1) Debtor/Debtor in Possession's Interest in the Property - Debtor/Debtor in Possession has a 8.33% interest in the residential real property located at 1330 Valley Home Road, Valley Home, California.
>
> (2) State Court Litigation - There was state court litigation brought by Movants to determine parties' interests in the Property and request a judgment for rent that Debtor/Debtor in Possession refused to pay to Movants. The State Court issued an interlocutory judgment which confirmed Debtor/Debtor in Possession's 8.33% interest and found a partition by sale is equitable. Additionally, the State Court awarded judgment which brought the total principal amount Debtor/Debtor in Possession owes to Movants to $223,457.62.
>
> (3) State Court Appeal - Debtor/Debtor in Possession appealed the interlocutory judgment and the Fifth District Court of Appeal affirmed the State Court Judgment in most parts. [FN. 1.]

FN. 1. The court notes, the Fifth District Court of Appeal reversed only one part of the interlocutory judgment in which they reduced the amount of credit the new owners received for their improvements on the Property. *Hofmann v. Hofmann*, No. F079977, 2021 Cal. App. Unpub. LEXIS 4583, at *117 (July 15, 2021).

> (4) State Court Proceedings to Sell the Home - Debtor/Debtor in Possession refused to participate in a consensual sale of the Property. Debtor/Debtor in Possession made an all cash offer to purchase the home. However, the State Court found Debtor/Debtor in Possession had not shown proof of funds, and on February 28, 2023, approved the sale to a third party. Escrow was scheduled to close by March 31, 2023.
>
> (5) Debtor/Debtor in Possession's Refusal to Leave the Property - Movants sought assurances that Debtor/Debtor in Possession would vacate by March 21, 2023. On March 15, 2023, Debtor/Debtor in Possession gave notice they would not be vacating the Property prior to the close of escrow. On March 17, 2023, Movants notified

Debtor/Debtor in Possession they would seek an order for writ of possession to compel Debtor/Debtor in Possession to vacate the Property. The request was set for hearing on March 21, 2023. On March 20, 2023, Debtor/Debtor in Possession filed for bankruptcy.

(6) Legal Grounds for Relief - Movants argue they are entitled to relief based on the following legal grounds:

a. The State Court Judgment is final and binding on the bankruptcy court.

b. Debtor/Debtor in Possession's Creditor's interests are limited to Debtor/Debtor in Possession's 8.33% interest.

c. Movants are not adequately protected due to Debtor/Debtor in Possession's failure to maintain the Property.

d. *Tucson Estates* Factors weigh in favor of the court abstaining from deciding the underlying property right issues. *In re Tucson Estates, Inc.*, 912 F.2d 1162 (9th Cir. 1990).

Supplemental Brief; Dckt. 47.

The court notes, the *Tucson Estates* Factors include factors in which a court may abstain in favor of state court adjudication of an issue. These factors are summarized as follows:

(1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention,

(2) the extent to which state law issues predominate over bankruptcy issues,

(3) the difficulty or unsettled nature of the applicable law,

(4) the presence of a related proceeding commenced in state court or other nonbankruptcy court,

(5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334,

(6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case,

(7) the substance rather than form of an asserted "core" proceeding,

(8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court,

(9) the burden of [the bankruptcy court's] docket,

(10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties,

(11) the existence of a right to a jury trial, and

(12) the presence in the proceeding of nondebtor/debtor in possession parties.

Tucson Estates, 912 F.2d at 1167 (citing *In re Republic Reader's Serv., Inc.*, 81 Bankr. 422, 429 (Bankr. S.D. Tex. 1987)) [this court reformatting the forgoing by breaking out each of the twelve elements into separate subparagraphs for ease of review).

At this point, the state court proceeding as been removed to this court. The Parties will address with the court whether they desire to proceed in this court or any parties will seek to have the State Court Action remanded.

Movants argue they are entitled from relief from the stay for "cause" pursuant to 11 U.S.C. § 362(d)(1) on the grounds that a final state court ordered compelled the sale of the Property and that Debtor/Debtor in Possession's interest in the Property is not necessary for an effective reorganization. Supplemental Brief, Dckt. 47 at 5.

Debtor/Debtor in Possession's Response to Motion and Movant's Supplemental Brief

Debtor/Debtor in Possession filed an initial Opposition to the Motion and Declaration. Dckts. 37, 38. Debtor/Debtor in Possession states the enforcement of the judgment will prejudice the Debtor/Debtor in Possession in that:

1. Movants have locked Debtor/Debtor in Possession out of the sale process despite Debtor/Debtor in Possession offering to purchase the home for a competitive price. Opposition, Dckt. 37 at ¶ 1.

2. There are contingencies associated with the current sale that the current buyer has failed to meet. *Id.*

3. The Property is necessary for an effective reorganization because it is the proper location for their rice business. *Id.* ¶ 5.

4. Movants are adequately protected because Debtor/Debtor in Possession is maintaining the property, paying property taxes and insurance, and seeking to pay Movants in an amount more than the current sale. *Id.* ¶ 6.

At the prior hearing, Debtor/Debtor in Possession's counsel asserted that Movants were adequately protected by the value of the Property. Counsel for the Debtor/Debtor in Possession indicated that the Debtor/Debtor in Possession sought to retain the Property in which he has 8.33% interest that is now property of the Bankruptcy Estate. However, Movants are not "mere" creditors with secured claims who are owed a finite amount, but are co-owners of the Property.

Debtor/Debtor in Possession filed a Response to Movants' Supplemental Brief on April 27, 2023. Dckt. 58. Debtor/Debtor in Possession insists cause for relief does not exist, "especially because of the breach of the California Residential Purchase Agreement and the Contingency for Sale of Buyer's Property addendum while the automatic stay was in effect." Response, Dckt. 58 at 1:22-25.

Debtor/Debtor in Possession argues the sale of the Property was contingent on buyer Michael G. Hudson ("Buyer"), selling Buyers existing property. Debtor/Debtor in Possession states that the proposed purchaser of Buyer's home backed out of escrow, which caused Buyer to take their house off market.

After this bankruptcy case was filed, Buyer put their house back on market, and on April 7, 2023, an offer of Buyer's home was accepted. Debtor/Debtor in Possession states this was a "critical breach" of the Purchase Agreement because Buyer had a duty to notify Movants and Debtor/Debtor in Possession, collectively, "Sellers," of the cancellation of escrow. Debtor/Debtor in Possession claims not informing Debtor/Debtor in Possession of the breach deprived Debtor/Debtor in Possession of their right to cancel the sale of the Property.

Movants' Reply

Movants filed a Reply to Debtor/Debtor in Possession's Response on May 4, 2023. Dckt. 63. Movants argue that Buyer removed the contingency on March 15, 2023, and the contingency was solely the benefit of Buyer. As evidence to support that Buyer removed the contingency, Movants direct the court to Buyer's Declaration, in which Buyer states, "[o]n March 15, 2023, I removed the contingency from my offer to purchase the Property, as our own home was in escrow at that point." There is no evidence for how Buyer removed the contingency, and whether Buyer provided notice to Debtor/Debtor in Possession.

Movant provides the court with well settled California case law in that a buyer may waive a condition precedent solely for their benefit. As the Second District Court of Appeal has stated:

> Where all of the material factors of a real property transaction are present, and a seller would not be prejudiced by removal from the agreement of a condition inserted solely for the benefit of the buyer, it would be a gross injustice to the buyer to allow the seller to escape legal responsibility because the courts would not permit a waiver of the condition.

Reeder v. Longo, 131 Cal. App. 3d 291, 296-97 (1982).

DISCUSSION

Contingency Clause

The "Contingency for Sale of Buyer's Property" portion of the Purchase Agreement, Exhibit D, Dckt. 59 at 53, states Buyer's purchase of the Property was contingent upon Buyer selling their own property. The Contingency Agreement is summarized, in relevant part, below:

1. Buyer has 17 days after Acceptance with Sellers to enter into a contract for the sale of their property. Once accepting the contract for sale of their property, Buyer has 2 days, but not more than 17 days after Acceptance with Sellers, to deliver escrow evidence to Sellers.

2. Buyer will sign a listing agreement for Buyer's Property within 1 day after Acceptance.

3. Buyer has until no later than 3 days prior to the scheduled close of escrow of Sellers' Property to close escrow. Once Buyer's property closes, Buyer can no longer use the contingency to cancel the Agreement.

4. **Status of Sale of Buyer's Property**

   a. Buyer agrees to keep Sellers informed about the status of the transaction for the sale of Buyer's property.

   b. Within 2 days after Sellers' written request, but no earlier than the applicable time to remove contingencies in the contract for sale of Buyer's property, Buyer shall deliver to Sellers evidence of the removal of identified contingencies.

5. **Cancellation of Sale of Buyer's Property**

   a. If either party subject to the sale of Buyer's property gives the other a notice of cancellation of contract, Buyer will, **within 2 days**, deliver to Sellers a written notice of that cancellation.

6. **Removal of Contingencies**

   a. This contingency can only be removed in writing, even by Buyer, unless:

      i. Buyer provides verification of sufficient funds to close escrow without the sale of Buyer's Property.

7. **Sellers' Right to Cancel**

   a. If after first giving buyer a Notice to Perform, or written Notice to Remove Buyer Contingencies and Provide Proof of Funds, Buyer fails to perform certain actions.

   b. If Buyer fails to deliver evidence of removal of contingencies in the sale of *Buyer's* property.

   c. If Buyer gives notice to Sellers of a cancellation of contract for Buyer's Property.

Debtor/Debtor in Possession states, "while the automatic stay was *pending*, [Buyer] breached the terms of the [Contingency Agreement] an addendum to the [Purchase Agreement] informing the Seller's that a proposed purchaser backed out of the sale." Response to Supplemental Brief, Dckt. 58 at 3. Debtor/Debtor in Possession states that Buyer's breach "deprived the Bankruptcy Court of an important fact

concerning the status of the transaction concerning estate property while the automatic stay was pending." *Id.*

Buyer, however, states they waived the contingency requirements on March 15, 2023. Dckt. 49. Buyer, nor Movant, provides evidence of how this waiver was effectuated.

Had Buyer not waived the contingency, there could be an argument that Buyer breached the Contingency Agreement by not providing notice of cancellation of the contract between Buyer and the purchaser of their home. Then, Sellers would have had the right to cancel the Purchase Agreement, although there is no such evidence that this would have occurred. There would be a question as to whether this breach were material, as Buyer re-listed their property and within a few weeks had accepted another offer.

However, the Motion is to grant relief from the automatic stay. The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief as part of a motion for relief from the automatic stay in a Contested Matter (Federal Rule of Bankruptcy Procedure 9014).

Relief from Stay

The court may grant relief from stay for cause when it is necessary to allow litigation in a nonbankruptcy court. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][a] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). The moving party bears the burden of establishing a prima facie case that relief from the automatic stay is warranted, however. *LaPierre v. Advanced Med. Spa Inc. (In re Advanced Med. Spa Inc.)*, No. EC-16-1087, 2016 Bankr. LEXIS 2205, at *8–9 (B.A.P. 9th Cir. May 23, 2016). To determine "whether cause exists to allow litigation to proceed in another forum, 'the bankruptcy court must balance the potential hardship that will be incurred by the party seeking relief if the stay is not lifted against the potential prejudice to the Debtor/Debtor in Possession and the bankruptcy estate.'" *Id.* at *9 (quoting *Green v. Brotman Med. Ctr., Inc. (In re Brotman Med. Ctr., Inc.)*, No. CC-08-1056-DKMo, 2008 Bankr. LEXIS 4692, at *6 (B.A.P. 9th Cir. Aug. 15, 2008)) (citing *In re Aleris Int'l, Inc.*, 456 B.R. 35, 47 (Bankr. D. Del. 2011)). The basis for such relief under 11 U.S.C. § 362(d)(1) when there is pending litigation in another forum is predicated on factors of judicial economy, including whether the suit involves multiple parties or is ready for trial. *See Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162 (9th Cir. 1990); *Packerland Packing Co. v. Griffith Brokerage Co. (In re Kemble)*, 776 F.2d 802 (9th Cir. 1985); *Santa Clara Cty. Fair Ass'n v. Sanders (In re Santa Clara Cty. Fair Ass'n)*, 180 B.R. 564 (B.A.P. 9th Cir. 1995); *Truebro, Inc. v. Plumberex Specialty Prods., Inc. (In re Plumberex Specialty Prods., Inc.)*, 311 B.R. 551 (Bankr. C.D. Cal. 2004).

At the heart of this Motion is the Debtor/Debtor in Possession having a fractional interest in the Property to be sold. Debtor/Debtor in Possession's co-tenants have prosecuted a partition action in the State Court. The result of that is the order for the residence at 13330 Valley Home Rd, Valley Home, California ("Property") to be sold and the sales proceeds to be "partitioned," it not being practical to give Debtor/Debtor in Possession 8.33% of the physical space in the residence. Debtor/Debtor in Possession does not dispute the validity of the state court's order. Response, Dckt. 58. Additionally, Debtor/Debtor in Possession's Schedules concedes that they only own a fractional interest of 8.33% interest, as described in the Second Amended Interlocutory Judgment. Schedule A/B, Dckt. 32; Exhibit B, Dckt. 20.

Movant contends they are not adequately protected in that the Property is "in unlivable conditions as a result of Debtor/Debtor in Possession's possession . . . ." Supplemental Brief, Dckt. 47 at 15. Movant

provides evidence of deterioration in the Property, including roof, mold, and dry rot issues. Declaration of Real Estate Broker, Dckt. 46. Additionally, Debtor/Debtor in Possession has lived in the Property since 1982 and has never paid rent more than $500 per month, and stopped paying rent altogether in 2015. Supplemental Brief, Dckt. 47 at 7.

The issues appear to have been litigated already, and a partition order has already been issued by the state court. Second Amended Interlocutory Judgment, Exhibit B, Dckt. 20. Additionally, Movant's have already been granted an *Ex Parte* Application to approve the sale of the Property to a third party buyer, Michael Hudson. Amended Order Granting *Ex Parte* Application, Exhibit D, Dckt. 22.

Movant is only seeking relief to complete the sale of the Property and otherwise comply with state court orders. Additionally, after the sale of the Property, the proceeds will still remain property of the estate.

As the court has noted in the prior civil minutes, there are issues concerning asserted and apparent property rights bearing on this Motion. The court does not determine property rights and interests in a motion for relief from the stay (Fed. R. Bankr. P. 7001 requires an adversary proceeding, unless the parties otherwise agree). The determination of the interplay between the Bankruptcy Code, the final judgments of State Court, and the property rights under State Law would be determined would be subject to a separate proceeding.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court.

The Motion states with particularity grounds upon which the request for waiver of the fourteen day stay is based. These include the delays in sale, Debtor/Debtor in Possession's failure to comply with the orders of the State Court, and a sale of the Property pending.

STATUTORY REQUIREMENT FOR ORDER APPROVING SALE OF PROPERTY OF THE BANKRUPTCY ESTATE

At the hearing the court addressed with the Parties a basic federal law issue, since the Debtor's 8.3% interest in the property is property of the Bankruptcy Estate, does any sale of it need to be approved pursuant to 11 U.S.C. § 363(b)? While the court may grant relief from the stay, must the court also either grant a motion to sell the property, and establish the sale to be through the state court, or abstain from ruling on the sale and authorize the State Court judge to do so as part of the exercise the original, but not exclusive, grant of jurisdiction of matters in a case under Title 11. 28 U.S.C. § 1334(b).

In light of this Statutory question, the court does not grant the Motion. At the request of Movant, the court further continues the hearing.

JUNE 29, 2023 HEARING

At the May 23, 2023 hearing on the Motion, the court raised a jurisdictional concern regarding allowing the partition sale to proceed in state court:

> When there is a pre-bankruptcy state court action in which there is an order for the sale of property and that property, or fractional interest in that property, becomes property of the bankruptcy estate, does modification of the automatic stay allow the state court proceedings to proceed and the property subsequently ordered to be sold? Or, must the sale need to be approved pursuant to 11 U.S.C. § 363(b)?

No briefing has been filed by the Parties to address the federal law issue raised by the court. Both parties were made aware of the court's concern, however, tasked the court with finding the applicable authority to answer the legal question.

The court has addressed that, in many situations, relief of stay is necessary to allow litigation in a nonbankruptcy court, predicating on factors of judicial economy. Here, however, the issues have been litigated in state court and a partition sale has been ordered. Therefore, the only outstanding issue that remains with the state court action is to complete the partition sale of the Property.

The Fourth Circuit Court of Appeals has addressed when cause exists to grant the automatic stay to allow the completion of equitable distributions proceedings. *In re Robbins*, 964 F.2d 342 (4th Cir. 1992). In *Robbins*, plaintiff-spouse and defendant-debtor were involved in state court equitable distribution proceedings to determine how valuable stock should be divided during their marital dissolution. *Id.* at 343. After defendant-debtor was ordered by the "special master" to pay plaintiff-spouse $2 million as their share of stock, but before the trial court entered the master's judgment, defendant-debtor filed for Chapter 11 bankruptcy. *Id.* at 344. This stayed the equitable distribution proceedings, including the entering of judgment and payment to plaintiff-spouse. *Id.*

The bankruptcy court ordered the stay lifted because the proceedings involved interpretation and application of Florida law, and would be concluded best in Florida courts. *Id.* The bankruptcy court found that the bankruptcy court could protect the bankruptcy estate "by retaining jurisdiction and determining the rights of creditors to any of its property once the Florida distribution became final." *Id.* at 344 (emphasis added). On appeal, the Fourth Circuit provided a list of factors to consider when determining whether there was cause to lift the stay:

> (1) whether the issues in the **pending litigation involve only state law**, so the expertise of the **bankruptcy court is unnecessary**;
>
> (2) whether modifying the stay will **promote judicial economy** and whether there would be greater interference with the bankruptcy case if the stay were not lifted because matters would have to be litigated in bankruptcy court; and
>
> (3) **whether the estate can be protected properly** by a requirement that creditors seek enforcement of any judgment through the bankruptcy court.

Id. at 345 (emphasis added). The court found all three factors weighed in favor of lifting the stay, determining the state court would determine the amount of the parties' claims to the property in question, while the bankruptcy court would retain jurisdiction to determine the allowance of claims against the estate.

The Ninth Circuit Court of Appeals has acknowledged *Robbins'* factors set forth by the Fourth Circuit, stating judicial economy and efficient administration should be considered by the bankruptcy court. *Benedor Corp. v. Conejo Enters.* (*In re Conejo Enters*.), 96 F.3d 346, 353 (9th Cir. 1996) (citing *Robbins*, 964 F.2d at 353). Additionally, the Ninth Circuit Bankruptcy Appellate Panel has recognized *Robbins*, stating, "[t]he automatic stay is often modified to enable the state court to determine . . . aspects of property division . . . provided that the estate's interests are adequately protected." *Sticka v. Rivera* (*In re Rivera*), No. OR-04-1596-MoRK, 2005 Bankr. LEXIS 3423, at *26 (B.A.P. 9th Cir. Sep. 14, 2005) (citing *Robbins*, 964 F.2d at 344).

Regarding state court partition actions, Maryland Bankruptcy Court used *Robbins* to resolve a partition dispute like the case at hand. *Flaherty v. Nims* (*In re Nims*), No. 11-15968-TJC, 2011 Bankr. LEXIS 1359 (Bankr. D. Md. Apr. 13, 2011).

In *Nims*, a partition action was filed in state court and the state court ordered the real property to be sold. *Nims*, 2011 Bankr. LEXIS 1359 at *3. The state court appointed a trustee, the property received an offer on the property, and the property was scheduled to close. Prior to closing, the debtor refused to vacate the property or make it available for inspection. *Id.* at *5. In anticipation of sale, the debtor still refused to vacate the property, resulting in the trustee filing a motion for possession. The debtor then filed their bankruptcy case, staying the partition action. *Id.* at *6.

The bankruptcy court in *Nims* applied the *Robbins* factors to determine the stay should be lifted to allow the partition action to be resolved in state court. *Id.* at *11. The bankruptcy court found that the partition action only involved state law, and the expertise of the bankruptcy court was not necessary. *Id.* Additionally, the partition action was pending for over eighteen months and was very close to resolution. *Id.* at *12. The state court appointed the trustee to sell the property, ratified the contract, and entered a judgment of possession. *Id.* Additionally, a sale was already scheduled to close. *Id.* As for the bankruptcy estate, the bankruptcy court concluded the estate could be protected by "requiring the Trustee to deliver to the Chapter 13 trustee any net proceeds due to the Debtor as a result of the sale . . . . Those net proceeds will be available for distribution to the Debtor's creditors in this bankruptcy case." *Id.*

This court agrees with the *Robbins* factors as applied to *Nims* in this case to allow a partition sale to proceed and conclude in state court. Here, as in *Nims*, the issues regarding the partition sale only involve matters of state real property law. Apart from how the estate's interest in Debtor's 8.33% ownership of the Property will be distributed, everything else can be decided in state court. The only outstanding issue that remains in the partition action is completing the sale of the Property. Judicial economy is promoted by allowing the sale to complete.

Additionally, the bankruptcy estate can be properly protected by allowing the sale to complete in state court. This court can protect the rights of creditors and the estate by retaining jurisdiction after the sale has been completed and the proceeds have been distributed. As in *Nims*, this bankruptcy court can require any proceeds generated from Debtor/Debtor in Possession's interest in the Property to be available for distribution to Debtor/Debtor in Possession's creditors.

Weighing the factors set forth in *Robbins*, the court finds the stay can be lifted to allow the partition sale to complete. The estate's interest in the proceeds of the sale will be protected by requiring Debtor/Debtor in Possession to deposit the proceeds into a segregated federally insured bank account from which no monies will be disbursed without further order of the court (i.e., a blocked account).

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 Sharon and Gary Hofmann ("Movants") having been presented to the court, the court having identified the statutory question of whether a sale of property of the bankruptcy estate (here, the Debtor's 8.3% interest) needed to be approved as required by 11 U.S.C. § 363(b) rather than merely granting relief from the automatic stay for a state court action to proceed, the court announcing it would not grant the Motion based on what was now before the court, Movant requesting that the court continue the hearing rather than denying without prejudice for the sake of judicial and party economy, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

~~**IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) are modified as applicable to Michael Erich Hofmann ("Debtor/Debtor in Possession") to allow Movants, its agents, representatives and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors to proceed with enforcing state court orders in *In Re* Estate of Erich Hofmann Testamentary Trust, Case No. 2200623 and proceed with a partition sale of the real property commonly known as 13330 Valley Home Road, Valley Home, California ("Property").~~

~~**IT IS FURTHER ORDERED** that any proceeds generated from Debtor/Debtor in Possession's interest in the Property shall be disbursed to the Michael Erich Hofmann, the Subchapter V Debtor/Debtor in Possession, as the fiduciary of the Bankruptcy Estate, with such monies to be deposited into a segregated federally insured bank account from which no monies will be disbursed without further order of the court (i.e., a blocked account).~~

~~Upon receipt of the 8.33% of the sales proceeds and deposit in the segregated account, the Debtor/Debtor in Possession in Possession shall file with the court documentation of said deposit and the segregated account, and serve such documentation on the Subchapter V Trustee and the U.S. Trustee.~~

~~**IT IS FURTHER ORDERED** that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived for cause.~~

~~No other or additional relief is granted.~~

5. 23-90111-E-11 DL-1 | **MICHAEL HOFMANN** **Brian Haddix** | **MOTION FOR REMOVAL OF DEBTOR IN POSSESSION FROM POSSESSION OF CERTAIN REAL PROPERTY OF THE ESTATE** **6-15-23 [98]**

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 Not Provided. The Proof of Service does not indicate which parties have been served. Certificate of Service, Dckt. 103 ¶ 5. Movant's Certificate of Service states the Motion has been served on registered users and parties in interest, and that a copy of the clerk's matrix has been attached. The clerk's matrix has not been attached. Therefore, the court cannot ascertain whether all parties in interest have been served.

At the hearing, XXXXXXXXXX

The Motion and supporting pleadings were served on ~~Debtor/Debtor in Possession, Debtor/Debtor in Possession's Attorney, Subchapter V Trustee, [Official Committee of Creditors Holding General Unsecured Claims / creditors holding the twenty largest unsecured claims~~], creditors, ~~parties requesting special notice~~, and Office of the United States Trustee on June 16, 2023. By the court's calculation, 13 days' notice was provided. 14 days' notice is required.

Under the facts and circumstances of this Motion, the court shortens the time to the 13 days given.

The Motion for Removal of Debtor In Possession from Possession of Certain Real Property of the Estate was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor/Debtor in Possession, creditors, the Chapter Subchapter V 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 for Removal of Debtor/Debtor In Possession from Possession of Certain Real Property of the Estate is xxxxxxxxxx

Walter R. Dahl, the Subchapter V Trustee ("Trustee") requests an order removing Debtor/Debtor in Possession, Michael Erich Hofmann ("Debtor/Debtor in Possession") from possession of real property commonly known as 13330 Valley Home Rd, Oakdale, California ("Property"). Debtor has an undivided eight and one-third interest in the Property that is now property of the Bankruptcy Estate. Trustee states Debtor/Debtor in Possession desires the opportunity to purchase the entirety of the Property, however, Debtor/Debtor in Possession's schedules do not reflect unencumbered assets sufficient to submit a viable bid. If Debtor/Debtor in Possession puts in a bid, Debtor/Debtor in Possession may need to seek court approval for financing.

Trustee brings this Motion pursuant to 11 U.S.C. §§ 1105(a), 105(a). If the court removes the Debtor/Debtor in Possession in a Subchapter V case, then the Subchapter V trustee's powers expand. The applicable statutory provisions are:

> § 1185. Removal of debtor in possession
>
> (a) In general. On request of a party in interest, and after notice and a hearing, the court shall order that the debtor shall not be a debtor in possession for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor, either before or after the date of commencement of the case, or for failure to perform the obligations of the debtor under a plan confirmed under this subchapter.
>
> (b) Reinstatement. On request of a party in interest, and after notice and a hearing, the court may reinstate the debtor in possession.

The duties of the Subchapter V trustee are specified in 11 U.S.C. § 1183, with there being an express expansion of those powers when a Subchapter V Debtor/Debtor in Possession is removed.

> § 1183. Trustee
>
> (a) In general. If the United States trustee has appointed an individual under section 586(b) of title 28 to serve as standing trustee in cases under this subchapter, and if such individual qualifies as a trustee under section 322 of this title, then that individual shall serve as trustee in any case under this subchapter. Otherwise, the United States trustee shall appoint one disinterested person to serve as trustee in the case or the United States trustee may serve as trustee in the case, as necessary.
>
> (b) Duties. The trustee shall—
>
> (1) perform the duties specified in paragraphs (2), (5), (6), (7), and (9) of section 704(a) of this title;
>
> (2) perform the duties specified in paragraphs (3), (4), and (7) of section 1106(a) of this title, if the court, for cause and on request of a party in interest, the trustee, or the United States trustee, so orders;

(3) appear and be heard at the status conference under section 1188 of this title and any hearing that concerns—

(A) the value of property subject to a lien;

(B) confirmation of a plan filed under this subchapter;

(C) modification of the plan after confirmation; or

(D) the sale of property of the estate;

(4) ensure that the debtor commences making timely payments required by a plan confirmed under this subchapter;

(5) **if the debtor ceases to be a debtor in possession**, (A) perform the duties specified in section 704(a)(8) [file business tax returns and reports] and paragraphs (1) [FN.1], (2) [filed the list, schedule, and statement required under 11 U.S.C. § 521(a)(1)], and (6) [furnish information for filing specified tax return] of section 1106(a) of this title , including operating the business of the debtor;

(6) if there is a claim for a domestic support obligation with respect to the debtor, perform the duties specified in section 704(c) of this title; and

(7) facilitate the development of a consensual plan of reorganization.

FN.1. 11 U.S.C. § 1106(a)(1) incorporates by reference the duties specified in 11 U.S.C. § 704(a)(2), (5), (7), (8), (9), (10), (11), and (12), which are:

(2) be accountable for all property received;

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;

(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires;

(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee;

(10) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (c);

(11) if, at the time of the commencement of the case, the debtor (or any entity designated by the debtor) served as the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan, continue to perform the obligations required of the administrator; and

(12) use all reasonable and best efforts to transfer patients from a health care business that is in the process of being closed to an appropriate health care business . . . .

The court notes, the provisions of 11 U.S.C. § 1185 do not explicitly allow a Debtor/Debtor in Possession to be removed with respect to one asset. From the plain language of § 1185(a), if a Debtor/Debtor in Possession is removed, they appear to be removed from possession of all assets.

The grounds for removal of a Subchapter V debtor/debtor in possession are essentially the same as the grounds for removing a Chapter 12 debtor, and closely align with the grounds for removing a Chapter 11 debtor. 8 Collier on Bankruptcy P 1185.01 (16th 2023). Upon review of the applicable provisions in a Chapter 12 and Chapter 11 case, there do not appear to be any provisions that allow a debtor in possession to be removed only with respect to certain property. 11 U.S.C. §§ 1204, 1104. Trustee has not provided the court with any legal authority or case law interpreting the applicable removal statutes as allowing any debtor in possession in any applicable code to be removed as to only a portion of the assets.

However, it appears that the court and parties in interest, including the Debtor/Debtor in Possession, are presented with a unique situation. The Bankruptcy Estate's interest in the Property, along with the co-owners holding more than 91% of the interests in the Property, must be sold in a commercially reasonable manner. In a bankruptcy case, that will commonly be done by the bankruptcy trustee or in a Chapter 11 or 12 case the debtor in possession or debtor/debtor in possession in the Subchapter V case. The trustee, and the debtor in possession, and debtor/debtor in possession exercising the powers of a trustee over property of the bankruptcy estate, are serving in a fiduciary capacity to the Bankruptcy Estate and not as an individual.

Normally, this presents little problem for a debtor in possession or debtor/debtor in possession for the marketing and sale of property of the bankruptcy estate because they are marketing it for sale to third-parties. However, in this case the Debtor/Debtor in Possession does not want to be the independent fiduciary marketing and selling the property to a third-party for the highest commercially reasonable value. Rather, the Debtor/Debtor in Possession wants to be the successful purchaser of the Property. As a potential buyer of the Property, the Debtor/Debtor in Possession desires to reduce the sales price and purchase for as little as possible.

This present a conflict of interest, not only with the Debtor/Debtor in Possession negotiating a purchase price with himself, but in actively marketing the Property to generate the most competitive bidding to generate the highest sales price possible.

Thus, the Debtor/Debtor in Possession may have created a legal incapacity to be the fiduciary of the Bankruptcy Estate for the marketing, negotiating, and consummating a commercially reasonable sale of the Property.

The court appreciates Trustee's desire to not assume all duties that are prescribed under 11 U.S.C. § 1183, especially given Trustee is only wishing to sell the Property. However, from the plain language of 11 U.S.C. § 1185, and absent any authority showing the contrary, it does not appear that Trustee can limit Debtor/Debtor in Possession's removal. The court does not agree that 11 U.S.C. § 105(a) allows the court to provide this limitation.

It appears Trustee's option would be to either allow Debtor/Debtor in Possession to sell the Property, or, move to remove Debtor/Debtor in Possession, assuming all duties in § 1183, and later reinstate Debtor/Debtor in Possession under § 1185(b) after completion of the sale.

Or, it may be possible for the Bankruptcy Estate to employ a professional to serve as the person with the fiduciary duty to the Bankruptcy Estate for the hiring the professionals for the marketing and sale of the Property and presenting the motion for the court to approve the proposed sale, at which hearing all other persons may present overbids in open court.

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 Removal of Debtor In Possession from Possession of Certain Real Property of the Estate filed by the Subchapter V Trustee Michael Erich Hofmann ("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 Motion for Removal of Debtor In Possession from Possession of Certain Real Property of the Estate is xxxxxxxxx

6. **23-21822-E-12** **RUSSELL LESTER** **MOTION TO DISMISS CASE AND/OR**
GB-4 **Brian Haddix** **MOTION FOR SANCTIONS**
6-15-23 [60]

6 thru 8

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)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession's Attorney, Trustee, creditors, and Office of the United States Trustee on June 16, 2023 By the court's calculation, 13 days' notice was provided. 14 days' notice is required. The court set the hearing for June 29, 2023. Dckt. 45.

The Motion to Dismiss Case was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). 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 relief requested in the Motion to Dismiss for sanctions is denied without prejudice.

The Motion to Dismiss is xxxxxxx .

The Motion to Dismiss the Chapter 12 bankruptcy case of Russell Lester ("Debtor in Possession"), for Contempt of Court, and for Compensatory Sanctions has been filed by Creditor First Northern Bank of Dixon ("Movant").

DOCUMENT FILING REQUIREMENTS
AND JOINDER OF MULTIPLE CLAIMS FOR RELIEF IN ONE MOTION

The present Motion filed by Movant, by there very experienced attorneys in this District, requests that the court first dismiss this bankruptcy case and then also impose sanctions. The Motion is ten pages in length, including extensive citation of authorities and legal arguments. In requesting sanctions, Movant

provides the court with the inherent power of the court as the basis for sanctions, as well as 11 U.S.C. § 105(a) for the violation of an order of the court.

Federal Rules of Bankruptcy Procedure 9011 requires that a motion for sanctions shall be made separately from other motions or requests.

> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.
>
> (1) How initiated.
>
> (A) By motion. A **motion for sanctions under this rule** shall be made **separately from other motions or requests** and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. **The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion** (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.
>
> (B) On court's initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

Fed. R. Bankr. P. 9011(c)(1)(A) [emphasis added]. The conduct constituting grounds for the Rule 9011 sanctions is stated in Federal Rule of Bankruptcy Procedure 9011(b) as (emphasis added):

> (b) Representations to the court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances[,]—
>
> (1) **it is not being presented for any improper purpose**, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other **legal contentions therein are warranted by existing law** or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

The court's inherent powers to issue sanctions is not limited by Federal Rule of Civil Procedure 11, for which Federal Rule of Bankruptcy Procedure 9011 is its counterpart, with the Supreme Court stating in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50-51 (1991), cited by Movant :

> There is, therefore, nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct. This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules. A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees, *see Roadway Express, supra*, at 767. Furthermore, **when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power**. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.
>
>]Like the Court of Appeals, we find no abuse of discretion in resorting to the inherent power in the circumstances of this case. It is true that the District Court could have employed Rule 11 to sanction Chambers for filing "false and frivolous pleadings," 124 F.R.D. at 138, and that some of the other conduct might have been reached through other Rules. **Much of the bad-faith conduct by Chambers, however, was beyond the reach of the Rules; his entire course of conduct throughout the lawsuit evidenced bad faith and an attempt to perpetrate a fraud on the court, and the conduct sanctionable under the Rules was intertwined within conduct that only the inherent power could address**. In circumstances such as these in which all of a litigant's conduct is deemed sanctionable, requiring a court first to apply Rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the Rules themselves. See, e. g., Advisory Committee's Notes on 1983 Amendment to Rule 11, 28 U. S. C. App., pp. 575-576.

Chambers v. NASCO, Inc., 501 U.S. 32, 50-51 (1991) [emphasis added]. The Motion makes no assertion that the alleged sanctionable conduct is not within the scope of Federal Rule of Bankruptcy Procedure 9011.

Applicable Local Rules

The Local Bankruptcy Rules in this District, which are well known to experienced bankruptcy counsel, impose specific pleading requirements which are consistent with the Federal Rules of Bankruptcy Procedure.

Local Bankruptcy Rule 9014-1(d)(5)(A) states that "[e]very application, motion, contested matter or other request for an order, shall be filed separately from any other request, except (1) that relief in the alternative based on the same statute or rule may be filed in a single motion; and (2) as otherwise provided by these rules." For the Local Rule 9014-1, the types of relief which may be combined in one motion (unless otherwise authorized by the court) are stated to be:

> B) Notwithstanding the foregoing, the following requests for relief may be joined in a single motion, Fed. R. Civ. P. 18, incorporated by Fed. R. Bankr. P. 7018, 9014(c):
>
> > (i) relief in the alternative based on the same statute or rule;
> >
> > (ii) authorization for sale of real property and allowance of fees and expenses for a professional authorized by prior order to be employed for the sale of such property, 11 U.S.C. §§ 327, 328, 330, 363, Fed. R. Bankr. P. 6004;
> >
> > (iii) authorization to employ a professional, i.e., auctioneer, for sale of estate property at public auction, and allowance of fees and expenses for such professional, 11 U.S.C. §§ 327, 328, 330, 363, Fed. R. Bankr. P. 6004-6005;
> >
> > (iv) motion for stay relief and/or abandonment of property of the estate, 11 U.S.C. §§ 362, 554, Fed. R. Bankr. P. 4001, 6007;
> >
> > (v) approval of compromise and compensation of special counsel previously authorized to be employed relating to the underlying compromise, Fed. R. Bankr. P. 9019; 11 U.S.C. §§ 327, 328, 330; and
> >
> > (vi) as otherwise expressly provided by these Rules.

L.B.R. 9014-1(f)(5)(B). Combining a request for sanctions with a request for relief form the automatic stay are not included in the forgoing.

The Local Bankruptcy Rules also require that the motion, notice, points and authorities, documentary evidence, exhibits, and proof of service are to be filed as separate documents. LBR. 9004-2(c)(1), 9014-1(d)(4). There is an exception to having to file a separate points and authorities, and a motion and points and authorities may be combined into one pleading so long as that single pleading does not exceed six (6) pages in length. LBR 9014-1(d)(4). Here the Mothorities (combined motion and points and authorities) is ten (10) pages in length.

With respect to imposition of sanctions, the Local Bankruptcy Rules Provide that failure to comply with the Local Bankruptcy Rules may be grounds for imposing sanctions on the violating party. *See*, LBR 1001-1(g), 9004-1(a), 9014(f),

Movant has combined two different types of relief in the one Mothorities. The request for additional relief of sanctions is denied without prejudice.

DISCUSSION

Movant filed this Motion seeking dismissal of the Chapter 12 case pursuant to 11 U.S.C. §1208(c).

The Motion states the following with particularity (FED. R. BANKR. P. 9013):

1. The case was filed on June 2, 2023 ("Chapter 12 Case").

2. Debtor in Possession has a pending Chapter 11 case that was filed on August 27, 2020 ("Chapter 11 Case"). *See* Bankr. E.D. Cal. No. 20-24123.

3. The Chapter 11 Case has a confirmed Plan that continues to govern the reorganization of debts between Debtor in Possession and his creditors, including Movant.

To support this, Movant provides in the Motion the following cases:

I. *In re Oakhurst Lodge, Inc.*, 582 B.R. 784 (Bankr. E.D. Cal. 2018) ("Confirmation of a chapter 11 plan binds the debtor, creditors, and equity security holders. . . . Moreover, the confirmation order has res judicata effect on issues that were raised in conjunction with plan confirmation or could have been raised at that time.");

II. *Trulis v. Barton*, 107 F.3d 685, 691 (9th Cir. 1995) ("Once a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to res judicata effect.");

III. *Caviata Attached Homes*, LLC v. U.S. Bank, N.A. (*In re Caviata Attached Homes, LLC*), 481 B.R. 34, 46 (B.A.P. 9th Cir. 2012) ("Under § 1141(a), the terms of a confirmed plan are binding on all parties.");

IV. *Hillis Motors v. Haw. Auto. Dealers' Ass'n* (*In re Hillis Motors*), 997 F.2d 581, 588 (9th Cir. 1993);

V. *Rosenstein & Hitzeman, AAPLC v. Eliminator Custom Boats, Inc.* (*In re Eliminator Custom Boats, Inc.*), Nos. CC-19-1003-KuFL, 2:14-bk-19226-DS, 2019 Bankr. LEXIS 2998 (B.A.P. 9th Cir. Sep. 23, 2019); In re A. Hirsch Realty, LLC, 583 B.R. 583, 603-04 (Bankr. D. Mass. 2018) ("A bankruptcy court's order confirming a reorganization plan is a final judgment, which binds the

debtor, any creditor, and equity security holder to the terms and effect of a confirmed plan. . . . the agreement and order of confirmation are binding in a subsequent bankruptcy case . . . .”); and

VI. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784-85 (9th Cir. 2001) (“In the bankruptcy context, a party is judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements.”).

7. Debtor in Possession is attempting to reorganize the same assets and claims that is currently being reorganized under the Chapter 11 Plan.

The court notes, Debtor in Possession has not yet filed their schedules or proposed a plan. It is not clear which assets and claims Debtor in Possession is attempting to reorganize.

8. The Chapter 12 Case was filed to hide their financial activities from the state court and the receiver, who is investigating the misappropriation of cash that should have been paid to Movant under Debtor in Possession’s Chapter 11 Case.

9. Dismissal is required pursuant to 11 U.S.C. § 1208(c)(9) because *res judicata* and judicial estoppel makes Debtor in Possession’s Chapter 11 Plan controlling in this case. Therefore, Debtor in Possession has no likelihood of any reorganization in this case.

10. Dismissal is required because the case was filed in bad faith and for an improper purpose, violating court orders and unfairly manipulating bankruptcy laws. By filing the Chapter 12 Case, Debtor in Possession is modifying the Confirmed Chapter 11 Plan without notice and hearing.

DISCUSSION

The Supreme Court has addressed whether multiple filings of bankruptcy cases are *per se* invalid. In *Johnson v. Home State Bank*, 501 U.S. 78 (1991), the Court addressed a situation where the debtor first filed a Chapter 7 case, obtained the benefits of that case as it applied to creditors, and then filed a Chapter 13 case to modify the rights and interests of creditors that remained after the Chapter 7 case. The court found that Congress has expressly prohibited various forms of serial filings under the Code provisions of 11 U.S.C. § § 109(g), 727(a)(8), and 727(a)(9). *Id.* at 87. The Court found that the absence of a provision prohibiting serial filings of Chapter 7 and 13 petitions, “combined with the evident care with which Congress fashioned these express prohibitions,” Congress did not intend to preclude a Chapter 13 reorganization to a debtor who has previously filed for Chapter 7 relief. *Id.*

The Fifth Circuit has applied the Supreme Court’s reasoning to subsequent Chapter 11 filings. *In re Elmwood Dev. Co.*, 964 F.2d 508 (5th Cir. 1992). In *Elmwood*, the Fifth Circuit found, “the mere fact that a debtor has previously petitioned for bankruptcy relief does not render a subsequent Chapter 11 petition ‘per se’ invalid.” *Id.* at 511. Rather, *Elmwood* states that the good faith inquiry test should focus on whether

the second petition was filed to contradict the first petition's proceedings. *Id.* Unanticipated changed circumstances may justify a valid successive request for Chapter 11 relief and require a second plan to accomplish the goals of bankruptcy relief. *Id.* at 511-12. Thus, merely there being a prior bankruptcy case with a confirmed Chapter 11 plan does not result in the forfeiture of a right to file a subsequent Chapter 11 case in the future.

The Ninth Circuit Bankruptcy Appellate Panel ("B.A.P.") has also found that a second filing and plan may be considered if unforeseeable or unanticipated changes in circumstances have affected the debtor's ability to perform under its confirmed plan. *Caviata Attached Homes, LLC v. U.S. Bank, N.A. (In re Caviata Attached Homes, LLC*), 481 B.R. 34, 47 (B.A.P. 9th Cir. 2012). The Ninth Circuit B.A.P. provided several examples of these circumstances, including lost crops due to hail, cattle and pasture lost due to fire, and more. *Id.*

There is no *per se* prohibition of a good faith Chapter 11 filing of a subsequent Chapter 11 case merely because there is a prior case with a confirmed Chapter 11 plan in the Bankruptcy Code. *In re Jartran, Inc.*, 886 F.2d 859, 869 (7th Cir. 1989). [Fn.1.]

Courts have allowed a debtor to file a second Chapter 11 reorganization case after failing in the first Chapter 11 reorganization plan if the debtor is acting in good faith. *In re Adams*, 218 B.R. 597, 601 (Bankr. D. Kan. 1998) (citing *CFC 78 Partnership B v. Casa Loma Assocs.* (*In re Casa Loma Assocs.*), 122 B.R. 814, 818 (Bankr. N.D. Ga. 1991); *Integon Life Ins. Corp. v. Mableton-Booper Assocs. (In the Matter of Mableton-Booper Assocs.*), 127 B.R. 941, 943 (Bankr. N.D. Ga. 1991); *Security Pacific Credit Corp. v. Savannah, Ltd.* (*In the Matter of Savannah, Ltd.*), 162 B.R. 912, 915 (Bankr. S.D. Ga. 1993); *In re Woodson*, 213 B.R. 404, 405 (Bankr. M.D. Fla. 1997); *In re Henke*, 127 B.R. 255 (Bankr. D. Mont. 1991)). Successive filings of bankruptcy petitions do not constitute bad faith per se, and to determine whether there is good faith, the court must apply the totality of circumstances test. *In re Metz*, 820 F.2d 1495, 1498 (9th Cir. 1987).

FN. 1. The court recognizes that this second case is filed under Chapter 12 of the Bankruptcy Code. However, the legal logic as discussing in Chapter 11 cases also applies to a subsequent reorganization under Chapter 12.

As the Bankruptcy Court in the Southern District noted in *Lincoln Nat'l Life Ins. Co. v. Bouy, Hall & Howard & Assocs.* (*in re Bouy, Hall & Howard & Assocs.*), 208 B.R. 737, 743 (Bankr. S.D. Ga. 1995):

> A debtor should not be permitted to routinely file a successive Chapter 11 reorganization where it has defaulted on a confirmed, substantially consummated plan of reorganization, because such an effort would, in effect, constitute an impermissible attempt to modify a substantially consummated plan. However, when the facts if the second case are significantly distinguishable from the first so as not to offend traditional notions of res judicata, a permissible exception exists.

However, foreseeable risks of doing business should not be grounds to relieve the debtor of the terms of its confirmed plan. *In re Adams*, 218 B.R. 597, 601 (Bankr. D. Kan. 1998). Only unanticipated and unforeseeable changed circumstances can warrant a subsequent filing.

Here, Debtor in Possession has a pending Chapter 11 case and filed this subsequent Chapter 12 case. The Bankruptcy Code does not provide that post-confirmation modifications to plans are the exclusive remedy if there is a default in the modified contract under the confirmed plan. No provision in the Bankruptcy Code nor any law cited by Movant states that once a debtor confirms a Chapter 11 plan, they forfeit their right to seek relief due to defaults under the modified contract. As numerous courts have found above, the question for whether this second petition is proper should be a good faith analysis and whether there were unanticipated circumstances that caused the first plan to be infeasible, or if the second petition was filed to contradict the first petition's proceedings.

Here, Movant states this case was filed in bad faith because the Debtor in Possession is "trying to escape compliance with the state court's orders on the appointment and authority of the receiver." Motion, Dckt. 60 at 8. Additionally, Movant states by filing this Chapter 12 case, Debtor in Possession is modifying the confirmed Chapter 11 Plan and *res judicata* and judicial estoppel rules make the Chapter 11 Plan as controlling. *Id.* Movant's assertion that there is an absolute bar on filing of a subsequent reorganization is not supported by the law which has been presented to the court.

Movant argues that once the Chapter 11 plan has been confirmed, the only relief available is to seek modification of 11 U.S.C. § 1127(b), which states (emphasis added):

> (b) The proponent of a plan or the reorganized debtor may modify such plan at any time **after confirmation of such plan and before substantial consummation of such plan**, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

Movant does not address the "substantial consummation" limitation imposed by 11 U.S.C. § 1127(b). Though Movant may argue that "it's for the Debtor to bring that requirement/limitation to the court's attention," it is Movant's burden to show that the grounds exist upon which the relief is request. The issue of substantial consummation is not mentioned in the Mothorities. [Fn.2.]

FN. 2. The court notes that in the Debtor's Chapter 11 Case he as filed a Motion to Reopen the Case (which was reopened pursuant thereto), in which it is stated by counsel for the Reorganized Debtor that:

> 11. The sale of the Conservation Easement closed on August 15, 2022.
> . . .
> 13. As set forth in the final Estimated Seller's Settlement Statement attached hereto, on April 27, 2023, the SPE Independent Manager, Hank Spacone, closed the sale of the McCune Ranch for a sale price of $14,925,302.50, resulting **in the payment in full of Reorganized Debtor's obligations to Prudential**; partial payment of his obligations to FNB; **payment in full of the Voluntarily Deferred Allowed Administrative Claims**; payment in full of all remaining General Unsecured Claims; and **payment in full of then-outstanding fees of the Independent SPE Manager and his attorney**, in addition to other closing costs as set forth in the attached closing statement.

14. On May 4, 2023, Reorganized Debtor tendered, and FNB accepted, certified checks in the aggregate amounts of $338,679.04, which amounts were required by FNB to reinstate the remaining three FNB loans secured by Reorganized Debtor's real property and his inventory, equipment, and other personal property.

15. **On May 4, 2023, FNB acknowledged receipt and reinstated the three FNB loans**.

16. Notwithstanding Reorganized Debtor's full reinstatement of the FNB loans under California Civil Code section 2924c, FNB on May 5, 2023 took the position that under California Commercial Code section 9604(a)(3)(C), FNB may continue enforcement of its liens on Reorganized Debtor's inventory, equipment, and other personal property by sale through the receivership, despite the absence of any further payment defaults.

20-24123; Motion to Reopen, Dckt. 905.

While the court does not accept such "mere" allegations in the Motion to Reopen, it does appear that substantial payments have been made. The Motion also expressly states that Movant obtained the appointment of a receiver in State Court on March 21, 2023, based on payment defaults on its claim under the Confirmed Chapter 11 Plan. Further, as noted above, notwithstanding the alleged curing of all defaults in plan payments on Creditor's claim under the Plan, Creditor asserts that right to continue with the imposition of the receivership citing to California Civil Code § 2924c, which relates to notices of default under deeds of trust and the curing of such defaults.

Debtor in Possession has not yet filed their schedules nor have they filed a proposed plan. Although they have a confirmed Chapter 11 Plan, courts have been clear that Debtor in Possession may file a subsequent petition absent Congress's explicit prohibition of the second petition. If Debtor in Possession can demonstrate unforeseeable changed circumstances caused them to default under their Confirmed Plan, the second Chapter 12 Plan appears permissible. [Fn.3..]

FN. 3. As the Supreme Court states in *United Student Air Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), while the court has to rely on the parties to present sufficient evidence, the court is not bound by the parties incompletely or incorrectly stating the law. The Parties may want to consider the provisions of 11 U.S.C. § 1127(e), which applies to individual Chapter 11 debtors, which Congress added to § 1127 in 2005.

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 To Dismiss filed by Creditor First Northern Bank of Dixon ("Creditor") 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 request by Movant for Sanctions is denied without prejudice.

IT IS FURTHER ORDERED that **xxxxxxx**

7.	**23-21822-E-12** **BSH-2**	**RUSSELL LESTER** **Brian Haddix**	**CONTINUED MOTION TO USE CASH COLLATERAL AND/OR CHAPTER 12 FIRST DAY MOTION GRANTING REPLACEMENT LIENS , CHAPTER 12 FIRST DAY MOTION FOR SCHEDULING FINAL HEARING PURSUANT TO BANKRUPTCY RULE 4001** **6-7-23 [18]**

The Motion for Use of Cash Collateral, Grant Replacement Liens, and Schedule Final Hearing is xxxxxxxxx

On June 6, 2023, the court issued an order modifying Local Bankruptcy Rule 9014(d) to allow omnibus pleadings respecting first day motions. Order, Dckt. 16. The order authorized Debtor in Possession to file First Day Motions and related documents for the following requests for relief:

1. **BSH-2** - Debtor in Possession's Emergency Motion for an Order (A) Authorizing Interim and Final Use of Cash Collateral; (B) Granting Replacement Liens; and (C) Scheduling Final Hearing Pursuant to Bankruptcy Rule 4001;

2. **BSH-3** - Debtor in Possession's Emergency Motion for Authority to Pay Prepetition Wages, Compensation and Employee Benefits, and for Related Relief;

3. **BSH-4** - Motion for Order to approve the Turnover of Funds Held by Receiver Subject to a Reasonable Reserve for Future Fee Applications.

The following deadlines were imposed:

1. Notice of the June 8, 2023 hearing shall be given by 5:00 p.m. on June 6, 2023; and

2. The pleadings and supporting documents for the Omnibus Motions will be filed and served by 4:00 p.m. on June 7, 2023, and a chambers electronic set of the pleadings filed on June 7, 2023 delivered by 4:00 p.m. on June 7, 2023 to the Judge assigned to the case.

Motion to Use Cash Collateral,
Granting Replacement Lien, and
Setting Final Hearing on Motion

Russell Lester, as the Debtor, commenced this bankruptcy case on June 2, 2023. Now, as Debtor in Possession seeks the interim and final authorization for use of cash collateral, and the granting of a replacement lien. Debtor is currently the post-confirmation, Plan Administrator in his prior case, 20-24123, which was recently reopened, the Reorganized Debtor seeking to have disagreements concerning the performance of the Confirmed Plan resolved.

The Creditor whose cash collateral is sought to be used in First Northern Bank ("FNB"). Currently the Estate has 1,257,197 pounds of walnuts (included in FNB collateral), valued at a bulk sale price of $5,333,161.70. The Debtor in Possession seeks to use some of the proceeds from the sale to continue in the farming, marketing, and sale of the walnuts at a higher value than a bulk sale.

The Motion recounts the challenges faced by the Reorganized Debtor in performing the confirmed Chapter 11 Plan and the default in making payments to FNB on its secured claim as required under the Confirmed Chapter 11 Plan.

Debtor in Possession states that on February 1, 2023, FNB obtained *ex parte* the appointment of a receiver in State Court, with the receiver taking possession and control of the personal property collateral securing FNB's claim. The appointment of the receiver was confirmed by the State Court on February 21, 2023, and a preliminary injunction was issued enjoining the Debtor from retaining possession of the personal property collateral.

With the receiver in possession of the personal property collateral, the Debtor in Possession cannot harvest the 2023 crop, which must be harvested "soon."

The obligation owed to FNB is stated to be approximately $7,800,000.00 for an asset based line of credit. In addition, there is $1,400,000.00 owed by Debtor to FNB on a Real Estate Loan.

For the emergency use of cash collateral pending a final hearing, the Debtor in Possession seeks authorization to use $205,000, plus a 10% variance, to pay the necessary expenses during the pre-harvest period pending final authorization.

The Debtor in Possession asserts that the real property securing the obligations owed to FNB have a value of $18,000,000.00.

Interim Use of Cash Collateral

The requested $205,000 of cash collateral to be used is stated to be for the following expenses and costs of operation:

> 28. As such, Dixon Ridge Farms needs to use cash collateral immediately to be able to pay critical and necessary expenses of its operations, including harvesting the 2023 walnut crop which will cost approximately $205,000.00, issuing payroll and related benefits in the approximate amount of $14,328 and paying for utilities. Payment of these expenses is critical for Dixon Ridge Farms to continue farming operations, to avoid incurring costs to destroy crops that have perished as a result of the failure to complete the 2023 harvest, and to avoid immediate and irreparable harm to the bankruptcy estate.

Motion, ¶ 28; Dckt. 18. In reviewing the Motion and the Exhibits, the court could not identify the expenses for which the monies would be spent (itemized categories), other than the $14,328 for payroll.

In the Motion it is stated that a proposed "interim budget" will be filed on or before June 22, 2023, which is two weeks after the current hearing.

June 8, 2023 Interim Use Hearing

At the hearing, the Parties reached a Stipulation to authorize the use of cash collateral in the amount of $113,000.00 through June 30, 2023, for the payment of the regular and ordinary operating expenses of the business of the Bankruptcy Estate, including prepetition payroll as authorized by the separate order of the court.

The continued hearing on the Motion to Use Cash Collateral shall be conducted at 10:30 a.m. on June 29, 2023.

Creditor's Opposition

Creditor First Northern Bank of Dixon ("Creditor"), holding a secured claim, filed an opposition to the Motion on June 15, 2023. Dckt. 49. Creditor states the following:

1. Debtor in Possession has failed to provide a cash collateral budget to show whether the use of cash collateral is necessary.

2. There are $93,555.53 of unexplained funds in an account held by Debtor in Possession at Bank of America. Debtor in Possession has not provided an explanation as to the source of the funds. Creditor believes the funds constitute proceeds of Creditor's Collateral that have been diverted from the receiver's estate.

3. Debtor in Possession states they are unaware of the exact amount of accounts receivable, however, they continue to process and sell inventory, issue invoices, and collect payments.

Creditor requests that if Debtor in Possession is allowed to use cash collateral, the following conditions should be imposed:

1. Replacement Lien - The Replacement Lien should include a lien on all post-petition assets in which Creditor was provided a pre-petition security interest. Creditor asserts it has a valid and perfected security interest on all crops growing.

The court's order granting the use of cash collateral on an interim basis granted Creditor a Replacement Lien on "post-petition revenues, accounts receivable, and other proceeds generated by the business to the extent that Creditor's cash collateral is diminished by this authorized use of cash collateral." Order, Dckt. 48.

2. Adequate Protection Payments - Creditor requests approximately $29,000 per month in adequate protection payments to cover all inters as it accrues.

3. Monthly Cash Collateral Reports - Debtor in Possession should provide monthly cash collateral reports to show the actual income and expenses as shown in the cash collateral budget.

June 29, 2023 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 Authorization to Use Cash Collateral filed by Russell Lester, the 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 xxxxxxxxxxxx

8. **23-21822-E-12** **RUSSELL LESTER**
GB-3 **Brian Haddix**

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ABSTENTION , MOTION FOR EXCUSAL OF TURNOVER BY RECEIVER IN STATE COURT PROCEEDING
O.S.T.
6-15-23 [53]

FIRST NORTHERN BANK OF DIXON
VS.

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)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 12 Trustee, creditors, and Office of the United States Trustee on June 16, 2023. By the court's calculation, 13 days' notice was provided. The court set the hearing for June 29, 2023. Dckt. 45.

The Motion for Relief from the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Chapter 12 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 for Relief from the Automatic Stay is granted.

First Northern Bank of Dixon ("Movant") seeks relief for the court to abstain from a pending state court action and the assets subject to that action, requests the receiver excused from turnover required by 11 U.S.C. § 543, and requests the automatic stay be terminated for Movant to continue the enforcement of its rights and remedies under the Chapter 11 Plan in the pending state court action.

Request for Relief from Stay

On January 25, 2023, Movant instituted a state court action in Solano County Superior Court, Case No. FCS059544 ("State Court Case"). The causes of action arise from rights and remedies prescribed in Russell Wayne Lester's ("Debtor in Possession") concurrent Chapter 11 Case, *See* E.D. Cal Case No. 20-24123 ("Chapter 11 Case"). In the Chapter 11 Case, Debtor in Possession's Plan allows Movant, in the event of a default, to "pursue all available remedies against the Reorganized Debtor . . . ." *See* E.D. Cal Case No. 20-24123, Chapter 11 Plan, Dckt. 716 § 6.13. The State Court Case alleges breach of contract, seeking to enforce rights and remedies under security agreements against Debtor in Possession's property. Movant alleges the legal grounds for the State Court Case arise under California law: California contract law and California Civil and Commercial Codes. Motion, Dckt. 53 at 4.

In the Motion, Movant states with particularity the grounds upon which the relief is requested, which include, but are not limited to, the following:

a. "A dispute arose though between the Bank and the Debtor about the reinstalment [*sic*] of loans, leading to the Debtor's apparent misappropriation of cash collateral and the receiver's corresponding investigation." Motion, p. 2:13-15; Dckt. 53.

b. "The Debtor filed this Chapter 12 case to stop the receiver's investigation into the misappropriation and prevent the state court from sanctioning him. *Id*., p. 2:15-16.

c. "Section 6.13 further provides that upon a Plan Default arising from any unpaid payment to any Class of creditors, the creditors in such Class with an uncured default shall immediately have relief from the Plan Injunction to pursue all available remedies against the Reorganized Debtor" *Id*., p. 3:24-28.

d. "On January 31, 2023, the Debtor and his counsel of record, Richard Lapping, executed a Stipulation for Entry of Order Appointing Receiver, Temporary Restraining Order and Order to Show Cause (the "Receiver Stipulation") stipulating to the appointment of receiver over the FNB Collateral." *Id*. p. 4:14-18.

e. "The Debtor believed that reinstatement of the FNB Loans pursuant to Cal. Civ. Code § 2924c would stop the receiver from liquidating the FNB Collateral under the order appointing the receiver. However, Cal. Comm. Code § 9604 provides that Cal. Civ. Code § 2924c has no application to the enforcement of the Bank's rights and remedies with respect to its personal property collateral, and therefore does not stop the receiver from proceeding with the enforcement of the Bank's rights and remedies with respect to the Bank's personal property collateral." *Id*., p. 2:24-28, 5:1-3. [Fn.1.]

FN. 1. California Commercial Code § 9604 states, in pertinent part:

> § 9604. Procedure if obligation secured by security interest in personal property or fixtures is also secured by interest in real property
>
> (a) If an obligation secured by a security interest in personal property or fixtures is also secured by an interest in real property or an estate therein:
>
> (1) The secured party may do any of the following:
>
> (A) **Proceed, in any sequence**, (i) in accordance with the secured party's rights and remedies in respect of real property as to the real property security, and (ii) in accordance with this chapter as to the **personal property or fixtures.**
>
> (B) **Proceed in any sequence**, as to both, some, or all of the real property and **some or all of the personal property or fixtures in accordance with the secured party's rights and remedies in respect of the real property**, **by including the portion of the personal property or fixtures selected by the secured party in the judicial or nonjudicial foreclosure of the real property** in accordance with the procedures applicable to real property. In proceeding under this subparagraph, (i) no provision of this chapter other than this subparagraph, subparagraph (C) of paragraph (4), and paragraphs (7) and (8) shall apply to any aspect of the foreclosure;
>
> (ii) a power of sale under the deed of trust or mortgage shall be exercisable with respect to both the real property and the personal property or fixtures being sold; and (iii) the sale may be conducted by the mortgagee under the mortgage or by the trustee under the deed of trust. The secured party shall not be deemed to have elected irrevocably to proceed as to both real property and personal property or fixtures as provided in this subparagraph with respect to any particular property, unless and until that particular property actually has been disposed of pursuant to a unified sale (judicial or nonjudicial) conducted in accordance with the procedures applicable to real property, and then only as to the property so sold.
>
> (C) Proceed, in any sequence, as to part of the personal property or fixtures as provided in subparagraph (A), and as to other of the personal property or fixtures as provided in subparagraph (B).
>
> (2)
>
> (A) Except as otherwise provided in paragraph (3), **provisions and limitations of any law respecting real property and obligations secured by an interest in real property or an estate therein**, including, but not limited to, Section 726 of the Code of Civil Procedure, **provisions regarding** acceleration or **reinstatement of obligations secured by an interest in real property** or an estate therein, prohibitions against deficiency judgments, limitations on deficiency judgments based on the value of the collateral, limitations on the right

to proceed as to collateral, and requirements that a creditor resort either first or at all to its security, **do not in any way apply to either (i) any personal property or fixtures other than personal property or fixtures as to which the secured party has proceeded or is proceeding under subparagraph (B) of paragraph (1), or (ii) the obligation.**

. . .

(3)

(A) Paragraph (2) does not limit the application of Section 580b of the Code of Civil Procedure.

(B) If the secured party commences an action, as defined in Section 22 of the Code of Civil Procedure, and the action seeks a monetary judgment on the debt, paragraph (2) does not prevent the assertion by the debtor or an obligor of any right to require the inclusion in the action of any interest in real property or an estate therein securing the debt. If a monetary judgment on the debt is entered in the action, paragraph (2) does not prevent the assertion by the debtor or an obligor of the subsequent unenforceability of the encumbrance on any interest in real property or an estate therein securing the debt and not included in the action.

(C) **Nothing in paragraph (2) shall be construed to excuse compliance with Section 2924c of the Civil Code** as a prerequisite to the sale of real property, **but that section has no application to the right of a secured party to proceed as to personal property** or fixtures except, and then only to the extent that, the secured party is proceeding as to personal property or fixtures in a unified sale as provided in subparagraph (B) of paragraph (1).

(D) Paragraph (2) does not deprive the debtor of the protection of Section 580d of the Code of Civil Procedure against a deficiency judgment following a sale of the real property collateral pursuant to a power of sale in a deed of trust or mortgage.

(E) Paragraph (2) shall not affect, nor shall it determine the applicability or inapplicability of, any law respecting real property or obligations secured in whole or in part by real property with respect to a loan or a credit sale made to any individual primarily for personal, family, or household purposes.

(F) Paragraph (2) does not deprive the debtor or an obligor of the protection of Section 580a of the Code of Civil Procedure following a sale of real property collateral.

(G) If the secured party violates any statute or rule of law that requires a creditor who holds an obligation secured by an interest in real property or an estate therein to resort first to its security before resorting to any property of the debtor that does not secure the obligation, paragraph (2) does not prevent

the assertion by the debtor or an obligor of any right to require correction of the violation, any right of the secured party to correct the violation, or the assertion by the debtor or an obligor of the subsequent unenforceability of the encumbrance on any interest in real property or an estate therein securing the obligation, or the assertion by the debtor or an obligor of the subsequent unenforceability of the obligation except to the extent that the obligation is preserved by subparagraph (B) of paragraph (2).

(4) If the secured party realizes proceeds from the disposition of collateral that is personal property or fixtures, the following provisions shall apply:

(A) The disposition of the collateral, the realization of the proceeds, the application of the proceeds, or any one or more of the foregoing shall not operate to cure any nonmonetary default.

(B) The disposition of the collateral, the realization of the proceeds, the application of the proceeds, or any one or more of the foregoing shall not operate to cure any monetary default (although the application of the proceeds shall, to the extent of those proceeds, satisfy the secured obligation) so as to affect in any way the secured party's rights and remedies under this chapter with respect to any remaining personal property or fixtures collateral.

(C) All proceeds so realized shall be applied by the secured party to the secured obligation in accordance with the agreement of the parties and applicable law.

---

f. "Unhappy with that result, the Debtor first filed an Ex Parte Application to Reopen the Chapter 11 Case, and the Chapter 11 Case was reopened on May 25, 2023. However, the Debtor soon discovered that reopening the Chapter 11 Case does not invoke a new automatic stay under 11 U.S.C. § 362 that would prevent the receiver from proceeding, and does not invoke the provisions of 11 U.S.C. § 543 requiring the receiver to turnover the assets held by the receiver." *Id*., p. 5:4-10.

g. "For some time before this case was filed, the receiver had requested numerous times from the Debtor information (including documents) about his financial affairs and about the assets the receiver was given authority to liquidate. Among other things, the receiver had been investigating the Debtor's misappropriation of the Bank's cash collateral. On May 31, 2023, the receiver sent out to the Debtor a last request for the sought information, before moving to hold the Debtor in contempt of court." *Id*., p.5:14-20.

Douglas Kraft, Esq., counsel for Movant provides his Declaration in support of the Motion. With respect to the performance of the Chapter 11 Plan and default on Movant's claim provided for in the Confirmed Chapter 11 Plan, Mr. Kraft testimony (identified by paragraph number used in the Declaration) includes the following:

51. The Gordon Ranch, MacQuiddy Ranch, the Oda Ranch and the Conservation Easement were sold and the Prudential Cure and Paydown Requirements were satisfied upon the close of the sale of the Conservation Easement, which occurred on August 15, 2022. As a result, the SPE Independent Manager became inactive effective August 15, 2022.

52. As a result of the FNB Payment Default and the Plan Default, pursuant to Section 4.1.iii.5) of the Plan, the SPE Independent Manager was reactivated for the purpose of selling McCune Ranch and Carrion Ranch.

53. On or about March 13, 2023, the SPE Independent Manager entered into a contract for the sale of the McCune Ranch through an escrow held by Old Republic Title Company (the "Escrow Holder").

54. On April 27, 2023, the sale of the McCune Ranch closed, and consistent with the terms of the Plan, the proceeds from the sale of the McCune Ranch were disbursed by the Escrow Holder to pay, in the following order (1) the related transactions costs, (2) the SPE Manager Fees, (2) to pay in full the remaining indebtedness owing under the Prudential Loans, (3) to pay in full the remaining amounts owed to the holders of the Voluntarily Deferred Allowed Administrative Claims, (4) to pay in full the indebtedness owed to FNB under the ABL, (5) to pay in full the Class 11 General Unsecured Claims, and (6) the balance to the SPE. A true and correct copy of the Estimated Seller's Statement, issued by the Escrow Holder, showing the disbursements from the proceeds of the sale of McCune Ranch (the "McCune Settlement Statement") is attached hereto as Exhibit F.

55. The Settlement Statement shows that $87,283.33 was disbursed to the SPE from the proceeds of the sale of McCune Ranch.

56. Upon the close of the sale of the McCune Ranch, the Prudential Loans were paid in full, and only remaining SPE Designated Properties is the Carrion Ranch. Presumably, title to the Carrion Ranch continues to be held by the SPE free and clear of any liens.

58. It is my understanding [Fn.2.] that at the time of the close of the sale of the McCune Ranch, the SPE held funds of in the Prudential Reserve account in access of $90,000.

FN. 2. It appears that this "understanding" is merely a conclusion made on information and belief, and not personal knowledge testimony of the witness as required by Federal Rule of Evidence 602.

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59. On May 2, 2023, the SPE Independent Manager sent an email to Mr. Lester (on which I was copied) (the "May 2 Wire Email") advising that the SPE Independent Manager caused $184,232.35 held by the SPE to be wired to an account at Bank of America (the "BofA Account") held by the Debtor. A true and correct copy of the May 2 Wire Email is attached as Exhibit G.

63. On April 26, 2023, I sent a letter to Mr. Lapping (the "Reinstatement Letter") setting forth the amounts required to reinstate the FNB Loans pursuant to Section 2924c and advising that the deadline to reinstate the FNB Loans pursuant to Section 2924c was May 4, 2023. A true and correct copy of the Reinstatement Letter is attached as Exhibit H.

64. As set forth in the Putah Creek Reinstatement Letter, the amount required to reinstate the FNB Loans (assuming that the ABL was paid in full from the proceeds of the sale of McCune Ranch) was $338,679.03, effective through May 4, 2023 (the "Total Reinstatement Amount").

65. Through subsequent communications with Mr. Lapping, an agreement was reached between the Debtor and FNB regarding the reinstatement of the FNB Loans pursuant to Section 2924c. That agreement was set forth in an email from me to Mr. Lapping on May 2, 2023 (the "Reinstatement Email"). A true and correct copy of the Reinstatement Email is attached as Exhibit I.

66. As set forth in the Reinstatement Email, subject to certain conditions, FNB allowed that Receiver to disburse to FNB, from the Receivership estate, the sum of $140,000.00 (the "Receiver Funds") to applied toward payment of the amounts owing under the AG Productions Loan, and to be applied toward payment of the Total Reinstatement Amount.

67. As set forth in the Reinstatement Email, after application of the Receiver Funds, the remaining amount required to reinstate the FNB Loans pursuant to Section 2924c totaled $198,679.03 (the "Remaining Reinstatement Amount").

68. As set forth in the Reinstatement Email, the Remaining Reinstatement Amount was to be paid with cashiers' checks drawn on the BofA Account (the "BofA Cashiers' Checks"), to be hand delivered to FNB on or before May 4, 2023.

69. Pursuant to the Reinstatement Email, the Receiver Funds were disbursed to FNB and the BofA Cashiers' Checks were hand delivered to FNB on May 4, 2023, upon which the FNB Loans were reinstated pursuant to Section 2924c, and the NODs were rescinded and the Nonjudicial Foreclosure Proceedings were terminated.

Dec.; Dckt. 62.

A copy of the Reinstatement Letter identified in Mr. Kraft's Declaration has been filed as Exhibit H, Dckt. 63. In the Letter, counsel for Movant states that the Debtor has the right to reinstate the Putah Creek Loan, pursuant to California Civil Code § 22924c until 5 business days before the May 11, 2023 foreclosure state. "As such, the deadline for Mr. Lester to reinstate the Putah Creek Loans is May 4, 2023." Exhibit H; Letter, p.1, third full paragraph; Dckt. 63.

Though making reference to California Civil Code § 2924c, the Letter does not appear to state that there can be only a partial reinstatement and that there is no reinstatement with respect to Movant proceeding against the personal property collateral. The Letter from Movant's counsel closes with the following statements:

> The AG Production Loan Reinstatement Amount and the Total Reinstatement Amount are effective through May 4, 2023, assuming that the ABL is paid in full on or before that date. If the ABL is not paid in full at the time that the Total Loan Reinstatement Amount is tendered, the Total Reinstatement Amount will increase by the amounts required to reinstate the ABL.
>
> Please let me know if you have any questions regarding the RE Loan Reinstatement Amount, the HELOC Reinstatement Amount, and the AG Production Loan Reinstatement Amount.

Id., Letter, p. 4.

Exhibit I, Dckt. 63, is a copy of a letter from Movant's counsel to counsel for the Reorganized Debtor which again makes one reference to reinstatement of the "Putah Creek Loans, pursuant to California Civil Code Section 2924c . . . ."

Neither the Letter nor the email state that the payment of the § 2924c reinstatement amount does not cure the default with respect to the obligation owed under the Confirmed Chapter 11 Plan to the extent it is secured by personal property.

As directed to by Movant (Motion, p. 3:24-28; Points and Authorities, p. 3:37; and Declaration, ¶ 15: Dckts. 53, 57, 62), the court has reviewed the Confirmed Chapter 11 Plan as for the relief provided in the event of a default in the required Plan disbursements. The Confirmed Chapter 11 Plan provides for plan defaults and the rights and duties of the respective parties in such an event.

> 6.13. Plan Default
>
> Except as otherwise set forth in Section 4.1(vii)[Default on Prudential's Class 1 Claim] and (viii) [Consequences of Default on Prudential Class 1 Claim], if the Reorganized Debtor or the SPE or the Lester Family Trust fails to make any payment or to perform any other material obligation required under the Plan, for more than fifteen (15) days after the time specified in the Plan for such payment or other performance, any member of a Class affected by the default may serve written notice of the default upon (i) the Reorganized Debtor, (ii) counsel for the Reorganized Debtor, and (iii) the SPE Independent Manager. **If the Reorganized Debtor or the SPE or the Lester Family Trust fails within fifteen (15) days after the date of service of the notice of default either: (i) to cure the default;** (ii) to obtain from the Court an extension of time to cure the default; or (iii) to obtain from the Court a determination that no default occurred, **then the Reorganized Debtor is in material default under the Plan to all the members of the affected** Class (also defined above as a "Plan Default").
>
> **Upon a Plan Default arising from an unpaid payment to any affected Classin which the SPE, the Lester Family Trust, or the Reorganized Debtor is the obligor** on a Plan payment obligation, **the creditors in such Class with an uncured default shall immediately have relief from the Plan Injunction to pursue all available remedies against the Reorganized Debtor and/or the Lester**

Family Trust or to file a motion to convert the case to a case under Chapter 7 of the Bankruptcy Code.

Upon a Plan Default arising from an asserted "non-payment" obligation of the Reorganized Debtor under this Plan, **the affected creditors in such Class must first obtain a Court determination that the "non-payment" defaulted obligation is material with respect to the treatment of that Class before pursuing any available remedies against the Reorganized Debtor and/or the Lester Family Trust** or filing a motion to convert the case to a case under Chapter 7 of the Bankruptcy Code.

20-24123; Order Confirming Plan, Chapter 11 Plan Attached, p. 69:16-28, 70:1-11, Dckt. 724.

It appears that this Plan does provide for a termination of the stay so that an unpaid creditor may then enforce its rights, but "[t]he affected creditors in such Class must first obtain a Court determination that the "non-payment" defaulted obligation is material with respect to the treatment of that Class before pursuing any available remedies . . . ." The court cannot identify such an order determining that such default is material with respect to Creditor.

XXXXXXX

Request for Excusal from Turnover and Request for Abstention as Additional Relief to Go with the Request for Termination of the Automatic stay.

Movant states a receiver was appointed in the state court case. Movant claims the filing of the Chapter 12 Case stopped the receiver's investigation into misappropriation of cash collateral and the state court's ability to sanction Debtor in Possession. Movant makes an additional request to excuse the receiver from turnover.

Additionally, Movant requests for a third relief, that of abstention by this court.

Additionally, Local Bankruptcy Rule 9014-1(d)(5) states that "[e]very application, motion, contested matter or other request for an order, shall be filed separately from any other request." The local rules allow six (6) scenarios in which requests may be "joined." These exceptions do not include joining a request for excusal of turnover with any other request.

Movant has requested relief arising from two different sections of the Code, containing separate notice requirements for a motion and hearing: one under 11 U.S.C. § 362, a second under 11 U.S.C. § 543, and a third under 28 U.S.C. § 1334(c) . Movant's request to excuse turnover and for abstention should properly have been brought as separate motions for relief, the court not having authorized them to be combined in one motion.

The request to excuse turnover is **XXXXXXX** .

The request to abstain is **XXXXXXX**

DISCUSSION

The court may grant relief from stay for cause when it is necessary to allow litigation in a nonbankruptcy court. 3 COLLIER ON BANKRUPTCY ¶ 362.07[3][a] (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). The moving party bears the burden of establishing a p at: rima facie case that relief from the automatic stay is warranted, however. *LaPierre v. Advanced Med. Spa Inc. (In re Advanced Med. Spa Inc.)*, No. EC-16-1087, 2016 Bankr. LEXIS 2205, at *8–9 (B.A.P. 9th Cir. May 23, 2016). To determine "whether cause exists to allow litigation to proceed in another forum, 'the bankruptcy court must balance the potential hardship that will be incurred by the party seeking relief if the stay is not lifted against the potential prejudice to the debtor and the bankruptcy estate.'" *Id.* at *9 (quoting *Green v. Brotman Med. Ctr., Inc. (In re Brotman Med. Ctr., Inc.)*, No. CC-08-1056-DKMo, 2008 Bankr. LEXIS 4692, at *6 (B.A.P. 9th Cir. Aug. 15, 2008)) (citing *In re Aleris Int'l, Inc.*, 456 B.R. 35, 47 (Bankr. D. Del. 2011)). The basis for such relief under 11 U.S.C. § 362(d)(1) when there is pending litigation in another forum is predicated on factors of judicial economy, including whether the suit involves multiple parties or is ready for trial. *See Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162 (9th Cir. 1990); *Packerland Packing Co. v. Griffith Brokerage Co. (In re Kemble)*, 776 F.2d 802 (9th Cir. 1985); *Santa Clara Cty. Fair Ass'n v. Sanders (In re Santa Clara Cty. Fair Ass'n)*, 180 B.R. 564 (B.A.P. 9th Cir. 1995); *Truebro, Inc. v. Plumberex Specialty Prods., Inc. (In re Plumberex Specialty Prods., Inc.)*, 311 B.R. 551 (Bankr. C.D. Cal. 2004).

The court finds that the nature of the State Court Litigation warrants relief from stay for cause. Judicial economy dictates that the state court ruling be allowed to continue after the considerable time and resources put into the matter already.

Movant makes additional claims that, "Debtor cannot be responsible for implementing two different plans of reorganization, in two different bankruptcy cases, involving and administering the same property." Movant does not provide legal basis for these arguments. Additionally, Movant argues, "[t]he Confirmed Chapter 11 Plan is *res judicata* to the disposal of property and treatment of the Bank's claims in this case. The Debtor is also judicially estopped from taking any positions inconsistent with the positions he took in the Chapter 11 Case, as to the Confirmed Chapter 11 Plan, and in the Pending State Court Action." Again, Movant does not provide legal grounds for this argument.

The court provides a further analysis regarding these claims in the ruling on Movant's Motion to Dismiss/Motion for Sanctions, Docket Control No. GB-4.

~~The court shall issue an order modifying the automatic stay as it applies to Debtor in Possession and the bankruptcy estate to allow Movant to continue the State Court Receivership Litigation, California Superior Court, for the County of Solano, Case No. FCS05944, allowing Movant and its agents~~ **XXXXXXX** ~~.~~

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests, for no particular reason, that the court grant relief from the Rule as adopted by the United States Supreme Court. With no grounds for such relief specified, the court will not grant additional relief merely stated in the prayer.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is not granted.

No other or additional relief is granted by the court.

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 First Northern Bank of Dixon ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the automatic stay provisions of 11 U.S.C. § 362(a) ~~are modified as applicable to Russell Wayne Lester ("Debtor in Possession") and the Bankruptcy Estate to allow Movant, its agents, representatives and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors to proceed with litigation in Solano County Superior Court, Case No. FCS059544 to **xxxxxxx** .~~
>
> **IT IS FURTHER ORDERED** that any request to excuse turnover ~~pursuant to 11 U.S.C. § 543 is denied without prejudice.~~
>
> **IT IS ORDERED** that the request for abstention is denied without prejudice.
>
> **IT IS FURTHER ORDERED** that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is not waived for cause.
>
> No other or additional relief is granted.

9. 22-20975-E-7 DNL-2 | **LINDA MIZOGAMI** **Eric Schwab** | **MOTION TO SELL FREE AND CLEAR OF LIENS** **5-25-23 [103]**

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 7 Trustee, creditors, and Office of the United States Trustee on May 25, 2023. By the court's calculation, 35 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion to Sell Property 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 to Approve Sale of Real Property Free and Clear of Liens is xxxxxxx

The Bankruptcy Code permits Susan K. Smith, the Chapter 7 Trustee, ("Movant") to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. Here, Movant proposes to sell the real property commonly known as 417 K Street, Davis, California 95616 ("Property").

The proposed purchasers of the Property are Davis Thompson, Jean Thompson, and Robert Thompson, and the terms of the sale are:

A. Purchase price of $536,000.00

B. The property shall be "as is" and "where is" without any representation or warranty, express or implied

C. Buyers acknowledge Trustee is not able to make any disclosures to the Buyers concerning the extent of the bankruptcy estate's interest in the property

D. Seller shall pay Natural Hazard Zone Disclosure Report and the County Transfer Tax

E. Buyers shall pay for all escrow and closing costs (including title insurance premiums)

F. Title shall be conveyed in the form of a grant deed executed by Trustee to Buyers

G. Sale is subject to Bankruptcy Court approval and any overbidding at a duly noticed hearing

Proposed Overbidding Procedures

Trustee proposes the following overbidding procedures:

A. Overbidders be required to provide Trustee with a deposit by cashier's check in the amount of $53,600

B. Overbidders be required to provide Trustee with proof of funds for the balance of the purchase price

MEB Loan Trust IV, U.S. Bank National Association's ("MEB") Nonopposition

MEB, a secured creditor, filed a nonopposition on June 14, 2023. Dckt. 114. MEB does not oppose the motion provided it is paid in full out of escrow pursuant to an updated payoff demand or MEB agrees in a duly notarized writing to any sale providing for less than payment in full and Debtor remains current with ongoing monthly payments due under the terms of the loan agreement.

United States' Department of Justice
Limited Opposition

The United States Department of Justice filed a limited opposition on June 15, 2023. Dckt. 116. The United States claims the Internal Revenue Service has a recorded tax lien on the property in the amount of $387,382, of which, $280,017 is taxes and interests. The United States opposes the Motion to the following extent:

A. Trustee's *Pro Rata* approach is not justified in law. The IRS should be paid at least $211,080, which is undisputed in the amount of the IRS secured claim for taxes and related interest.

The court notes, the Motion states the United States' claim is $280,017 in tax and interest and $107,365 in penalties. It appears that Movant does not dispute the tax and interest claim, and that the United States will be paid for their tax and interest portion of the claim through the sale proceeds. At the hearing, XXXXXXXXXX

B. Trustee has not sought to avoid any part of the United State's secured claim. The United States should be paid in full on the taxes and interest portion, and Trustee should bring an adversary proceeding if they wish to avoid the penalty and interest on penalty portion of their claim.

#	Claimant	Total	Penalties	Tax & Interest
8	FTB	13,907	8,641	5,266
9	TCYC	336	198	138
10	FTB	3,871	1,374	2,497
	Sub-Total	**18,114**	**10,213**	**7,901**
11	IRS	387,382	107,365	280,017
	Sub-Total	**405,496**	**117,578**	**287,918**
12-14	EDD	5,338	1,607	3,731
15	TCYC	295	81	214
16	FIGFCU	74,388	0	74,388
17	FTB	70,783	20,630	50,153
18	TCYC	227	56	171
19	TCYC	224	26	198
	Grand Total	**556,842**	**139,978**	**416,864**

Sale Free and Clear of Liens

The Motion is confusing in part to the court. From review of the Motion, it appears Movant seeks to sell the Property free and clear of the liens of Internal Revenue Service ("IRS"), Franchise Tax Board ("FTB"), Employment Development Program ("EDD"), Tax Collector of Yolo County ("TCYC"), and Farmers Insurance Group Federal Credit Union ("FIGFCU"), collectively, "Creditors". Movant states the net proceeds are estimated at $310,127, while the Creditors liens total $556,842. Movant provides the court with the following table:

Movant argues Claims 12-19 of the EDD, TCYC, FIGFCU, and FTB will be treated as unsecured because the net proceeds is less than the more senior liens of FTB, TCYC, and IRS, Claims 8-11 . Movant argues the proceeds will be sufficient to pay all components of the FTB and TCYC's more senior liens, leaving $292,013 for the IRS lien, Claim 11.

Legal Basis For Ordering the Sale Free and Clear of Liens

In the Motion, Movant provides the court with the following legal authority and analysis in support of requesting that the sale be authorized and ordered free and clear of the forgoing liens:

> The Trustee may avoid a lien that secures penalties, like the Subject Liens (except for the FIGFCU lien addressed below) and use sale proceeds to pay administrative expenses. 11 U.S.C. Section 724(a) & (b). The avoided liens are preserved for the benefit of the bankruptcy estate. 11 U.S.C. Section 551. Standing in the shoes of the IRS, the Trustee may enforce the avoided liens to sell short of junior liens (e.g. the FIGFCU lien) and compel such claimants to accept payments in accordance with respective priorities. 26 U.S.C. Section 7403(c). As such, a sale free and clear of the Tax Liens is appropriate pursuant to 11 U.S.C. Section 363(f)(1) ("applicable nonbankruptcy law permits sale of such property free and clear of such interest"

Motion, p. 7:18-25; Dckt. 103. The sole basis is stated to be that nonbankruptcy law permits the sale free and clear of the various liens, citing to 11 U.S.C. § 363(f)(1), which states:

> § 363. Use, sale, or lease of property
>
> (f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; . . . .

The only nonbankruptcy law cited by Movant is 26 U.S.C. 7403(c) (which Movant cites, but does not provide the court with the language of the nonbankruptcy law statute). Having assigned to the court the task to research the statute and provide the law upon which Movant's relief hangs in the balance, the court states the cited code section:

> § 7403. Action to enforce lien or to subject property to payment of tax.
>
> (a) Filing. In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability. For purposes of the preceding sentence, any acceleration of payment under section 6166(g) shall be treated as a neglect to pay tax.
>
> (b) Parties. All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.
>
> (c) Adjudication and decree. The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, **in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sales according to the findings of the court in respect to the interests of the parties and of the United States**. If the property is sold to satisfy

> a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary directs.
>
> (d) Receivership. In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity.

26 U.S.C. § 7403. This is a lien foreclosure action, in which the federal tax lien is then enforced against the taxpayer and junior lien holders.

The Movant asserts that as trustee she may avoid (not that she has avoided) tax liens to the extent they secure penalties, citing to 11 U.S.C. § 724(a) and (b). 11 U.S.C. § 724(a) provides:

> § 724. Treatment of certain liens
>
> (a) The trustee may avoid a lien that secures a claim of a kind specified in section 726(a)(4) of this title.

11 U.S.C. § 726(a)(4) specifies that such an avoidable lien is one for (emphasis added):

> (4) fourth, in payment of any allowed claim, whether secured or unsecured, for any **fine, penalty, or forfeiture,** or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim;

The Movant asserts that ($117,579) of the IRS ($405,496) secured claim is for penalties, leaving ($287,018) of the IRS secured claim not for penalties. Motion, ¶ 11; Dckt. 103. The IRS concurs that at least ($280,017) of its secured claim is for taxes and interest - not penalties.

The Movant's computation of proposed allocation of the net sales is not clear, but it appears to be as follows in order of priority of the liens:

Net Sales Proceeds	$310,127
FTB Secured Claim (12/13/2017 Perfection)	
Tax & Interest	($5,266)
Avoidable Lien for Estate for Penalties	($8,641)
Yolo County Tax Collector (11/19/2018 Perfection	
Tax & Interest	($138)
Avoidable Lien for Estate for Penalties	($336)
FTB Secured Claim (3/07/2019 Perfection)	

Tax & Interest	($7,901)
Avoidable Lien for Estate for Penalties	($10,231)
Balance of Net Proceeds Remaining for IRS Secured Tax Claim (3/19/2019)	$277,614

By the Movant's calculations there will be $277,614 in net sales proceeds for the next priority secured claim, that being the IRS secured claim for ($405,496).

Of that secured claim, Movant asserts the right to, though not having done, to avoid the lien to the extent of ($107,365) for the penalties, and that such avoided lien can be preserved for the benefit of the bankruptcy estate as provided in 11 U.S.C. § 551, which states:

> § 551. Automatic preservation of avoided transfer
>
> Any transfer avoided under section 522, 544, 545, 547, 548, 549, or **724(a)** of this title, or any lien void under section 506(d) of this title, is preserved for the benefit of the estate but only with respect to property of the estate.

Thus, the Movant contends that the she as trustee and the IRS hold equal priority liens securing their respective portions of the IRS tax claim: The Estate having ($117,365) and the IRS having ($280,918) of the total ($405,496) claim secured by the one tax lien.

The Estate's avoided lien portion of the total secured claim is 29% and the IRS's portion of the total secured claim is 71% (with the court rounding to the nearest one-hundredth of a percent).

Given the pari passu (equal priority) liens,[Fn.1.] applying those percentages would provide for the respective parties to receive on their secured claims:

Movant/Bankruptcy Estate.....$80,508.06

IRS.....$197,105.94 [Fn.2.]

FN. 1. Black's Law Dictionary provide the following definition of *pari passu*:

> pari passu (pahr-ee pahs-oo or pair-I, pair-ee, or par-ee pas-[y]oo) [Latin "by equal step"] (16c) Proportionally; at an equal pace; without preference <creditors of a bankrupt estate will receive distributions pari passu>.

FN.2. This *pro rata* distribution for the *pari passu* liens (if the Movant Trustee exercises the powers and rights to avoid the tax lien to the extent it secured penalties is consistent with the distribution required by 11 U.S.C. § 724(b), which provides (as summarized by the court):

First to holders of allowed secured claims that are not avoidable and senior to the tax lien.

Second, to the holders of allowed 11 U.S.C. § 507(a)(1)(C) [administrative expense of a trustee] or (a)(2) [§ 503(b) administrative expenses and specified unsecured federal reserve bank loans].

Third, to the holder of the tax lien.

Fourth, to the holder of allowed claim junior to the tax lien.

Fifth, to the holder of the tax lien, to the extent not paid in the third position above.

Sixth, to the bankruptcy estate.

The Movant, as Trustee, if avoiding that portion of the tax lien for the penalty, are both sitting in the third position, each holding a portion of the one tax lien to secure the IRS claim.

The IRS opposition to such a percentage distribution based on *pari passu* liens is that the Movant has not sought to avoid the IRS lien, has not avoided the IRS lien, and does not now have any such *pari passu* lien for the benefit of the bankruptcy estate.

The IRS position, on a text book, academic, non-bankruptcy world approach, is correct. The Movant is talking about what may happen in the future. But the IRS ignores that the Movant, as the Chapter 7 Trustee, is "fiduciarily"duty-bound to avoid the IRS lien for the penalty amounts. If a Trustee failed to so act, the court is confident that the US Trustee would move quickly to replace such a trustee.

At the hearing, **xxxxxxx**

The Bankruptcy court notes that 11 U.S.C. § 363(f) provides different grounds for the sale of estate property free and clear of liens, stating:

> (f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if–
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f)(1)–(5).

Movant asserts they can avoid (or more precisely sell free and clear of as a foreclosing tax lien creditor) the more junior liens under 11 U.S.C. § 362(f)(1), utilizing 26 U.S.C. § 7403(c).

At the hearing, XXXXXXXXXX

~~**DISCUSSION**~~

~~At the time of the hearing, the court announced the proposed sale and requested that all other persons interested in submitting overbids present them in open court. At the hearing, the following overbids were presented in open court: xxxxxxxxxxxxxx.~~

~~Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate because it will allow a partial pay-down of secured priority claims.~~

~~Movant has estimated that a 6% percent broker's commission from the sale of the Property will equal approximately $32,160.00. As part of the sale in the best interest of the Estate, the court permits Movant to pay the broker an amount not more than 6% percent commission.~~

~~Movant has also requested reimbursement of cleanup costs in the amount of $8,465.13. The court finds these expenses as customary expenses incurred to effectuate the sale and approves the reimbursement costs of $8,465.13.~~

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 6004(h) stays an order granting a motion to sell for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court because of no reason other than simply noting the request in the motion.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 6004(h). Thus, the court could deny such relief that is casually mentioned in one line at the start of the Motion and for which no grounds are stated.

However, the court recognizes that denial of such may put the close of escrow at peril and causing possible loss to the Bankruptcy Estate for which its professionals and Trustee would have to answer. Rather than running such a risk for the Bankruptcy Estate, the court will take this failure of basic pleading requirements into account when considering the appropriate billing rates for the various attorneys for Trustee who have worked on matters in this case – from the most senior to the most junior.

The court grants the request to waive the fourteen-day stay of enforcement.

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 Sell Property filed by Susan K. Smith, the Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Susan K. Smith, the Chapter 7 Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to Davis Thompson, Jean Thompson, and Robert Thompson or nominee ("Buyer"), the Property commonly known as 417 K Street, Davis, California 95616 ("Property"), on the following terms:

A. The Property shall be sold to Buyer for $536,000.00, on the terms and conditions set forth in the Purchase Agreement, Exhibit A, Dckt. 106, and as further provided in this Order.

B. The sale proceeds shall first be applied to closing costs, real estate commissions, prorated real property taxes and assessments, liens, other customary and contractual costs and expenses, including Trustee's reimbursement of cleanup costs in the amount of $8,465.13, incurred to effectuate the sale.

C. The Property is sold free and clear of the penalty liens of the following parties:

(1) Internal Revenue Service, Tax Lien, No. 2019-0005337 Recorded 03/19/2019 xxxxxxx

(2) California Employment Development Department, No. 2019-0015613 Recorded 07/11/2019 xxxxxxx

(3) California Employment Development Department, No. 2019-0022253 Recorded 09/13/2019 xxxxxxx

(4) California Employment Development Department, No. 2019-0031331 Recorded 12/11/2019 xxxxxxx

(5) Tax Collector of Yolo County Tax Lien, No. 2020-0006558 Recorded 03/05/2020 xxxxxxx

(6) Farmers Insurance Group Federal Credit Union Abstract of Judgment, No. 2020-0033478 Recorded 10/07/2020

(7) California Franchise Tax Board Tax Line, No. 2020-0039978 Recorded 11/19/2020 xxxxxxx

(8) Tax Collector of Yolo County Tax Lien, No. 2020-0042531 Recorded 12/07/2020 xxxxxxx

(5) Tax Collector of Yolo County Tax Lien, No. 2021-0040907 Recorded 10/29/2021 xxxxxxx

D. The next proceeds remaining after payment of the obligations secured by liens not avoided, closing costs and expenses, and the real estate commission, shall be divided between the Bankruptcy Estate, asserting the 11 U.S.C. § 724(a) avoided portion of the lien of the Internal Revenue Service and the Internal Revenue Service on the non-penalty portion of its secured claim, with 29% of the remaining net proceeds disbursed directly from escrow to the Chapter 7 Trustee for the Bankruptcy Estate and 71% of the remaining net proceeds disbursed directly from escrow to the Internal Revenue Service.

E. The Chapter 7 Trustee is authorized to execute any and all documents reasonably necessary to effectuate the sale.

F. The Chapter 7 Trustee is authorized to pay a real estate broker's commission in an amount not more than 6% percent of the actual purchase price upon consummation of the sale. The 6% percent commission shall be paid to the Chapter 7 Trustee's broker, Coldwell Banker Kappel Gateway Realty.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 6004(h) is waived for cause.

10. 23-20380-E-12 MHM-1 | **TIMOTHY WILSON** / **Mark Wolff** | **OBJECTION TO DEBTOR'S CLAIM OF EXEMPTIONS** / **5-24-23 [68]**

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, and parties requesting special notice on May 24, 2023. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Objection to Claimed Exemptions 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 Objection to Claimed Exemptions is sustained.

The Chapter 12 Trustee, Michael Meyer ("Trustee") objects to Timothy C. Wilson's ("Debtor") claimed exemptions under California law because the claimed homestead exemption is in excess of the countywide median sale price for a single-family home in the calendar year prior to the calendar year in which the judgment debtor claims the exemption. California has opted out of the federal exemptions. California Civil Procedure Section 704.730 provides exemptions of the greater of (1) countywide median up to $600,000 or (2) $300,000. The Debtor has claimed an exemption of $500,000. Here, the Trustee has concluded the median single family home sale price in 2022 for Amador County is $419,875. Therefore, the Debtor's claimed exemption is in excess of what is allowed.

Debtor's Nonopposition

On June 15, 2023, Debtor filed a Nonopposition. Dckt. 93. Debtor states they will file an amended schedule C to correct his exemption claim.

A claimed exemption is presumptively valid. *In re Carter,* 182 F.3d 1027, 1029 at fn.3 (9th Cir.1999); *See also* 11 U.S.C. § 522(l). Once an exemption has been claimed, "the objecting party has the burden of proving that the exemptions are not properly claimed." FED. R. BANKR. P. RULE 4003(c); *In re Davis*, 323 B.R. 732, 736 (9th Cir. B.A.P. 2005). If the objecting party produces evidence to rebut the presumptively valid exemption, the burden of production then shifts to the debtor to produce unequivocal

evidence to demonstrate the exemption is proper. *In re Elliott*, 523 B.R. 188, 192 (9th Cir. B.A.P. 2014). The burden of persuasion, however, always remains with the objecting party. *Id*.

The Chapter 12 Trustee's Objection is sustained.

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 Objection to Claimed Exemptions filed by The Chapter 12 Trustee, Michael Meyer ("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 Objection is sustained.

11. 23-21899-E-12 WF-2 | **JAKOB/GLADYS WESTSTEYN Daniel Egan** | **MOTION TO USE CASH COLLATERAL 6-15-23 [13]**

11 thru 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 in Possession, creditors, parties requesting special notice, and Office of the United States Trustee on June 15, 2023. By the court's calculation, 14 days' notice was provided. 14 days' notice is required. FED. R. BANKR. P. 4001(b)(2) (requiring fourteen days' notice).

The Motion for Authority to Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor in Possession, 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 for Authority to Use Cash Collateral is granted.

Jakob Gerritt Weststeyn and Gladys Yvonne Weststeyn ("Debtor in Possession") moves for an order approving the use of cash collateral encumbered by the California Franchise Tax Board ("FTB") arising from 2020 and 2021 unpaid state income taxes.

Debtor in Possession believes they will harvest 790 tons of rye and triticale hay inventory and that the FTB will contend to have liens on this inventory. Debtor in Possession will treat the proceeds on these crops as the cash collateral of FTB and Debtor in Possession requests to use this cash collateral to fund their ongoing farming operations. Debtor in Possession proposes, as adequate protection, that the Franchise Tax Board be granted a replacement lien on prepetition and postpetition inventory solely to secure the use of cash collateral generated from prepetition collateral.

Debtor in Possession proposes to use cash collateral for the following expenses:

TABLE 1			
Description of Expense	**June**	**July**	**August**
Labor & Related (Farming)			
Labor	$4,689.00	$4,689.00	$4,689.00
Federal Payroll Taxes	$1,693.00	$1,693.00	$1,693.00
State Payroll Taxes and Garnishments	$76.00	$76.00	$76.00
Workers Comp Insurance	$543.00	$543.00	$543.00
Owner Distribution	$5,000.00	$5,000.00	$5,000.00
Subtotal	**$12,000.00**	**$12,000.00**	**$12,000.00**
Farming Operating Expenses			
Custom Hire	$1,500.00	$1,500.00	$1,500.00
Repairs & Maintenance	$12,500.00	$12,500.00	$9,500.00
Supplies	$2,500.00	$2,500.00	$2,500.00
Utilities	$4,000.00	$4,000.00	$4,000.00
Irrigation	$16,618.00	$16,618.00	$16,618.00
Seed	$25,000.00	$0.00	$0.00
Fertilizer & Chemicals	$45,000.00	$0.00	$0.00
Insurance	$45,000.00	$0.00	$0.00
Property Rent (Farmland)	$0.00	$0.00	$0.00
Fuel & Oil	$6,500.00	$6,500.00	$6,500.00
Office Expenses	$250.00	$250.00	$250.00
Subtotal	**$158,868.00**	**$43,868.00**	**$40,868.00**
Total Requested	**$170,868.00**	**$55,868.00**	**$52,868.00**

APPLICABLE LAW

Pursuant to 11 U.S.C. § 1203, a debtor in possession serves as the trustee in the Chapter 12 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

Debtor in Possession has shown that the proposed use of cash collateral is in the best interest of the Estate. The proposed use provides for funding of Debtor in Possession's ongoing farming operations. The Motion is granted, and Debtor in Possession is authorized to use the cash collateral for the period June 1, 2023, through August 31, 2023, including required adequate protection payments. The court does not pre-judge and authorize the use of any monies for "plan payments" or use of any "profit" by Debtor in Possession. All surplus cash collateral is to be held in a cash collateral account and accounted for separately by Debtor in Possession.

The court continues the hearing to xx:xx x.m. on xxxx, 202x, for Debtor in Possession to file a Supplement to the Motion to extend authorization. That Supplement is due by xxxx, 202x (seven days before hearing), with any opposition to be presented orally at the continued hearing.

Counsel for Debtor in Possession shall prepare and lodge with the court a proposed order consistent with this ruling. The cash collateral budget (Exhibit A, Dckt. 16) shall be attached to the proposed order as an Addendum and incorporated therein.

12. 23-21899-E-12 WF-3 **JAKOB/GLADYS WESTSTEYN** **Daniel Egan** **MOTION TO BORROW** **6-15-23 [18]**

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, Chapter 12 Trustee, creditors, and Office of the United States Trustee on June 15, 2023. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion to Borrow was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 12 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 Incur Debt is ~~granted~~.

Jakob Gerritt Weststeyn and Gladys Yvonne Weststeyn ("Debtor in Possession") seeks permission to borrow monies from an interest they have in their irrevocable trust. Movant seeks to borrow up to $200,000 from their irrevocable trust as working capital for the remainder of the 2023 farming season.

The loan will be unsecured and due and payable in full on or before December 1, 2023. Debtor in Possession does not explain how they will be able to pay the loan in full by December 1, 2023. It is also

unclear why this debt will be paid off in less than six months, while Debtor in Possession has other secured and unsecured debts. Quick repayment of this debt appears preferential. At the hearing, XXXXXXXXXX

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

~~The court finds that the proposed credit, based on the unique facts and circumstances of this case, is reasonable. There being no opposition from any party in interest and the terms being reasonable, the Motion is granted.~~

~~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 Incur Debt filed by Jakob Gerritt Weststeyn and Gladys Yvonne Weststeyn ("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 granted, and Jakob Gerritt Weststeyn and Gladys Yvonne Weststeyn ("Debtor in Possession") is authorized to incur debt pursuant to the terms of the agreement, Exhibit B, Dckt. 21.~~

FINAL RULINGS

13. 21-21424-E-7 BHS-3 | **ROBERT MOHR** | **David Foyil** | **MOTION FOR COMPENSATION FOR BARRY H. SPITZER, TRUSTEES ATTORNEY(S)** **5-11-23 [71]**

Final Ruling: No appearance at the June 29, 2023 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 11, 2023. By the court's calculation, 49 days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).

The Motion for Allowance of Professional Fees 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Professional Fees is granted.

The Law Office of Barry H. Spitzer, the Attorney ("Applicant") for Kimberly Husted, the Chapter 7 Trustee("Client"), makes a First and Final Request for the Allowance of Fees and Expenses in this case.

Fees are requested for the period August 2, 2021, through May 11, 2023. The order of the court approving employment of Applicant was entered on August 13, 2021. Dckt. 55. Applicant's total fees are $13,387.50, but is only requesting fees in the amount of $8,032.50 and costs in the amount of $136.77.

APPLICABLE LAW

Reasonable Fees

A bankruptcy court determines whether requested fees are reasonable by examining the circumstances of the attorney's services, the manner in which services were performed, and the results of the services, by asking:

A. Were the services authorized?

B. Were the services necessary or beneficial to the administration of the estate at the time they were rendered?

C. Are the services documented adequately?

D. Are the required fees reasonable given the factors in 11 U.S.C. § 330(a)(3)?

E. Did the attorney exercise reasonable billing judgment?

In re Garcia, 335 B.R. at 724 (citing *In re Mednet*, 251 B.R. at 108; *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 860 (9th Cir. 2004)).

Lodestar Analysis

For bankruptcy cases in the Ninth Circuit, "the primary method" to determine whether a fee is reasonable is by using the lodestar analysis. *Marguiles Law Firm, APLC v. Placide (In re Placide)*, 459 B.R. 64, 73 (B.A.P. 9th Cir. 2011) (citing *Yermakov v. Fitzsimmons (In re Yermakov)*, 718 F.2d 1465, 1471 (9th Cir. 1983)). The lodestar analysis involves "multiplying the number of hours reasonably expended by a reasonable hourly rate." *Id.* (citing *In re Yermakov*, 718 F.2d at 1471). Both the Ninth Circuit and the Bankruptcy Appellate Panel have stated that departure from the lodestar analysis can be appropriate, however. *See id.* (citing *Unsecured Creditors' Comm. v. Puget Sound Plywood, Inc. (In re Puget Sound Plywood)*, 924 F.2d 955, 960, 961 (9th Cir. 1991) (holding that the lodestar analysis is not mandated in all cases, thus allowing a court to employ alternative approaches when appropriate); *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143 B.R. 560, 562 (B.A.P. 9th Cir. 1992) (stating that lodestar analysis is the primary method, but it is not the exclusive method)).

Reasonable Billing Judgment

Even if the court finds that the services billed by an attorney are "actual," meaning that the fee application reflects time entries properly charged for services, the attorney must demonstrate still that the work performed was necessary and reasonable. *In re Puget Sound Plywood*, 924 F.2d at 958. An attorney must exercise good billing judgment with regard to the services provided because the court's authorization to employ an attorney to work in a bankruptcy case does not give that attorney "free reign to run up a [professional fees and expenses] tab without considering the maximum probable recovery," as opposed to a possible recovery. *Id.*; *see also Brosio v. Deutsche Bank Nat'l Tr. Co. (In re Brosio)*, 505 B.R. 903, 913 n.7 (B.A.P. 9th Cir. 2014) ("Billing judgment is mandatory."). According to the Court of Appeals for the Ninth Circuit, prior to working on a legal matter, the attorney, or other professional as appropriate, is obligated to consider:

> (a) Is the burden of the probable cost of legal [or other professional] services disproportionately large in relation to the size of the estate and maximum probable recovery?

(b) To what extent will the estate suffer if the services are not rendered?

(c) To what extent may the estate benefit if the services are rendered and what is the likelihood of the disputed issues being resolved successfully?

In re Puget Sound Plywood, 924 F.2d at 958–59 (citing *In re Wildman*, 72 B.R. 700, 707 (N.D. Ill. 1987)).

A review of the application shows that Applicant's services for the Estate include preparing motions and documents, administration services, and asset recovery. The court finds the services were beneficial to Client and the Estate and were reasonable.

FEES AND COSTS & EXPENSES REQUESTED

Fees

Applicant provides a task billing analysis and supporting evidence for the services provided, which are described in the following main categories.

General Case Administration: Applicant spent 1.4 hours in this category. Applicant reviewed documents, email, schedules, and petition from the Trustee, and communicated with Trustee and attorneys involved in the case.

Fee and Employment Applications: Applicant spent 3.1 hours in this category. Applicant prepared Applicant's fees and employment application.

Meeting of Creditors: Applicant spent 1.0 hours in this category. Applicant attended the First Meeting of Creditors.

Efforts to Assess and Recover Assets: Applicant spent 26.0 hours in this category. Applicant prepared for and attended the Court hearing and status conference; communicated with Debtor and Trustee via email and telephone; prepared a demand letter and complaint; prepared a Request for Default Judgement; discussed settlement options with Trustee and Debtor and prepared a settlement letter; prepared the Motion to Approve Compromise; and emailed Debtor's attorney regarding Debtor's turnover of non-exempt funds and buy back of non-exempt equity in a vehicle.

The fees requested are computed by Applicant by multiplying the time expended providing the services multiplied by an hourly billing rate. The persons providing the services, the time for which compensation is requested, and the hourly rates are:

Names of Professionals and Experience	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
Barry H. Spitzer, Attorney	31.5	$425.00	$13,387.50
Total Fees for Period of Application			$13,387.50

The court notes, Applicant is voluntarily reducing their fees and is only requesting for total fees of $8,032.50.

Costs & Expenses

Applicant also seeks the allowance and recovery of costs and expenses in the amount of $136.77 pursuant to this application. However, Applicant has not provided a breakdown of costs and expenses in the Motion and has left the court to go through the exhibits and manually categorize the costs and expenses. In the future, the court requests Applicant provide a breakdown, similar to the billing table provided in the Motion, that provides the court a summary of each of the costs and expenses.

The costs requested in this Application are,

Description of Cost	**Per Item Cost, If Applicable**	**Cost**
Copying	$0.15 per page	$69.00
Postage		$34.77
Courtcall		$33.00
Total Costs Requested in Application		$136.77

Attempting to Recover Inappropriate Costs - CourtCall

Applicant is expected as part of its hourly rate to have the necessary and proper office and business support to provide these professional services to Client. These basic resources include, but are not limited to, basic legal research (such as online access to bankruptcy and state laws and cases); phone, email, and facsimile; and secretarial support. The costs requested by Applicant include CourtCall.

While Applicant requested reimbursement for costs associated with making telephonic CourtCall Appearances, the court does not permit such reimbursements and therefore declines to award Applicant CourtCall costs. The decision to attend hearings via CourtCall is at the cost of the attorney included in the hourly rate for the services.

Here, Applicant could have appeared in person, but probably recognized how even with the associated costs it is more economically efficient to attend remotely. CourtCall is a very effective tool allowing attorneys to market their legal skills (and generate fees from a much larger client base).

However, for this Application, AND THIS APPLICATION ONLY, in light of the substantial reduction of the fees, the court allows the additional CourtCall expense.

Therefore, Applicant is allowed costs in the amount of $136.77.

FEES AND COSTS & EXPENSES ALLOWED

Fees and Costs & Expenses

Applicant is allowed, and the Chapter 7 Trustee is authorized to pay, the following amounts as compensation to this professional in this case:

Fees	$8,032.50
Costs and Expenses	$136.77

pursuant to this Application as final fees and costs pursuant to 11 U.S.C. § 330 in this case from the available funds of the Estate.

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 Allowance of Fees and Expenses filed by The Law Office of Barry H. Spitzer ("Applicant"), Attorney for Kimberly Husted, the Chapter 7 Trustee, ("Client") 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 Law Office of Barry H. Spitzer is allowed the following fees and expenses as a professional of the Estate:
>
> The Law Office of Barry H. Spitzer, Professional employed by the Chapter 7 Trustee
>
> Fees in the amount of $8,032.50
> Expenses in the amount of $136.77,
>
> as the final allowance of fees and expenses pursuant to 11 U.S.C. § 330 as counsel for the Chapter 7 Trustee.

14. 10-27435-E-7 KJH-2 | **THOMAS GASSNER, Paul Pascuzzi** | **MOTION FOR ADMINISTRATIVE EXPENSES, 5-19-23 [257]**

Final Ruling: No appearance at the June 29, 2023 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on May 19, 2023. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion for Allowance of Administrative Expenses 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Allowance of Administrative Expenses is granted.

Kimberly Husted ("Movant") requests payment of administrative expenses in the amount of $108,000.00 and $56,000.00, for the estate's tax obligations to Internal Revenue Service ("IRS") and Franchise Tax Board ("FTB") respectively.

DISCUSSION

Movant argues the payment to the IRS and FTB is appropriate under United States Bankruptcy Code § 503(b)(1)(B) because it is a tax liability incurred post-petition by the estate.

Section 503(b)(1)(A) of the Bankruptcy Code accords administrative expense status to "the actual, necessary costs and expenses of preserving the estate . . . ." Under 11 U.S.C. § 503(b)(1)(B), income taxes postpetition in a chapter 7 case generated from property of the estate are subject to administrative priority. 4 Collier on Bankruptcy P 503.07 (16th 2022).

Movant having demonstrated that the expenses were necessary, the court finds that Movant paying 2023 income taxes is necessary for Debtor and provides benefit to the Estate. The Motion is granted, and the Chapter 7 Trustee is authorized to pay administrative expenses in the amount of $164,000.00.

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 Allowance of Administrative Expense filed by Kimberly Husted ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted, and the Chapter 7 Trustee is authorized to pay Internal Revenue Service $108,000.00 and the Franchise Tax Board $56,000.00 relating to 2023 tax obligations as an administrative expense of the Chapter 7 Estate in this case pursuant to 11 U.S.C. § 503(b)(1).