

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

December 14, 2023 at 10:30 a.m.

1. 23-21438-E-12 RLC-1	WESLEY/RUTH WOOLERY Stephen Reynolds	CONTINUED MOTION TO USE CASH COLLATERAL AND/OR MOTION TO GRANT REPLACEMENT LIENS , MOTION TO APPROVE DIP BUDGET 5-12-23 [21]
---	---	---

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

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 Chapter 12 Trustee and fewer than all creditors on May 12, 2023. By the court’s calculation, 4 days’ notice was provided. The court required 4 days’ notice. Dckt. 30.

The Certificate of Service, Dckt. 26, indicates fewer than all creditors have been served, however, no “box” is checked to indicate whether these creditors are:

1. Creditors that have filed claims,
2. Creditors holding allowed secured claims,
3. Creditors holding allowed priority unsecured claims,
4. Creditors holding leases or executory contracts that have been assumed, or
5. 20 largest creditors

as required by EDC Form 7-005. At the hearing, counsel addressed shortcoming in the initial service.

In light of Creditor having filed an opposition and being in attendance at the hearing, the court waived the deficiency for this Initial Hearing on the Motion.

The Motion for Authority to Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Chapter 11 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

The Motion for Authority to Use Cash Collateral is XXXXX.

DECEMBER 14, 2023 HEARING

The court entered prior Orders authorizing the use of cash collateral. The latest order was entered on August 14, 2023. Dckt 84. The Civil Minutes for the last hearing on this Motion, conducted on September 28, 2023, state that the Parties agreed to extend the use of cash collateral and a proposed order was to be prepared by the Parties and lodged with the court. A review of the Docket indicates that no order has been issued from the September 28, 2023 hearing.

At the December 14, 2023 hearing, XXXXXXXX

REVIEW OF MOTION

Wesley and Ruth Woolery (“Debtor in Possession”) moves for an interim order authorizing the use of cash collateral and requests the court schedule a final hearing to consider entry of a final order authorizing use of cash collateral, granting replacement liens, and approving the proposed Debtor in Possession budget.

Debtor in Possession requests the use of cash collateral to (1) pay post-petition operating expenses incurred in the ordinary course of business; (2) pay costs and expenses of administration of the case; and (3) pay all other amounts as specified in the Debtor in Possession budget. Debtor’s Declaration in support of the Motion states the use of cash collateral is necessary to continue farming operations. Dckt. 23. Upon review of the proposed budget, Exhibit 1, Debtor’s budget is funded by the sale of the following:

Spring 2023 Calves.....\$355,000 generated February 2024

AB Fats.....\$20,000 generated December 2023

Cull Cows.....\$20,000 generated May 2023

.....\$18,750 generated February 2024

MC Fats.....\$7,215 generated monthly, beginning in June 2023

FSA Livestock Forage.....\$90,000 generated July 2023

.....\$75,000 generated September 2023

Thursday, December 14, 2023 at 10:30 a.m.

Equipment Sales.....\$20,000 generated June 2023.

CREDITOR’S OPPOSITION

Creditor Rabo Agrifinance LLC (“Creditor RAF”) filed a preliminary opposition on March 15, 2023. Dckt. 27.

Debtor’s Motion states Creditor holds first-priority lien on substantially all assets, due to a perfected UCC-1 filing, as well as real property located at 42563 Wilcox Road, Hat Creek, California, in the amount of approximately \$1,700,000. Debtor’s Motion, Dckt. 21. Debtor’s Schedules, however, state under penalty of perjury that Creditor RAF has a secured claim in the amount of \$0.00, supported by collateral in an amount of \$0.00 and unsecured in the amount of \$0.00. Schedule D, Dckt. 1 at 11. Creditor RAF has not yet filed a proof of claim, however, their opposition states Debtor owes approximately \$2,269,868.81 on an Operating Line of Credit and \$496,569.11 on a Real Estate Line of Credit. Opposition, Dckt. 27 at 3:21-22.

Schedule Creditor RAF objects on the following grounds:

1. No Emergency Articulated:
 - a. The Emergency Motion fails to explain why Debtor in Possession must use Creditor RAF’s cash collateral on an emergency basis.
 - b. The Motion fails to provide any details regarding the status of Creditor RAF’s collateral, or what, precisely, Debtor in Possession would like to sell. The Motion only states Debtor in Possession plans to sale \$20,000 in “Cull Cows.”
2. Shortcomings of Budget:
 - a. The budget does not indicate what is truly necessary for Debtor’s continued operations.
 - b. The proposed accounting expense is inappropriate because Debtor has not sought approval to employ an accountant.
 - c. It is not clear whether May budgeted items relate to pre-petition obligations.
 - d. Creditor RAF does not know what cash collateral Debtor currently has on hand.

Creditor RAF requests the Emergency Motion be denied or set on full notice so Debtors may file their schedules and provide information necessary for Creditor RAF and the court to evaluate the proposed use of collateral.

APPLICABLE LAW

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

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

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

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

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

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

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

(b)(2) Hearing

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

DISCUSSION

The court has not been provided with enough financial information to determine whether the proposed use of cash collateral is in the best interest of the Estate.

First, Debtor has not yet filed all of their required Schedules. Rather, Debtor has only filed Schedules D and E/F. Even these Schedules appear inaccurate as there are discrepancies with the amount of Creditor RAF's secured claim, as detailed above. The court has no information regarding Debtor's financial information, which is necessary to determine whether to grant the Motion.

Second, the court has no information regarding Debtor's assets as of the petition date. Debtor states the "balance available" after one year of the Debtor in Possession Proposed Budget will be \$334,811:

	Monthly Expenses	Monthly Income	Balance Available
May-23	\$11,717	\$20,000	\$8,283
Jun-23	\$23,467	\$27,215	\$12,031
Jul-23	\$75,667	\$97,215	\$33,579
Aug-23	\$20,667	\$7,215	\$20,127
Sep-23	\$23,167	\$82,215	\$79,175
Oct-23	\$32,917	\$7,215	\$53,473
Nov-23	\$23,167	\$7,215	\$37,521
Dec-23	\$20,667	\$27,215	\$44,069
Jan-24	\$15,467	\$7,215	\$35,817
Feb-24	\$58,967	\$380,965	\$357,815
Mar-24	\$17,967	\$7,215	\$347,063
Apr-24	\$19,467	\$7,215	\$334,811
Total	\$343,304	\$678,115	\$334,811

However, the Debtor has not provided the court with information as to what the balance of cash on hand is currently, nor at the time of filing the petition. The court is unable to determine whether the income generated is necessary for the farming operations.

Third, Debtor has not filed their Schedules A/B or C. Debtor appears to be generating income from the sale of cattle and equipment. The Proposed Budget does not indicate the quantity of herd that will be sold in order to generate the necessary income, the fair market value for the specific type of cattle, and what percent of Debtor's herd they will be selling. Absent this information, the court cannot postulate whether the proposed budget is fair and in the best interest of the estate.

Fourth, as Creditor RAF has stated, Debtor has not adequately described what the "emergency" is. It is not clear why the Motion is set on an emergency basis, and why it cannot be set by the full noticed period, allowing creditors and the court proper time to review Debtor's financial reality, and whether the use of cash collateral is necessary for the continued farming operation.

Fifth, although Debtor states Creditor RAF will be adequately protected, Debtor has not described what the "adequate protection payments the Debtor proposes to pay equal to the accruing interest on the Secured Claims" will be.

Sixth, Debtor's Budget includes a monthly expense of \$500 for "Accounting." If Debtor is using an accountant, the employment and compensation of such must be approved consistent with Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 327(a), 328(a), and 330.

MAY 16, 2023 HEARING AND INTERIM AUTHORIZED USE OF CASH COLLATERAL

Counsel for the Debtor in Possession reported that on May 16, 2023, a cattle report to Creditor. There are 658 head of cattle. The Debtor in Possession is providing documentation to Creditor's counsel.

A long, constructive discussion was conducted at the May 16, 2023, Emergency First Day hearing for the use of cash collateral. Counsel for the Debtor in Possession reported that the FSA Livestock Forage are direct payments from the Dept of Agriculture. Other than that, the Debtor in Possession is generating revenues from the sale of Creditor's collateral.

Counsel for the Debtor in Possession advanced the argument that the monies being spent are to not just maintain Creditor's collateral, the herd, but enhance its value. If the revenues to be generated from the sale as show on the budget are accurate, such would be true.

Counsel for the Debtor in Possession also reported that there is very little cash in the bank today for the estate, and the sale of Creditor's collateral is necessary to move forward, care for the herd, and generate increased revenues from the sale of the her.

Counsel for Creditor pointed out that in January 2023 the Debtor reported that there were 687 cows in the herd, but in June that number had dropped to 658 cows in June 2023 - which included 183 new cows just born. Under the agreements in the State Court Receivership Action Debtor was to report any proposed sales to the Receiver and Creditor, and Creditor does not have information about how the herd was reduced between January and June 2023.

The Debtor in Possession and Creditor agreed to authorize the emergency use of cash collateral to pay the necessary expenses to care for and preserve the herd. These are only for post-petition expenses. The Parties will meet and confer to draft an order authorizing the interim use of cash collateral and continue the hearing to 11:30 a.m. on June 8, 2023.

As discussed at the hearing, the order will not authorize the use of cash collateral for expenses not relating to preserving the herd pending further hearings. An example of such is the "Vehicle Payments" listed on the proposed budget. That is for the Debtor's truck and will be addressed later.

The Debtor in Possession, Creditor, their respective counsel, and the court are limited at this point in time, the Schedules and Statement of Financial Affairs not having yet been filed.

The court authorizes the use of cash collateral for May and June 2023 as outlined above for the proposed budget (Dckt. 31).

Counsel for Creditor and counsel for Debtor in Possession shall joint prepare and lodge with the court a proposed order authorizing such use.

June 8, 2023 Hearing

The court's review of the Docket as of June 5, 2023, showed that no further pleadings were filed.

The Debtor in Possession filed Status Conference Report on May 31, 2023. Dckt. 51. In this Status Report the Debtor in Possession states that are no significant Motion to be prosecuted and that the Debtor in Possession intends to timely file a Chapter 12 Plan of Reorganization.

With respect to providing evidence that Debtor was eligible to file a case under Chapter 12, the following is stated:

The creditor meeting in this case is scheduled for June 6, 2023. Debtors are providing the Chapter 12 Trustee various documents which may provide the Trustee the information he requires to make his report regarding Chapter 12 Eligibility. The vast majority of the debt and income in this case is farm related and eligibility issues are not anticipated.

Status Report, p. 2:7-11; Dckt. 51.

Michael Meyer, the Chapter 12 Trustee, provided his Status Report, filed on June 2, 2023. Dckt. 52. The Trustee discusses the delay in Debtor in filing the required Schedules. Additionally, the Trustee states that the Debtor, who is serving as the Debtor in Possession, has not provided various documents, which is preventing the 341 Meeting of Creditors being conducted. These documents, requested on May 9, 2023, include:

- a. Last Two Years Tax Returns
- b. Bank Statements for The Last Six Months.
- c. Business Licenses
- d. Income Statement and Balance Sheets
- e. Insurance Policies
- f. Cash Flow Statements
- g. Copies of the Deed for each property owned or leased by the debtor including details as to acreage and crop status
- h. Production records with respect to growing crops. Corporate and LLC or LLP documents.
- I. All lawsuits
- j. List of all inventory and equipment with current values dates of purchase and values when purchased
- k. List of all funds, accounts receivables, claims pending escrows, owed to the business at the time of filing.
- l. Any and all permits required to operate the business.

Trustee Status Report, p. 2:10-27; Dckt. 52.

The Trustee notes that the Order Setting the Chapter 12 Status Conference requires the Debtor, serving as the Debtor in Possession, file with the court for the Status Conference evidence showing eligibility to file a Chapter 12 Case, not merely provide it to the Trustee. The court's Order setting the Status Conference states:

The court also intends to review the issue of Chapter 12 eligibility. Before the court can confirm a Chapter 12 plan, the court must make a finding that the plan complies with the provisions of Chapter 12 and the other applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1225(a)(1). **One of those provisions is 11 U.S.C. § 101(18), which defines who is a "family farmer" eligible for relief under Chapter 12. Eligibility is a necessary requirement to confirmation of a Chapter 12 plan under § 1225(a)(1). *In re Garako Farms, Inc.*, 98 B.R. 506, 508 (Bankr. E.D. Cal. 1988). The Debtor has the burden of proof to convince the court that the requirements of § 1225 have been met. *Id.* at 509.**

On or before 6/14/23, the **Debtor(s) shall file and serve** on the Chapter 12 Trustee a status report together with **evidence and legal authority to establish that these Debtor(s) are a "family farmer" as that term is defined in § 101(18)(A).** Said evidence shall include, but not be limited to, documentation which illustrates the nature of and parties to each of the farm related secured debts listed in Schedule D. The parties shall also file and serve evidence to show the terms of any partnership agreements, real property leases, crop sharing agreements or other documents which tend to show who owns and operates the farming operation of the Debtors' property. The Trustee is invited to file his report and analysis regarding the issue of eligibility.

Order Setting Chapter 12 Status Conference, p. 2; Dckt. 10. (Emphasis added.)

At the hearing, counsel for the Debtor in Possession reported that a stipulation has been reached with Rabo Agrifinance for the interim use of cash collateral. The parties have prepared a Stipulation to be filed with the court and a proposed order to be lodged with the court. The Stipulation provides for the use of cash collateral through August 11, 2023.

AUGUST 10, 2023 CONTINUED HEARING

The court has authorize the prior use of cash collateral as agreed by the Parties. The most recent order was entered on June 9, 2023. Dckt. 58. No supplemental pleadings for the further use of cash collateral have been filed.

At the hearing, counsel for the Debtor in Possession reported that the Debtor in Possession is preparing the Chapter 12 Plan and anticipates having the confirmation hearing set for September 7, 2023. Counsel for Creditor Rabo Agrifinance LLC requested that the authorization be on a further interim basis in light of the Debtor in Possession not yet selling cattle and generating income (including the monies to be paid Creditor under the agreed cash collateral term.

The court grants the Motion on an interim basis, authorizing the use of cash collateral as state din the budget. Counsel for the Debtor in Possession shall lodge with the court a proposed order authorizing the use of cash collateral through September 30, 2023.

The court continues the hearing on this Motion to 10:30 a.m. on September 28, 2023, for consideration of the further authorization to use cash collateral.

SEPTEMBER 28, 2023 HEARING

On August 30, 2023, the Debtor in Possession filed a dismissal of the Motion to Confirm the Chapter 12 Plan filed in this Case. Dckt. 19. Further, that an amended Plan would be filed the week of September 5, 2023. The Docket does not reflect such an amended Plan having been filed.

At the hearing, counsel for the Debtor in Possession reported that 20 head of cattle have been sold and the 20% of the proceeds will be transmitted to the creditor shortly.

The Parties agreed to extend the use of cash collateral, with a continued hearing date on December 14, 2023 at 10:30 a.m. The Parties may by Joint Status Report further extend the time for the use of Cash Collateral and the hearing date.

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 for Authority to Use Cash Collateral filed by Wesley and Ruth Woolery, Debtor in Possession, (“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 Motion is **XXXXX**.

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors that have filed claims, parties requesting special notice, and Office of the United States Trustee on November 21, 2023. By the court's calculation, 23 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(2) (requiring twenty-one days' notice).

The Motion to Sell Property was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, -----.

The Motion for Authorization to Sell Property and for Compensation of Real Estate Broker is granted.

REUSED DOCKET CONTROL NUMBER

The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. LOCAL BANKR. R. 9014-1(c). Here, the moving party reused the Docket Control Number from Movant's Motion to Abandon. Dckt. 82. That is not correct. The court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

DISCUSSION

The Bankruptcy Code permits Geoffrey Richards, the Chapter 7 Trustee ("Movant," "Trustee"), to sell property of the estate after a noticed hearing. 11 U.S.C. § 363. Local Bankruptcy Rule 9014-

1(d)(5)(B)(ii) allows Movant to request court approval for the sale and for the real estate broker's compensation in connection with the sale in the same motion. Movant proposes to sell the real property commonly known as 565 Arcade Boulevard, Sacramento, California ("Property"), a piece of property that Debtor previously used as a rental property and is now vacant. Dec., Dckt. 99 ¶ 3. On August 14, 2023 the court authorized Gary Welsh of Lyon Real Estate ("Broker") to represent the Trustee for the marketing and a sale of the Property. Order, Dckt. 79.

The proposed purchaser of the Property is M.L. Davis Construction, Inc. ("Buyer"), and the terms of the sale are filed as Exhibit A, Dckt. 101, the California Residential Purchase Agreement and Joint Escrow Instructions. As stated in the Motion, the essential terms of the sale are as follows:

1. The Buyer is to pay a purchase price \$261,000.00 cash for title to the Property;
2. The Buyer is to pay a \$2,610.00 earnest money deposit that is to be increased to \$7,830.00 upon satisfaction of the inspection contingency for the sale, which is to be satisfied within ten (10) days of the acceptance of terms;
3. The Trustee is to pay liens of record, including accrued property taxes, from escrow;
4. The Trustee is to pay from escrow designated costs of sale, specifically including the sales commission to Broker, and the costs of (I) a mandatory natural hazard disclosure, (ii) a 50% share of escrow fees, title insurance, and city transfer fees, and (iv) county fees;
5. The sale escrow is to close once all contingencies are satisfied and after court approval of the sale; and
6. The Property is sold "as-is," with no representations or warranties from the Trustee or the estate.

Dckt. 96 p. 3:11-24. Movant submits his own Declaration (Dckt. 99) as well as the Declaration of Broker (Dckt. 100) to authenticate and testify to the facts the Motion relies on.

Movant informs the court the sale is disinterested, but that the Buyer's broker and Trustee's Broker are employed in the same firm. Dckt. 96 p. 4:4-9.

The Property is subject to liens for real property taxes, assessments, supplemental taxes, and utility and various case fees or assessments. *Id.* at p. 5:15-16. The Property is also subject to a single deed of trust initially granted in favor of Wells Fargo Bank, N.A., and now belonging to Rushmore Loan Management Services in the amount of approximately \$90,000.00. *Id.* at p. 5:26-28, 6:1-4. The Trustee therefore requests that he be authorized to pay the estimated amounts of such liens and encumbrances from the sale's escrow.

Movant proposes the following terms for overbidding procedure:

1. All overbids shall be on substantially the same terms and conditions as the pending sale.
2. The first initial overbid shall be in the minimum amount of \$262,000.00 (\$1,000.00 over pending sale price), and subsequent overbids shall be in minimum increments of \$1,000.00.
3. Persons wishing to overbid must provide a cashier's check payable to the Trustee in the minimum amount of \$7,830.00, payable to the bankruptcy estate, before the time the prospective purchaser makes the first overbid at the hearing. This amount is the amount of the deposits provided under the Sale Contract.
4. The successful bidder shall be required to pay the balance of the purchase price and close the sale on those terms stated in the Sale Agreement, except that the parties may agree to close of the sale at a later date.
5. In the event that, through no fault of the Trustee, the approved purchaser fails to close escrow during the time period stated in the Sale Agreement, or such later date as Trustee and the approved purchaser may mutually agree, the entire amount of all deposits then held shall be retained by the Trustee and may be applied by the Trustee toward any damages incurred by the estate as a consequence of that party's default.
6. The cashier's checks of all unsuccessful bidders shall be returned immediately following the hearing.
7. A back-up bid may be approved, and the Real Property may be sold to the back-up bidder, at the option of the back-up bidder, if the successful bidder fails to close escrow within the time limitations provided above, without necessity of a further court order.

Dckt. 96 p. 7:20-26; 8:1-18.

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

Based on the evidence before the court, the court determines that the proposed sale is in the best interest of the Estate as proceeds from the sale will pay unsecured general creditors in full as well as paying off the existing liens on the Property.

Movant has estimated that a 6% broker's commission from the sale of the Property will equal approximately \$15,660. This entire fee will be going to the same real estate broker firm, Lyon Real Estate, because both Buyer and Trustee's brokers are members of that firm. As part of the sale in the best interest of the Estate, the court permits Movant to pay Broker an amount not more than 6% commission.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 6004(h) stays an order granting a motion to sell for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court because the Property is vacant and may be subject to vandalism. It would help the process if the sale could close as quickly as possible. Debtor has aided Trustee in selling the Property by providing necessary documents, and so it appears no Opposition from Debtor will be filed.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 6004(h), and this part of the requested relief is granted.

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

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

The Motion to Sell Property filed by Geoffrey Richards, the Chapter 7 Trustee (“Movant,” “Trustee”), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that Geoffrey Richards, the Chapter 7 Trustee, is authorized to sell pursuant to 11 U.S.C. § 363(b) to M.L. Davis Construction, Inc. or nominee (“Buyer”), the Property commonly known as 565 Arcade Boulevard, Sacramento, California (“Property”), on the following terms:

1. Approving the proposed sale of the Real Property to the Buyer or assignee/nominee(s) on the terms and conditions set forth In the California Residential Purchase Agreement and Joint Escrow Instructions (“Sale Contract”) (Exhibit A, Dckt. 101);
2. Authorizing the Chapter 7 Trustee to execute any and all documents necessary to consummate the sale, including, but not limited to, the deed conveying title;
3. Approving the broker’s commission of 6% (\$15,660) to Lyon Real Estate (“Broker”) and authorizing payment of same from escrow;
4. Authorizing the payment of taxes, liens, fees, costs, and the like from escrow as described above, including, if necessary, the withholding of a reserve amount to pay estimated income taxes as may be required by any taxing agency;
5. Providing that this court shall retain jurisdiction to resolve any dispute under or related to the order approving the sale and to the Sale Contract; and
6. Granting such other and further relief as the court deems proper.

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

3. [23-20380-E-12](#) **TIMOTHY WILSON** **CONTINUED STATUS CONFERENCE RE:**
[CAE-1](#) **VOLUNTARY PETITION**
2-7-23 [1]

Debtor's Atty: Mark A. Wolff

Notes:

Continued from 11/30/23 to be conducted in conjunction with the hearing on the Motion to Dismiss this bankruptcy case.

[WW-6] Interim Order granting Motion to Extend Deadline to Obtain Confirmation of Chapter 12 Plan [extended to 12/20/23] filed 12/1/23 [Dckt 190]

[WW-6] Amended Interim Order granting Motion to Extend Deadline to Obtain Confirmation of Chapter 12 Plan [Pursuant to Civil Rule 60(a)] filed 12/6/23 [Dckt 192]

The Status Conference is XXXX.
--

DECEMBER 14, 2023 STATUS CONFERENCE

In response to the Motion to Dismiss this Chapter 12 Bankruptcy Case, the Debtor in Possession has advanced a possible plan that is to be built around a gold and silver mining operation on the property of the Bankruptcy Estate – not a farming or agricultural business. A proposed Third Amended Plan has been filed (Dckt. 177), the funding for which is to quarterly pay 50% of all gross mining proceeds into the Plan.

The court has reviewed these points and oppositions from Creditors as part of the hearings on the Motion to Dismiss. The Debtor in Possession requested that the court continue the hearing to allow a short period of time to receive the report as to the mineral content of the sample that had been sent for analysis, with the report due back within ten days of the November 30, 2023 hearing.

As of the court's December 12, 2023 review of the Docket, no updated Status or other reports had been filed by the Debtor in Possession.

At the December 14, 2023 Status Conference, XXXXXXX

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—Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 12 Trustee, persons having filed a Request for Notice, all creditors and parties in interest, and Office of the United States Trustee on October 25, 2023. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Debtor filed opposition. If it appears at the hearing that disputed, material, factual issues remain to be resolved, then a later evidentiary hearing will be set. LOCAL BANKR. R. 9014-1(g).

The Motion to Dismiss is XXXXX.

December 14, 2023 Hearing

A review of the Docket on December 8, 2023 reveals that no new supplemental documentation, including a mineral assay report, has been filed with the court. At the hearing, XXXXXXXXXX

REVIEW OF MOTION

Creditor Umpqua Bank ("Creditor") moves to dismiss debtor Timothy Wilson's ("Debtor," "Debtor in Possession") case pursuant to 11 U.S.C. § 1208(c)(1) & (9). Motion, Dckt. 151. Creditor further seeks dismissal on the grounds that Debtor has filed and prosecuted this case in bad faith. Movant states the following grounds exist for dismissal:

1. This case was filed on February 7, 2023, and no Plan is in place.
2. Debtor is a serial filer. This is Debtor's sixth bankruptcy case since June 13, 2011. Except for approximately 16 months Debtor has been in bankruptcy continuously for 10 of the last 12 years, all the while never bringing current or repaying Creditor's claim. All of Debtor's prior cases have been dismissed for either a failure to prosecute, failure to confirm a Plan, and failure to make plan payments.
3. Debtor has offered three separate ways of how he plans to fund this case, including by seeking to sell real property and by operating a mining

operation, none of which have been viable. This court has entertained these different suggestions with the Debtor changing his mind along the way, seeking continuance after continuance.

4. The court should dismiss the case and impose a two-year bar to refiling.

Id.

Creditor submits the Declaration of Douglas H. Kraft, co-counsel of record for Creditor, in support. Dec., Dckt. 154. Mr. Kraft authenticates and testifies to the facts alleged in the Motion.

DEBTOR'S OPPOSITION

Debtor filed an Opposition on November 15, 2023. Dckt. 165. Debtor submits his own Declaration in support, testifying to the facts alleged in his Opposition. Dec., Dckt. 167. Debtor argues:

1. Debtor is in the process of preparing a new Chapter 12 Plan to be funded by mining operations on his real property.
2. Debtor has received a report from a Nova Explorations employee, Steve Cockrell, on November 14, 2023, attached as Exhibit A, Dckt. 166. The report states that there are traces of gold and silver on Debtor in Possession's property and those elements can be mined for substantial profit.
3. Debtor has some concentrated head ore already stockpiled waiting for refinement. Debtor estimates this ore to value \$14,684,976.00 when refined based on current gold and silver prices.
4. Debtor will break this concentrated head ore down then ship it to a refinery, Elemental Refineries, which will pay 80% of the ore's value.
5. Debtor wants to use this money to pay the creditors in full.
6. Debtor is asking this court for more time to gather relevant documents related to filing a new Plan funded by the mining operation.

Dckts. 165, 167. In his Declaration, Debtor testifies that the new Plan will be filed by November 21, 2023, to account for the money derived from his mining operation. Dec., Dckt. 167 ¶ 19. A review of the docket on November 28, 2023 reveals that no new Plan has been filed.

CREDITOR'S RESPONSE TO DEBTOR'S OPPOSITION

On November 22, 2023, Creditor filed a Response to Debtor's Opposition. Dckt. 173. In its Response, Creditor states:

1. Debtor's claim that he will pay all creditors in full is outlandish. Debtor has never paid his creditors in full in his previous six cases, and this time is no different.
2. Debtor is not qualified to offer his own testimony concerning details of the mining operation. An expert must testify because it is an area requiring specialized skill or knowledge. Furthermore, Debtor's testimony leaves too many variables unaddressed, such as when will Debtor actually sell the ore, and what happens if the refinery decides not to accept the ore?
3. The report in Debtor's Exhibits is not admissible because it has not been authenticated by the expert, Steve Cockrell.
4. Debtor cannot be trusted. He was planning this mining operation the whole time, even while telling the court he would fund the Plan by selling real property.

Dckt. 173.

On the same day, Creditor also filed evidentiary objections to Debtor's exhibits and testimony.

Dckt. 174. Creditor argues:

1. Debtor is not qualified to offer opinion testimony on specialized knowledge. Therefore, Debtor's Declaration is not credible.
2. The report attached to Debtor's Opposition, purportedly from Steve Cockrell, is not properly authenticated, and therefore is inadmissible.

Dckt. 174.

CREDITOR JANA PROPERTIES, LP AND JACK FARAONE'S JOINDER

On October 26, 2023, creditor JANA Properties, LP and Jack Faraone ("JANA"), filed a joinder motion in this case, siding with Creditor and arguing the case should be dismissed with a two-year bar to refiling. Dckt. 163. JANA asserts it has not been paid on its secured claim in the previous six filings in this case, and there are no viable reorganization prospects in this case.

CHAPTER 12 TRUSTEE'S JOINDER

On November 13, 2023, the Chapter 12 Trustee, David Burchard ("Trustee"), filed a joinder motion in this case, siding with Creditor and arguing the case should be dismissed with a two-year bar to refiling. Dckt. 163.

DISCUSSION

Evidentiary Issues

The Federal Rules of Evidence do not allow “a lay opinion [to be] based on scientific, technical, or other specialized knowledge.” *Lee v. City of Stockton, California*, F. App’x. 297, 299 (9th Cir. 2003). Fed. R. Ev. 701(c) (“If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is. . . not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”). Federal Rule of Evidence 702 states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods;
and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Further, the federal Rules of Evidence outline what type of facts or data an expert may rely on when testifying. Federal Rule of Evidence 703 states:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

In this case, the issue is whether Debtor’s testimony is based on scientific, technical, or specialized knowledge that would either prevent him from testifying as a layperson, or require the Debtor to be qualified as an expert. Specialized knowledge, though not precisely defined, typically involves sophisticated issues or knowledge concerning particular techniques of a trade. *See U.S. v. Figueroa-Lopez*, 125 F. 3d 1241, 1245 (9th Cir. 1997) (holding that a witness should have been qualified as an expert when the bulk of his testimony was based on his perceptions, education, training, and experiences as a law enforcement officer).

The court finds that Debtor’s Declaration does involve scientific, technical, or specialized knowledge that would require him to either be qualified as an expert or prevent the admissibility of his Declaration as improper testimony. Debtor is testifying to precious mineral and ore refinery processes and projected yields, including expected profits. Dec., Dckt. 167 ¶¶ 12, 13-16. These particular areas of the trade involve sophisticated issues and projections that only an experienced expert could testify to. Debtor does not submit to the court any evidence that he should be qualified as an expert on gold and precious mineral mining, meaning this testimony may not be considered as evidence. Furthermore, Creditor raises

the issue that a license would be required to conduct such an operation. Opposition, Dckt. 169, p. 3. Debtor does not address this issue.

Motion to Dismiss

Dismissal of a Chapter 12 case is governed by 11 U.S.C. § 1208(c). That section of the Code provides:

On request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including—

- (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors;
- (2) nonpayment of any fees and charges required under chapter 123 of title 28;
- (3) failure to file a plan timely under section 1221 of this title;
- (4) failure to commence making timely payments required by a confirmed plan;
- (5) denial of confirmation of a plan under section 1225 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;
- (6) material default by the debtor with respect to a term of a confirmed plan;
- (7) revocation of the order of confirmation under section 1230 of this title, and denial of confirmation of a modified plan under section 1229 of this title;
- (8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan;
- (9) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation; and
- (10) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

This list is not exhaustive. 8 COLLIER ON BANKRUPTCY ¶ 1208.03. Bankruptcy courts have held that dismissal is also proper for bad faith. *See In re Walton*, 116 B.R. 536 (Bankr. N.D. Ohio 1990) (dismissal for bad faith filing when case was debtor's third bankruptcy filing and first two had been dismissed); *In re Beswick*, 98 B.R. 900 (Bankr. N.D. Ill. 1989) (debtors' second chapter 12 case dismissed as an attempt to circumvent the appellate process); *In re Galloway Farms, Inc.*, 82 B.R. 486 (Bankr. S.D. Iowa 1987)

(dismissal for bad faith filing when case was debtor's third bankruptcy filing and first two had been dismissed); *In re Welsh*, 78 B.R. 984 (Bankr. W.D. Mo. 1987) (dismissal for bad faith when debtor withheld information from the court).

Chapter 12 of the Bankruptcy Code empowers the Debtor to elect to convert a case to one under another chapter, but provides that the court may convert a case to one under Chapter 7 only upon a showing that the debtor has committed fraud in connection with the bankruptcy case. 11 U.S.C. § 1208(d).

Prior Bankruptcy Cases Prosecuted by Debtor

In this case, a review of Debtor in Possession's filings shows he has only filed one previous case in the last year. Case no. 2022-22415. That case was dismissed, in part, because Debtor attempted to navigate the Chapter 12 process *pro se*. Debtor in Possession has retained counsel in this current case, addressing that defect in the previous case. However, that does not address the more than a decade of Debtor in Possession having bankruptcy relief but not performing the bankruptcy plan.

Before that, there were two Chapter 12 cases filed by Debtor:

1. 15-25059; Filed June 24, 2015, and dismissed on November 24, 2015.
2. 15-29451; Filed December 10, 2015, and dismissed on September 24, 2021.

In both of the 2015 filed cases Debtor was represented by the same counsel as in this Bankruptcy Case.

In Case 15-29541, Debtor confirmed a Chapter 12 Plan. 15-29541; Order, Dckt. 124. The Plan was modified in 2020 and then again in 2021. By Motion filed August 6, 2021, the Chapter 12 Trustee filed a Motion to Dismiss that Bankruptcy Case, asserting a (\$50,000) default in Plan payments for the months of March, April (partial payment), May (partial payment), June (partial payment), July, August, September, and October 2021. *Id.*; Dckt. 219. Debtor did not oppose the Motion to Dismiss, and Case 15-29542 was dismissed.

As pointed out by counsel for the Debtor in Possession, in Case 15-29541, the Debtor funded the Plan with \$337,700.00. 15-29541; Trustee Final Report, Dckt. 227. Though the Plan was not completed, Debtor did provide substantial monetary funding in that Case.

Going earlier, Debtor filed his first Chapter 12 case on November 17, 2011, Case 11-47119, which was dismissed on March 27, 2015. Debtor was represented by the same counsel in Case 11-47119 that represents him in this case.

In substance, Debtor has been living under Chapter 12 Plans since November 17, 2011—which is now more than a decade without performing the confirmed Chapter 12 Plans.

It has been questioned whether Debtor qualifies for Chapter 12 Relief. See, Civil Minutes; Dckt. 54. As it developed, the Debtor's path in this case was to proceed with the prompt sale of his real property and protect any exemption he had in it. At the July 19, 2023 Status Conference, Debtor's counsel reported the independent fiduciary who had been engaged to consider the marketability of the property (and the court

thought for the marketing and sale of the property). Civ. Minutes; Dckt. 119. As stated in the Civil Minutes for the July 19, 2023 Status Conference:

At the Status Conference, counsel for the Debtor in Possession has retained Mr. Spacone and has provided his report of value. The low \$2,050,000 and high of \$2,350,000. The Debtor in Possession finds these values to be sufficient to proceed with a plan for liquidation of the real property.

At the hearing, counsel for the Debtor in Possession has retained Mr. Spacone and has provided his report of value. The low \$2,050,000 and high of \$2,350,000. The Debtor in Possession finds these values to be sufficient to proceed with a plan for liquidation of the real property. Counsel for Jana expressed concerns.

Counsel for Umpqua Bank stated that some concerns exist as to the proposed Plan. As to feasibility, it is concerned that the Debtor, as plan administrator, can actually sell the Real Property. Counsel for Jana Properties expressed similar concerns.

The productive discussions continued, with the creditors pressing the point of the need for employment of a professional to take on the responsibilities for the marketing and sale of the Real Properties (in light of Debtor's multiple unsuccessful bankruptcy filings). Some questions were raised about the Debtor's dramatic increase in income, which was stated by counsel being due to the sale of minerals on the Properties.

In the course of the discussions, counsel for Debtor in Possession appeared to acknowledge the need for an independent fiduciary for the Bankruptcy Estate taking over the marketing and sale of the Real Properties - which independent fiduciary would protect the economic interests of not only creditors, but the Debtor, in proceeding with a timely, commercially reasonable, fair market value sale of the Real Properties.

Id.

At the September 21, 2023 Status Conference, the tenor of this case took a turn for the worse, the court stating:

The Trustee's September 14, 2023 Docket Entry Report states that the 341 Meeting of Creditors has been concluded.

At the Continued Status Conference, counsel for the Debtor in Possession reported that they have been working on a Plan, but the Debtor in Possession did not agree with the final version that creditors supported.

The Chapter 12 Trustee believes that this case is one that should be dismissed.

The Creditors supported the Trustee's statement that this case should be dismissed.

The court addressed with Counsel for the Debtor in Possession the issues being raised by the Chapter 12 Trustee and counsel, the statements that motions to dismiss to be filed will request a bar on filing another case by the Debtor in light of the five prior cases that have been filed and dismissed since November 2011, and that at prior hearings the representations from the Debtor in Possession were along the lines of his proceeding with a commercially reasonable sale so he could protect his large California homestead exemption in the real property.

Civil Minutes; Dckt. 133.

On October 25, 2023, Umpqua Bank filed this Motion to Dismiss this Bankruptcy Case, and Creditor requests the court to impose a two year bar on Debtor filing another case (Debtor having continually been in bankruptcy, and having the protections thereof, since 2011). Mtn. Dismiss; Dckt. 151. The Motion includes the following statement of the proceedings in this case:

When the Debtor filed this Case on February 7, 2023, he said that he intended to reorganize and had ability to reorganize by continuing his "farming" operations. When it became apparent that the Debtor cannot reorganize through his "farming" operations, he said that he wanted to sell his real property. The Court continued the hearing on plan confirmation twice and extended the deadline for plan confirmation three times. After the creditors and the trustee spent significant time and expense working with the Debtor and a marketing and sales consultant, to formulate a plan for selling the real property, the Debtor changed his mind again. Nearly nine (9) months into this Sixth Case, the Debtor says that he wants to mine his real property—a business operation he has never attempted or conducted before. How does he even have the funds to start a mining operation. Moreover, with his poor health, there are serious questions of the Debtor ability to start, manage, and maintain a mining operation during a 60-month plan.

Mtn. Dismiss, p. 2:17 - 3:2; Dckt. 151. Additionally:

On May 8, however, the Debtor filed a liquidating plan, seeking to sell his real property by May 2024. Docket 47 at §7. Relying on this change of mind, the Court continued twice (once to June 28 and second time to July 19) the hearing on the Debtor's plan confirmation motion. Dockets 86, 87, 103. The Court also continued three times the deadline for obtaining plan confirmation (to July 21, August 31, and then to October 6). Dockets 87, 103, 123. Also relying on this, the creditors (including Umpqua) and the Chapter 12 trustee began working with the Debtor on an amended Chapter 12 plan that would provide for the appointment of Hank Spacone as Plan Administrator, with the authority to sell the Debtor's real property. On June 22, the Court approved Mr. Spacone's employment as a consultant to determine the value of the real property. Docket 122; Kraft Decl. ¶¶21-24.

Notwithstanding the foregoing, the Debtor changed his mind once again. In mid September, the Debtor told Umpqua that he no longer wanted to liquidate the

real property. Instead, he now wanted to start a mining operation on the real property. Kraft Decl. ¶25. As such, the Debtor is asking now for a fourth (4th) extension of the deadline to obtain plan confirmation. See Docket 135.

Id.; p. 7:19 - 8:8.

The Motion provides a general discussion of the Debtor's change of heart about selling the property. Also, a history of Debtor's prior filings, defaults, failures, and cases being dismissed.

In the more than a decade of being in bankruptcy, Debtor has demonstrated that while he has great visions for his financial future, the bankruptcy filings have been used to delay creditors without good faith prosecutions by Debtor. With the Debtor in Possession's last minute plan shifting to his new vision of a mining operation on the properties of the Bankruptcy Estate, Debtor manifests the same "vision" of being able to live in bankruptcy and speculate on financial outcomes at the cost and expense of creditors. This bankruptcy case is being prosecuted to hinder and delay creditors – including Creditor.

Before the court now are interesting reports and allegations that purportedly show millions of dollars of precious ores and minerals on Debtor's property. Exhibit A, Dckt. 166; Dec., Dckt. 167 ¶ 12-13. However, Debtor attempts to submit these facts based on his testimony as a layperson where such facts require an expert's opinion. For example, Debtor informs the court that,

Running the head ore through an X-Ray fluorescence (XFR) shows the valuable mineral content. The head ore at location H1 was run through the XFR twice and shows element 47 AG Silver at a percentage of 1.14% and .97%. Further the head ore at location H1 shows element 79 Au Gold at a percentage of .51% and .50%. The current price for silver is at \$23.25 Ozt and gold is at \$1,967.90 Ozt. This equates to a value for the silver of \$6,765.00 per ton of head ore and a value for the gold of \$285,345.00 per ton of head ore.

Dec., Dckt. 167 ¶ 12. Debtor does not explain to the court how he, as a layperson, is qualified to offer this specialized knowledge concerning the details of a precious ore and mineral mining operation. Moreover, Debtor informed the court that he is receiving a more formal report soon from Mr. Cockrell of Nova Explorations and expects to have a Chapter 12 Plan filed with the court by November 21, 2023. However, no formal report or Chapter 12 Plan has been filed with the court. Debtor also informs the court that presumably expensive pieces of industrial mining equipment, such as a "ball mill," are being delivered to his Property. Dec., Dckt. 167 ¶ 15. The court is left in the dark as to how Debtor can afford such equipment.

Debtor's behavior in this case is consistent with his behavior in his previous five cases. It appears to the court that Debtor is yet again stringing the court and creditors along by proffering false or untenable solutions to his problems. Debtor's repeated failure to pay his creditors and prosecute a viable bankruptcy case amount to unreasonable delay, or gross mismanagement, by the Debtor that is prejudicial to creditors. 11 U.S.C. § 1208(c)(1). Furthermore, Debtor's inability to propose a viable Chapter 12 Plan and pay his creditors shows a continuous loss to the Estate without a reasonable likelihood of rehabilitation. 11 U.S.C. § 1208(c)(9).

Two-Year Bar to Refiling

The bankruptcy courts are established by an act of Congress and the All Writs Act, 28 U.S.C. § 1651(a), and 11 U.S.C. § 105 provides the bankruptcy courts with the inherent power to enter pre-filing orders against vexatious litigants. *Molski v. Evergreen Dynasty Corp, et al*, 500 F.3d 1047 (9th Cir. 2007); *Gooding v Reid, Murdock & Co.*, 177 F.3d 684, (7th Cir 1910), *Weissman v. Quail Lodge Inc.*, 179 F.3d 1194, 1197 (9th Cir. 1999), and *In re Bialac*, 15 B.R. 901, (9th Cir. B.A.P. 1981), *aff'd* 694 F.2d 625 (9th Cir. 1982). A court must be able to regulate and provide for the proper filing and prosecuting of proceedings before it. 11 U.S.C. § 105(a) expressly grants the court the power to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. Further, the court is authorized to *sua sponte* take any action or make any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process. This power exists, and it does not matter whether it is being exercised pursuant to 11 U.S.C. § 105 or the inherent power of the court. *In re Volpert*, 110 F.3d 494, 500 (7th Cir. 2007); and *Peugeot v. U.S. Trustee (In re Crayton)*, 192 B.R. 970, 976 (9th Cir. BAP 1996).

The Ninth Circuit Court of Appeals re-stated the grounds and methodology for pre-filing review requirements as an appropriate method for the federal courts in effectively managing serial filers or vexatious litigants. *Molski v. Evergreen Dynasty Corp, et al*, 500 F.3d 1047 (9th Cir. 2007), *en banc* hearing denied, 521 F.3d 1215 (9th Cir. 2008); and *In re Fillbach*, 223 F.3d 1089 (9th Cir. 2000). While maintaining the free and open access to the courts, it is also necessary to have that access be properly utilized and not abused. The abusive filing of bankruptcy petitions, motions, and adversary proceedings for purposes other than as allowed by law diminishes the quality of and respect for the judicial system and laws of this country.

As addressed by the Ninth Circuit Court of Appeals in *Molski*, the ordering of a pre-filing review requirement is not to be entered with undue haste because such orders can tread on a litigant's due process right of access to the courts. As discussed in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982), the right to seek redress from the court is a protected right civil litigants. The issuing of a pre-filing only is to be made only after a cautious review of the pertinent circumstances.

However, the Ninth Circuit Court of Appeals clearly draws the line that a person's right to present claims and assert rights before the federal courts is not a license to abuse the judicial process and treat the courts merely as a tool to abuse others.

Nevertheless, "[f]lagrant abuse of the judicial process cannot be tolerated because it enables one person to preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants." *De Long*, 912 F.2d at 1148; *see O'Loughlin v. Doe*, 920 F.2d 614, 618 (9th Cir. 1990).

Molski v. Evergreen Dynasty Corp, et al, *supra*, p. 1057. In the Ninth Circuit the trial courts apply a four factor analysis in determining if and what type of pre-filing or other order should properly be issued based on the conduct of the party at issue.

1. First, the litigant must be given notice and a chance to be heard before the order is entered.
2. Second, the district court must compile "an adequate record for review."
3. Third, the district court must make substantive findings about the frivolous or harassing nature of the plaintiff's litigation.

4. Finally, the vexatious litigant order “must be narrowly tailored to closely fit the specific vice encountered.”

Id.

The Debtor's repetitive filing of bankruptcy cases, motions, and adversary proceedings demonstrates abusive conduct and misuse of the bankruptcy laws. Though the bankruptcy court is open to all and a person's financial, personal, or other missteps are not a bar to seeking the extraordinary relief available, debtors must seek the relief and prosecute the cases in good faith. In this case the Debtor has chosen to repeatedly file a series of Chapter 12 cases in which he has failed to file necessary documents or make necessary payments and has demonstrated that he is otherwise unable to prosecute a Chapter 12 case.

The court is cognizant of the significant impact the filing of a bankruptcy case has on the not only the Debtor, but creditors and other persons. Even if, due to the repeated filings and the provisions that Congress has placed in a subparagraph of a subsection of the Bankruptcy Code, the automatic stay does not go into effect, the mere presentation of a petition and the significant sanctions imposed on someone violating the stay can work to prevent creditors from legitimately enforcing their rights. In these cases the Debtor has filed a series of non-productive Chapter 12 cases, which appear to exist only for the purpose of deterring a creditor from proceeding with a foreclosure on real property. The Debtor has been afforded multiple opportunities to advance a Chapter 12 Plan to cure defaults on the obligation owing to the creditors and restructure the debt through the Chapter 12 Plan. While obtaining the benefit of the automatic stay, whether actual or improperly represented to exist, the Debtor has been unable or refused to properly prosecute a Chapter 12 Plan to completion.

The court has weighed the options, ranging from just dismissing the current case, as it has done in the past, to imposing an outright bar on the Debtor filing a bankruptcy case. Clearly, some limits need to be placed on the Debtor to prevent the abuse and attempted abuse of the bankruptcy court, bankruptcy laws, state court judgments, and third-parties. The court will not ban the Debtor from ever filing bankruptcy, but will impose the much more moderate requirement that he first obtain the pre-filing authorization from the chief judge in the bankruptcy district before commencing another bankruptcy case during the two year period following the dismissal of this case.

A pre-filing review requirement is of little impact to a debtor seeking legitimate relief from the bankruptcy court. In this case, it will require the debtor to have the initial bankruptcy pleadings completed and on their face appear to be consistent with the requirements of the Bankruptcy Code and Chapter under which the Debtor seeks to file bankruptcy. It imposes no significant cost or delay, in that the petition, schedules, and other basic pleadings need to be prepared at the time of filing. The ability to file rests solely with the Debtor, requiring him to do and comply with only what the Bankruptcy Code requires.

It also has the effect of this Debtor being prepared to successfully prosecute a Chapter 12 case, rather than continue to flounder and squander his rights under the Bankruptcy Code. By his conduct, the Debtor has lost the ability to receive the automatic stay. To the extent that he has or had the ability to cure any defaults and restructure any debts allowed in the Chapter 12 case, those appear to have squandered as well.

**November 30, 2023 Hearing
Continuance and Status Quo Order**

As addressed below, the Debtor in Possession has changed the focus of this case and any plan therein from farming operations to a purported mining operation for precious minerals such as gold and silver. The Debtor in Possession currently has a sample of the materials mined with the property with an assayer and anticipates having the results back in ten days.

While creditors have been dragged through a decade of unsuccessful bankruptcy cases by Debtor, Debtor and Debtor's counsel point out that Debtor has substantially performed the Plan in the 2015 case, with it coming to an end after five years, which Debtor says was caused by COVID. The Trustee's Final Report in that Case states that Debtor paid \$377,700 into the Plan. 15-29541; Trustee Fin. Rpt., Dckt. 227 at 2.

Though the switch from farming to mining is a last minute, eleventh hour and fifty-ninth minute change, the potential for funding of a Plan (possibly a Chapter 11 Plan) can find support in the next ten days. If the assayer's report shows a substantial amount of gold and silver from the sample, further investigation to preserve and obtain for the benefit of the Bankruptcy Estate, and then on to creditors and ultimately the Debtor such value. As has been discussed, it may be necessary to have a bankruptcy trustee "running the show" to get a plan confirmed and performed, but if the property has substantial mineral value and such can be mined, based on Debtor's projections such Plan term may well be short and the Debtor "bank in control" post-confirmation in a relatively short period of time.

Continuance of the hearing for a short period of time is not of prejudice to the creditors and will afford Debtor his last minute opportunity to show that reorganization may be possible and further investigation and effort is warranted.

Enforcement of 11 U.S.C. § 363(b)

Creditor Umpqua Bank has raised several points concerning its security interest in the Real Property on which the Debtor in Possession wants to conduct mining operations. Some go to potential damage to the Property and environmental damage. Some go to whether mining is allowed on the Property and what permits and authorizations are required. The court has not been presented with the legal requirements, ordinances, and evidence of whether such mining operations are allowed and the permits that are required.

There is no showing that there was a pre-petition, ordinary course of business mining operation on the Real Property. To the contrary, it was presented as the Debtor having agricultural business operations centering around timber harvesting.

Congress provides that a bankruptcy trustee, or a debtor in possession exercising the powers, rights, duties, and responsibilities of a bankruptcy trustee, may use or property of the bankruptcy estate other than in the ordinary course of business only after notice and hearing, and as ordered by the court. 11 U.S.C. § 362(b). Additionally, the trustee/debtor in possession may not use cash without consent of the creditor having a lien on the cash (which may be proceeds of the original collateral) or order of the court. In this case, Umpqua Bank asserts a lien on the Real Property, including the proceeds and products thereof, and has not consented to the use of any cash collateral.

Congress provides in 11 U.S.C. § 105(a) that the court may issue an "order, process, or judgment" that is necessary to carry out the provisions of Title 11 - the Bankruptcy Code. Here, the Debtor in Possession is using, altering, modifying, and possibly preparing to sell property of the bankruptcy estate

without court authorization. In light of the circumstances of this case, an order for the Debtor in Possession and Debtor to maintain the status quo pending further hearing(s) and evidence of whether mining operations are allowed on the Property, the potential damage to the Property, and the methodology for payment of the claims secured by the Property that may be altered by the use of the Property of the Bankruptcy Estate outside the ordinary course of business is warranted and proper.

Pending further order of the court, the court will further order that the Debtor in Possession and the Debtor, each in their respective capacities, cease any and all mining operations on the Property, and to maintain the status quo on the property pending further order of the court.

The Debtor in Possession has represented that by December 14, 2023 the assay report from the sample of material from the Property will have been received and the Debtor in Possession and Creditors would have information from a third-party as to the mineral potential on the Property.

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

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

The Motion to Dismiss the Chapter 12 case filed by Umpqua Bank (“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 **XXXXX**.

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—Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 12 Trustee, attorneys of record who have appeared in the bankruptcy case, and Office of the United States Trustee on October 6, 2023. By the court's calculation, 55 days' notice was provided. 28 days' notice is required.

The Motion to Extend Deadline to File a Complaint Objecting to Discharge has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006).

**The Motion to Extend Deadline to Obtain Confirmation of a Chapter 12 Plan is
XXXXX.**

December 14, 2023 Hearing

At the hearing, **XXXXXXXXXX**

A REVIEW OF THE MOTION

Timothy Wilson, Debtor in Possession, ("Movant") moves to extend the deadline to obtain confirmation of a Chapter 12 Plan. Movant argues that the extension is warranted because Movant is waiting on reports from Nova Exploration concerning a potential mining operation on Movant's property. Dec., Dckt. 137. According to Movant, the extension is warranted because these documents are essential to forming a viable Chapter 12 Plan. *Id.*

The deadline for filing and confirming a Chapter 12 Plan was previously extended by this court's Order to August 31, 2023. Dckt. 103. The court again extended that deadline to October 6, 2023. Dckt. 123. Movant now requests another extension, this time to November 29, 2023.

Creditor Umpqua Bank (“Creditor”) opposes the Motion on the following grounds:

1. Movant has not filed a new Plan.
2. Movant’s proposed mining operation is highly improbable because Movant requires a license for such an operation, contrary to Movant’s assertion that he does not require a license.
3. This court did not approve the retention of Nova Explorations as a professional in this case.
4. Movant’s proposed mining operation violates Creditor’s Deed of Trust because it causes impermissible waste on Movant’s property.
5. Movant’s Plan is not feasible because he has no prior mining experience and his projections are speculative. Furthermore, Movant is in poor health and is likely unable to run a mining operation.
6. The proposed mining operation is just another delay tactic used by Movant.

Opposition, Dckt. 169. Creditor also lodges evidentiary objections, arguing that Movant is relying on hearsay evidence from County employees concerning the requirement of a license to run the mining operation. Evid. Objection, Dckt. 171 p. 2:6-8. Further, Creditor argues any such statements from the County should be excluded from the record because they are highly unreliable, confusing, and prejudicial. *Id.* at 9-10.

Creditor submits the Declaration of Douglas H. Kraft, co-counsel of record for Creditor, in support of its Opposition and Evidentiary Objection. Dec., Dckt. 170. Mr. Kraft testifies to and authenticates the facts alleged in the Opposition and Evidentiary Objection.

DISCUSSION

Federal Rule of Bankruptcy 9006 governs motions for extending time. According to that Rule,

Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Fed. R. Bankr. 9006(b)(1). So long as the request is made before the expiration of time, the court may, in its discretion, grant an extension of time for cause shown. 10 COLLIER ON BANKRUPTCY ¶ 9006.06[2].

In this case, Movant made its request for extension just before time expired. Where the court has mentioned this case is in its 11th hour, the court now holds the case to be in its 11th hour and 59th

minute. Movant has informed the court there are untold riches to be had if this extension can be granted.

November 30, 2023 Hearing

After the November 30, 2023 hearing, the court granted the Motion by Order on an interim basis to December 20, 2023. Dckt. 192.

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 Extend Deadline to File a Complaint Objecting to Discharge filed by Timothy Wilson, Debtor in Possession, (“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 Motion is **XXXXX**.