

# 90<sup>th</sup> CML ANNUAL CONFERENCE

## BANKRUPTCY OVERVIEW

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### A. What is Bankruptcy?

#### 1. The Automatic Stay. 11 U.S.C. §362(a).

The automatic stay precludes any creditor from taking action against a debtor or his/her/its property. 11 U.S.C. §362(a). Any action taken in violation of the automatic stay is void and without effect. *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020 (10<sup>th</sup> Cir. 1994). The automatic stay does not stop a debtor's actions or claims against creditors or third parties. *Victor Foods, Inc. v. Crossroads Economic Development of St. Charles County, Inc.*, 977 F.2d 1224 (8<sup>th</sup> Cir. 1992); *Martin-Trigona v. Champion Federal Sav. and Loan Ass'n*, 892 F.2d 575 (7<sup>th</sup> Cir. 1989).

Violations of the automatic stay are sanctionable. *In re Skinner*, 917 F.2d 444 (10<sup>th</sup> Cir. 1990); *In re Aspen Limousine Svc., Inc.*, 198 B.R. 341 (D.Colo. 1996). Individual debtors have a cause of action for damages for violations of the automatic stay, including attorney's fees. 11 U.S.C. §362(k). Entities can seek sanctions under 11 U.S.C. §105(a), using the Bankruptcy Court's equitable powers to enforce the Bankruptcy Code. *Standard Indus., Inc. v. Aquila, Inc. (In re C.W. Mining Co.)*, 625 F.3d 1240 (10<sup>th</sup> Cir. 2010).

Enforcement of governmental regulatory power is not stayed by bankruptcy. 11 U.S.C. §362(b)(4).

#### 2. Chapter 7 vs. Chapter 11. Liquidation vs. Reorganization.

Chapter 7 is known as the traditional "liquidation" bankruptcy. A Chapter 7 Trustee is appointed to oversee all of the assets and if necessary, sell the assets and distribute the cash to creditors. 11 U.S.C. §§704, 726. The Chapter 7 Trustee has quasi-judicial immunity when performing his/her duties and is not liable for ordinary negligence. *In re Ebel*, 338 B.R. 862 (Bankr.D.Colo. 2005); *Sherr v. Winkler*, 552 F.2d 1367 (10<sup>th</sup> Cir. 1977). In limited circumstances and with Court approval, a Chapter 7 Trustee may operate a business. 11 U.S.C. §721.

Chapter 11 is known as the "reorganization" bankruptcy. Chapter 11 allows a business to continue to operate while attempting to restructure its debts. 11 U.S.C. §§1107, 1108. A Chapter 11 Plan of Reorganization, if approved, is a new contract between the debtor and its creditors. 11 U.S.C. §§1123, 1129, 1141. *Laing v. Johnson (In re Laing)*, 31 F.3d 1050 (10<sup>th</sup> Cir. 1994).

Individual debtors whose debts are primarily consumer debts must pass a "means test" based

upon their current monthly income; otherwise, they are not eligible for a Chapter 7 case. 11 U.S.C. §707(b). Such debtors may be forced into a Chapter 13 bankruptcy or Chapter 11 bankruptcy depending upon the size of their debt. 11 U.S.C. §109(e).

### 3. Relief from Stay: Insurance Recovery & Liquidation of Debt.

Creditors can seek an order from the Bankruptcy Court lifting the automatic stay to continue liquidation to recover against an insurance policy or to liquidate and determine the amount of the claim. 11 U.S.C. §362(d). *Tucker v. American Intern. Group, Inc.*, 745 F.Supp.2d 53 (D.Conn.2010)(employee granted lift of stay to recover against debtor employer insurance, no protection for third parties).

Automatic stay does not prevent a judgment creditor from attempting to recover on a supersedeas bond even though the indemnity on such bond is secured by a debtor's property. *Edwards v. Armstrong World Indus.*, 6 F.3d 312 (5<sup>th</sup> Cir. 1993), *rev'd on another issue, sub nom., Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995).

Courts look to various factors to determine whether relief from the automatic stay is appropriate to continue with non-bankruptcy litigation. *In re Curtis*, 40 B.R. 795, 799-800 (Bankr.D.Utah 1984). Such factors include the impact of the litigation on the bankruptcy case, the status of the case as of the bankruptcy filing, and the cost to the debtor of litigating in multiple forums. *Id.*

Bankruptcy Court lacks power to enter final judgment on a tortious interference counterclaim filed in response to a creditor's proof of claim. *Stern v. Marshall*, 564 U.S. \_\_\_\_, 131 S.Ct. 2594 (2011). Final judgments must be decided either by federal district court or state court. *Id.*

## **B. Construction Claims in Bankruptcy**

### 1. Mechanic's Liens & Trust Fund Claims.

Claims under Colorado's Mechanic's lien Trust Fund Statute are not dischargeable in bankruptcy. C.R.S. §38-22-127; 11 U.S.C. §523(a)(4); *In re Regan*, 477 F.3d 1209 (10<sup>th</sup> Cir. 2007). To recover treble damages, a creditor must prove specific evidence of violation of Colorado's Civil Theft Statute. C.R.S. §18-4-405; *Itin v. Ungar*, 17 P.3d 129 (Colo. 2000).

### 2. Administrative Claims.

To the extent that a creditor provides services to a debtor after the debtor files for bankruptcy protection, and such services are necessary for the preservation of the debtor's property, the creditor may apply to the Court for a priority administrative claim. 11 U.S.C. §503(b). Ongoing expenses of a debtor in chapter 11 do not require court approval. 11 U.S.C. §363(b); *Burlington Northern R.R. Co. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.)*, 853 F.2d 700 (9<sup>th</sup> Cir. 1988).

### 3. Contract & Tort Claims: Priority vs. General Unsecured Claims

Only certain types of pre-bankruptcy claims are entitled to priority treatment under the Bankruptcy Code. 11 U.S.C. §507(a). Domestic support obligations, employee wages and benefits, and taxes, generally receive payment before general unsecured claims like breach of contract actions or negligence claims. *Id.*

A creditor should file a proof of claim in a Chapter 7 or Chapter 13 Bankruptcy to share in any distribution from the bankruptcy estate. 11 U.S.C. §726; Fed.R.Bankr.P. 3001 & 3002. In a Chapter 11 case, if the debtor has listed the creditor as not disputed, not contingent, and liquidated, then the creditor need not file a proof of claim if the creditor agrees with the amount listed by the debtor. 11 U.S.C. §1111(a). If the debtor lists the creditor as disputed, contingent or unliquidated, or if the creditor disagrees with the amount listed by the debtor, the creditor should file a proof of claim. Fed.R.Bankr.P. 3001 & 3002.

### **C. Loans and Lender Issues in Bankruptcy.**

#### 1. Forced Restructuring & Cram Down: Cash collateral issues & financing.

In bankruptcy, a secured creditor's claim can be "crammed down" to the value of the property securing such claim. 11 U.S.C. §506(a). So, if the value of the property has been reduced to less than the debt, the creditor's claim is split into secured and unsecured claims. *Bartee v. Tara Colony Homeowners Assoc. (In re Bartee)*, 212 F.3d 277 (5<sup>th</sup> Cir. 2001). If there is equity in the property, the secured creditor is entitled to its continuing contract interest and attorney's fees. 11 U.S.C. §506(b); *Bradford v. Crozier (In re Laymon)*, 958 F.2d 72 (5<sup>th</sup> Cir. 1992).

During bankruptcy, a debtor must provide adequate protection to a secured creditor if the debtor is retaining and/or using the secured property. 11 U.S.C. §361. The form of adequate protection can be cash payments, additional or replacement liens or other relief designed to protect the secured creditor. *Id.*; *United Savings Ass'n v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988).

A debtor or trustee in bankruptcy may incur unsecured debt in the ordinary course without court approval. 11 U.S.C. §364(a). Any credit or debt outside the ordinary course or granting of liens against property requires court approval. 11 U.S.C. §§364(b) and (c).

#### 2. Single Asset Real Estate Debtors & "363" sales in Bankruptcy.

A single asset real estate debtor means a person who holds real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the debtor's gross income (who is not a farmer) and on which no other substantial business is being conducted. 11 U.S.C. §101(51B).

In a Single Asset Real Estate case, a debtor must commence making non-default payments

on its secured debt within 90 days after filing bankruptcy, or have a plan on file which has a reasonable possibility of being confirmed within a reasonable time. 11 U.S.C. §362(d)(3). Otherwise, the Court must lift the automatic stay to permit the secured creditor to enforce its state law remedies. *Id.*

A small business debtor is defined as a person engaged in commercial or business activities, other than owning or operating real estate, whose noncontingent liquidated secured and unsecured debts do not exceed \$2,343,300. 11 U.S.C. §101(51D). A small business debtor has different time frames within which to file and confirm its plan of reorganization. 11 U.S.C. §1121.

Any use, sale or lease of a debtor's property outside the ordinary course of business must have court approval. 11 U.S.C. §363(b). Such property can sold "free and clear" of any liens so long as: (a) nonbankruptcy law permits such sale; (b) the secured creditors consent; (c) the sale price is greater than all liens; (d) there is a bona fide dispute as to the creditor's lien; or, (d) the creditor could be compelled in any legal or equitable proceeding to accept a monetary satisfaction of such interest. 11 U.S.C. §363(f).

### 3. Bankruptcy Trustee & Executory Contracts.

A Chapter 7 Trustee, or Chapter 11 debtor, may assume any executory contract or unexpired lease, provided that when the lease is assumed there is a cure of any monetary default, compensation for any loss, and adequate assurance of future performance. 11 U.S.C. §§365(a) and (b). If a Chapter 7 Trustee does not assume or reject an executory contract or unexpired lease of residential property or personal property within 60 days after the debtor files bankruptcy, such lease is automatically rejected. 11 U.S.C. §365(d)(1). In Chapter 11, the debtor has until it confirms a plan of reorganization to assume or reject any executory contract or unexpired lease pertaining to residential property or personal property, and must perform those contracts or leases in the interim. 11 U.S.C. §§365(d)(2), (d)(3) and (d)(5). With respect to a lease of nonresidential real property, the Chapter 7 Trustee or Chapter 11 debtor must assume or reject such lease within 120 days after the debtor files bankruptcy. 11 U.S.C. §365(d)(4).

Any provision in an executory contract or unexpired lease which provides for a default upon the bankruptcy of a debtor, is not valid. 11 U.S.C. §365(e).

An contract is "executory" if the obligation of both the debtor and other party to the contract are "so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other." Vern Countryman, *Executory Contracts in Bankruptcy*: Part I, 57 Minn. L.Rev. 439, 460 (1973).

## **D. Development Agreements in Bankruptcy**

Towns, cities, municipalities and other governmental organizations often enter into various agreements with a developer to develop land within their boundaries. Such agreements may be adopted by the municipality through various means, including ordinances, legislative acts, or other powers. Municipalities may also acquire water rights which have been declared through a water court decree. Typically, these agreements and decrees are recorded in the records of the clerk and recorder for the applicable county.

A debtor cannot use the Bankruptcy laws to strip off the obligations of a development agreement or a water decree (which can be likened to a restrictive covenant) through 11 U.S.C. § 363 or some other provision. Many bankruptcy courts have rejected such attempts. *E.g.*, *Gouveia v. Tazbir*, 37 F.3d 295, 299 (7th Cir. 1994) (debtor cannot sell property free and clear of equitable servitude limiting use of property to residential uses); *In re Oyster Bay Cove, Ltd.*, 196 B.R. 251, 255-56 (E.D.N.Y. 1996) (“Clearly, 11 U.S.C. § 363(f) and Bankruptcy Rule 6004, which refer to the sale of land ‘free and clear’ from these ‘interests,’ are not intended to sever easements and other non-monetary property interests that are created by substantive State law.”); *In re 523 East Fifth Street Housing Preservation Dev. Fund Corp.*, 79 B.R. 568, 570-76 (Bankr. S.D.N.Y. 1987) (debtor not entitled to sell property free and clear of restrictive covenant limiting use of property to low income housing).

Restrictions in such development agreements and water decrees are not liens, encumbrances or interests. Rather, they are legislative acts, containing restrictions on a debtor’s use of its property. Colorado law grants its municipalities the power to impose development restrictions, including zoning for the purpose of promoting health, safety, morals, or the general welfare of the community. C.R.S. § 31-23-301, (2010). *See also*, C.R.S. §31-23-201, *et seq.* The Colorado Supreme Court has made it clear in *South Creek Associates v. Bixby & Associates, Inc.*, 781 P.2d 1027 (Colo. 1989), that legislative enactments are not “liens” or “encumbrances” which can be stripped off in a normal foreclosure. Bankruptcy law similarly only allows stripping of liens in limited circumstances. 11 U.S.C. §363(f). Attached to these materials is a representative bankruptcy decision on development agreements.

## **E. Pre-bankruptcy planning.**

### **1. Red Flags signaling possible bankruptcy: Project Management & financial condition of Builder/owner.**

Slow paying or no paying opposing contractual parties is the first sign of economic distress. If the contractor or owner begins to dispute charges or work, which disputes do not have a rational basis, then they are trying to obtain more time before payment. Also, different forms of payment, such as using a credit card, or different credit cards, switching banks, also signal financial distress. These signals may not be obvious at the beginning of the opposing party’s financial distress who will make various explanations for the changes; but one should immediately notify in this event.

## 2. Supplier issues: Preferential Payments

A supplier, contractor, or other creditor of a debtor should also be concerned about payments it received within the 90 days prior to a debtor's bankruptcy filing. Payments made to or for the benefit of a creditor of a debtor within 90 days on account of an old debt are avoidable by a Chapter 7 Trustee (or Chapter 11 debtor) if the creditor received more than it would have in a liquidation. 11 U.S.C. §547(b). Transferring balances from one credit card to another is a preferential transfer. *Parks v. FIA Card Services, N.A. (In re Marshall)*, 550 F.3d 1251 (10<sup>th</sup> Cir. 2008). A debtor is presumed insolvent in the 90 days before bankruptcy. 11 U.S.C. §547(f) However, creditors who receive payments in the ordinary course of business or for contemporaneous exchange for new value have defenses to the avoidance claims. 11 U.S.C. §547(c).

## 3. Foreclosure & Receivership options.

Under Colorado law, if a debtor has given a security interest in its property to a creditor, the creditor may be able to have a receiver appointed to take over control and use of the property. For real property, the deeds of trust typically contain receivership provision which allow for the appointment upon default. *See Phillips v. Webster*, 426 P.2d 774 (Colo. 1967). C.R.S. §38-38-601, provides for the appointment of a receiver when there is a foreclosure. If there are instances of waste to the real property, the court may also appoint a receiver. C.R.S. §38-38-602. For personal property, C.R.C.P. 66 permits the court to appoint a receiver if there is a prima facie right to the property and danger of the property being lost, removed or materially injured. *Oman v. Morris*, 471 P. 2d 430 (Colo.App. 1970). These tools may be useful to a secured creditor who believes that a debtor may improperly dispose of the collateral.

Colorado also permits a judgment creditor to avoid certain transactions by a debtor. C.R.S. §38-8-105(1) is modeled after the Uniform Fraudulent Transfer act and generally permits a creditor to avoid a transfer made by a debtor with actual fraud, or a transfer made for less than "reasonably equivalent value." This permits a creditor to obtain the property transferred from the third party to satisfy its claim against the debtor, among other limited remedies. C.R.S. §38-8-108. If the debtor is no longer in possession of the disputed property, a receivership or foreclosure may not be an option. In such circumstance, these statutes may be available to creditors.

## **F. Resourceful links**

- a. US Bankruptcy Court, Colorado: [www.uscourts.cob.gov](http://www.uscourts.cob.gov).
- b. American Bankruptcy Institute: [www.abiworld.org](http://www.abiworld.org).
- c. PACER for Colorado Bankruptcy Court: <https://ecf.cob.uscourts.gov>.
- d. PACER home page: [www.pacer.gov](http://www.pacer.gov).

**About the presenter:** Ken Buechler specializes in representing small and closely-held businesses, individuals with complex debt structures, and fiduciaries who recover assets from Ponzi schemes. His work includes creditor-debtor workouts, as well as bankruptcy reorganization and liquidations. Ken has been involved in representing creditors, debtors, trustees and creditors' committees in such industries as real estate investment and development, hotels, heavy equipment, residential and commercial construction, trucking, oil and gas, farming and dairy operations, banking, and municipalities. His bankruptcy practice also includes the restructuring side of representing debtors, in such matters as pre-bankruptcy planning and asset protection, modification of debts, and successful exiting of bankruptcy with plans of reorganization.



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## **REPRESENTATIVE CASE**

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLORADO  
Honorable Howard R. Tallman**

**In re:** )  
 )  
**LONESOME PINE HOLDINGS, LLC** ) **Case No. 10-34560 HRT**  
 ) **Chapter 11**  
**Debtor.** )  
 )  
\_\_\_\_\_ )

**ORDER ON DEBTOR’S MOTION FOR ORDERS TO IMPLEMENT PLAN OF REORGANIZATION PURSUANT TO 11 U.S.C. § 1142(b)**

THIS MATTER came before the Court at a hearing held on August 19, 2011, on the Debtor’s Corrected Motion for Orders to Implement Plan of Reorganization Pursuant to 11 U.S.C. § 1142(b) (docket #94), and the Town of Buena Vista’s Response thereto (docket #99). The Court, having reviewed the Motion and Response, the Debtor’s First Amended Chapter 11 Plan of Reorganization, and other relevant documents, and having heard the evidence and arguments of the parties, enters the following order.

**I. BACKGROUND**

Debtor Lonesome Pine Holdings, LLC, filed for bankruptcy under Chapter 11 on September 28, 2010. The Court entered an Order confirming the Debtor’s First Amended Plan of Reorganization Dated March 11, 2011 (“the Plan”), on May 12, 2011.

The Debtor is in the business of developing and investing in a real estate project consisting of approximately 274 acres of property adjacent to and incorporated into the town of Buena Vista, Colorado (“Project”). (Plan at 1.) The Plan provides for the sale or refinancing of the various tracts of property that comprise the Project in the event that the Class 3 claimant, Armed Forces Bank, N.A., as successor by merger to Bank Midwest, N.A., is not paid in full. It states: “The Plan shall be funded through the sale of the Project Parcels A-D [as defined in the Plan], or such other parcels as Debtor may reconfigure to enhance the sale.” The Plan further provides: “The sale of the Parcels shall be by auction sale, free and clear of liens claims and interest pursuant to the terms of this Plan and 11 U.S.C. § 363. . . .” (Plan at 11.)

In the section that specifically deals with the sale or refinancing of the Property, section 9.2.1, the Plan provides: “The Debtor shall sell or refinance a sufficient number of the four Parcels, or such other Parcels as Debtor may reconfigure to enhance the sale. . . .” (Plan at 12, § 9.2.1 ¶ 1.) It continues:

All collateral securing the debt owed to Armed Forces Bank, N.A. successor by merger to Bank Midwest is to be auctioned subject to the Bank’s single credit bid. The Debtor is allowed to have bidders submit bids on separate Parcels, but no bids will be accepted on any of the Debtor’s property unless the aggregate net

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from the separate bids is sufficient to pay the Bank's debt and the Bank is actually paid in full. The Bank's collateral includes all real property and water rights in which the Bank holds a security interest.

(Plan at 12, § 9.2.1 ¶ 3.)

In addition, the Plan states:

The highest bidder at the auction will acquire the Project free and clear of liens, claims, interests, and encumbrances. If the Bank's credit bid is the highest bid, the Bank will acquire all of its collateral free and clear of any liens, claims, interests and encumbrances without having to conduct a foreclosure sale.

(Plan at 12, § 9.2.1 ¶ 5.) Finally, section 9.3 of the Plan states: "All sales of Parcels by the Debtor shall be free and clear of all liens, claims, and encumbrances of record and free and clear of any interest in such property held by any entity." (Plan at 13, § 9.3.)

The auction is scheduled to occur on September 30, 2011.

The Town of Buena Vista ("Town") is and has been listed as a disputed creditor in this case, having filed a proof of claim for a secured claim in the amount of \$53,005 on December 30, 2010. The Town has received all notices and filings.

In its Motion, the Debtor seeks an order declaring that the phrase "free and clear of liens, claims, interests and encumbrances," as used in section 9.2.1 ¶ 5 of the Plan, means being free and clear of certain Town ordinances and other obligations, including (1) the First Amended Annexation and Development Agreement dated June 22, 2010, between the Town, the Meadows at Buena Vista, Inc., Lonesome Pine Holdings, LLC, and Jeffrey C. Allen and Teresa M. Allen ("First Amended Annexation Agreement") and (2) the Findings of Fact, Conclusions of Law, and Consent Decrees issued by the Colorado Water Court, Division 2, on June 19, 1989 ("Water Decree"). The Debtor further seeks a declaration that the divisions of land in connection with the auction sale required by the Plan are exempt from the Town Subdivision Code. Finally, the Debtor asks the Court to order the Town to execute and deliver to Debtor such documents as may be necessary to effectuate a transfer of Debtor's property free and clear of the Town's "claims and interests." In summary, the Debtor asks the Court to enter an order declaring that the so-called "dry up" provision in the Water Decree, which is also addressed in the First Amended Annexation Agreement, does not burden the Property that Debtor is required to sell pursuant to the Plan.

Debtor asserts that the Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. It further asserts that the Court has authority under 11 U.S.C. §§ 1141(a) and 1142(b)

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and under § 11.2 ¶ 4 of the Plan,<sup>1</sup> which provides for the limited retention of jurisdiction by the Court, to enter the requested orders because such orders are necessary in order to implement the Debtor's Plan.

For its part, the Town disputes that the Court has jurisdiction to grant the relief requested. It argues that the type of relief requested by the Debtor is not available under 11 U.S.C. §§ 1141(a) and 1142(b), as the obligations under the First Amended Annexation Agreement and the Water Decree are not "liens, encumbrances or interests" that are capable of being "stripped off." Further, The Town argues that, because the Debtor is not eligible for a discharge, its Property cannot be transferred free and clear of the Town's rights. Finally, the Town asserts that the Court does not have jurisdiction to void the First Amended Annexation and Agreement and Water Decree because the Town's rights arise from substantive Colorado law and, therefore, the determination of the validity of those rights is not a "core proceeding" governed by 28 U.S.C. §§ 157 and 1334. The Town contends that it does not have a "claim"; instead, it holds rights that a subsequent purchase of the Property will have to address.

## II. DISCUSSION

### A. **Jurisdiction**

Citing the Tenth Circuit's decision in *In re CF&I Fabricators of Utah*, 150 F.3d 1233, 1237 (10th Cir. 1998), the Debtor asserts that, pursuant to 11 U.S.C. § 1142(b),<sup>2</sup> the Court has jurisdiction to enforce the provisions of a confirmed plan. In *CF&I*, the Court noted that Section 1142(b) is a grant of authority that permits a court to exercise jurisdiction over post-confirmation disputes if the matter sufficiently affects creditors' recovery. 157 F.3d at 1237 (citing *In re Gryphon*, 204 B.R. 460 (Bankr. W.D. Pa.1997)). Failure to declare that the Water Decree and First Amended Annexation Agreement do not affect the Property, Debtor argues, will undermine the Debtor's ability to market the Property for auction and will negatively affect implementation

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<sup>1</sup> Section 11.2 ¶ 4 of the Plan provides that the Court shall retain jurisdiction for certain purposes, including "[r]esolution of any disputes regarding interpretation of the Plan," and "[i]mplementation of the provisions of the Plan and entry of orders in aid of consummation of the Plan."

<sup>2</sup> Section 1142(b) provides:

The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

11 U.S.C. § 1142(b).

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of the Plan's sale provision. Because this will impair creditors' recovery, Debtor contends, the Court may exercise jurisdiction to enter the requested relief.

Section 1142(b), and the provisions of the Plan that allow the Court to retain jurisdiction, are not themselves jurisdictional. Rather, the sources of the Court's jurisdiction over this matter are 28 U.S.C. §§ 157(b) and 1334, which provide for jurisdiction over core matters – in this case, over a matter concerning the administration of the estate, use of estate property, and proceedings affecting the liquidation of the assets of the estate. 28 U.S.C. § 157(b)(2)(A), (M), and (O). *See also In re U.S. Brass Corp.*, 301 F.3d 296, 306 (5th Cir. 2002) (addressing basis of jurisdiction). Indeed, as noted by the Seventh Circuit, section 1142(b) “does not confer any substantive rights on a party apart from what the plan provides.” *Village of Rosemont v. Jaffe*, 482 F.3d 926, 935 (7th Cir. 2007). The court explained that section 1142(b) merely “empowers the bankruptcy court to enforce the unperformed terms of a confirmed plan.” *Id.* (quoting *U.S. Brass*); *Zahn Bldg. Prods., Inc. v. Leeds Bldg. Prods., Inc.*, (In re *Leeds Bldg. Prods., Inc.*), 160 B.R. 689, 690-91 (Bankr. N.D. Ga. 1993) (interpreting section 1142(b) as allowing bankruptcy courts to include in confirmation orders provisions retaining jurisdiction over certain limited matters involving execution, implementation, or interpretation of plan and over disputes requiring application of bankruptcy law, but noting that language of such provisions will be interpreted very narrowly to ensure that a court's role after confirmation remains limited to that which Congress has given, *i.e.*, what is necessary to effectuate plan of reorganization).

**B. Enforcement of the Plan**

In this case, the Plan, in various places, provides for the sale of the Property free of any liens, interests, claims or encumbrances. These provisions are governed by 11 U.S.C. § 363. Under this section of the Bankruptcy Code:

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

In this case, Debtor seeks a declaration that its Property is free and clear of the burdens imposed by the Water Decree and by the Town's Subdivision Code. But, restrictions of record

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that run with the land are not “interests” that fall within § 363. *See Skyline Woods Homeowners Ass’n, Inc. v. Broekemeier*, 758 N.W.2d 376, 392 & n.36 (Neb. 2008) (“The courts addressing whether a [debtor] may sell property of an estate free and clear of restrictive covenants under § 363(f) have all concluded that such a sale is not permitted.”) (citing *Gouveia v. Tazbir*, 37 F.3d 295 (7th Cir. 1994); *In re WBQ Partnership*, 189 B.R. 97 (Bankr. E.D.Va. 1995); *In re Oyster Bay Cove, Ltd. (In re Oyster Bay Cove, Ltd.)*, 161 B.R. 338 (Bankr. E.D.N.Y. 1993); *In re 523 E. Fifth St. Housing Pres. Dev. Fund*, 79 B.R. 568 (Bankr. S.D.N.Y. 1987); Basil H. Mattingly, *Sale of Property of the Estate Free and Clear of Restrictions and Covenants in Bankruptcy*, 4 Am. Bankr. Inst. L. Rev. 431 (1996)).

As the *Skyline Woods* court held, restrictions that run with the land “create equitable interests that do not compel a person to accept a monetary interest; thus, when restrictive covenants are involved, there is nothing that can force those who benefit from restrictive covenants to ‘forego [sic] equitable relief in favor of a cash award.’” *Id.* (citing *Gouveia v. Tazbir*, 37 F.3d at 299-300); *see also In re Southcreek Development, LLC*, No. 10–90327, 2011 WL 44703 (Bankr. C.D.Ill. Jan. 6, 2011) (finding that a municipality could not be compelled to accept a money judgment in lieu of equitable enforcement of an annexation agreement). This Court cannot strip the Property of burdens imposed by a state water court determination, nor can it strip a burden imposed by an ordinance enacted pursuant to the authority of a municipality. To do so “would be taking a property interest away from a third party and giving the debtor a property interest which the debtor never had.” *Skyline Woods*, 758 N.W.2d at 393 (citing *In re Rivera*, 256 B.R. 828 (Bankr. M.D.Fla. 2000)).

Section 1142(b) provides no alternative avenue through which the Debtor may seek its requested relief. Though § 1142(b) authorizes the Court to enforce the provisions of the Plan, consistent with applicable bankruptcy and non-bankruptcy law, it does not confer substantive rights on the Debtor or allow this Court to determine substantive rights in the Property. *See Village of Rosemont*, 482 F.3d at 935 (citing *U.S. Brass Corp.*, 301 F.3d at 306). Section 1142(b) authorizes the Court to enter orders that allow the Debtor to sell only that which the Debtor has the right to sell under the Plan and under state law – in this case, Property that may or may not be burdened by the “dry up obligation.”<sup>3</sup> The determination of substantive matters under state law – that is, whether or not the “dry up” obligation actually burdens the Property – is properly the province of the Colorado courts. Such determination is not required in order to *enforce* provisions of the Plan nor to enable the Debtor to sell its interest in the Property, as is.

Finally, § 365 does not apply here. It is not clear that the First Amended Annexation Agreement is an executory contract within the meaning of § 365(a). *See Gouveia v. Tazbir*, 37 F.3d at 298 (holding that, although restrictive covenants may contain the characteristics of both a contract and an interest in real estate, the primary nature of such covenants is not contractual but

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<sup>3</sup> This Court does not opine about what obligation Colorado law would or would not enforce.

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rather a property interest). Even if it were, the Debtor's Plan specifically provided that all executory contracts listed on an Exhibit A were assumed and all executory contracts listed on Exhibit B were rejected. Exhibit A includes "All leases and contracts that are not specifically rejected." Exhibit B includes "All leases and contracts previously rejected by Court Order." The First Amended Annexation Agreement was not previously rejected by Court Order. It was therefore assumed by the Debtor.

**C. Due Process Concerns**

Even if the Court were to determine that it had authority to enter orders allowing the Debtor to sell the Property free and clear of any burden that might be imposed by the First Amended Annexation Agreement, the Water Decree, or the Town's Subdivision Code, before it could "enforce" the "free and clear" language in such a manner, in order to satisfy due process concerns, the Court would have to determine that the Debtor's Plan gave adequate notice of the Debtor's intention to strip the obligations of the Water Decree and the Subdivision Code from the Property. *See In re Barton Indus. Inc.*, 104 F.3d 1241 (10th Cir. 1997) (requiring notice to specify treatment of claim and requiring that notice be "of such nature as reasonably to convey the required information"). This it cannot do, for the general language of the provisions in the Plan were not specific enough to put the Town on notice that these particular interests or claims might be lost if the Plan were confirmed.

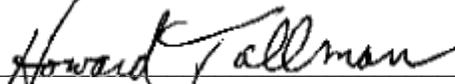
**III. CONCLUSION AND ORDER**

Based on the foregoing,

IT IS THEREFORE ORDERED that the relief requested in Debtor's Corrected Motion for Orders to Implement Plan of Reorganization Pursuant to 11 U.S.C. § 1142(b) is hereby DENIED.

Dated this 1st day of September, 2011.

BY THE COURT:

  
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Howard R. Tallman, Chief Judge  
United States Bankruptcy Court