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IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re: KOREA TECHNOLOGY INDUSTRY AMERICA, INC., et al.[1], Debtors.	**Bankruptcy No. 11-32259** Honorable R. Kimball Mosier (Filed via ECF)

[1] The three Debtors involved in the jointly-administered Chapter 11 cases above and the Bankruptcy Case numbers of their respective Chapter 11 cases are as follows: Korea Technology Industry America, Inc. (Bankruptcy Case No. 10-25027); Uintah Basin Resources, LLC (Bankruptcy Case No. 11-32261; Crown Asphalt Ridge, LLC (Bankruptcy Case No. 11-32264).

MOTION TO ALTER AND AMEND ORDER APPROVING SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS

Western Energy Partners, LLC ("**Western Energy**"), Tar Sands Holding, LLC ("**Tar Sands**") creditors in the above-captioned bankruptcy cases, and Elgin Services Company, Inc. ("**Elgin**", and together with Western Energy and Tar Sands, the "**Secured Creditors**"), move the Court to alter and amend its *Order Approving the Sale or Sales of Substantially All of the Debtors' Assets and Approving the Assumption and Assignment of Contracts and Leases* (the "**Sale Order**"), entered November 15, 2011 [Doc. # 204] to add necessary terms and conditions to the Asset Purchase Agreement (the "**APA**") between the Debtors, as Sellers, and Rutter and Wilbanks Corporation ("**R&W**"), as Buyer, which, if not supplied, render the APA illusory, unenforceable and subject to possible future litigation. In support of this Motion, the Secured Creditors represent as follows:

BACKGROUND

1. On October 3, 2011, the Debtors filed their *Motion for Orders (I) Approving (A) Bidding Procedures; (B) Auction Procedures; and (C) Assumption and Assignment Procedures; (II) Approving Notice Procedures for (A) the Solicitation of Bids, and (B) an Auction; (III) Scheduling Hearings on Approval of a Sale or Sales of Substantially All of the Debtors' Assets; (IV) Approving the Sale or Sales of Substantially All of the Debtors' Assets; (V) Approving the Assumption and Assignment of Contracts and Leases; and (VI) Granting Related Relief* (the "**Sale Motion**") [Doc. # 99]. Pursuant to the Sale Motion, the Debtors sought to sell substantially all of the assets of their estates.

2. Various timely objections to the Sale Motion were filed by parties in interest, including objections filed by the Secured Creditors [Doc. # 189].

3. An evidentiary hearing on the Sale Motion was held before the Court on November 9, 2011 and November 14, 2011.

4. During the course of the evidentiary hearing, numerous amendments to the APA were offered and made by the Debtors and R&W to address objects expressed by the Secured Creditors, by other parties in interest and by the Court.

5. Parties in interest, including the Secured Creditors, had little, if any, time to review and comment upon the proposed amendments or, more importantly, to consider the impact of the amendments on other terms and conditions in the APA or on the logistical aspects related to the proposed sale.

6. The Sale Order incorporated the APA by reference and as an Exhibit.

LEGAL BASIS

This Court can and should amend or alter the Sale Order pursuant to either Rule 9023 or Rule 9024, of the Federal Rules of Bankruptcy Procedure. With minor modifications regarding timing, these Rules incorporate Rules 59 and 60 of the Federal Rules of Civil Procedure. The Sale Order is a "final judgment" entered in the context of a "contested matter" and is subject to Rules 9023 and 9024. *See* *Bullock v. Telluride Income Growth LP (In re Telluride Income Growth LP)*, 364 B.R. 407, 409-417 (B.A.P. 10th Cir. 2007) (deciding an appeal from a motion to alter or amend a section 363 judgment pursuant to Rule 9023). Rule 9014(c), which governs contested matters, incorporates by reference Rule 7054. In turn, Rule 7054, incorporates Rule 54(a) of the Federal Rules of Civil Procedure, which explicitly defines "judgment" as "a decree and any order from which an appeal lies." Therefore, the Sale Order constitutes a judgment subject to Rules 9023 and 9024. Pursuant to these rules, this Court has full authority to reconsider and amend its Sale Order.

7. Standard of Review

(a) *Rule 9023*

A motion filed pursuant to Rule 9023 allows the bankruptcy court "to open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment." *In re Donohue*, 410 B.R. 311, 314 (Bankr. D. Kan. 2009). A motion to alter or amend is intended to correct manifest errors of law or fact, or to present newly discovered evidence under certain circumstances. *American Freight Sys. v. Point Sporting Goods* (*In re American Freight Sys.*), 168 B.R. 245, 247 (D. Kan. 1994); *see also Webber v. Mefford*, 43 F.3d 1340, 1345 (10th Cir. 1994). Courts have held that appropriate circumstances to consider a motion for reconsideration, which is similar to a motion to alter or amend, include when "the court has obviously misapprehended a party's position on the facts or the law, or the court has mistakenly decided issues outside of those the parties presented for determination." *In re Sunflower Racing, Inc*, 223 B.R. 222, 223 (D. Kan. 1998). A motion to alter or amend, however, should not be used as a "vehicle for the losing party to rehash arguments previously considered and rejected" by the court. *In re American Freight Sys*, 168 B.R. at 247 (quoting *National Metal Finishing v. Barclays American*, 899 F.2d 119, 123 (1st Cir. 1990)).

(b) *Rule 9024*

The Court also may grant relief from judgment or order pursuant to Rule 9024, which incorporations Rule 60 of the Federal Rules of Civil Procedure. Rule 60(a) allows the Court to make corrections to its judgment based on clerical mistakes, oversights, and omissions. In particular, "[t]he court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." Fed. R. Civ. P. 60(a). The Tenth Circuit has recognized that under Rule 60(a), a court is not limited to correcting clerical mistakes. *Burton v. Johnson*, 975 F.2d 690, 694 (10th Cir. 1992), cert. denied,

507 U.S. 1043 (1993). "A court may also invoke Rule 60(a) to resolve an ambiguity in its original order to more clearly reflect its contemporaneous intent and ensure that the court's purpose is fully implemented." *Id.* Any new interpretation under this rule "must reflect the contemporaneous intent of the district court as evidenced by the record. . . [the court] . . . may not resort to hindsight." *Id.*

In addition, Rule 60(b) allows the court to "relieve a party… from a final judgment order or proceeding….for (1) mistake, inadvertence, surprise, or excusable neglect . . . or (6) for any other reason that justifies relief." Although relief under Rule 60(b) is considered extraordinary, motions for relief under Rule 60(b) lie within the broad equitable discretion of the court. *Peters v. Bryan (In re Bryan)*, 429 B.R. 1, 6 (Bankr. D. Colo. 2010). The rule strikes a "delicate balance between two countervailing impulses of the judiciary: The desire to preserve the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." *Id.* (quotations omitted).

Utah bankruptcy courts have determined that "[r]elief may be afforded on the basis of mistake when a party has made a reasonable litigation mistake. Relief may be afforded on the basis of surprise when a judgment or order is taken against the parties' understanding or agreement." *In re Bryner*, 2010 Bankr. LEXIS 1101, *12-13 (Bankr. D. Utah Mar. 10, 2010) (quotations omitted).

(c) *Resolving Ambiguity*

"Ambiguity is defined as: intellectual uncertainty, the condition of admitting to two or more meanings, of being understood in more than one way." *Nelson Co. v. Counsel for the Official Comm. of Unsecured Creditors (In re Nelson Co.)*, 959 F.2d 1260, 1263 (3d Cir. 1992). Once a court determines that an order is ambiguous, it should look to the intent of the parties. *Id.* at 1264 (citations omitted). As part of this analysis, the court can look to all submissions and evidence presented at the hearing. *See id.* Resolving ambiguities in an order requires a court to

look to the same rules that apply to other legal documents. *Culbertson v. Bd. of County Comm'Rs*, 2001 UT 108, ¶ 15 (Utah 2001). "Where construction is called for, it is the duty of the court to interpret an ambiguity in a manner that makes the judgment more reasonable, effective, conclusive, and that brings the judgment into harmony with the facts and the law." *Id.* (citations omitted). Although *Culbertson* looks to the interpretation of an ambiguous order by another court, it specifies the ideals that should be included in an order created by the court.

(d) *Court Discretion Regarding Sale Orders*

Courts have the power to set aside an order of sale "either before or after confirmation when it appears that the same was entered through mistake, inadvertence, or improvidence." *Golfland Entertainment Centers, Inc. v. Peak Investment, Inc. (In re BCD Corp.)*, 119 F.3d 852, 860 (10th Cir. 1997); *In re Donohue*, 410 B.R. at 314. "While a judicial sale will not be set aside on the ground of inadequacy of price alone, unless the inadequacy is so great as to shock the conscience of the chancellor, inadequacy of price, accompanied with other circumstances having a tendency to cause such inadequacy, or indicating any apparent unfairness or impropriety, will justify setting aside the sale. Such additional circumstances may be slight and insufficient in themselves to justify vacating the sale." *In re BDC Corp*, 119 F.3d at 860 (quoting *Webster v. Barnes Banking Co*., 113 F.2d 1003, 1005 (10th Cir. 1940)). For example, in *In re BDC Corp*., the bankruptcy court relied on Rules 9024 and 60(b) to vacate a written order that had allowed the sale of a water park. *Id*. at 857. The Tenth Circuit upheld the decision, finding that "the bankruptcy court did not abuse its discretion in setting aside the original sale when it concluded that the confirmation had been granted through a mistake as to the terms of the sale." *Id*. at 860. The court determined that there was general confusion as to the terms of the sale and that the order was correspondingly vague because the parties had not truly reached an agreement. *Id*. at 861. While the secured creditors only request that the sale order be amended and not set aside,

this case law illustrates that the court has a great deal of discretion regarding sale orders when the sale order was entered through mistake, inadvertence, or improvidence.

ARGUMENT

A. The "Purchase Price" Under the APA is Illusory, as There is No Mechanism for Determining the Amount to be Paid.

1. Section 2.2(a) of the APA specifies the purchase price as follows:

> (a) Purchase Price. The Purchase Price and other consideration to be paid by Buyer in connection with Buyer's purchase and acquisition of the Assets shall be the sum of (1) the Mineral Royalty Conveyance to KTIA described in Section 2.2(c) below; (2) due and unpaid amounts of any Debtor in Possession Loans extended to the Sellers by Buyer, including but not limited to the Start-up Loan, as defined below in Section 2.2 (b); and (3) money in the amount equal to the total amount of Creditors' Claims that are verified and allowed by the Bankruptcy Court. The Purchase Price money shall be paid by Buyer, in full, by wire transfer to facilitate the Closing.

The third aspect of the Purchase Price requires R&W to pay "money in the amount equal to the total amount of *Creditors' Claims* that are *verified and allowed* by the Bankruptcy Court." (emphasis added) There is no mechanism for determining this amount in either the APA or Sale Order prior to the Closing.

2. The term "Creditors' Claims" is not defined in either the APA or Sale Order, although the terms "Creditor" and "Clams" are defined in Sections 1.2(l) and 1.2(g), respectively. The parties may have intended the phrase "Creditors' Claims" to mean all of the "Claims" as defined in Section 1.2(g) that are held by any "Creditor" as defined in Section 1.2(l), or they may have intended something else. There is nothing in either the APA or Sale Order to resolve this doubt. Thus, on its face, the term "Creditors' Claims" is ambiguous.

3. In addition, the term "verified and allowed" is not defined in either the APA or the Sale Order. While the term "allowed" has a common meaning in bankruptcy cases, there is

no such common meaning for the term "verified." Since these terms are used in the conjunctive, it is apparent that both events must occur. Nevertheless, there is no mechanism in either the APA or the Sale Order for determining when and how the claims will be "verified and allowed" *by the Bankruptcy Court*. Again, the phrase is ambiguous.

4. There is no deadline on when "Creditors' Claims" are to be determined, i.e., as of the Closing, as of the closing of the Debtors' bankruptcy cases, or as of some other date. Presumably, administrative claims will continue to accrue after the Closing and until the cases are closed. How are these post-Closing claims to be paid by the Buyer?

5. Paragraph 2.2(e) acknowledges that the Buyer has an interest in determining the verified and allowed amount of the "Creditors' Claims," but, again, it provides no mechanism for making any determination respecting the verification and allowance of such claims, and it sets no deadlines for this determination.

6. Furthermore, it will not be possible to determine whether the Debtors will owe any sales and related income taxes *until the Closing*, and the amount of those tax obligations, if any, depend on the amount of the purchase price. Depending upon the Debtors' basis in the Assets, the sale could result in a capital gains tax liability for the Debtors which might be an administrative expense "claim" of the estates. The amount of these taxes must be paid by the Buyer. When and how such tax claims will be determined or estimated, and then paid, is unknown based on the current language in the APA.

7. Sections 9.2 and 2.2(a) of the APA also are inconsistent. While Section 2.2(a) requires the Buyer to pay all creditor claims, Section 9.2 provides as follows:

> 9.2 Fees and Taxes. Except as otherwise specifically provided, all fees, costs, expenses and taxes incurred by Sellers and Buyer in negotiating this Agreement or in conducting Due Diligence and consummating the Transaction contemplated by this Agreement shall be paid by the Party incurring the same, including without limitation, legal and accounting fees, costs and expenses.

Section 9.2 contradicts section 2.2 and seems to require that the Sellers pay for their respective tax and administrative "claims" relating to the Agreement, the due diligence and in "consummating the transaction". The Sale Order should be amended to delete the Sellers from Paragraph 9.2 and require only that the Buyer pay its fees and taxes associated with the Sale.

8. The aforementioned ambiguities render the purchase price under the APA illusory and, more importantly, expose the Debtors' estates to the uncertainties, risks and costs of possible future litigation. The remedy for these deficiencies, however, is straight forward. The Court should amend the Sale Order in at least the following particulars:

a. Specify that the term "Creditors' Claims" as contained in Section 2.2(a) of the APA means all "Claims" as defined in Section 1.2(g) that are held by any "Creditor" as defined in Section 1.2(l) of the APA;

b. Specify a date, not more than 30 days after entry of the Amended Sale Order, by which the Debtors must file an objection to any claims that are disputed stating, with particularity, the factual and legal basis for each such dispute;

c. Specify a deadline, not less than 30 days after service of the Debtors' claim objections, for creditors to file responses to any such objections;

d. Set hearings on the Debtors' objections;

e. Clarify that the term "verified and allowed" as contained in Section 2.2(a) of the APA means (i) the amount of a creditor's claim that is scheduled by the Debtors, where no timely objection by the Debtors has been filed to the claim and no proof of claim has been filed by the Creditor; (ii) the amount shown by the Creditor's proof of claim, if the Creditor filed a proof of claim and the Debtors did not file a timely objection; (iii) the amount stipulated between the affected Creditor and the Debtors, as supported by a joint motion and order, after notice and opportunity for hearing; or (iv) the

amount determined by the Court in a final order at the conclusion of any claim objection hearing, if the Debtors file a timely objection; and

f. Specifying a procedure for estimating claims that cannot be determined until the Closing.

9. Section 2.2(a) also is unclear about whether "verified and allowed" creditor claims include post-petition interest on such Claims. There is nothing in either the APA or the Sale Order that addresses post-petition interest on secured claims, which otherwise would be allowable under Section 506 of the Code. Since the Debtors and R&W submitted evidence at the Sale Hearing that there was substantial equity in the Debtors' assets in excess of all asserted claims, secured creditors would be entitled to interest, fees and other charges in accordance with the terms of their respective loan documents, and unsecured creditors would be entitled to interest on their claims "at the legal rate from the date of the filing of the petition" in accordance with Section 1129(a)(7)(A)(ii) and Section 726(a)(5). In Utah, the legal rate is 10% per annum. Utah Code Ann. § 15-1-1(2).

10. To remedy this ambiguity, the Court should amend the Sale Order to clearly specify that "verified and allowed" secured claims bear interest at the rate specified in their loan documents, or as otherwise determined by the Court in a final order if a timely objection is filed, and that "verified and allowed" unsecured claims bear interest, from the petition date, at the rate of 10% per annum.

B. By Its Terms, the APA is Not Enforceable and May Never Become Enforceable.

1. Section 2.3 of the APA provides as follows:

> 2.3 Verification of Buyer's Funds. Buyer acknowledges that, notwithstanding the submission and approval of the Sale Motion seeking approval of this Agreement, Sellers shall not be required to execute and deliver this Agreement until such time as Sellers and TSH receive reasonable verification of the availability of the Start-up Funds.

2. There is no standard in either the APA or in the Sale Order for determining "reasonable verification" or for determining what "availability of the Start-up Funds" means. Until these events occur, however, the Sellers *are not required to execute or deliver the APA.* Since these events may never occur, the APA may never become an enforceable contract.

3. The Sale Order should be amended to require (a) that the Buyer deposit the full amount of the Start-up Funds in a domestic bank account by a date not longer than 30 days after entry of an appropriate DIP Order, (b) that the Buyer enter into a control agreement with the depository institution and the Debtors earmarking such funds for use exclusively as the Start-up Funds under the APA, and (c) that until termination of the APA, or a closing, whichever occurs first, the funds in the account may only be used as the Start-up Funds under the APA. Absent such provisions, the APA may never become an effective contract binding on both Sellers and Buyer.

C. <u>There is No Mechanism in the APA or in the Sale Order That Requires the Buyer to Demonstrate the Ability to Close Prior to The Closing Date.</u>

1. Section 1.2(i) of the APA defines the "Closing Date" as "the date on which the Closing shall occur as agreed by Buyer and the Sellers, which shall occur on or before June 30, 2012." While there are several conditions to Closing as described in Article IV of the APA, there is no provision in the APA that requires the Buyer to demonstrate the ability to close, i.e., to actually pay the purchase price, at any time sooner than at "2:00 p.m. Mountain Time one (1) day prior to the Closing." *See*, Section 4.4(e).

2. Moreover, if all of the "Creditors' Claims" have not been "verified and allowed by the Bankruptcy Court" prior to June 30, 2012, there is no mechanism in either the Sale Order or in the APA that would require the Buyer to deposit an amount sufficient to pay all "asserted" claims should those claims ultimately become "verified and allowed by the Bankruptcy Court" after to the Closing.

3. To remedy these deficiencies, the Sale Order should be amended in two regards. First, on or before May 31, 2012, the Buyer should be required to show its ability to pay the purchase price. This verification could take the form of either, an irrevocable loan commitment, letter of credit or good funds on deposit that have been earmarked to pay the purchase price. Second, the Sale Order should be amended to require the Buyer to deposit, at the Closing, *the greater of* the verified and allowed claims, if all such claims have been verified and allowed prior to the Closing, or the sum of (a) the verified and allowed claims, (b) the asserted claims that have not yet been verified and allowed, and a reasonable estimate, as approved by the Bankruptcy Court, of the administrative expenses and tax claims that might be allowed after the Closing. The Sale Order should then provide that such funds would be used to pay all verified and allowed claims with any unused funds being remitted to the Buyer. Otherwise, creditors have no assurance that all claims will be paid as required by the terms of the APA.

D. The Consequences of a "*Force Majeure*" Event are Inconsistent and Contradictory.

1. Section 1.2(q) broadly defines a "*Force Majeure*" as follows:

> (q) "*Force Majeure*" means if Buyer or Sellers are prevented in good faith from complying with any of their obligations or performing any of the activities contemplated under this Agreement, or prevented from conducting any Due Diligence, or delayed in completing any Due Diligence activity including the timely and successful completion of the Dry Froth Circuit and Production Program by reason of fire, storm, flood, explosion, act of God; by reason of rebellion, insurrection or riot; by reason of differences with the workmen or material suppliers or labor disputes, including strikes and walkouts; by reason of lack of water, electricity, natural gas or other materials and resources; by reason of failure to receive timely delivery of supplies, materials, or equipment; by reason of failure of carriers to transport or to furnish facilities for transportation; by reason of non-availability of equipment including but not limited to cranes, mining equipment, processing equipment, haul trucks, water trucks and storage facilities; by reason of the inability to obtain adequate replacement equipment, parts and materials; or by the inability to employ qualified engineers, professionals, supervisors, work crews and

> labor; by reason of any federal, or state law, or any order, rule or regulation of a governmental authority; by reason of lack of permits or extreme weather conditions; or by reason of any other cause or causes beyond Buyer's or Sellers' control or any operation of *Force Majeure* then, while so prevented, this Agreement shall not terminate in whole or in part and performance of this Agreement shall be temporarily excused. *Any period of time for which performance is temporarily excused hereunder shall be added to the term or the time(s) set forth for performance of this Agreement.* (Emphasis added).

It is apparent from this definition that the events giving rise to a possible *Force Majeure* are exceptionally broad. It also is apparent that any period of time for performance that is excused "shall be added to the term or the time(s) set forth for performance of this Agreement." Therefore, a *Force Majeure* could extend the Closing Date.

2. Paragraph 4.6, however, of the same APA contains contradictory language. That section provides:

> 4.6 Extension of Closing. The Closing Date may be extended by the mutual agreement of the Parties in writing and approved by the Bankruptcy Court. The Closing Date may also be extended due to a Force Majeure event, *but only if such event is a federal, or state law, or any order, rule or regulation of a governmental authority (including, without limitation, a moratorium on tar sands mining or processing)*. (Emphasis added)

3. To resolve this ambiguity, the Sale Order should be amended to provide that the express provisions in Section 4.6 govern the more general provisions in Section 1.2(q).

E. There Is No Protection For Losses or Damages Caused by the Buyer To The Assets if the Buyer does not Close.

1. Section 2.2(b) of the APA contemplates a "Start-up Loan" that will be made by the Buyer to the Debtors.

2. Section 2.2(d) of the APA provides that "during the due diligence period, Buyer may conduct and, to the extent conducted, shall pay, all costs for its due diligence, completion and commissioning, . . ." Article III of the APA, however, gives the Buyer complete control and

discretion about when and how to conduct the due diligence and, importantly, when and how to use the Start-up Funds to complete the due diligence. In particular, Section 3.1 expressly provides that "Buyer shall be entitled to conduct due diligence during the due diligence period in its sole discretion." That same section authorizes the Buyer to "carry out completion and commissioning of the Dry Froth Circuit and Production Program by expending the required Start-up Funds."

3. In essence, these provisions obligate the Debtors to incur a debt of up to five million dollars ($5,000,000), but the Buyer/Lender completely controls the use of the loan proceeds. The Debtors' estate, however, has no protections if the Buyer damages the Assets, or otherwise impairs their value, and does not close the purchase. As clearly stated in Section 4.1 of the APA, "notwithstanding any provision herein to the contrary, Buyer may, in its sole and absolute discretion and for any reason and at any time prior to Closing, elect not to consummate the Transaction contemplated by this Agreement and proceed with the Closing and terminate this Agreement."

4. Furthermore, while Article VII contains various indemnifications *in favor of the Buyer*, there are no similar indemnifications in favor of the Seller, nor are there any financial mechanisms, such as surety bonds or insurance contracts, to protect the Debtors if the Buyer damages the Assets and fails to close. These provisions are tantamount to a financial experiment, at the Debtors' expense, with no possible consequence to the Buyer. And, even if the Buyer does not close, the Buyer would still be able to demand repayment of the Start-up Loan when and if the Assets are sold to a subsequent third party.

5. To remedy this oversight, the Court should amend the Sale Order to grant the Debtors a set-off right against the Start-up Loan for any damages or losses caused to the estates by the Buyer during the Due Diligence period if the Buyer fails to close.

CONCLUSION

The Asset Purchase Agreement was a hastily constructed document. It was pieced together during the course of an evidentiary hearing with little or no opportunity for parties in interest to contemplate its actual implementation and to address its many internal inconsistencies and shortcomings. For the benefit of the Debtors' estate and creditors, and to avoid costly future litigation, the Court should amend the Sale Order to address these deficiencies or, in the alternative, conduct a further hearing on these matters and then enter an appropriate amended Sale Order.

Dated this 29th day of November, 2011.

SNELL & WILMER L.L.P.

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SCALLEY READING BATES

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of November, 2011, I caused the foregoing document to be filed electronically via the electronic filing system of the United States Bankruptcy Court for the District of Utah, which caused a true and correct copy of the foregoing to thereafter be served electronically via the Bankruptcy Court's ECF noticing system upon those parties registered to receive electronic service in this case, as listed below.

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I further certify that on the 29th day of November, 2011, I caused the foregoing document to be sent by first-class mail, prepaid, to the following at the addresses set forth below:

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/s/ *David E. Leta*

In re: Roger Scott Bryner, Debtor.

Bankruptcy Number 08-26804, Chapter 13

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH

2010 Bankr. LEXIS 1101

March 10, 2010, Decided

COUNSEL: [*1] Roger Scott Bryner, Debtor, Pro se, Midvale, UT.

Trustee: Kevin R. Anderson tr, Salt Lake City, UT.

JUDGES: WILLIAM T. THURMAN, U.S. Bankruptcy Chief Judge.

OPINION BY: WILLIAM T. THURMAN

OPINION

MEMORANDUM DECISION ON MOTION TO RECONSIDER CLAIM 14

The matter before the Court is Svetlana Bryner's Motion to Reconsider Order Allowing and Approving Payment of Claim 14 ("Motion to Reconsider") pursuant to *Federal Rules of Bankruptcy Procedure 3008*. She seeks reconsideration and vacation of the Order Approving Stipulation dated August 11, 2009 ("Challenged Order") which provides that the Chapter 13 Trustee pay "claim 14-3 in the amount of $ 6,745 on a pro rata basis based on the Trustee's receipt of 36 payments in the amount of $ 75 for a total contribution to the plan of $ 2,700."

At the hearing on the Motion to Reconsider, appearances were made by Svetlana Bryner ("Ms. Bryner"), Roger Scott Bryner ("Debtor"), Chapter 13 Trustee, Kevin R. Anderson ("Chapter 13 Trustee"), and Lou Gehrig Harris, representing the Alexander and Andrew Bryner Irrevocable Trust ("Trust"). Both Ms. Bryner and the Debtor appeared pro se. The Court received evidence, heard arguments from all presenting parties and reviewed all pleadings and papers [*2] submitted and conducted research on its own regarding these issues. In addition, this Court takes judicial notice of the Debtor's entire bankruptcy case including pleadings and other submissions on file. [1] Based on the same and good cause appearing, the Court determines that notice was appropriate to consider the Motion to Reconsider and that jurisdiction and venue are proper in this Court. For the reasons stated hereafter, the Court will grant the Motion to Reconsider. [2]

1 This exercise of judicial notice is appropriate under *CA 79-3511 St. Louis Baptist Temple, Inc., 605 F.2d 1169 (10th Cir. 1979)* which provides a court may sua sponte take judicial notice of its own records, files and facts which are part of its public records as well as notice of proceedings in other courts if those proceedings have a direct relations to matters at issue.

2 The Memorandum Decision shall constitute the Court's findings and conclusions as required by *Bankruptcy Rule 7052*.

BACKGROUND

This Court will go into the history of the case as it is necessary to understand the nature of the proceedings in regards to the matter that was heard. This is a chapter 13 case with a confirmed plan. There are still some outstanding [*3] issues regarding claims that need to be determined to assist the Chapter 13 Trustee in administering the plan. This matter involves such claims.

The Debtor and Ms. Bryner have been involved in a domestic dispute regarding their two minor children since 2004 in the Domestic Court. [3] At times, their dispute has been very acrimonious [4] which has continued before this Court. The Challenged Order relates to an initial claim filed on February 2, 2009 by Steven Fritts ("Fritts"), as Trustee for the Trust in the amount of $

4,745 and filed as a domestic support obligation ("DSO") [5] (claim 14-1). On February 17, 2009, Fritts filed an amended claim for the Trust for $ 7,745 and referred to the original claim 14 filed on February 2, 2009 and again checked the box on the claim form for a DSO (claim 14-2).

> 3 The Third District Court for the County of Salt Lake, State of Utah, case # 044904183.
>
> 4 Attached to Ms. Bryner's claim 17-2 is a copy of the parties' Final Order of Custody of which the Court takes judicial notice further indicating the acrimonious relationship.
>
> 5 DSOs must be paid in full in chapter 13 and are given the highest priority pursuant to *11 U.S.C. § 507(a)(1).*

On February 17, 2009, the [*4] Debtor filed an Objection to Claim # 14 (docket 97) stating: "Debtor does not dispute the existence of a $ 4,745 priority claim" but disputes the calculation by the Trust for any amount over the $ 4,745. The Debtor further stated in his Objection to Claim 14 that "Either this court, or the underlying state court, needs to determine [what date to begin the calculation] is." That same day, the Debtor also filed a Motion to Give Claim 14 Priority (docket 107) stating:

> This priority is based upon the ruling of the state court that this money is "that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit" pursuant to *11 USC 523(a)(15).*

The Debtor's Affidavit in Support of Motion to Give Claim 14 Priority (docket 119) states:

> 6) In a separate court action to establish priority for these funds as they are "in the nature of child support" Judge Hanson entered the order attached to 14-1, and I recognize that document as a true and correct copy of the most recent order of the court with respect to [*5] the trust.

Also filed on February 17, 2009 by the Debtor was a Stipulation in Support of Motion to Give Claim 14 Priority (docket 108) wherein the Debtor and Fritts, as Trustee for the Trust, stipulate:

> [T]here is no disagreement between them that at least $ 4,745 of the claim of the creditor is legitimate, a priority claim under federal law as it is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit" pursuant to *11 USC 523(a)(15)*, and thus should have priority over everything but taxes.

As a result of the submissions filed on February 17, 2009, this Court entered an Order Remanding Sole Financial Issue of Trust Amounts Owed Pre-Petition to the State Court (docket 163).

On April 17, 2009, Fritts, as Trustee for the Trust, filed an amended claim (claim 14-3) which provided that the claim was $ 6,745 and was a DSO. Attached to 14-3 is a transcript from Judge Royal Hansen of the Domestic Court dated October 9, 2008 which in relevant part states:

> Upon reviewing the March 17, 2008 order referred [*6] to above, the Court found the Order states that the Defendant [the context of this suggests this refers to the Debtor herein] is to discharge this part of his support obligation by the amount of $ 500 per month per child in the college fund...Accordingly the Court...ordered in case number 044904183 a custody case involving the Defendant's two minor children, that Defendant [Debtor] pay $ 500 per month per child into the college fund. [Parenthesis added] [6]

Also attached to claim 14-3 is a Minute Entry from Commissioner Patrick Casey from the Domestic Court dated April 2, 2009, stating the balance due towards the college funds was $ 6,745 as of the date of the bankruptcy petition. On April 17, 2009, the Debtor withdrew his objection to the claim stating:

> [B]ased upon the fact that the claim has priority without an order of the court, and as a matter of law the onus is actually on the objecting party to challenge the status of the priority, thus not my problem.

> 6 This was memorialized into an order from the Domestic Court dated October 9, 2008 submitted

as exhibit 2 to the Debtor's Verified Reply dated February 26, 2010.

The Chapter 13 Trustee then filed the Motion to Pay - Determination of Allowance [*7] and Payment of Claims 14 & 17 ("Motion to Pay") (docket 218) on May 12, 2009. The Debtor filed a Partial Joinder in the Chapter 13 Trustee's Motion (docket 234) stating:

> Debtor Roger Bryner joins partially in the motion for relief asked for by the trustee's motion at docket # 218 served upon him on May 12th 2009 fully as it relates to the prayer for relief at page 5 paragraphs 1 [7] and 2...

Fritts, as Trustee of the Trust, also filed a Partial Joinder in the Chapter 13 Trustee's Motion (docket 235) stating he joins with regards to payment of claim 14 only. Ms. Bryner also filed a response to the Chapter 13 Trustee's Motion to Pay and requested this court abstain from ruling on the issue (docket 232). The hearing on the Motion to Pay was set for August 11, 2009 wherein the Challenged Order was entered. Ms. Bryner timely filed a Motion for Reconsideration on September 10, 2009. Due to various delays and continuances, the hearing on the Motion to Reconsider was not held until March 1, 2010.

7 Paragraph 1 provides that Claim 14-3 be allowed as priority claim in the amount of $ 6,745.

The Debtor challenged Ms. Bryner's standing to file the current Motion to Reconsider alleging she is not a creditor, [*8] is not involved in the Trust and is not an attorney and therefore cannot represent her children because only an attorney may represent the children in court. To understand the Debtor's and Ms. Bryner's positions, another claim must be reviewed.

The Debtor filed a claim for Ms. Bryner on March 6, 2009 in the amount of $ 1,031.30 (claim 17-1) as an unsecured priority claim. Attached to the claim were emails between himself and Ms. Bryner referring to claims for medical insurance, medical and dental costs and the college fund. On March 16, 2009, Ms. Bryner filed an amended claim for $ 23,000 as a DSO which included both pre-petition medical insurance and the obligation for the children's college fund and attached the Final Order of Custody. She checked the box on the form indicating it amends a previously filed claim, but did not indicate which claim it amended. The Clerk of Court office staff then docketed Ms. Bryner's claim as amending claim 17-1 and assigned the amended claim number 17-2. On March 20, 2009, the Debtor filed an amended claim (claim 17-3) which listed the amount at $ 1,031.30 and stated that it replaced claim 17-2, and listed it as an unsecured priority claim. On March [*9] 23, 2009, the Debtor filed another amendment (claim 17-4) for the same amount, $ 1031.30, as a priority unsecured claim with a memorandum in support which included an email from himself to Ms. Bryner dated March 17, 2009 stating "[b]asically, your 'amended claim' should actually amend 14...." Ms. Bryner testified and argued at the March 1, 2010 hearing that she filed the amended claim, dated March 16, 2009, to amend claim 14, but she did not put a claim number indicating what claim it was amending. The attachments to Claim 17-2, Ms. Bryner's credible testimony and representations indicating the debt on her amended claim 17-2 was for both medical insurance and the college fund and the Debtor's acknowledgment in his March 17, 2009 email all indicate Ms. Bryner's intent to include the college fund debt in some form of claim. The Court entered an order on September 18, 2009 fixing claim 17 at zero which was based on Ms. Bryner's representations on August 27, 2009. [8]

8 It is clear from the evidence and argument that Ms. Bryner was referring to the insurance portion being zeron, and not the college fund.

STANDING

Rule 3008 does not have restrictive language as to who may file a motion to reconsider [*10] a claim and instead broadly states "a party in interest." The party in interest designation has been extended to a creditor of a debtor which was not involved in the filing of other creditor claims. [9] Elsewhere a chapter 11 partnership debtor-in-possession stipulated with a creditor to pay in full that claim; later, that claim was allowed to be reconsidered upon motion of a general partner of the debtor. [10] Although these cases are not from this circuit, they are persuasive.

9 *In re Flagstaff Foodservice Corp., 32 B.R. 820 (Bankr S.D.N.Y. 1983)*.

10 *In re Delafield Development, 54 B.R. 442 (Bankr. E.D. Wis. 1985)*.

Ms. Bryner, the mother of the children who will utilize the college fund to pay for their college education, is in a similar position as the general partner. She may have to pay any college expenses that are not paid out of the college fund. [11] Accordingly, Ms. Bryner, at a minimum is a party in interest and has standing to bring the Motion to Reconsider. In addition, the Court finds that Ms. Bryner's amendment of Claim 17, which included reference to the college fund, gives Ms. Bryner standing for Claim 14 as she included both debts in her claim. She made a mistake in not separating [*11] the claims into Claim 14 and Claim 17 as the Debtor pointed out in his email of March 17, 2009 attached to his amendment to claim 17-4

above mentioned. Alternatively, the Clerk of Court staff of the Clerk's office incorrectly determined that her claim amended claim 17 instead of 14.

> 11 Paragraph 3 of the Final Order of Custody addressed in footnote 3 above provides in part: "...[the Debtor] is ordered to pay $ 500 per month per child into the children's fund until each child graduates from high school?" The Court cannot find an order from the Domestic Court specifically authorizing the creation of the Trust or who was authorized by the court to be the Trustee. However, there are references to a trust in some of the exhibits submitted by the Debtor at the March 1, 2010 hearing. In Ms. Bryner's Motion to Reconsider, she raised questions regarding the creation of the Trust and the authority of the trustee, alleging he is a close associate of the Debtor. It is unclear if the Domestic Court has specifically ruled on this matter. For the purpose of this ruling, and in addition to the other findings of the Court, the Court finds Ms. Bryner as the mother of the minor children who are to receive [*12] the benefits of the college fund, has standing to assert rights for them here.

EXCUSABLE NEGLECT AND SURPRISE

There is no standard articulated for determining whether a claim should be reconsidered under *Rule 3008*. However, the Court finds *Rule 9024* helpful and will look to the standard found in this Rule as a guide to determine whether reconsideration of Claim 14 may occur. *Rule 9024* incorporates *Federal Rule of Civil Procedure 60* and allows the Court to grant relief from an order on grounds of "mistake, inadvertence, surprise, or excusable neglect." Relief may be afforded on the basis of mistake when a party has made a reasonable litigation mistake. [12] Relief may be afforded on the basis of surprise when a judgment or order is taken against the parties' understanding or agreement. [13] Further, by analogy, even inadvertent failure to file a proof of claim by the bar date can constitute excusable neglect suggesting some liberality is allowed in interpreting the effect of filing proofs of claims. [14] The U.S. Supreme Court's statement is helpful here:

> Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute "excusable" neglect, it is clear [*13] that "excusable neglect" under *Rule 60(b)* is a somewhat "elastic concept" and is not limited strictly to omissions caused by circumstances beyond the control of the movant. [15]

> 12 *Yapp v. Excel Corp. 186 F.3d 1222 (10th Cir 1999).*
> 13 *Thompson v. American Home Assurance Co., 95 F.3d 429 (6th Cir. 1996).*
> 14 *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993).*
> 15 *Id at 381.*

Here, Ms. Bryner has raised due process concerns over the actions that occurred at the August 11, 2009 hearing based emails between herself, the Debtor and the Chapter 13 Trustee which stated the hearing would be continued until August 27, 2009. Ms. Bryner had filed a timely response to the Chapter 13 Trustee's motion that was set for the August 11, 2009 hearing. Further, an email initiated by the Debtor on July 13, 2009 to the Chapter 13 Trustee and Ms. Bryner stated:

> This email is to confirm our joint agreement, between [Ms. Bryner], Myself, and Mr. Anderson, to move the hearings set for this Thursday and early August to after August 26th 2009. Please respond to all to confirm.

The Chapter 13 Trustee responded that he would appear at the August 11, 2009 hearing and request the [*14] continuance at that time to limit his notice requirements. At the March 1, 2010 hearing, Ms. Bryner asserted that she relied on the Chapter 13 Trustee's representation that the hearing would be continued and did not attend the August 11, 2009 hearing because she was out of town and did not file a motion to continue the hearing prior thereto.

The Motion to Pay hearing was held on August 11, 2009 despite the agreement set forth in the email among the parties to continue the hearing. The result of this hearing was the Challenged Order stating that Claim 14 would accept a pro rata distribution from the funds paid under the chapter 13 from the Chapter 13 Trustee. It appears that the net effect of this order will be that instead of the $ 6,745 claim fixed by Commissioner Casey with the Domestic Court in April 2009, being paid in full as a DSO through the Debtor's plan, Claim 14 was turned into a non-priority claim [16] to be paid pro rata out of a total pool of approximately $ 3,000 as payments under the plan. [17] The hearing was held despite the absence of Ms. Bryner and despite the request of the Chapter 13 Trustee to continue the hearing. A visiting judge [18] was sitting for

the Court on August [*15] 11, 2009 due to a conflict of scheduling of the Court. The judge elected to issue the Challenged Order upon a stipulation among the Chapter 13 Trustee, the Debtor and Fritts, as Trustee of the Trust, regarding payment and classification of Claim 14. The Challenged Order stated a position that was inconsistent with the positions the Debtor and Fritts had previously stipulated to and referenced in earlier pleadings. [19] The Court is concerned that judge was not completely informed as to all the pleadings and other court papers filed and agreed to prior to the hearing. This is particularly significant when the position in the Challenged Order was completely different than previously asserted by the Debtor and Fritts and possibly in contradiction to the orders from the Domestic Court issued by Commissioner Casey and Judge Hansen (see Page 4 supra).

16 The Chapter 13 Trustee's handwritten amendment to the stipulation at the August 11, 2009 hearing included the sentence "The balance of claim 14-3 shall be paid after the completion of the plan." The Debtor objected to that language stating he thinks the claim is dischargeable despite his previous filings stating differently; the Chapter 13 Trustee [*16] stated he was not in a position to determine dischargeability and had no problem with striking the sentence. The Court then commented that it was not there to determine the dischargeability of the debt as that would be a state court issue. This part of the Chapter 13 Trustee's amendment was then stricken.

17 The plan provides that any DSO must be paid in full. Often times claims are not fixed and finally determined at the date that a chapter 13 plan is confirmed. Additional time is frequently needed to finally determine all claims. Once they are, the plan may need amending to provide for all claims, or alternatively, if claims are larger than originally projected, additional time may be needed to receive all payments and complete the plan.

18 Occasionally, this Court asks other bankruptcy judges from this circuit to sit if the Court has a conflict in scheduling. This practice is very helpful to keep matters moving along and not delayed waiting for the Court to hold a hearing. The caseload in this district is extremely heavy and the assistance of visiting judges is greatly appreciated to avoid delays in obtaining hearing dates. It is uncertain whether the Court would have done what was [*17] done on August 11, 2009, and this is only mentioned to give additional context and by no means is it intended to criticize the visiting judge or the practice of having visiting judges assist this Court..

19 See above: Debtor's Objection to Claim 14 (docket 97); Debtor's Motion to Give Claim 14 Priority (docket 107); Debtor's Stipulation in Support of Motion to Give Claim 14 Priority (docket 108); Debtor's Notice of Withdrawal of Objection (docket 210); Debtor's Partial Joinder in Trustee's Motion (docket 234); and Fritts Partial Joinder in Trustee's Motion (docket 235). See also Fritts' Reply to Objection to Claim (docket 143) which states "There is no dispute that while this debt is in the nature of child support, it is not child support." All of these suggest that the Debtor had accepted the Trust claim was $ 6,745 as a priority DSO.

This Court finds that Ms. Bryner reasonably relied upon the emails that the hearing would be continued. This is a reasonable litigation mistake from which Ms. Bryner should be afforded relief. In addition, the Challenged Order was a surprise to Ms. Bryner as it was taken against her understanding or agreement from the emails which indicated the hearing [*18] would be continued. Further, the Challenged Order took a completely different stance on the classification of the Trust than both the Debtor and Fritts, as Trustee of the Trust, had previously asserted. [20] In addition, the Court notes that the Challenged Order was a stipulation between the Debtor, Fritts for the Trust and the Chapter 13 Trustee. However, no attorney represented the Trust at the August 11, 2009 hearing or anytime prior. Consistent with to *Local Rule 9011-2*, requiring attorney appearance to represent any non-natural entities and the Debtor's argument on March 1, 2010 that only an attorney can represent the Trust at a contested matter hearing, Fritts could not represent the Trust at the August11, 2009 hearing. [21] Accordingly, Ms. Bryner has not only shown excusable neglect and surprise, but also that she may have a meritorious position with respect to Claim 14 and has otherwise shown cause to grant the Motion to Reconsider. The Court will reconsider Claim 14 and all parties position at a future date.

20 Id.

21 A trust may file proofs of claim without an attorney. However, appearing in Court and signing pleadings and a stipulation in a contested matter is something that is [*19] reserved for attorneys where the claimant is not an individual. Mr. Lou Gehrig Harris has entered an appearance for the Trust as of September 29, 2009 and the Court looks to him for authority to act for and on behalf the Trust consistent with *Local Rule 9010-1*. At times, Fritts has appeared and in deference to him appearing and receiving his input, this

> Court has allowed him to comment in open court based on the discretion afforded by *Local Rule 9010-1(c)*. see also *28 U.S.C. § 1654* and *In re Shattuck, 411 B.R. 378 (10th Cir. BAP 2009). 28 U.S.C. § 1654* does not permit artificial entities, such as...trusts or estates, to prosecute or defend in a federal court except through an attorney that is licensed and admitted to practice in that particular court.

PROCEDURE FOR FUTURE CONSIDERATION OF CLAIM 14

This Court previously granted Ms. Bryner relief from stay to have the issue on whether the college fund claim is a DSO be determined by the Domestic Court in an order dated October 7, 2009 and clarified by order dated December 7, 2009. In addition, this Court also entered an order dated March 3, 2009 entitled, "Order Remanding Sole Financial Issue of Trust Amounts Owed pre-Petition To the State [*20] Court" which "remands the sole issue of clarifying what the total pre-petition payments to the Trust should have been to the Court in case # 044904183 in the Third District Court." It appears this has been complied with as evidenced by the Exhibit B to Claim 14-3 (the Commissioner Casey order from the District Court). Accordingly, consistent with the previous orders, this Court will defer to the Domestic Court for a determination of how the college fund should be administered, whether it is in the nature of support and to whom it is owed. Following the Domestic Court's ruling on these matters, this Court requires the parties to renew the matter before the Court to determine the allowance and classification of Claim 14, at which time the Court will hear arguments by the parties.

It is noted that the Debtor has appealed both the September 21, 2009 Order Granting the Motion to Pay ("Pay Order") which relates to claim 14 and 17 and the October 7, 2009 Relief from Stay Order ("Stay Order") to the Bankruptcy Appellate Panel for the Tenth Circuit (the "BAP")(appeals 09-0058 and 09-0059 respectively). Following the dismissal by the BAP on the Pay Order appeal (09-0058), the Debtor appealed [*21] that BAP dismissal order to the Tenth Circuit Court of Appeals (10-4024), where it is pending at this time. The BAP entered another order ("BAP Order") which defers and suspends the Stay Order appeal (09-0059) pending a hearing on the current Motion to Reconsider. Ms. Bryner sought to present this matter and others to the Domestic Court following the granting of her motion for relief in the Stay Order in what she called an "Order to Show Cause." Shortly before the hearing on the Order to Show Cause in Domestic Court, the Debtor removed that proceeding to this Court. This Court remanded and abstained in that proceeding and the Debtor has appealed that remand to the United States District Court ("District Court Appeal"). No ruling has been made on the District Court Appeal at this time.

Though this Court defers to the Domestic Court for a determination on the college fund, it is unclear exactly when that might be. This Court's present ruling is in part a response to being as prompt as possible to address the BAP Order. A separate order has also been entered based on this Memorandum Decision.

The below described is SIGNED.

Dated: March 10, 2010

/s/ William T. Thurman

WILLIAM T. THURMAN

U.S. [*22] **Bankruptcy Chief Judge**