UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

August 23, 2023 at 10:00 a.m.

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1. **23-21822-E-12** **BSH-9** **1 thru 5**

RUSSELL LESTER
Brian Haddix

MOTION TO APPROVE STIPULATION RE DISPOSITION OF ESTATE ASSETS IN CUSTODIAN'S POSSESSION
8-2-23 [120]

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.

No Certificate of Service has been filed. At the hearing, XXXXXXXXXX

~~Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 12 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 xxxx, 201x. By the court's calculation, xx days' notice was provided. 35 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice); LOCAL BANKR. R. 9014-1(f)(1)(B) (requiring fourteen days' notice for written opposition).~~

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

The Motion for Approval of Stipulation Between Debtor in Possession and State Court Receiver is ~~granted~~.

Chapter 12 Debtor in Possession, Russell Wayne Lester, ("Debtor in Possession") requests that the court approve a stipulation with the State Court Receiver, Douglas Howell ("Receiver") which provides that Receiver will retain possession of $23,169.03currently held by the Receiver as a reasonable reserve.

The court notes, the Motion states it is based on the Notice of Motion, Declaration(s) of Debtor(s), Evidence in Support, and Points & Authorities. Motion, Dckt. 120. Debtor in Possession has not filed a declaration, nor has Points & Authorities been filed. It appears either this was a typographical error or Debtor in Possession's declaration and the Points & Authorities were inadvertently omitted. At the hearing, XXXXXXXXXX

Debtor in Possession's Counsel's Declaration, Dckt. 122, states the Stipulation is a result of the following:

1. Creditor First Northern Bank of Dixon filed an action in Solano County Superior Court, which sought the appointment of a receiver over certain assets of the Debtor in Possession.

2. Receiver was appointed, and shortly after the Chapter 12 filing, Counsel for Debtor in Possession contacted the Receiver's Counsel to discuss turnover of Debtor in Possession's funds held by the Receiver.

3. Receiver's Counsel informed Debtor in Possession's Counsel that they were holding approximately $23,169.03 and requested they hold this amount as the Receiver's reserve for Receiver and Receiver's Counsel's fees.

STIPULATION

Debtor in Possession and Receiver stipulate to an order regarding the Receiver's reserve:

A. Receiver will retain possession of $23,169.03 of estate property funds currently held by the Receiver.

B. Debtor in Possession reserves all rights to comment on, oppose, or support the Receiver's applications to approve its accounting fees or expenses in the receivership action or this Chapter 12 case.

The full terms of the Stipulation are set forth in the Stipulation filed in support of the Motion, Dckt. 132.

~~The court determines that the stipulation is in the best interest of the Debtor in Possession and Receiver. The Motion is granted.~~

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

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

~~The Motion to Approve Stipulation filed by Chapter 12 Debtor in Possession, Russell Wayne Lester, ("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 for Approval of Stipulation between Debtor in Possession and the State Court Receiver, Douglas Howell ("Receiver") is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Stipulation filed in support of the Motion (Dckt. 132).~~

2.	**23-21822-E-12** **GB-4**	**RUSSELL LESTER** **Brian Haddix**	**CONTINUED MOTION TO DISMISS CASE** **6-15-23 [60]**

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 Motion to Dismiss is xxxxxxxxx

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**. <u>But if in the informed discretion of the court</u>, <u>neither the statute nor the Rules are up to the task</u>, <u>the court may safely rely on its inherent power.</u>
>
>]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 <u>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</u>

> 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):
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> > (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.").

The court notes that these authorities address the legal principle of *Res Judicata* as applying to issues that were or could have been raised when the prior bankruptcy plan was confirmed. Such items can include the validity of a creditor's lien that is provided for in the plan and the amount of the claim provided for in the plan. However, subsequent events which occurred and the legal rights asserted based thereon do not appear to be " issues that were raised in conjunction with plan confirmation or could have been raised at that time."

The law is well established that with the confirmation of a Chapter 11 (or other) Plan, it is construed as the modified contractual terms between the debtor and creditors. Looking at the *Hillis Motors* case cited by Movant, the Ninth Circuit Court of Appeals states:

> A reorganization plan resembles a consent decree and therefore, should be construed basically as a contract. *See The Official Creditors Committee of Stratford of Texas, Inc. v. Stratford of Texas, Inc. (In re Stratford of Texas, Inc.)*, 635 F.2d 365, 368-69 (5th Cir. Unit A Jan. 1981); *see also Rufo v. Inmates of Suffolk County Jail*, 116 L. Ed. 2d 867, 112 S. Ct. 748, 757 (1992) (a consent decree has elements of both a judgment and a contract). Although a confirmed bankruptcy plan is a judgment rendered by a federal court in a case arising under federal law, because there is little need for a nationally uniform body of law regarding the interpretation of Chapter 11 plans and because state law is regularly incorporated into bankruptcy law, state law constitutes the federal rule of decision here and governs our interpretation of Hillis' plan. *See Kamen v. Kemper Financial Serv. Inc.*, 114 L. Ed. 2d 152, 111 S. Ct. 1711, 1717 (1991); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-29, 59 L. Ed. 2d 711, 99 S. Ct. 1448 (1979); *Stratford*, 635 F.2d at 368-39.

Hillis Motors v. Hawaii Auto. Dealers' Ass'n (In re Hillis Motors), 997 F.2d at 588. This language takes one down the path of the confirmed Chapter 11 Plan being a "contract," which like every other contract is subject to modification under the Bankruptcy Code. However, issues and disputes that were, or could have been addressed through or at the time of the prior confirmed plan cannot be subsequently raised and litigated.

3. 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.

4. 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.

5. 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.

6. 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 of Georgia 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.

Must the Debtor Seek Modification of the Prior Chapter 11 Plan

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**; <u>partial payment of his obligations to FNB</u>; **payment in full of the Voluntarily Deferred Allowed Administrative Claims**; <u>payment in full of all remaining General Unsecured Claims</u>; 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.
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> 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.
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> 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 in a prior case, 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.

Opposition Stated, Briefing Schedule, and Question re Whether There is a Default On the Obligation as Modified by the Confirmed Chapter 11 Plan

At the initial hearing, counsel for the Debtor in Possession stated an opposition to the Motion, including that it is necessary to proceed with a reorganization in this case in light of Movant asserting that there exists a default in the amended obligation as provided in the confirmed Chapter 11 Plan and therefore Movant may proceed with liquidating Debtor's personal property that is collateral for it amended obligation as provided for in the Chapter 11 Plan.

In the oral argument, what came to light was an interesting legal question concerning the prior case, the Confirmed Chapter 11 Plan, and whether or not a default exists on the obligation of owed to Movant as modified by the Chapter 11 Plan.

Movant does not dispute that the default, as stated in the Notice of Default given for its obligation as modified by the Chapter 11 Plan , has been cured, but citing to the California Commercial Code Movant asserts that there exists a default by which it can proceed to enforce its rights against personal property collateral.

In the Motion, Movant discusses how under the Confirmed Chapter 11 Plan if a default occurs, then if it is not cured within a specified number of days, then the Plan injunction is terminated and the Movant may proceed against its collateral. Such default occurred, was not cured, and Movant acted to enforce its rights, including obtaining the appointment of a receiver in State Court.

Prior to foreclosure under the Deed of Trust, Debtor cured the default as Noticed. As of this point in time there appears to be no dispute that the Debtor has not cured the default in payments as provided on Movant's obligation as modified by the Plan. Debtor under the Plan has further, future payments coming due.

However, Movant asserts that California Commercial Code § 9604 (which addresses the rights of a creditor who has real and personal property collateral) allows Movant to proceed to liquidate the personal property collateral securing its obligation as modified under the Confirmed Chapter 11 Plan. This argument presents the court with an interest, and as of yet unaddressed, legal question.

California Commercial Code § 9604 states that if a party has a right to proceed against both real and personal property collateral, then it may do so in the specified says. § 9604 does not grant a right to proceed against such collateral.

What Movant and Debtor/Debtor in Possession have not made clear is whether there is a non-curable default under Movant's obligation as modified by the Chapter 11 Plan, without regard to whether the default as noticed and under California Civil Code § 2924c was "cured," and if so, whether that resulting from a post-confirmation event: (1) can be cured or (2) can be addressed through a modification of the Confirmed Chapter 11 Plan.

From the court's limited review of the 84 page Confirmed Chapter 11 Plan (20-24123; Order Confirming and Plan attached, Dckt. 724), the court could not identify a provision altering the default and cure provisions for Movant's obligation as provided in the contract(s) and applicable State Law.

With respect to California Civil Code § 2924c, the court notes that this section expressly provides that all amounts asserted to be in default must be cured for the Notice of Default to be rescinded. This section provides (the court reorganizing the long narrative paragraph for better ease in reading and court's emphasis added):

> **2924c. Curing default; Notice of default; Limitation on costs and expenses; Trustee's or attorney's fees; Reinstatement of default**
>
> **(a)**
> **(1)** Whenever all or a portion of the principal sum of any obligation secured by deed of trust or mortgage on real property or an estate for years therein hereafter executed **has, prior to the maturity date fixed in that obligation, become due or been declared due by reason of default in payment of interest or of any installment of principal**,.or . . ., the trustor or **mortgagor** or their successor in interest in the mortgaged or trust property or any part thereof, . . ., at any time within the period specified in subdivision (e), if the power of sale therein is to be exercised, or,

> otherwise at any time prior to entry of the decree of foreclosure, **may pay to the beneficiary** or the mortgagee or their successors in interest, respectively, the **entire amount due, at the time payment is tendered, with respect to**
>
>> (A) **all amounts of principal, interest**, taxes, assessments, insurance premiums, or advances **actually known by the beneficiary to be, and that are, in default and shown in the notice of default**, under the terms of the deed of trust or mortgage and the obligation secured thereby,
>>
>> (B) **all amounts in default on recurring obligations not shown in the notice of default**, and
>>
>> (C) **all reasonable costs and expenses, subject to subdivision (c), that are actually incurred in enforcing the terms of the obligation**, deed of trust, or mortgage, and trustee's or attorney's fees, subject to subdivision (d) other than the portion of principal as would not then be due had no default occurred
>
> **and thereby cure the default theretofore existing**, and thereupon, all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and deed of trust or mortgage shall be reinstated and shall be and remain in force and effect, the same as if the acceleration had not occurred.
>
> . . . .

This is discussed in WITKIN SUMMARY OF CALIFORNIA LAW, CH VIII § 232, that the § 2924c cure includes all amounts due at the time the cure payment is tendered.

Thus, it appears that upon confirming that the default had been cured for California Civil Code § 2924c, Movant is stating that the default has been cured, there is no default. The provisions of California Commercial Code § 9604 relate to how a creditor may resort to its personal and real property collateral when there is a default. *See* Cal. Com. § 9601(a), addressing rights of a secured party after default, stating, "(a) After default, a secured party has the rights provided in this chapter and, except as otherwise provided in Section 9602, those rights provided by agreement of the parties."

What is unclear to the court is what "default" exists by which Movant would be exercising its lien rights against personal property collateral after it has confirmed that the default as provided for in California Civil Code § 2924c has been cured.

Debtor's Response

Debtor in Possession filed a Response on August 2, 2023. Dckt. 124. Debtor in Possession states:

1. Movant provides no evidence that there is a continuing loss or diminution of the estate. The Monthly Operating Report shows the Debtor is within budget and able to pay Movant.

2. Movant provides no authority that Debtor in Possession's only remedy after Chapter 11 Confirmation is to seek relief from the confirmation order or seek modification of the Chapter 11 Plan.

3. Movant provides no authority that filing a Chapter 12 petition modifies a confirmed Chapter 11 Plan.

AUGUST 23, 2023 HEARING

This court is presented with an interesting situation concerning the filing of this Bankruptcy Case, starting with whether the proper action for the Debtor, who is serving as the Reorganized Debtor in the place of a plan administrator under the confirmed Chapter 11 Plan and his counsel in the Chapter 11 case should be seeking modification of the Chapter 11 Plan in light of Congress giving an individual debtor the ability to modify a Chapter 11 plan notwithstanding substantial consummation of the plan. This statutory provision may well demonstrate the Congressional intent to create a "simple," straightforward, cost effective way to address minor or modest tweaks to a Chapter 11 plan in light of subsequent events rather than new "reorganization war" in a second case.

Additionally, there is an active dispute between the Reorganized Debtor in the Chapter 11 Case and Movant as to whether the there is a default or whether the default has been cured. This appears to include a factual dispute as to whether Movant stated a cure amount, which the Reorganized Debtor then paid, or whether such cure was only limited to the then pending nonjudicial foreclosure sale and cure the default as applies to other collateral.

Further, the Parties may have a dispute as to what the Modified Amended Chapter 11 Plan confirmed in the prior case provides for defaults and cure of defaults, and what balances are due and owing if there is a monetary default and such monetary default is cured.

The Debtor has stated that he is not intending to delay the payment in full dates for Movant, but to have the full period provided in the Chapter 11 Plan to make those payments, having cured, by Debtor's calculation, any default under the Chapter 11 Plan that existed. At the initial hearing, the Parties indicated that this deadline will occur in the next two or three years.

It may well be that Debtor, as the Reorganized Debtor in the Chapter 11 Case has a clear(er), cost effective, more straightforward, fast lane created by Congress and provided in the Chapter 11 Plan (allowing for disputes to be determined by motion) to address the asserted Plan default issues rather than the time, cost, and expense of this new Chapter 12 case. [Fn.4.]

FN. 4. Though the Reorganized Debtor and Richard Lapping, Esq, the Reorganized Debtor's attorney in the Chapter 11 Case, reopened the Chapter 11 Case on May 24, 2023 (Motion to Reopen Filed), and stated that the Reorganized Debtor would seek a modification of the Chapter 11 Plan or other proceeding to resolve the dispute concerning the asserted default under the Plan, no action was taken by the Reorganized Debtor and his counsel. No action having been taken, the Chapter 11 Case was re-closed on June 30, 2023. 20-24123.

At the hearing, **xxxxxxx**

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

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

The Motion To 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 Motion to Dismiss is xxxxxxxxx

3. 23-21822-E-12 GB-3

RUSSELL LESTER
Brian Haddix

CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY
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, opposition was stated.

The Motion for Relief from the Automatic Stay is denied without prejudice.

First Northern Bank of Dixon ("Movant") seeks in this one Motion: (1) that the court abstain from exercising federal court jurisdiction as it applies to property of the Bankruptcy Estate for which Movant is prosecuting a State Court Receivership Action; (2) Excuse the State Court Receiver from turning over property of the Bankruptcy Estate as otherwise required by 11 U.S.C. § 543; and (3) granting relief from the automatic stay to allow Movant to proceed with the State Court Receivership Action to exercise control over property of the Bankruptcy Estate by enforcing Movant's interests in the property of the Bankruptcy Estate.

Movant asserts that this triple relief requested is necessary so this court will "honor" its order confirming the Chapter 11 Plan in the Debtor's prior Chapter 11 Case. The basis assertion is that the Debtor filed this Chapter 12 case in bad faith and for the improper purpose of preventing the enforcement of Movant's rights as provided for in the confirmed Chapter 11 Plan.

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** **<u>in accordance with the secured party's rights and remedies in respect of the real property</u>**, **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.

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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.

Issuing Relating to § 2924c Confirmed Cure of Default and Default Pursuant to Which Rights in Personal Property Collateral Are Being Asserted

With respect to California Civil Code § 2924c, the court notes that this section expressly provides that all amounts asserted to be in default must be cured for the Notice of Default to be rescinded. This section provides (the court reorganizing the long narrative paragraph for better ease in reading and court's emphasis added):

> 2924c. Curing default; Notice of default; Limitation on costs and expenses; Trustee's or attorney's fees; Reinstatement of default
>
> **(a)**
> **(1)** Whenever all or a portion of the principal sum of any obligation secured by deed of trust or mortgage on real property or an estate for years therein hereafter executed **has, prior to the maturity date fixed in that obligation, become due or been declared due by reason of default in payment of interest or of any installment of principal**,.or . . ., the trustor or **mortgagor** or their successor in interest in the mortgaged or trust property or any part thereof, . . ., at any time within the period specified in subdivision (e), if the power of sale therein is to be exercised, or, otherwise at any time prior to entry of the decree of foreclosure, **may pay to the beneficiary** or the mortgagee or their successors in interest, respectively, the **entire amount due, at the time payment is tendered, with respect to**
>
> > (A) **all amounts of principal, interest**, taxes, assessments, insurance premiums, or advances **actually known by the beneficiary to be, and that**

> **are, in default and shown in the notice of default**, under the terms of the deed of trust or mortgage and the obligation secured thereby,
>
> (B) **all amounts in default on recurring obligations not shown in the notice of default**, and
>
> (C) **all reasonable costs and expenses, subject to subdivision (c), that are actually incurred in enforcing the terms of the obligation**, deed of trust, or mortgage, and trustee's or attorney's fees, subject to subdivision (d) other than the portion of principal as would not then be due had no default occurred
>
> **and thereby cure the default theretofore existing**, and thereupon, all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and deed of trust or mortgage shall be reinstated and shall be and remain in force and effect, the same as if the acceleration had not occurred.
> . . . .

This is discussed in WITKIN SUMMARY OF CALIFORNIA LAW, CH VIII § 232, that the § 2924c cure includes all amounts due at the time the cure payment is tendered.

Thus, it appears that upon confirming that the default had been cured for California Civil Code § 2924c, Movant is stating that the default has been cured, there is no default. The provisions of California Commercial Code § 9604 relate to how a creditor may resort to its personal and real property collateral when there is a default. *See* Cal. Com. § 9601(a), addressing rights of a secured party after default, stating, "(a) After default, a secured party has the rights provided in this chapter and, except as otherwise provided in Section 9602, those rights provided by agreement of the parties."

What is unclear to the court is what "default" exists by which Movant would be exercising its lien rights against personal property collateral after it has confirmed that the default as provided for in California Civil Code § 2924c has been cured.

Additional Relief Requested for Excusal from Turnover and for Abstention

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, 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.

In addition to combining multiple requests for relief in this one Motion, Movant has also filed

The request to excuse turnover is denied without prejudice.

The request for abstention is denied without prejudice.

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.

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).

AUGUST 23, 2023 HEARING

In filing the present Motion seeking relief from the automatic stay, Movant is implicitly admitting that pursuant to the filing of this Bankruptcy Case: (1) federal court jurisdiction exists, (2) that this Bankruptcy Case will proceed in this Court, and (3) this bankruptcy court will continue with the administration of property of the bankruptcy estate – but Movant just wants this court to not administer property of the Bankruptcy Estate in which Movant asserts an interest.

If this Bankruptcy Case was improperly filed and federal court jurisdiction is being improperly sought by Debtor, then this violation applies to all creditors, the Debtor, and all property of the Bankruptcy Estate. If this case was improperly filed to modify the confirmed plan, other than such subsequent case is proper under the Bankruptcy Code, then that improper filing taints the entire case and constitutes a violation of the federal court process.

But, Movant can't say that it "merely" should be given relief from the stay so that it can gut the property of the Bankruptcy Estate in this case and leave the remnants for this court to then exercise federal court jurisdiction over.

While asserting many alternative (and legally inconsistent) legal theories, the one warranting adjudication by this court is Movant's separate Motion to Dismiss.

The Motion for Relief From the Stay is denied without prejudice. The court will consider whether this case has been properly filed and whether the exercise of federal court jurisdiction pursuant to the Bankruptcy Code is permitted in light of the prior confirmed Chapter 11 Plan in the context of Movant's separately filed Motion to Dismiss.

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 Motion for Relief From the Automatic Stay is denied without prejudice.
>
> **IT IS FURTHER ORDERED** that the additional requests for relief for Excusal of Turnover of Property of the Bankruptcy Estate by the State Court Receiver and for this court to Abstain from exercising federal court jurisdiction over

property of the Bankruptcy Estate are both dismissed without prejudice, having been improperly combined into one omnibus motion by Movant.

4. 23-21822-E-12 GB-5 | **RUSSELL LESTER Brian Haddix** | **MOTION FOR ABSTENTION 7-19-23 [100]**

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's, Debtor's Attorney, Chapter 12 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 19, 2023. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion for Abstention is denied without prejudice.

Creditor, First Northern Bank of Dixon ("Creditor"), moves the court for an order that the court abstain in this case from exercising authority and jurisdiction that interferes with the Pending State Court Action. Creditor argues:

1. The mandatory abstention rules of 28 U.S.C. § 1334(c)(2) mandate the court to abstain;

2. The discretionary abstention rules of 28 U.S.C. § 1334(c)(1) strongly favor abstention; and

3. Abstention is also required because the current case interferes with Debtor in Possession's Chapter 11 Case in that the Pending State Court Action arises from Creditor's rights under the Chapter 11 Plan.

DEBTOR'S RESPONSE

Debtor in Possession filed a Response on August 2, 2023. Dckt. 126. Debtor in Possession states:

1. There is no case law supporting Creditor's theory that a proceeding need not be pending in bankruptcy court in order for the bankruptcy court to assert jurisdiction over the action.

2. There is nothing in the court where res judicata applies.

CREDITOR'S REPLY

Creditor filed a Reply on August 15, 2023. Dckt. 150. Creditor states:

1. Debtor provides no legal authority that abstention does not apply when there is only a bankruptcy case before the court.

2. 11 U.S.C. § 305(a)(1) provides that a court may dismiss a case under the bankruptcy code or suspend all proceedings if the interests of creditor and debtor would be better served.

3. Res judicata and judicial estoppel apply because the filing and prosecution of a bankruptcy case triggers creditors' filing claims, which is equivalent to complaints.

DISCUSSION

Congress created the extraordinarily broad grant of federal court jurisdiction for federal court bankruptcy proceedings in 28 U.S.C. § 1334 which first provides:

> § 1334. Bankruptcy cases and proceedings
>
> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. §1334(a), (b). Federal court jurisdiction exists for everything in the bankruptcy case; starting with the Title 11 case itself, matters arising under Title 11, matters arising in the Title 11 case, and matters in anyway related to the Title 11 case. As noted in § 1334(b), except for the bankruptcy case itself and as provided in 11 U.S.C. § 1334(e), the federal courts have original, but not exclusive jurisdiction, thus giving the court some flexibility in how various issues are addressed and what that federal court determines to be the proper forum.

In 11 U.S.C. § 1334(e) Congress created several other areas in which the federal courts have exclusive jurisdiction, stating:

> e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—
>
>> (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and
>>
>> (2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

Thus, for property of the bankruptcy estate, the federal courts have exclusive jurisdiction, as well as exclusive jurisdictions over the employment of professional persons in the bankruptcy case (11 U.S.C. § 327).

Recognizing that given the broad scope of federal jurisdiction created, the various non-bankruptcy proceedings in various stages of prosecution, and important State Law issues, Congress created a discretionary and mandatory abstention provisions to the broad grant of federal court jurisdiction.

> (c)
>
>> (1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
>>
>> (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.
>
> (d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

28 U.S.C. § 1334(c), (d).

The discretionary abstention provisions of 28 U.S.C. § 1334(c)(1) state that abstention is discretionary as they relate to a particular proceeding under Title 11 or arising in or relating to a case under Title 11.

It appears that the "comity with State courts or respect for State law" advanced by Creditor is to allow the State Court to dismember the assets of the bankruptcy estate in this case. *See* Motion, Dckt. 100 at 7; Memorandum of Points and Authorities, Dckt. 104 at 20-25. That is nothing more than any other situation in which a creditor asserts the right to avail itself of a debtor's assets outside of bankruptcy and is then derailed from that dismembering by a bankruptcy case being filed.

For mandatory abstention there must be a State law claim or cause of action that is related to a case under Title 11, for which such action could not have otherwise been commenced in this federal court absent jurisdiction arising under 28 U.S.C. § 1334, and for which there is a pending action in which such claim can be timely adjudicated. 28 U.S.C. § 1334(c)(2).

Here, what is asserted is that this federal court must abstain from exercising the exclusive (not merely original, but non-exclusive) jurisdiction that Congress has created pursuant to 28 U.S.C. § 1334(e)(1) over all property of the debtor as of the commencement of the bankruptcy case and all property of the bankruptcy estate. *See* Motion, Dckt. 100 at 6-7 ("The Pending State Court Action involves purely state law questions (under California contract law and the California Civil and Commercial Codes), also meaning that the claims are non-core. Aside from this Chapter 12 case, the Court has no jurisdiction over the Bank's claims in the Pending State Court Action.")

What Creditor argues is that this court must abstain so that the State Court can administer property of the bankruptcy estate. *Id.* If this were a valid argument, this logic would allow creditors in every bankruptcy case filed to assert that the federal court should abstain so that the creditor could finish the prosecution of its debt collection action and then execute against the property of the bankruptcy estate.

Creditor's Admission That Filing of This Chapter 12 Case is Proper

Creditor has chosen to file this Motion that "merely" seeks to have this court abstain from properly exercising the federal court jurisdiction for a bankruptcy case properly filed by the Debtor in Possession. Creditor does not assert and has not sought the dismissal of this bankruptcy case.

In the pages and pages of the Motion and arguments in the Points and Authorities, reference is made that a second reorganization case should not be allowed after the confirmation of a Chapter 11 plan in a prior case. Motion, Dckt. 100 at 8:15-19. That is merely asserted as a basis for the court to continue with this second Bankruptcy Case, but abstain to allow the State Court to administer the property of the Bankruptcy Estate (for which this court has exclusive jurisdiction).

While this issue of whether the Chapter 12 case before this court is proper has been referenced, the Parties have only nibbled around whether a subsequent bankruptcy case can be filed and whether a plan confirmed in this second Bankruptcy Case can modify the terms set forth in the confirmed plan in the prior case. This is discussed in 7 Collier on Bankruptcy P 1127.05, which states:

¶ 1127.05 Distinguishing Sequential Chapter 11 Cases and Plan Modifications

Some courts have held that section 1127(b) precludes a debtor from filing a second chapter 11 case because any plan in the second case would be an impermissible modification of the confirmed plan in the original case.1

"Courts have recognized certain situations, however, when it is appropriate to allow a successive [c]hapter 11 case notwithstanding the prohibition against post-substantial consummation modifications contained in § 1127 and the plan's binding res judicata effect under § 1141."2 Courts may consider certain factors in determining whether a debtor should be allowed to file successive chapter 11 filings, such as: (1) the length of time between the first and second chapter 11 cases; (2) the foreseeability and substantiality of events which ultimately cause the second chapter 11 filing; (3) whether the new plan contemplates liquidation or reorganization; (4) whether creditors consent to the second chapter 11 filing; or (5) the extent to which an objecting creditor's rights were modified in the initial reorganization and its treatment in the subsequent chapter 11.3 The inquiry also should include consideration of the debtor's good faith, since good faith is a requirement of every chapter 11 plan under 11 U.S.C. § 1129(a)(3).4

Courts generally allow an exception for a second chapter 11 filing when "there has been an extraordinary, unanticipated and unforeseeable change in circumstances since the first Chapter 11 case" that affects "the debtor's ability to fully perform under its confirmed plan."5 The debtor bears the burden of proof of demonstrating an unanticipated change in circumstances that would justify a serial chapter 11 filing.6

Courts have also recognized exceptions allowing a corporate debtor to file a second chapter 11 case when the debtor seeks to file a liquidating plan7 or when the reorganized debtor is a large debtor with many employees.8

The better view is that successive chapter 11 filings are acceptable because the Bankruptcy Code does not prohibit or limit a company's commencement of a second chapter 11 case.9 Also, the second case may be the only way to maximize value for the benefit of creditors and equity holders.

Footnotes

1

In re Frank's Nursery & Crafts, Inc., 2006 Bankr. LEXIS 1964, at *9–10 (Bankr. S.D.N.Y. May 8, 2006) (absent the most extraordinary circumstances, it is impermissible for a debtor to file a second chapter 11 petition after substantial consummation of the plan in the prior chapter 11 (citing *In re Roxy Real Estate)*); *In re Roxy Real Estate Co., Inc.*, 30 C.B.C.2d 570, 170 B.R. 571, 576 (Bankr. E.D. Pa. 1993); *In re Miller*, 122 B.R. 360, 366–67 (Bankr. N.D. Iowa 1990) (denying chapter 12 relief after a prior chapter 11 filing); *In re AT of Maine, Inc.*, 56 B.R. 55, 57 (Bankr. D. Me. 1985); *In re Northhampton Corp.*, 37 B.R. 110, 113 (Bankr. E.D. Pa. 1984). *Contra In re Elmwood Dev. Co.*, 964 F.2d 508, 511 (5th Cir. 1992) ("[T]he mere fact that a debtor has previously petitioned for bankruptcy relief does not render a subsequent chapter 11 petition 'per se' invalid."); *In re Jartran, Inc.*, 886 F.2d 859, 867–69, 21 C.B.C.2d 1141 (7th Cir. 1988) (may file second case for a liquidating plan).

2

In re Sandia Resorts, Inc., 2016 Bankr. LEXIS 366, at *21–22 (Bankr. D.N.M. Feb. 5, 2016). The *Sandia Resorts* court also recognized that a second chapter 11 filing that restructures new debt incurred after substantial consummation of the first chapter 11 plan would not impermissibly modify the first chapter 11 plan. Id. n.16 (citing *In re Garsal Realty, Inc.*, 98 B.R. 140, 150 (Bankr. N.D.N.Y. 1989) (second chapter 11 case was not an attempt to modify the plan contrary to section 1127(b) because the new debt did not exist until after substantial consummation of the earlier plan)).

. . .

5 *Sandia Resorts*, 2016 Bankr. LEXIS 366, at *22 (citing *Elmwood Dev. Co. v. General Elec. Pension Trust (In re Elmwood Dev. Co.)*, 964 F.2d 508, 511 (5th Cir. 1992) ("unanticipated changed circumstances may justify a valid successive request for Chapter 11 relief."), and quoting *In re Caviata Attached Homes, LLC*, 481 B.R. 34, 47 (B.A.P. 9th Cir. 2012)); *see also In re Triumph Christian Ctr., Inc.*, 493 B.R. 479, 487 (Bankr. S.D. Tex. 2013) (*citing Elmwood*, 964 F.2d 508, 511).

. . .

9

Elmwood Dev. Co. v. General Elec. Pension Trust (In re Elmwood Dev. Co.), 964 F.2d 508, 511 (5th Cir. 1992) (deciding that successive chapter 11 filings are not invalid because Congress did not prohibit or limit successive chapter 11 filings in 11 U.S.C. § 109, as it did for successive chapter 7 and 13 filings (citing *Johnson v. Home State Bank*, 501 U.S. 78, 87, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991))); *In re Woods*, 2011 Bankr. LEXIS 788, at *10 (Bankr. D. Kan. Mar. 7, 2011) ("[H]ad Congress intended to outlaw successive chapter 11 filings, it would have included that provision in § 109 where it explicitly conditioned or prohibited successive chapter 7 and 13 filings." (citing *Johnson v. Home State Bank*, 501 U.S. 78, 87, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991))).

7 Collier on Bankruptcy P 1127.05

It appears that one could address this issue in a fairly straightforward manner in seeking dismissal of this second Bankruptcy Case.

In its Reply Brief Creditor notes that 11 U.S.C. § 305(a)(1) provides that a court may dismiss a bankruptcy case or suspend the proceedings if it is the interests of both creditors and debtor would be served by dismissal or suspension. Reply, Dckt. 150, p. 2:8-13. Looking at the noticed Motion filed by Creditor, Dckt. 100, it (1) is titled as a Motion for Abstention; (2) states that "[Creditor] requests the Court to abstain in this case from exercising authority and jurisdiction that interferes with the Pending State Court Action (defined below) and the confirmed Chapter 11 Plan . . .," (p. 1:28 - 2:2); and (3):

> WHEREFORE, the Bank respectfully requests this Court to grant this Motion for Abstention as follow:
>
> A. **Abstaining from exercising authority and jurisdiction** through this Chapter 12 case
> over the claims and assets in the Pending State Court Action and the Chapter 11 Case;
>
> B. **Allowing continuation of the Pending State Court Action**;
>
> C. Providing that the **order on this Motion is binding and effective** despite the conversion of this case to a case under any other chapter of title 11 of the United States Code;
>
> D. Granting the Bank such other relief as this Court deems just and proper.

(p. 10:10-19 (emphasis added)).

Upon review of the ten-page Motion, Creditor does not mention "dismiss" or "dismissal" once. Upon review of the thirty-two page Points and Authorities, Dckt. 104, the word "dismissal" appears twice, but only to reference when dismissal of a second Chapter 11 case may be proper.

However, Creditor is clear in its Motion that it does not seek dismissal of the Chapter 12 case before the court, but merely requests the court to allow it to stay before this court while Creditor seeks to have the State Court administer property of this Bankruptcy Estate.

Creditor references 11 U.S.C. § 305 in their Reply. Reply, Dckt. 150 at 2. 11 U.S.C. § 305 provides:

> § 305. Abstention
>
> (a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—
>
> (1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or
>
> (2)
>
> > (A) a petition under section 1515 for recognition of a foreign proceeding has been granted; and
> >
> > (B) the purposes of chapter 15 of this title would be best served by such dismissal or suspension.

(b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.

(c) An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of title 28 or by the Supreme Court of the United States under section 1254 of title 28.

While, as Creditor states, this Code Section is titled "Abstention," if affords the court the authority to either dismiss the bankruptcy case or suspend all proceedings (not "merely" abstain from adjudicating a specific issue or claim) if the interests of both the debtor and creditor are served by such suspension or dismissal.

However, such suspension or dismissal may be done only after "notice and hearing." Here, no notice was given that Creditor would be seeking a dismissal or suspension, but only for this court to abstain to allow the State Court receivership proceedings proceed as to Creditor's collateral.

With respect to the statutory requirement that any suspension or dismissal is properly only if it is in the interests of both the debtor and creditors, Collier on Bankruptcy comments:

[1] In the Interests of Creditors and Debtor

Relief under section 305(a)(1) is **proper only if the interests of both the "creditors and the debtor" would be "better served"** by dismissal or suspension.3 **If dismissal or suspension is not in the interest of the debtor, relief under section 305(a)(1) is inappropriate**.4 The moving party bears the burden to demonstrate that dismissal or suspension benefits the debtor and its creditors.5 The Bankruptcy Appellate Panel for the Ninth Circuit has formulated the proper section 305(a)(1) analysis as follows:

> As the statutory language and legislative history demonstrate, the test under section 305(a) is not whether dismissal would give rise to a substantial prejudice to the debtor. Nor is the test whether a balancing process favors dismissal. **Rather, the test is whether both the debtor and the creditors would be "better served" by a dismissal.6**
>
> **Because of this requirement, few fact patterns fall within section 305(a).**7 Accordingly, parties who wish to seek dismissal of a case **based** primarily **on** the debtor's misconduct or **bad faith should invoke**, in most instances, the **dismissal provisions** contained **in the** relevant **chapter under which the case was filed.**

2 Collier on Bankruptcy P 305.02 (emphasis added).

Prior Case, Plan, and

Asserted Default

As the court discussed with counsel for the Debtor in Possession and counsel for Creditor, the substance of the dispute that led to the filing of his second Bankruptcy Case is the confirmed Chapter 11 Plan in the prior case, Case No. 20-24123, whether there is a default under the confirmed Plan in that case, and whether such default was cured.

The Parties discussed, making it clear how unreasonable they found the other Party and that Party's counsel to be, the default that occurred, the "cure" payment made, and the post-payment assertion by Creditor that the cure payment "merely" cured the default on the real property nonjudicial foreclosure sale, but not Creditor's ability to take control of and sell personal property collateral.

It appears that Creditor asserts that the default arising under the confirmed Chapter 11 Plan is not curable, that the Chapter 11 Plan is in irrecoverable default, and that it may exercise its rights against all of its collateral.

Thus, it appears that the real battles for the Debtor in Possession, who is the Reorganized Debtor (who appears to have the role of "plan administrator" (there being no plan administrator identified)) and who is:

> [r]esponsible for the implementation of the Plan, including but not limited to objecting to claims, operating the business, and making real estate sales as necessary to meet the payment obligations under this Plan. The Reorganized Debtor shall have all powers and duties under federal and California law to implement the terms and provisions of this Plan. The Reorganized Debtor shall be authorized to execute such other documents as are necessary and appropriate to carry out the provisions of this Plan, without the necessity of filing such documents with the Court or obtaining approval for actions in or outside the ordinary course of business.

10-24123; Modified Amended Chapter 11 Plan, ¶ 6.2, Dckt. 724; and Creditor as to what their rights are under the terms of the Confirmed Modified Amended Chapter 11 Plan.

Then, the battle in connection with the Chapter 12 Bankruptcy Case is whether the Chapter 12 Plan can modify the Confirmed Modified Amended Chapter 11 Plan. If not, then there is no reason for this court to maintain an active, ongoing federal judicial proceeding, but then it would appear the Chapter 12 case should then be dismissed. However, Creditor does not seek dismissal, but to have this court retain jurisdiction while allowing a limited, specialized State Court proceeding to be concluded and then have that judgment brought back to this federal court to be included in this second Bankruptcy Case.

Creditor does note the provisions of 11 U.S.C. § 1127 which provide for modification of a Chapter 11 Plan and the ability of the Reorganized Debtor in the Chapter 11 Case to modify the Plan. Motion, Dckt. 100 at 8:13-19. With respect to modification of a Chapter 11 Plan after confirmation, Congress provides in pertinent part:

> § 1127. Modification of plan
> . . .
> (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.
> . . .
> (e) If the debtor is an individual, the plan may be modified at any time after confirmation of the plan but before the completion of payments under the plan, whether or not the plan has been substantially consummated, upon request of the debtor, the trustee, the United States trustee, or the holder of an allowed unsecured claim, to—
>
>> (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
>>
>> **(2) extend or reduce the time period for such payments;** or
>>
>> (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim made other than under the plan.

In requesting "abstention," Creditor notes that it appears that this Chapter 12 Case is an attempt to modify the Modified Amended Chapter 11 Plan outside of the provisions of 11 U.S.C. § 1127. Motion, Dckt. 100 at 8 ("By prosecuting this Chapter 12 case, the Debtor violates and collaterally attacks the Court's order confirming the Confirmed Chapter 11 Plan; he is in effect modifying the Confirmed Chapter 11 Plan without a notice and hearing or filing a motion under 11 U.S.C. § 1127 (where he has the burden of proof)").

7 Collier on Bankruptcy P 1127.04 discusses this ability of a debtor to modify a confirmed Chapter 11 plan, even if it has been substantially consummated, and directs the reader to Federal Rule of Bankruptcy Procedure 9019(b) which governs the procedure for modification of an individual's confirmed Chapter 11 plan.

> Rule 3019. Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case
> . . .
> (b) Modification of plan after confirmation in individual debtor case. If the debtor is an individual, a request to modify the plan under § 1127(e) of the Code is governed by Rule 9014. The request shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 21 days' notice by mail of the time fixed to file objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee, together with a copy of the proposed modification. Any objection to the proposed modification shall be filed and served on the debtor, the proponent of the modification, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee.

This provides a simpler process then the original confirmation, with the court and parties focusing on the Party(ies) whose claim(s) are subject to the modification of the already confirmed Chapter 11 Plan.

August 24, 2023 Hearing

Movant asserts that the filing of this Chapter 12 case in improper and not permitted under the Bankruptcy Code. As clearly addressed in Movant's pleadings, it is asserted that this Bankruptcy Case should not exist. Movant then takes the position that it is fine if the Bankruptcy Case exists, a bankruptcy estate is created, and that federal court jurisdiction is exercised – but just let Movant take the property of the Bankruptcy Estate in which Movant asserts an interest out of the Bankruptcy Estate, allow a State Court to administer that property of the Bankruptcy Estate, and then leave this court to exercise federal court jurisdiction over the remnants of the Bankruptcy Estate (for which exclusive federal court jurisdiction is granted as provided in 28 U.S.C. § 1334(e).

These asserted ground are not sufficient for this court abstaining (and abdicating) responsibility for the exercise of federal court jurisdiction under the Bankruptcy Code if an when a bankruptcy case is properly filed.

The real issue – whether this Bankruptcy Case was filed for a properly permitted purpose under federal law – can and will be addressed in Movant's separate Motion to Dismiss.

The Motion for this court to abstain is denied without prejudice.

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 Abstention, 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 Motion for Abstention is denied without prejudice.

5. **23-21822-E-12** **GB-6** | **RUSSELL LESTER** **Brian Haddix** | **MOTION FOR EXCUSAL OF TURNOVER BY RECEIVER IN STATE COURT PROCEEDING** **7-19-23 [106]**

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 12 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July19, 2023. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion for Excusal of Turnover is denied without prejudice.

Creditor First Northern Bank of Dixon, a creditor holding a secured claim, ("Creditor") in the above entitled case and moving party herein, seeks an order to excuse turnover as to assets held by Douglas Howell, the State Court Receiver ("Receiver"), ("Property") pursuant to 11 U.S.C. § 543. Creditor argues cause exists to excuse turnover on the following grounds:

1. Debtor in Possession has not paid payroll taxes and witholdings;

2. Debtor in Possession did not comply with orders of the state court and requests from the receiver; and

3. Debtor in Possession violates federal bankruptcy rules, fails to cooperate with creditors, and misrepresents critical information about their business and financial affairs.

Additionally, Creditor states that res judicata and judicial estoppel effects of the confirmation of Debtor's Chapter 11 Plan are cause for excusal. Creditor states the receiver has been investigating Debtor in Possession's financial affairs and assets that Creditor has been given authority to liquidate. In particular, the receiver has been investigating Debtor in Possession's alleged misappropriation of Creditor's cash collateral.

The court notes, Debtor in Possession has not identified property of the bankruptcy estate that receiver is currently in possession of.

DEBTOR IN POSSESSION'S RESPONSE

Debtor in Possession filed a Response on August 2, 2023. Dckt. 127. Debtor in Possession argues Creditor's request is moot, since Debtor in Possession and the Receiver have stipulated to the Receiver retaining the estate property funds as a "Receiver's Reserve."

CREDITOR'S REPLY

Creditor filed a Reply on August 15, 2023. Dckt. 151. Creditor states Debtor's Response is not responsive to the Motion. Creditor states the Receiver is "charged with much more than just the funds he had on hand on the petition filing date." The Receiver has the authority to administer the collateral of Creditor. Thus, Creditor argues, Debtor in Possession has not opposed the Motion.

DISCUSSION

11 U.S.C. § 543 governs actions of a pre-petition custodian after a bankruptcy case is filed. 5 Collier on Bankruptcy P 543.01 (16th 2023). Section 543 requires a custodian with knowledge of the commencement of a case to deliver to the trustee any property of the debtor held by or transferred to the custodian. "Once the custodian has knowledge of the case, the custodian may not make any disbursement or take any action regarding the administration of the debtor's property, except as necessary to preserve the property, and must deliver and account for the debtor's property to the bankruptcy trustee." 5 Collier on Bankruptcy P 543.01 (16th 2023).

Section 543 provides exceptions to turnover of a custodian, providing that a court:

> (1) may excuse compliance . . . if the interests of creditors and, if the debtor is not insolvent, of equity security holders would be better served by permitting a custodian to continue in possession, custody, or control of such property, and
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> (2) shall excuse compliance . . . if the custodian is an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, unless compliance with such subsections is necessary to prevent fraud or injustice.

11 U.S.C. § 543(d).

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

> (11) The term "custodian" means—

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

11 U.S.C. § 101(11).

Here, the state court receiver's responsibilities were to investigate and liquidate Debtor's assets. It is clear the duties of the receiver was for the prepetition liquidation of Debtor in Possession's property and protecting creditors' rights. Thus, Receiver is a custodian under 11 U.S.C. § 543, and therefore, turnover of properties would be required, absent the court granting excusal of compliance under 11 U.S.C. § 543(d).

The court notes, Creditor has not provided the court with any evidence of Receiver's possession of Debtor in Possession's or the bankruptcy estate's property. Nowhere in the Motion does Creditor describe what this "property" Receiver is holding that Creditor wishes is excused to turnover.

On page six of the Motion, Creditor states, "[t]he receiver had custody and control over [Creditor's] equipment and inventory collateral. The Debtor had possession of that collateral." Motion, Dckt. 106 at 6:18-19. Creditor does not state whether the Receiver is currently in possession of that collateral.

In Douglas Kraft's Declaration, Dckt. 108, Mr. Kraft states under the State Court Action, Receiver was appointed over the collateral, which gave the Receiver the power and responsibility to sell, lease, transfer, or otherwise deal with the collateral. Declaration, Dckt. 108, ¶¶ 24, 25. Mr. Kraft did not state whether the Receiver had possession over estate property.

Further in Kraft's Declaration, Mr. Kraft states that on May 19, 2023, the Receiver sent a letter to Debtor in Possession, instructing them to "deliver keys to all equipment, and give unfettered access to the walnut inventory and processing equipment" so the Receiver could market the equipment. *Id.* ¶ 91.

Additionally, Mr. Kraft states that on May 19, 2023, Debtor in Possession sent an email to Receiver requesting the Receiver allow Debtor in Possession to continue processing and shipping orders, including orders Debtor in Possession intended to fill. *Id.* ¶ 92.

From these factual statements, stated under penalty of perjury, Creditor has not provided any evidence that Debtor in Possession is in possession of estate property. Rather, it appears Creditor is attempting to prospectively take property away from the bankruptcy estate, that Receiver will become in possession of. 11 U.S.C. § 543 is clear, it requires custodians to turnover property held at **the filing of the petition**, it is not used to allow custodians to take property from the estate after the case is filed.

There being no property identified in the Motion that is held by the custodian and property of the Bankruptcy Estate, the Motion is denied.

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

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

The Motion to Excuse Turnover of Property filed by Creditor First Northern Bank of Dixon, a creditor holding a secured claim, ("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 Motion to Excuse Turnover of Property is denied.