

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

September 21, 2023 at 11:30 a.m.

1. 23-21899-E-12 WF-7	JAKOB/GLADYS WESTSTEYN Daniel Egan	MOTION TO CONFIRM CHAPTER 12 Plan 8-17-23 [67]
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Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor in Possession, Debtor in Possession’s Attorney, Chapter 12 Trustee, creditors, and Office of the United States Trustee on August 17, 2023. By the court’s calculation, 35 days’ notice was provided. 35 days’ notice is required. FED. R. BANKR. P. 2002(a)(9); LOCAL BANKR. R. 3015-1(d)(1).

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rules 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Motion to Confirm the Plan is XXXXX.

The Debtor in Possession, Jakob and Gladys Weststeyn (“Debtor in Possession”) seeks confirmation of the Chapter 12 Plan. The Plan provides for Class 1 claims of professional fees, postpetition tax claims, postpetition ordinary course claims, and claims for postpetition borrowing. Class 2 consists of secured claims, the California Franchise Tax Board’s claim, Farm Credit Services of America, PCA’s claim, and BMO Harris Bank’s claim. The Plan further provides that BMO Harris Bank’s claim will not accrue

interest. Class 3 consists of unsecured priority claims, and Class 4 provides for general unsecured claims. Plan, Dckt. 69. 11 U.S.C. § 1223 permits a Debtor in Possession to amend a Plan any time before confirmation.

CHAPTER 12 TRUSTEE’S OPPOSITION

The Chapter 12 Trustee, David Burchard (“Trustee” or “Ch.12 Trustee”), filed an Opposition on September 7, 2023. Dckt. 85. Trustee opposes confirmation of the Plan on the basis that:

- A. The 341 meeting of creditors has not been concluded.
- B. Debtor in Possession’s Chapter 12 Plan has not met the requirements of 11 USC § 1225(a)(4) because Debtor in Possession is settlor, trustee, and a beneficiary of the 2015 Irrevocable Real Estate Trust, meaning the trust should be a part of the bankruptcy estate. With the full value of the 2015 Irrevocable Real Property Trust (“2015 Trust”) added into the bankruptcy estate, creditors would receive a higher distribution under a Chapter 7 case.
- C. At the least, the Ch. 12 Trustee needs more time and information in determining what assets are owned by the 2015 Trust and which debts are secured by assets in the 2015 Trust.

Dckt. 85.

DEBTOR IN POSSESSION’ REPLY TO CH. 12 TRUSTEE’S OPPOSITION

On September 14, Debtor in Possession filed a Reply in Support of Debtor in Possession’s Motion for Order Confirming Plan of Reorganization (“Reply”). Dckt. 101. Debtor in Possession addresses Ch. 12 Trustee’s objection in its reply, stating:

- A. The Trustee is unable to disregard rights of the other eight beneficiaries of the 2015 Trust, meaning Trustee is only able to reach Debtor in Possession’s beneficial interest in the 2015 Trust. Furthermore, as a health, education, maintenance and support trust, Debtor in Possession’s beneficial interest is limited to monthly distribution of approximately \$10,000 per month.
- B. Trustee’s reliance on *Cutter* is not warranted because the trust in *Cutter* was characterized as a “failed asset protection scheme,” whereas the 2015 Trust in this case was established when the Debtor in Possession was solvent.

Dckt. 101.

CREDITOR FIFTH THIRD BANK’S OPPOSITION

Fifth Third Bank (“Creditor FTB”) holding a secured claim filed an Opposition on August 30, 2023. Dckt. 79. Creditor opposes confirmation of the Plan on the basis that:

- A. Creditor filed a proof of claim in the amount of \$5,278.01, which is secured by collateral described as: 2003 Keyston Cougar M295EFS, vin ending in 3639. Debtor in Possession's Chapter 12 Plan failed to provide for this obligation.

Dckt. 79.

DEBTOR IN POSSESSION'S REPLY TO CREDITOR FTB'S OPPOSITION

In its same Reply, Debtor in Possession addresses Creditor FTB's objection, stating:

- A. Creditor FTB's claim is secured by a recreational vehicle trailer, and Debtor in Possession has reached an agreement with Creditor FTB where the Plan provides Creditor FTB will either be paid the full amount of its claim, or Debtor in Possession will surrender the collateral.

Dckt. 101.

CREDITOR GEH FARMS AND GREG HAWES' OPPOSITION

GEH Farms and Greg Hawes ("Creditor GEH") holding a secured claim filed an Opposition on September 7, 2023. Dckt. 87. Creditor GEH made its Opposition. Creditor opposes confirmation of the Plan on the basis that:

- A. The 341 meeting of creditors has not been concluded.
- B. Debtor in Possession did not state a deadline for filing for approval of administrative claims.
- C. Debtor in Possession failed to include all of the secured claims in the class 2 section in the Plan, and Debtor in Possession also did not estimate what the value of the unsecured portion of the class 2 claim would be when treated as a class 4 claim.
- D. Debtor in Possession states the amount of class 3 claims is \$0, where the IRS has filed a claim for \$1,254,727, and Debtor in Possession has not addressed how they will pay the claim.
- E. Debtor in Possession did not include any estimate of the class 4 claims.
- F. Debtor in Possession did not provide enough information in the liquidation analysis.

Dckt. 87.

DEBTOR IN POSSESSION'S REPLY TO CREDITOR GEH'S OPPOSITION

In its same Reply, Debtor in Possession addresses Creditor GEH's objection, stating:

- A. Creditor GEH's objection is based on no evidence as Creditor GEH never filed a declaration or any documentation in support of its Opposition.
- B. Creditor GEH's objection appears to be motivated by a continuation of harassing tactics employed by Creditor GEH prior to commencement of this bankruptcy case.
- C. Creditor GEH is asking the court for additional time before confirmation of a Plan for unspecified reasons. Any information Creditor GEH should have needed is provided by Debtor in Possession in its filings.
- D. Creditor GEH did not show up to three of the four creditor meetings in which Debtor in Possession was present and fully willing and able to answer creditors' questions.
- E. In the end, Creditor GEH's objection is "nothing more than a vindictive attempt to further bully the Debtors."

Dckt. 101.

CREDITOR TA ENERGY XXXIV, LLC'S OPPOSITION

TA Energy XXXIV, LLC, a wholly owned subsidiary of TRITEC Americas, LLC ("Creditor TA") holding a secured claim filed an Opposition on September 7, 2023. Dckt. 90. Creditor opposes confirmation of the Plan on the basis that:

- A. On or around July 17, 2021 Creditor TA entered into a PowerNow Solar Purchase Agreement ("PPA") with Weststeyn Dairy where Creditor TA would sell Weststeyn Dairy solar generated electric energy from a single-axis tracker system installed by Creditor TA.
- B. Jakob Weststeyn signed the PPA on behalf of Weststeyn Dairy.
- C. The PPA is an executory contract to which Mr. and Mrs. Weststeyn may be parties in their individual capacities.
- D. Debtor in Possession does not state any intention to assume the PPA in their Chapter 12 Plan, meaning Debtor in Possession apparently seeks to reject the PPA.
- E. Debtor in Possession cannot reject the PPA because Debtor in Possession is not a party to the PPA. Instead, the proper party to which the obligation under the PPA rests is with Weststeyn Dairy LP, a non-debtor limited partnership.

Dckt. 90.

DEBTOR IN POSSESSION'S REPLY TO CREDITOR TA'S OPPOSITION

In its same Reply, Debtor in Possession addresses Creditor TA's objection, stating:

- A. There is no such entity as Weststeyn Dairy as listed in the PPA.
- B. Creditor TA appears to be referencing the legal entity JG Weststeyn Dairy, LP, to which Debtor in Possession does not disagree.
- C. If the PPA is with JG Weststeyn Dairy, LP, then the proposed Plan does not effect Creditor TA. Creditor TA would not even be a creditor of the Debtor in Possession because JG Weststeyn Dairy, LP is not a debtor in this bankruptcy case.
- D. In the alternative, if Debtor in Possession is a party to the PPA, then the executory contract is burdensome to the estate and should be rejected.
- E. At this time, it is procedurally premature for the court to determine the issue of whether Debtor in Possession or JG Weststeyn Dairy, LP is the proper party to the PPA.

Dckt. 101.

HANK SPACONE'S REPLY TO CH. 12 TRUSTEE'S OPPOSITION

On September 14, Hank Spacone, manager for the 2015 Trust, submitted a reply to Ch. 12 Trustee's Opposition. In his reply, Mr. Spacone asserts:

- A. Debtor in Possession is the current trustee of the 2015 Trust, but they engaged the services of Mr. Spacone to manage the trust by providing more professional and independent direction and advice.
- B. All ten beneficiaries, including Debtor in Possession and their eight children, have vested rights in the trust.
- C. The trustee of the 2015 Trust is only able to distribute that which is necessary for the health, education, maintenance, and support of the beneficiaries. This standard is cognizable and puts limitations on what the trustee may access in the 2015 Trust.
- D. Mr. Spacone cites to California Probate Code § 15302 to support his contention that trust assets in a health, education, maintenance, and support trust may not be reached by a creditor until a distribution is actually made to the beneficiary. ^{FN.1.}

FN. 1. California Probate Code § 15302 states:

§ 15302. Trust for support

Except as provided in Sections 15304 to 15307, inclusive, if the trust instrument provides that the trustee shall pay income or principal or both for the education or support of a beneficiary, the beneficiary's interest in income or principal or both under the trust, to the extent the income or principal or both is necessary for the education or support of the beneficiary, may not be transferred and is not subject to the enforcement of a money judgment until paid to the beneficiary.

Mr. Spacone provides a copy of the Weststeyn 2015 Irrevocable Real Property Trust as Exhibit 1, Dckt. 99. A review of the provisions of the Trust includes the following:

B. Character of Trust Estate. Any community property transferred to the trust shall remain community property after its transfer. Any separate property transferred to the trust shall remain the separate property of the contributing Trustor after its transfer. It is the Trustors' intention that the Trustee shall have no more extensive power over any community property transferred to the Trust Estate than either of the Trustors would have had under California Family Code Sections 1100 and 1102 had this trust not been created, and this Agreement shall be so interpreted to achieve this intention. This limitation shall terminate on the death of either Trustor.

Article 1.

ARTICLE 3

DISPOSITION OF INCOME AND PRINCIPAL DURING TRUSTORS' LIVES

A. Disposition of Income and Principal From Community Estate.

1. Distributions to Husband and/or Wife. During the joint lifetimes of the Trustors, the Trustee shall [the two Debtors and Debtors in Possession] pay to Husband or Wife for the account of the community, or shall apply for the Trustors' benefit, as much of the net income and principal of the community estate as is necessary in the Trustee's [Debtor's and Debtor's in Possession] discretion for the Trustors' proper health, education, support and maintenance in accordance with their accustomed manner of living at the date of this Agreement, and taking into account, to the extent the Trustee deems advisable, any income or other resources of the Trustors known to the Trustee and reasonably available for these purposes. The spouse receiving payments shall have the same duty to use community income and principal received under this Agreement for the benefit of the Trustors as he or she has with respect to any other community property.

Article 3

The Purchase Agreement signature page states that the purchaser is "Weststeyn Dairy" and is signed by Jakob Weststeyn, who title is "Owner." The Credit Information Page (Exhibit 3 to the Agreement) is signed by Jakob Weststeyn, with no title stated. The Solar Power Purchase Agreement General Terms and Conditions [Exhibit 5 to the Agreement] is signed by Jakob Weststeyn, whose title is Owner.

The Easement Agreement [Exhibit 6 to the Agreement] states that Weststeyn Dairy grants an easement to Creditor TA on the 5907 Co Rd 65 Willows, California property. It is signed by Jakob Weststeyn, whose title is owner.

- E. It is difficult to give an accurate valuation of Debtor in Possession's interest in the 2015 Trust; however, \$10,000 per month for the next five years is a good valuation because this number equals or exceeds what the Debtor in Possession can reasonably expect in payments from the 2015 Trust. Therefore, \$470,653.00 is a good valuation.

Dckt. 98.

DISCUSSION

Failure to Include all Relevant Assets in the Bankruptcy Estate

The Chapter 12 Trustee asserts that Debtor in Possession is one of the beneficiaries in the Weststeyn 2015 Trust, and Debtor in Possession did not list the full value of the 2015 Trust as property of the bankruptcy estate. As well as being a beneficiary of the 2015 Trust, Debtor in Possession established this trust and is the trustee. Therefore, the Ch. 12 Trustee asserts the full, present value of the trust should be included as property of the bankruptcy estate. Debtor in Possession holds a beneficial interest in the trust as noted in the Status Statement section (E)(1)(e)(1), Dckt. 51, enabling Debtor in Possession, under its own discretion, to distribute as much of the net income or principal of the 2015 Trust to themselves.

Where Debtor in Possession is the trustee and is able to exercise rights within the 2015 Trust that benefits Debtor in Possession itself, the assets in the 2015 Trust become property of the bankruptcy estate. *In re Cutter*, 398 B.R. 6, 19 (B.A.P. 9th Cir. 2008) (citing *Askanase v. LivingWell, Inc.*, 45 F.3d 103, 106 (5th Cir.1995)). The Supreme Court has interpreted 11 U.S.C. § 541(c)(1) & (2) to mean that a Debtor in Possession may only "exclude property of the estate in any interest in a Plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law." *In re Bogetti*, 73 Fed. App'x. 266, 268 (9th Cir. 2003) (quoting *Patterson v. Shumate*, 504 U.S. 753, 758 (1992)). California Probate Code § 15304, the relevant nonbankruptcy law in California, states that:

(a) If the settlor is a beneficiary of a trust created by the settlor and the settlor's interest is subject to a provision restraining the voluntary or involuntary transfer of the settlor's interest, the restraint is invalid against transferees or creditors of the settlor. The invalidity of the restraint on transfer does not affect the validity of the trust.

(b) If the settlor is the beneficiary of a trust created by the settlor and the trust instrument provides that the trustee shall pay income or principal or both for the education or support of the beneficiary or gives the trustee discretion to determine the amount of income or principal or both to be paid to or for the benefit of the settlor, a transferee or creditor of the settlor may reach the maximum amount that the trustee

could pay to or for the benefit of the settlor under the trust instrument, not exceeding the amount of the settlor's proportionate contribution to the trust.

Cal. Prob. Code § 15304 (a) & (b).

As can be seen here, the relevant nonbankruptcy law does not permit a Debtor to exclude a self-settled trust from the estate, nor does the law permit restraints on alienation in a trust when the settlor is also the beneficiary. Furthermore, this section of the Code provides that if the settlor of the trust is the beneficiary, then whatever the trustee has the power to distribute, the creditors may collect. In deciding what the trustee has ability to distribute, the court looks to the trust instrument, which states as follows:

1. Distributions to Husband and/or Wife. During the joint lifetime of the Trustors, the Trustee shall pay to Husband or Wife for the account of the community, or shall apply for the Trustors' benefit, as much of the net income and principal of the community estate as is necessary in the Trustee's discretion for the Trustors' proper health, education, support and maintenance in accordance with their accustomed manner of living at the date of this Agreement, taking into account, to the extent the Trustee deems advisable, any income or other resources of the Trustors known to the Trustee and reasonably available for these purposes.

Status Statement section (E)(1)(e)(1), Dckt. 51. Trustee, also Debtor in Possession in this case, may pay to beneficiaries whatever is necessary from both principal and income of the 2015 Trust, at trustee's discretion, for the health, education, support and maintenance of beneficiaries. The controlling language of this trust is discretionary, apparently placing no actual limits on the trustee's ability to make distributions from the trust.

Mr. Spacone cites to California Probate Code § 15302 to support his contention that trust assets in a health, education, maintenance, and support trust may not be reached by a creditor until a distribution is actually made to the beneficiary. Dckt. 98. His reliance on this code section is misplaced; § 15302 states "Except as provided in Sections 15304. . ." thereby subjecting § 15302 to the provisions of § 15304. Cal Prob. Code. § 15302. Therefore, even a health, education, maintenance, and support trust is subject to creditor judgments if the trust was self-settled, up to the limits the trustee may access in the trust. Cal Prob. Code. § 15304(b).

Debtor in Possession, realizing the hurdle it must overcome, attempts to focus the court's attention on language in the trust instrument such as "is necessary" for "health, education, support, and maintenance." Dckt. 101. However, Debtor in Possession is not addressing the problem of the controlling term "discretionary" regarding the trustee's powers of distribution. By the court's interpretation of the 2015 Trust instrument, Debtor in Possession settled the 2015 Trust, retained beneficial rights in the real property placed into the trust, retained legal title over the real estate by naming themselves as trustees, and indeed placed no limits on its ability to withdraw from the "net income and principal of the community estate." Status Statement section (E)(1)(e)(1), Dckt. 51. The only purported limitation Debtor in Possession points to is the language of "necessary for... health, education, support and maintenance," an HEMS standard. *Id.*

However, what is "necessary" is whatever the Debtor in Possession as trustee impose on themselves, in their discretion.

Without any guardrails or safeguards in place to define the HEMS standard, the trustee could theoretically decide any amount is necessary for maintenance or support, within its sole discretion, giving the trustee what amounts to unfettered access to both the trust corpus and net income generated.

The court disagrees with Debtor in Possession and finds *Cutter* to be a helpful case. The important language from the trust instrument in *Cutter* stated,

No distributions shall be made out of the trust except in the sole discretion of the trustee, in an amount to provide for the health, the education, or the support and maintenance in the customary manner of living of the trustor, prior to the death of the trustor. At the time of the death of the trustor, outright distributions shall be made to the beneficiaries of the trust subject to the limitation in Paragraph 6.

In re Cutter, 398 B.R. at 12. There, the Debtor was similarly settlor, trustee, and beneficiary of the trust. With a few minor differences, the controlling language from the trust instrument in *Cutter* largely resembles the trust instrument in this case. Both trusts are HEMS trusts but left power of distributions to the trustee's discretion. In fact, the trust in *Cutter* may have been even more restrictive regarding distributions because it only allowed the trustee to invade the trust corpus for emergencies, whereas in our case, the trust instrument allows the trustee to invade the trust corpus merely to support their standard of living. *In re Cutter*, 398 B.R. at 22. The discussion by the Bankruptcy Appellate Panel in *Cutter* includes the following:

We agree with the bankruptcy court's conclusion. Debtor had access to potentially all of the Trust's assets and income in order to maintain his standard of living. Debtor possessed the power to "invade" the corpus of the Trust for emergencies relating to his health, education, support and/or maintenance. See P 7.13 of the Trust. Debtor possessed the right, at his sole discretion, to make distributions in order to provide for his health, education, or "support and maintenance in [his] customary standard of living." See P 5.00 of the Trust.

B. The Bankruptcy Court Did Not Err In Applying California Law on Self-Settled Spendthrift Trusts

Debtor had a beneficial and equitable interest in the Trust which became property of the estate under section 541(a). California law invalidating efforts of a settlor from using a trust to shield property from his or her creditors applies "even where the settlor is not a nominal beneficiary, as where a settlor attempts to create a spendthrift trust for the benefit of his or her minor children, to be managed by the settlor and revocable at his or her pleasure." 60 Cal. Jur. 3d Trusts § 134 (2008)(emphasis added), citing *Sheean v. Michel*, 6 Cal.2d 324, 57 P.2d 127 (1936).

To the extent Debtor was the trustor and beneficiary of the Trust, it is a self-settled trust. While California law recognizes the validity of spendthrift trusts, any spendthrift provisions are invalid when the settlor is a beneficiary. *Brooks-Hamilton v. City of Oakland (In re Brooks-Hamilton)*, 348 B.R. 512, 521 (Bankr. N.D. Cal. 2006); see also Restatement (Third) of Trusts § 58(2) (2003) ("A restraint on the voluntary and involuntary alienation of a beneficial interest retained by the settlor of a trust is invalid."). As noted by the Ninth Circuit:

The critical inquiry in determining whether a spendthrift trust is valid under California law is whether the trust's beneficiaries exercise excessive control over the trust. *See In re Witwer*, 148 B.R. 930, 937 (Bankr. C.D. Cal. 1992). California law does not allow a participant with excessive control over his or her trust to shield that trust with an anti-alienation provision lacking true substance.

Ehrenberg v. S. Cal. Permanente Med. Group (In re Moses), 167 F.3d 470, 473 (9th Cir. 1999) (emphasis added).

As the Ninth Circuit observed in *Moses*, citing California Probate Code section 15304(a), "under California law, a settlor of a spendthrift trust cannot also act as beneficiary of that trust (i.e., California law prohibits 'self-settled' trusts)." *Id.* "California law voids self-settled trusts to prevent individuals from placing their property beyond the reach of their creditors while at the same time still reaping the bounties of such property." *Id.*, citing *Nelson v. California Trust Co.*, 33 Cal.2d 501, 202 P.2d 1021 (Cal. 1949). The *Nelson* court succinctly described why California law prohibits a trustor from benefitting from trust property he is attempting to shield from creditors:

It is against public policy to permit a man to tie up his property in such a way that he can enjoy it but prevent his creditors from reaching it, and where the settlor makes himself a beneficiary of a trust any restraints in the instrument on the involuntary alienation of his interest are invalid and ineffective.

Nelson, 202 P.2d at 1021.

The California Legislature confirmed the rule of *Nelson* in Probate Code section 15304(a):

If the settlor is a beneficiary of a trust created by the settlor and the settlor's interest is subject to a provision restraining the voluntary or involuntary transfer of the settlor's interest, the restraint is invalid against transferees or creditors of the settlor. The invalidity of the restraint on transfer does not affect the validity of the trust.

Cal. Prob. C. § 15304(a) (emphasis added). Moreover, subsection (b) of Probate Code section 15304 states that if the settlor is the beneficiary of a trust that he created and the trust instrument provides that a trustee may or shall pay income or principal for the support of the settlor, a creditor of that settlor can reach "the maximum amount that the trustee could pay to or for the benefit of the settlor under the trust instrument, not exceeding the amount of the settlor's proportionate contribution to the trust." Cal. Prob. C. § 15304(b).

Under the Trust Agreement, Debtor as Trustee could potentially use all of the Trust's principal and income to maintain his standard of living; no limitation is

placed on the amount that he can use for that purpose. Thus, under California Probate Code section 15304(b), a creditor of Debtor could reach all of the Trust assets contributed by Debtor. Therefore, under California law, Trustee (as a hypothetical lien creditor) can likewise recover those assets under section 544(a)(1). The court did not err in holding that the Trust Properties were property of the estate.

C. The Bankruptcy Court Should Have Granted Summary Judgment As to the Entire Trust Corpus, Including the Ermatinger Third

While the bankruptcy court correctly vested title to the Trust Properties in Trustee pursuant to section 544(a)(1) and California Probate Code section 15304(b), it could have held, as a matter of law, that the entire Trust corpus was property of the estate by virtue of section 541 alone. Ordinarily, if only a portion of a spendthrift trust's corpus is contributed by a beneficiary-debtor, only that portion becomes property of the beneficiary-debtor's estate. *Osherow v. Porras (In re Porras)*, 312 B.R. 81, 131 (Bankr. W.D. Tex. 2004). If, however, the trust agreement allows the debtor-beneficiary to exercise control over and reach trust property contributed by others, the estate is entitled to the maximum amount that the trust could pay or distribute to the debtor-beneficiary. *Id.* at n.30. Therefore, the bankruptcy court could have, and should have, granted summary judgment granting Trustee title to all of the Trust corpus.

As trustee of the Trust, Debtor had the sole discretion to use Trust assets and income for his benefit. Under paragraph 5.00, Debtor had the power, as trustee, to make distributions from the Trust to himself in order to maintain his customary standard of living. Under paragraph 7.13, he had the power to invade the Trust corpus for "emergencies related to [his] health, education, support and/or maintenance." Debtor had unfettered access to and dominion and control over the Trust and its assets; he could use the Trust income and corpus for whatever he deemed necessary for his support and maintenance.

Consequently, under section 541(a)(1) itself, Debtor's beneficial interest in all of the Trust corpus became property of the estate and Debtor's power to use Trust assets for his benefit became property of the estate. *See Askanase*, 45 F.3d at 106 ("what comes to the bankruptcy estate is not only the property in which debtor has an interest, but also, the powers the debtor can exercise for its own benefit over property regardless of the title debtor may be acting under"), quoting and citing *In re Gifford*, 93 B.R. 636, 638-40 (Bankr. N.D. Ind. 1988) (observing public policy "against allowing anyone to place their assets in trust, for their own benefit, and simultaneously shielding them from the claims of their creditors" and holding that where debtor had authority to exercise dominion over trust assets for his own benefit, the bankruptcy trustee assumes that authority and can acquire access to the funds for the benefit of creditors). *See also Robbins v. Webster (In re Robbins)*, 826 F.2d 293, 295 (4th Cir. 1987) (where trust trustee was authorized to apply entire corpus of trust for support and maintenance of settlors, entire corpus was property of estate which debtors could not exempt); *Miller v. Lincoln Nat'l Bank & Trust Co. (In re Cook)*, 43 B.R. 996, 1001 (N.D. Ind. 1984) (where debtor had present access to trust corpus for

hardship purposes such as health or education, the debtor's right of withdrawal and his interest in the trust became property of the estate).

In summary, to the extent Debtor was the trustee of the Trust, he possessed the power (at his sole discretion) to invade the corpus and make distributions from the Trust for his own benefit. The entire corpus, including the Ermatinger Third, is therefore property of the estate. The bankruptcy court should have granted summary judgment in favor of Trustee as to the entire trust corpus.

Cutter v. Seror (In re Cutter), 398 B.R. 6 at 20-22.

In reviewing California Probate Code § 15304 cited by the Bankruptcy Appellate Panel, the court emphasizes these provisions that may need to be considered at the September 21, 2023 hearing:

§ 15304. Where settlor is a beneficiary

(a) **If the settlor is a beneficiary of a trust** created by the settlor and the settlor's interest is subject to a provision restraining the voluntary or involuntary transfer of the settlor's interest, **the restraint is invalid against transferees or creditors of the settlor**. The invalidity of the restraint on transfer does not affect the validity of the trust.

(b) **If the settlor is the beneficiary of a trust created by the settlor** and the trust instrument **provides that the trustee shall pay income or principal or both for the education or support of the beneficiary or gives the trustee discretion to determine the amount of income or principal or both to be paid to or for the benefit of the settlor**, a transferee or **creditor of the settlor may reach the maximum amount that the trustee could pay to or for the benefit of the settlor under the trust instrument**, not exceeding the amount of the settlor's proportionate contribution to the trust.

(c) For purposes of this chapter, the settlor shall not be considered to be a beneficiary of an irrevocable trust created by the settlor solely by reason of a discretionary authority vested in the trustee to pay directly or reimburse the settlor for any federal or state income tax on trust income or principal that is payable by the settlor, and a transferee or creditor of the settlor shall not be entitled to reach any amount solely by a reason of that discretionary authority.

Cal Prob. Code § 15304 (emphasis added).

The Ninth Circuit is certainly not alone in holding that self-settled trusts, where the debtor is settlor, trustee, and beneficiary of the trust, belong in the bankruptcy estate. *See in re Cameron*, 223 B.R. 20, 25 (Bankr. S.D. of Fla. 1998); *In re Schultz*, 324 B.R. 712, 718 Bankr. (E. D. of Ark. 2005) (limiting trustee's control over trust assets to only those which the debtor retained beneficial interests); *Matter of Shurley*, 115 F.3d 333, 339 (5th Cir. 1997).

Asserted Executory Contract

The Creditor TA Opposition focuses on an alleged executory contract. A copy of the Agreement is provided as Exhibit 1; Dckt. 93. The Agreement is titled “PowerNow Solar Power Purchase Agreement. It states, “This Agreement sets forth the terms and conditions of the purchase and sale of solar generated electric energy from the solar panel system described in Exhibit 2 [to the Agreement].”

The term of the Agreement is stated to be for 25 years and there is an option to purchase the system. Weststeyn Dairy is identified as the “Purchaser” with no information given about what or who Weststeyn Dairy is.

The Agreement states it is for the purchase and sale of Electricity.

Neither the Debtor in Possession nor Creditor TA provide the court with an analysis of what constitutes an executory contract and whether a contract to purchase electricity is an executory contract.

11 U.S.C. § 365 deals with executory contracts and unexpired leases. For the purpose of this Motion, Section 365 provides in relevant part:

- (a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.

In the Ninth Circuit, courts apply the business judgment rule when reviewing a decision to reject an executory contract or lease. *See Agarwal v. Pomona Valley Med. Group, Inc. (In re Pomona Valley Med. Group, Inc.)*, 476 F.3d 665 (9th Cir. 2007). In reviewing a rejection motion, the bankruptcy court should presume that the trustee “acted prudently, on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the bankruptcy estate” and should approve rejection unless the “conclusion that rejection would be ‘advantageous is so manifestly unreasonable that it could not be based on sound business judgment, but only on bad faith, or whim or caprice.’” *Id.* at 670 (quoting *Lubrizol Enter. v. Richmond Metal Finishers*, 756 F.2d 1043, 1047 (4th Cir. 1985). Adverse effects upon the other contract party are not relevant, unless the effect is so disproportionate to the estate’s prospective advantage that it shows rejection could not be a sound exercise of business judgment. *See id.* at 671; *In re Old Carco LLC*, 406 B.R. 180, 192 (Bankr. S.D.N.Y. 2009). However, if the debtor is not a party to the contract, 11 U.S.C. § 365(a) is inapplicable.

At the hearing, **XXXXXXX**

Need for Determination of Estate’s Interest in the Trust Before Determining Whether Confirmation is Proper

A fundamental dispute in this case concerns what is the extent and value of the Estate’s interest in the 2015 Trust. Debtor in Possession argues it is very modest. The Ch. 12 Trustee argues it is everything in the 2015 Trust. It seems that there will be a need for an evidentiary hearing to determine the Estate’s interest in the Trust. Such determination appears to require an adversary proceeding as stated in Federal Rule of Bankruptcy Procedure 7001(2), or conducted as an evidential hearing within the Motion to Confirm if consented to by the Parties.

While the Debtor in Possession asserts that certain creditors are attempting to delay, disrupt, and vindictively bully the Debtor in Possession, the need for a determination of the interests of the Estate in the Trust will afford such creditors the time to engage in *bona fide*, good faith discovery as is necessary and appropriate.

At the hearing, **XXXXXXX**

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 Confirm the Chapter 12 Plan filed by the Debtor in Possession, Jakob and Gladys Weststeyn (“Debtor in Possession”), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Confirm the Plan is **XXXXXXX**.

2. [22-22662-E-7](#)
[22-2111](#)

STACIE BUCKINGHAM

**EMERGENCY TRIAL STATUS
CONFERENCE RE: COMPLAINT
12-16-22 [1]**

FENTON-POTTRATZ V. BUCKINGHAM