EXHIBIT 5

(ORDER DENYING MOTION TO DISMISS & PETITIONERS PROOF OF FUNDS IMMEDIATELY AVAILABLE)

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Thomas B. McNamara

In re: SHERRY ANN MCGANN, Debtor.	Bankruptcy Case No. 20-18118 TBM Chapter 7

ORDER DENYING MOTION TO DISMISS

I. Introduction.

Years ago, the Debtor, Sherry Ann McGann (the "Debtor"), filed for protection under Chapter 7 of the Bankruptcy Code.[1] As of the Petition Date, she owned real property and improvements located at 1535 Grand Avenue, Grand Lake, Colorado 80447 (the "Grand Lake Property"). Chapter 7 Trustee Jeanne Y. Jagow (the "Trustee") has been seeking access to the Grand Lake Property in order to determine whether it may be liquidated for the benefit of the bankruptcy estate. The Trustee filed a "Motion for Order Requiring the Debtor to Turnover Property and Records to the Trustee" (Docket No. 297, the "Turnover Motion")[2] seeking an order compelling the Debtor to provide the Trustee with access to the Grand Lake Property and preventing the Debtor from interfering with the Trustee's efforts to market and potentially sell the Grand Lake Property. The Debtor objected to the Turnover Motion. (Docket No. 297.) The Court conducted a two-day trial on the Turnover Motion as well as the Debtor's request for conversion.

About a week later, the Court issued an Oral Ruling (Docket No. 320, the "Oral Ruling") granting the Turnover Motion. The next day, the Court entered a confirming written "Order Requiring the Debtor to Turnover Property to the Trustee" (Docket No. 321, together with the Oral Ruling, the "Turnover Order"). Among other things, the Turnover Order directed that "the Debtor shall allow the Trustee, her agents and representatives reasonable access to the Grand Lake Property to inspect, market, repair, improve, monitor, visit, and sell it." The Turnover Order was an order for access and did not authorize actual sale of the Grand Lake Property under Section 363(b) of the Bankruptcy Code. Thereafter, the Debtor requested reconsideration multiple

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[1] All references to the "Bankruptcy Code" are to the United States Bankruptcy Code, 11 U.S.C. § 101 et seq. Unless otherwise indicated, all references to "Section" are to sections of the Bankruptcy Code.

[2] The Court uses the convention "Docket No. ___" to refer to documents filed in the CM/ECF system in this bankruptcy case, *In re McGann*, Bankr. Case No. 20-18118 TBM (Bankr. D. Colo.).

times and appealed the Turnover Order to the United States Bankruptcy Appellate Panel for the Tenth Circuit (the "BAP"). (Docket No. 327, the "Appeal.")

This matter is now before the Court on the Debtor's "Motion to Voluntarily Dismiss Chapter 7 for Cause" (Docket No. 324, the "Motion to Dismiss"). Having previously failed in her attempts to convert her bankruptcy case to Chapter 11, 12, or 13 in order to stop possible turnover and sale of the Grand Lake Property, the Debtor now proposes that her bankruptcy case be dismissed. Then, she intends to pay those creditors whom she characterizes as "legitimate" creditors. The Debtor proposes not to pay those creditors she deems "illegitimate." And, she will not satisfy any Chapter 7 administrative expenses either. The Trustee, and creditors 1450 Oka Kope, LLC ("Oka Kope") and Gan-Bei-La, LLC ("Gan-Bei-La") as well as Menehune Ventures, LLC ("Menehune Ventures") and Nick Braber ("Braber") (together, the "Objecting Creditors") all object to dismissal. (Docket Nos. 338-340.) For the reasons set forth below, the Court denies the Motion to Dismiss.

II. Procedural Background.[3]

A. The Debtor's First Chapter 11 Bankruptcy Case.

The Debtor, acting through legal counsel, filed her voluntary Petition for relief under Chapter 11 of the Bankruptcy Code on October 17, 2019, commencing *In re McGann*, Case No. 19-18971-EEB (Bankr. D. Colo.) (the "Chapter 11 Case"). The Debtor failed to propose a reorganization plan. After the Chapter 11 Case had been pending almost a year, on September 1, 2020, the Court entered an order dismissing the Chapter 11 Case.

B. The Debtor's Current Chapter 7 Bankruptcy Case.

A few months later, on December 22, 2020, the Debtor (acting through her legal counsel) filed a new voluntary Petition for relief under Chapter 7 of the Bankruptcy Code, commencing the current liquidation case: *In re McGann*, Bankr. Case No. 20-18118 (Bankr. D. Colo.) (the "Chapter 7 Case"). Although the Debtor was represented by legal counsel for the first year of the Chapter 7 Case, her lawyer eventually sought and obtained Court authorization to withdraw. (Docket Nos. 119, 123, and 134). Since February 7, 2022, the Debtor has proceeded *pro se* in her Chapter 7 liquidation.

On her Schedule A/B (Docket No. 15), the Debtor listed her ownership of real property and improvements located at 1535 Grand Avenue, Grand Lake, Colorado. She valued the Grand Lake Property at $719,000. It was her most significant tangible asset. On the Debtor's Schedule C (Docket No. 16), the Debtor claimed a homestead exemption in the amount of $105,000 against the Grand Lake Property (which she

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[3] The Court takes judicial notice of the dockets in *In re McGann*, Case No. 19-18971-EEB (Bankr. D. Colo.) and *In re McGann*, Case No. 20-18118 (Bankr. D. Colo.) for purposes of describing the current procedural status. *See St. Louis Baptist Temple, Inc. v. F.D.I.C.*, 605 F.2d 1169, 1172 (10th Cir. 1979) (a court may *sua sponte* take judicial notice of its docket).

identified as a residence and "farm location") pursuant to Colo. Rev. Stat. § 34-54-102(1)(e). On Schedule D (Docket No. 17), the Debtor listed four claims secured by the Grand Lake Property: (1) a first mortgage with Cenlar Loan in the amount of $420,927; (2) a second mortgage with Elevations Credit Union in the amount of $144,467; (3) a lien held by Oka Kope in the amount of $500,000; and (4) a lien held by Oka Kope in the amount of $351,000. The Court will refer collectively to the liens held by Oka Kope as the "Oka Kope Liens." The Debtor indicated on Schedule D that the Oka Kope Liens were "disputed."

On the December 22, 2020 Petition Date, the Trustee (Jeanne Y. Jagow) was appointed to serve as trustee for the Debtor's Chapter 7 bankruptcy estate. A few months later, on March 31, 2021, the Court entered an "Order of Discharge" in the Chapter 7 Case, discharging the Debtor's debts. (Docket No. 63.)

C. <u>The Oka Kope Adversary Proceeding</u>.

On June 23, 2021, the Trustee commenced an Adversary Proceeding against creditors Oka Kope and Gan-Bei-La: *Jagow v. 1450 Oka Kope, LLC et al. (In re McGann)*, Adv. Pro. No. 21-1132 (Bankr. D. Colo.) (the "Oka Kope Adversary Proceeding"). Among other things, the Trustee sought avoidance and recovery of multiple alleged fraudulent transfers. Subsequently, the Trustee settled the Oka Kope Adversary Proceeding and filed a "Motion to Approve Settlement Agreement." (Docket No. 93.) As part of the Settlement Agreement (Docket No. 93-1, the "Settlement Agreement"), Oka Kope agreed to withdraw its secured claims against the Grand Lake Property. Oka Kope and Gan-Bei-La also agreed to withdraw their claims against the Debtor's bankruptcy estate. In return, the Trustee committed to release all claims of the bankruptcy estate against Oka Kope and Gan-Bei-La. (Docket No. 93-1.) The Settlement Agreement recited that it would be binding on the Debtor and the Debtor's bankruptcy estate.

The Debtor objected to the Settlement Agreement between the Trustee, Oka Kope and Gan-Bei-La. (Docket No. 97.) On May 3, 2022, after an evidentiary hearing during which the Debtor changed her position, the Court approved the Settlement Agreement which resolved the Oka Kope Adversary Proceeding and entered a confirming judgment. (Docket Nos. 146 and 147.) Shortly thereafter, the Oka Kope Adversary Proceeding was dismissed. As a result of the Settlement Agreement, Oka Kope released its liens against the Grand Lake Property. (Docket No. 339.) Accordingly, there are only two remaining liens secured by the Grand Lake Property.

D. <u>Claims Disallowance Proceedings</u>.

Not long after the Settlement Agreement was approved, the Debtor commenced efforts to disallow certain claims filed against her bankruptcy estate. (Docket Nos. 151, 153, 155, 157 and 205.) At a hearing held October 17, 2022, the Court granted the Debtor's motion to disallow Claim No. 5-1 of Navient Solutions, LLC ($3,961.19), and the Debtor's motion to disallow Claim No. 8-1 of Citibank, N.A. ($49,133.33). (Docket

No. 223.) In a separate order issued October 18, 2022, the Court denied without prejudice the Debtor's motion to disallow Claim No. 11-1, filed by Menehune Ventures and Braber ($154,845.38). (Docket No. 224.) The Court noted:

> Menehune Ventures, LLC and Nick Braber (together "Menehune") filed claim No. 11-1 for $154,845.38, which is the amount of attorney fees and costs they seek in a Hawaii state court action captioned *Mary Jacqueline Scheibel, et al. vs. Celestial Properties, LLC, et al.*, Civil No. 18-1-0206(2). The Hawaii state court had not entered a ruling on Menehune's request for attorney fees before the Debtor filed this bankruptcy case. On January 6, 2022, the Court granted Menehune's request for relief from stay so the creditors could proceed to liquidate their attorney fee claim in the Hawaii state court. The state court has not yet ruled on the claim.

The Court ruled that the Debtor could file a renewed motion to disallow in the event that the Hawaii state court entered an order denying the creditors' request for attorney fees and costs or allowing it in a reduced amount. However, a few months later, the Hawaii state court entered a judgment for attorney's fees against the Debtor and in favor of Menehune Ventures and Braber. (Claim No. 11-2 Part 2.) Thereafter, Menehune Ventures and Braber filed amended Claim No. 11-2 ($154,845.38) attaching the Hawaii state court's order. The Debtor has indicated that she appealed the Hawaii state court's judgment. But, since the Hawaii state court judgment has not been reversed, Claim No. 11-2 filed by Menehune Ventures and Braber remains allowed. Meanwhile, on December 21, 2022, the Court denied the Debtor's motion to disallow Claim No. 1-1 of FirstBank, N.A. (Docket No. 251).

E. Trustee's Efforts to Obtain Access to Grand Lake Property for Possible Marketing and Sale: the Turnover Order.

After the Oka Kope liens were released and the claims of Oka Kope and GBL withdrawn, the Trustee commenced efforts to gain access to the Grand Lake Property and to possibly market and sell such property for the benefit of the bankruptcy estate. The Debtor has vigorously opposed all such efforts over an extended period of time.

First, the Debtor filed a series of documents, all of which were entitled "Motion to Convert Chapter 7 to Chapter 12." (Docket Nos. 163, 173, and 189, collectively, the "First Motion to Convert.") The Trustee opposed the First Motion to Convert. (Docket No. 200.) At the Debtor's request, the Court treated the First Motion to Convert as a motion to convert the Debtor's case either to Chapter 12 or to Chapter 13. The Court conducted a trial on the First Motion to Convert. Thereafter, on May 30, 2023, the Court determined that the Debtor was not eligible for conversion either to Chapter 12 or 13 and so denied the First Motion to Convert. (Docket Nos. 261 and 262.)

A few weeks later, the Debtor tried another tactic to stop the Trustee's efforts to liquidate the Grand Lake Property. On June 23, 2023, the Debtor filed a "Motion to Convert Chapter 7 to Chapter 11." (Docket No. 271, the "Second Motion to Convert.") In the Second Motion to Convert, the Debtor requested that she be allowed to convert the Chapter 7 Case from liquidation to a Chapter 11 reorganization so that Mystic Mountain Mushrooms, LLC or SAMcGann LLC could operate a mushroom farm located on the Grand Lake Property[4] and use the proceeds from operation of the farm to repay her creditors. The Trustee objected to the Second Motion to Convert. (Docket No. 282.) Creditors Menehune Ventures and Braber joined in the Trustee's objection. (Docket No. 283.) Thereafter, the Debtor filed a number of additional documents in support of the Second Motion to Convert. (Docket Nos. 284, 285, 286, 287, and 311.)

While the Second Motion to Convert was pending, on August 25, 2023, the Trustee filed the Turnover Motion. (Docket No. 297.) Through the Turnover Motion, the Trustee sought entry of an order compelling the Debtor to provide the Trustee with access to the Grand Lake Property and prevent the Debtor from interfering with the Trustee's efforts to market and sell the Grand Lake Property. (Docket No. 297.) The Debtor objected to the Turnover Motion. (Docket No. 298.) In her Objection, the Debtor generally asserted her belief that the Trustee should be attempting to liquidate assets other than the Grand Lake Property in order to pay creditors. She argued that the Trustee should not be allowed to market or try to sell the Grand Lake Property, since the Property is not only the Debtor's home, but also the site of the Debtor's business (Mystic Mountain Mushrooms, LLC or SAMcGann LLC), which, the Debtor contended, she needed to be able to operate in order to rehabilitate herself financially. The Debtor also contested the legitimacy of some of the claims against her bankruptcy estate, complained about the Trustee's failure to liquidate other assets and the fees generated by the Trustee's attorney, and argued that if she were simply allowed to convert the case to Chapter 11 and to operate the mushroom farm without interference, she would be able to generate enough income to pay her "legitimate" creditors.

The Court set the Second Motion to Convert, the Turnover Motion, and the various objections thereto, for an evidentiary hearing. (Docket No. 299.) The Debtor and the Trustee engaged in significant motions practice before the trial. The Court conducted the trial over two days: October 16 and 17, 2023. (Docket Nos. 317 and 318.)

On the second day of the trial, the Debtor advanced an oral motion to dismiss her Chapter 7 Case arguing that the case was no longer necessary because her family was willing to give her funds to help her and because she could refinance the Grand Lake Property to pay her "legitimate creditors." However, the Debtor acknowledged that written notice of such motion had to be given to creditors and parties in interest. The Debtor then made an oral motion to withdraw the Second Motion to Convert but

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[4] The Debtor's wholly-owned entities, Mystic Mountain Mushrooms, LLC or SAMcGann LLC (not the Debtor herself) operate a mushroom farm on the Grand Lake Property. The Debtor does not receive farm income. (Docket No. 261.)

continued her opposition to the Turnover Motion, stating that turnover was "inappropriate" and "just not necessary anymore," as "legitimate" creditors would be "paid off in the next 30 days" if a motion to dismiss were granted. The Trustee opposed the oral motion to dismiss.

Thereafter, the Court denied the oral motion to dismiss without prejudice on the ground that such motion had to be filed and notice of such motion given pursuant to Section 707(a), Fed. R. Bankr. P. 2002(a)(4), and L.B.R. 2002-1 and 9013-1. The Court granted the Debtor's oral motion to withdraw the Second Motion to Convert with prejudice based on the Debtor's commitment that she would not file a new motion to convert to Chapter 11. Then, the Court proceeded to hear the remainder of the evidence for purposes of adjudicating the Turnover Motion.

On October 23, 2023, the Court issued the Oral Ruling, including findings of fact and conclusions of law. The Court granted the Turnover Motion. (Docket No. 320.) In the Oral Ruling, the Court emphasized that the Court was not granting the Trustee the authority to sell the Grand Lake Property, but was requiring the Debtor to provide the Trustee with keys and reasonable access to the Grand Lake Property so that the Trustee could inspect and market the Grand Lake Property with the goal of ascertaining whether sale of the Grand Lake Property might actually generate sufficient proceeds to benefit creditors and the estate. The Court noted that the Trustee could not sell the Grand Lake Property without first filing a motion to sell the Grand Lake Property and obtaining an order granting such motion per Section 363(b). The Court also entered a series of orders aimed at ensuring the Debtor's cooperation with the Trustee, and preventing her from inhibiting the Trustee's marketing efforts, as well as orders designed to ensure that the Debtor was provided with reasonable notice when the Trustee wished to show the Grand Lake Property. (As noted below, those orders were later memorialized in a written "Order Requiring Debtor to Turnover Property to the Trustee (Docket No. 321, the "Turnover Order") issued on October 24, 2023.) Specifically, the Court ordered:

(1) The Debtor shall turn over to the Trustee a key (or keys) to the real property and improvements at the Grand Lake Property;

(2) The Debtor shall allow the Trustee, her agents and representatives reasonable access to the Grand Lake Property to inspect, market, repair, improve, monitor, visit, and sell it. Those allowed access include, without limitation, the Broker, her associates and staff, other brokers showing the Grand Lake Property, the Trustee, Trustee's counsel, any repair person retained by the Trustee or Broker, and any other person the Trustee deems appropriate to access the Grand Lake Property in furtherance of her duties as Trustee;

(3) Neither the Debtor, the Debtor's service animal, nor any other pet residing on the Grand Lake Property shall be present at the Grand Lake Property during any inspection, showing, or other visit by the Trustee or her agents

or any potential purchaser of the Grand Lake Property;

(4) The Trustee shall provide the Debtor with at least twenty-four (24) hours' notice (other than in an emergency) before any inspection, showing, or other visit by the Trustee or her agents or any potential purchaser of the Grand Lake Property; and

(5) The Debtor shall allow Trustee to place a sign on the Grand Lake Property in a conspicuous place in furtherance of Trustee's efforts to market and sell the Grand Lake Property, and the Debtor is hereby forbidden from altering, removing, or in any way defacing any such signage.

Though the Debtor has been aware of the Trustee's effort to gain access to the Grand Lake Property for some time, and, indeed, had been given notice by the Trustee that her businesses needed to cease and desist their operations at the Grand Lake Property long before the Trustee even filed the Turnover Motion, the Court gave the Debtor 21 more days (through November 13, 2023) to make arrangements to protect the Mystic Mountain Mushrooms, LLC or SAMcGann LLC businesses operating at the Grand Lake Property to the extent practicable and to prepare for turnover of the Grand Lake Property. The Court warned the Debtor that if she failed to comply with the Turnover Order, she could be found to be in contempt of court.

At the conclusion of the Court's oral ruling, the Debtor immediately requested reconsideration (the "First Motion for Reconsideration"). The Trustee opposed the oral First Motion for Reconsideration. After making its findings and conclusions, the Court denied the First Motion for Reconsideration. And, the Court subsequently confirmed the Oral Ruling in the Turnover Order which was docketed the next day. (Docket No. 321.)

On October 27, 2023, the Debtor filed a written "Motion for Reconsideration on Turnover of Property" (Docket No. 323, the "Second Motion for Reconsideration."). The Trustee opposed the Second Motion for Reconsideration. (Docket No. 333.) On November 20, 2023, the Court denied the Second Motion for Reconsideration. (Docket No. 342.) The Debtor appealed the Turnover Order to the United States Bankruptcy Appellate Panel for the Tenth Circuit. (Docket No. 327.) The appeal is pending.

F. <u>The Motion to Dismiss</u>.

Meanwhile, seemingly in another attempt to avoid the Turnover Order, on November 17, 2023, the Debtor filed the Motion to Dismiss. (Docket No. 338.) As set forth in more detail below, the general thrust of the Motion to Dismiss (like the earlier oral motion to dismiss) is that the Debtor wishes for the Court to dismiss this Chapter 7 bankruptcy case. Then, she intends to pay what she characterizes as "legitimate" creditors. The Debtor proposes not to pay those creditors she deems "illegitimate." And, she will not satisfy any Chapter 7 administrative expenses either.

The Debtor posits that her "plan" for repayment of "legitimate" creditors is superior to the Trustee's liquidation effort, in that it will enable her to pay all of the "legimate" creditors in full. The Trustee, and creditors Oka Kope and Gan-Bei-La as well as Menehune Ventures and Braber (together, the "Objecting Creditors") all object to dismissal. (Docket Nos. 338-340, the "Objections.") Subsequently, the Debtor filed a myriad of additional responses favoring the Motion to Dismiss. (Docket Nos. 341, 343, 345, 346 and 353.)

The Court conducted a hearing on the Motion to Dismiss and Objections on January 4, 2024. (Docket No. 360.) The Court heard fulsome legal argument from the Debtor in favor of dismissal. The Debtor did not request an evidentiary hearing and instead contended that the Court could and should rule on the Motion to Dismiss and Objections based on her written and oral presentations. Similarly, the Trustee and the Objecting Creditors all presented comprehensive legal argument. The Trustee and the Objecting Creditors all concurred that the Court could and should adjudicate the Motion to Dismiss and Objections based upon the structure of the proposed dismissal and the docket record without the need for a full trial. The Court took the dispute under advisement.

In the time since the hearing, the Court has carefully reviewed the Motion to Dismiss, the Objections, the procedural history, the docket record, the materials submitted by the parties, and the relevant statutes and rules. The Court finds that there is no need for a further evidentiary hearing because no factual disputes have been identified. The dispute is ripe for decision.

III. Jurisdiction and Venue.

The Court has jurisdiction over this dispute pertaining to dismissal pursuant to 28 U.S.C. § 1334(b) and (e) and 28 U.S.C § 157(b). This is a core proceeding under § 157(b)(2)(A) (matters concerning administration of the bankruptcy estate); § 157(b)(2)(E) (orders to turn over property of the estate); and § 157(b)(2)(O) (other proceedings affecting the liquidation of the assets of the estate). And, venue is proper in this Court under 28 U.S.C. §§ 1408 and 1409. Neither the Debtor, the Trustee, nor the Objecting Creditors have contested this Court's jurisdiction or venue to decide the Motion to Dismiss and Objections.

However, the Defendant's recent submission of an appeal of the Turnover Order throws a small wrinkle into the jurisdictional calculus. As a general matter of federal practice, "[t]he filing of a notice of appeal is an event of jurisdictional significance — it confers jurisdiction on the court of appeals and divests the district court of its control *over those aspects of the case involved in the appeal.*" *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (emphasis added); *see also Lancaster v. Indep. Sch. Dist. No. 5*, 149 F.3d 1228, 1237 (10th Cir. 1998) ("[a]lthough filing a notice of appeal generally divests the district court of jurisdiction over the issues on appeal, . . . the *district court retains jurisdiction over collateral matters not involved in the appeal.*") (emphasis added, internal quotations omitted). Since the Motion to Dismiss and

Objections are not part of the appeal, the Court retains jurisdiction to decide such collateral matters. *Id.*

IV. Factual Findings.

The Court makes the following findings of fact under Fed. R. Civ. P. 52(a)(1), as incorporated by Fed. R. Bankr. P. 7052 and 9014(c).[5] All such findings of fact are based upon the uncontested record filings in the bankruptcy case and exhibits attached by the Debtor to the Motion to Dismiss and uncontested by the Trustee and Objecting Creditors. Although the Debtor submitted a myriad of materials, the Court makes findings of fact only on matters necessary to resolve the Motion to Dismiss.

A. Incorporation of Procedural Background.

To the extent that any of the Procedural Background already identified in this Order constitutes facts, the Court incorporates such Procedural Background as part of the Court's findings of fact.

B. The Filed Creditor Claims.

On January 27, 2021, the Trustee issued a "Notice of Possible Distribution," directing creditors to file proofs of claim no later than May 3, 2021. (Docket No. 37.) The following proofs of claim were filed by creditors against the bankruptcy estate.[6] The Court also lists the current status of such claims.

Claim No.	Creditor	Status	Allowed Amount
1-1	FirstBank, N.A.	Allowed[7]	$ 9,600.14
2-1	Bank of America, N.A.	Allowed[8]	$ 15,043.32
3-1	Bank of America, N.A.	Allowed[9]	$ 1,992.21

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5 As required by Fed. R. Civ. P. 52(a)(1), as incorporated by Fed. R. Bankr. P. 7052, this Order states "findings of fact specially and conclusions of law separately." *See S.E.C. v. St. Anselm Explor. Co.*, 936 F. Supp. 2d 1281, 1285 n.6 (D. Colo. 2013). "Any finding of fact more properly deemed a conclusion of law, or any conclusion of law more properly deemed a finding of fact, shall be as more properly characterized." *Id.*, *see also Kolbe v. Endocrine Servs., P.C.*, 2022 WL 970004, at *1 (D. Colo. Mar. 31, 2022).

6 Elevations Credit Union did not file a proof of claim. However, in her Schedule D, the Debtor listed Elevations Credit Union as a secured creditor in the amount of $144,467.00, holding a lien against the Grand Lake Property.

7 On December 21, 2022, the Court denied the Debtor's motion to disallow Claim No. 1-1 of FirstBank, N.A. (Docket No. 251). *See also* Fed. R. Civ. P. 3001(f) ("A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.").

8 Fed. R. Civ. P. 3001(f). The Debtor did not object to the claim.

9 Fed. R. Civ. P. 3001(f). The Debtor did not object to the claim.

4-1	Bank of America, N.A.	Allowed[10]	$	1,568.34
5-1	Navient Solutions, LLC	Disallowed[11]	$	0.00
6-1	American Express N.B.	Allowed[12]	$	37,899.71
7-1	Capital One Bank, N.A.	Allowed[13]	$	647.06
8-1	CitiBank, N.A.	Disallowed[14]	$	0.00
9-1	Wells Fargo Bank, N.A.	Allowed[15]	$	7,488.77
10-1	Quantum3 Group LLC (Crown Asset Mgmt. LLC)	Allowed[16]	$	4,848.84
11-2	Menehune Ventures and Braber	Allowed[17]	$	154,845.38
12-1	Ford Motor Credit Co.	Allowed[18]	$	1,081.46
13-1	Oka Kope	Withdrawn[19]	$	0.00
14-1	Gan-Bei-La	Withdrawn[20]	$	0.00
15-1	Oka Kope	Withdrawn[21]	$	0.00
16-1	Oka Kope	Withdrawn[22]	$	0.00
17-1	U.S. Trustee	Allowed[23]	$	1,950.00
18-1	Wilmington Trust, N.A. (Cenlar FSB)	Allowed[24]	$	438,623.35
		Total:	$	675,618.58[25]

[10] Fed. R. Civ. P. 3001(f). The Debtor did not object to the claim.

[11] At a hearing held October 17, 2022, the Court granted the Debtor's motion to disallow Claim No. 5-1 of Navient Solutions, LLC ($3,961.19). (Docket No. 223.)

[12] Fed. R. Civ. P. 3001(f). The Debtor did not object to the claim.

[13] Fed. R. Civ. P. 3001(f). The Debtor did not object to the claim.

[14] At a hearing held October 17, 2022, the Court granted the Debtor's motion to disallow Claim No. 8-1 of Citibank, N.A. (49,133.33). (Docket No. 223.)

[15] Fed. R. Civ. P. 3001(f). The Debtor did not object to the claim.

[16] Fed. R. Civ. P. 3001(f). The Debtor did not object to the claim.

[17] O October 18, 2022, the Court denied without prejudice the Debtor's motion to disallow Claim No. 11-1, filed by Menehune Ventures and Braber ($154,845.38). (Docket No. 224.) *See also* Fed. R. Civ. P. 3001(f).

[18] Fed. R. Civ. P. 3001(f). The Debtor did not object to the claim.

[19] On May 24, 2022, Oka Kope withdrew Claim No. 13-1 in accordance with the Settlement Agreement approved by the Court. Claim No. 13-1 was originally filed in the amount of $499,878.74.

[20] On May 24, 2022, Gan-Bei-La withdrew Claim No. 14-1 in accordance with the Settlement Agreement approved by the Court. Claim No. 14-1 was originally filed in the amount of $632,384.72.

[21] On May 24, 2022, Oka Kope withdrew Claim No. 15-1 in accordance with the Settlement Agreement approved by the Court. Claim No. 15-1 was originally filed in the amount of $14,915.62.

[22] On May 24, 2022, Oka Kope withdrew Claim No. 16-1 in accordance with the Settlement Agreement approved by the Court. Claim No. 16-1 was originally filed in the amount of $449,458.04.

[23] Fed. R. Civ. P. 3001(f). The Debtor did not object to the claim.

[24] Fed. R. Civ. P. 3001(f). The Debtor did not object to the claim. The claim is secured by the Grand Lake Property.

[25] The amount of claims not secured by the Grand Lake Property is $236,965.23.

C. **Secured Claims.**

Wilmington Trust, N.A. (Cenlar FSB) has a first lien on the Grand Lake Property. (Docket No. 17.) Although such creditor filed a claim (Claim No. 18-1) in the amount of $438,623.35 about two years ago, the Debtor concedes that the claim has now grown to at least $454,253.92 (presumably through the non-payment of such mortgage and the continued accrual of interest). (Docket No. 324 at 20.)

Elevations Credit Union has a second lien on the Grand Lake Property. (Docket No. 17.) Elevations Credit Union did not file a claim. However, the Debtor concedes that the Elevation Credit Union is owed at least $144,467.00. (Docket No. 324 at 20.)

As set forth above, Oka Kope filed secured Claim No. 13-1 in the amount of $499,878.74 asserting a lien against the Grand Lake Property. And, Oka Kope filed secured Claim No 16-1 in the amount of $449,458.04 asserting a lien against the Grand Lake Property. Although the amounts of Claim Nos. 13-1 and 16-1 are similar, they are based upon separate promissory notes. Oka Kope withdrew such claims and released its liens pursuant to the requirements of the Court-approved Settlement Agreement.

D. **Administrative Expenses.**

According to the Debtor, the Trustee has incurred administrative expenses for legal counsel and accounting professionals in the amount of approximately $156,500.00 as of October 2, 2023. (Docket No. 324 at Ex. 1.)

E. **Proposed Payments and Source of Funds.**

Through the Motion to Dismiss, the Debtor asserts that she will pay the two liens against the Grand Lake Property held by Wilmington Trust N.A. (Cenlar FSB) and Elevation Credit Union along with all other "legitimate" claims. According to the Debtor, under her proposal, she will not pay allowed general unsecured Claim No. 11-2 held by Menehune Ventures and Braber in the amount of $154,845.38, which the Debtor deems "illegitimate." Also, the Debtor will not pay the Trustee's administrative expenses for legal counsel and accounting professionals in the amount of approximately $156,500.00 which the Debtor deems "illegitimate."

Since the Debtor does not have the funds to make the proposed payments to Wilmington Trust N.A. (Cenlar FSB) and Elevation Credit Union along with the general unsecured claims she deems "legitimate," the Debtor presented the Court with a "Conditional Loan Commitment" (Docket No. 345 at Ex. 8, the "Conditional Loan Commitment"). The entire text of the Conditional Loan Commitment is as follows:

November 21, 2023

Sherry McGann
1535 Grand Avenue
Grand Lake, CO 80447

Re: Conditional Loan Commitment – 1st Mortgage on 1535 Grand Avenue, Grand Lake, CO (the "Property")

Dear Ms. McGann:

The law firm of West Huntley Gregory PC represents Ali Rose LLC, a Delaware limited liability company ("Lender"). Lender has approved your refinance loan in the amount of $660,000.00 to be secured by a first lien Deed of Trust on the Property.

This loan approval and commitment is conditional upon the following:

- Title commitment showing Lender in first lien position upon the payoff of the current first lienholder Cenlar and second lienholder Elevations Credit Union.
- Approval by the Bankruptcy Court in Case No. 20-18118.

The loan can be funded and closed within 10 business days following receipt of said title commitment insuring Lender a first lien position on the Property and a court order from the bankruptcy court in Case No. 20-18118 approving the refinance.

Sincerely,

/s/ Adrienne C. Rowberry
Adrienne C. Rowberry, Esq.
(970) 453-2926
adrienne@brecklaw.com

The key point is that the Conditional Loan Commitment is "conditional." The conditions are: (1) providing the lender (Ali Rose, LLC) with a first lien position as against the Grand Lake Property by paying off the Wilmington Trust (Cenlar FSB) lien and the Elevations Credit Union lien; and (2) approval by the Court. According to the Conditional Commitment Letter, the Debtor must obtain a "court order from the bankruptcy court in Case No. 20-18118 approving the refinance."

V. Legal Analysis and Conclusions of Law.

A. Section 707(a).

The Debtor, who filed for bankruptcy liquidation under Chapter 7, seeks dismissal of her bankruptcy case pursuant to Section 707(a) which provides:

> The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including —
>
> (1) Unreasonable delay by the debtor that is prejudicial to creditors;

> (2) Nonpayment of any fees or charges required under chapter 123 of title 28; and
>
> (3) Failure of the debtor in a voluntary case to file, within 15 days or such additional time as the court may allow after the filing of the petition commencing such case, the information required under paragraph (1) of section 521(a), but only on a motion by the United States trustee.

The Debtor does not rely on any of the three enumerated grounds for cause set forth in Section 707(a). However, cause is broader than the three identified grounds. The text of Section 707(a) uses the word "including," suggesting that the list of causes is not exclusive. *In re Garza*, 2013 WL 3155105, at *2 (Bankr. D. Colo. 2013) ("The examples of cause listed in § 707(a) are not exclusive.").

B. <u>Legal Framework for Dismissal Under Section 707(a) for Unenumerated Causes</u>.

The Debtor filed her Chapter 7 liquidation case more than three years ago. She does not have an absolute right to dismiss her Chapter 7 bankruptcy case. *Isho v. Loveridge (In re Isho)*, 498 B.R. 391, 2013 WL 1386208, at *3 (10th Cir. BAP Apr. 5, 2013) (unpublished) ("It is well-established that a Chapter 7 debtor does not have a right to dismiss his case . . . ."); *Sicherman v. Cohara (In re Cohara)*, 324 B.R. 24, 27 (6th Cir. BAP 2005) ("The Debtor does not have an absolute right to dismiss a Chapter 7 petition."); *Turpen v. Eide (In re Turpen)*, 244 B.R. 431, 434 (8th Cir. BAP 2000) ("Unlike under Chapter 13, the debtor has no absolute right to dismissal of a Chapter 7 case."); *In re Foster*, 316 B.R. 718, 720 (Bankr. W.D. Mo. 2004) (same); *In re Schafroth*, 2012 WL 1884895, at *2 (Bankr. D.N.M. May 23, 2012) ("A debtor does not have an absolute right to dismiss a voluntary Chapter 7 bankruptcy case.").

Instead, under the text of Section 707(a), a debtor seeking dismissal must establish "cause." *Isho*, 2013 WL 1386208, at *3; *Cohara*, 324 B.R. at 27; *Turpen*, 244 B.R. at 434 ("In order to succeed in a motion to dismiss, the debtor must make a showing of cause and demonstrate why dismissal is justified."). Importantly, it is the Debtor's burden to prove "cause" exists for dismissal by the preponderance of the evidence. *In re Enloe*, 373 B.R. 123, 133 (Bankr. D. Colo. 2007) ("the burden for establishing 'cause' to dismiss under Section 707(a) is on the moving party . . . and that party must meet their burden by a preponderance of the evidence."). *See also Cohara*, 324 B.R. at 27 ("As the movant, the Debtor has the burden of showing cause for dismissal" under Section 707(a)); *Schafroth*, 2012 WL 1884895, at *2 (same). It is a "heavy burden." *Garza*, 2013 WL 3155105, at *2 (debtors "bear a heavy burden to show cause why a bankruptcy case should be voluntarily dismissed" under Section 707(a)).

In this jurisdiction, the Court employs a "totality of the circumstances" approach to deciding whether the showing of "cause" justifies dismissal. *Garza*, 2013 WL 3155105, at *3 (citing numerous cases). To assist in evaluating the totality of the circumstances, the following "dismissal factors" often are considered:

> [1] the best interests of both debtor and creditors; [2] trustee's consent or objection; [3] potential delay to creditor payments; [4] good faith or bad faith in seeking dismissal; [5] and the possibility of payment priority becoming reordered outside of bankruptcy.

Isho, 2013 WL 1386208, at *3; *In re Akbarian*, 2013 WL 6710347, at *3 (Bankr. D. Utah Dec. 19, 2013) (citing *Isho* factors). Some courts have identified slightly different groups of factors.[26]

But whichever factors are evaluated, the foremost issue is whether dismissal would prejudice the bankruptcy estate's creditors. *Isho*, 2013 WL 1386208, at *3 ("Emphasis is typically given to any prejudice that dismissal might cause the estate's creditors."); *In re Stairs,* 307 B.R. 698, 703 (Bankr. D. Colo. 2004) (stating the "[p]redominant view [of what constitutes cause], at a minimum, requires that dismissal not cause prejudice to the creditors"); *In re Komyathy*, 142 B.R. 755 (Bankr. E.D. Va. 1992) ("The primary consideration courts have used in making this [Section 707(a)] determination is whether dismissal will cause some plain legal prejudice to the creditors. Legal prejudice is found to exist where assets which would otherwise be available to creditors are lost because of the dismissal.") (internal quotations omitted); *Schafroth*, 2012 WL 1884895, at *2 ("Even when applying the various factors under a totality of the circumstances approach, by far the most important consideration is whether dismissal will prejudice creditors."). Put another way, "[i]f dismissal would prejudice the creditors, then it will ordinarily be denied." *Peterson v. Atlas Supply Corp. (In re Atlas Supply Corp.)*, 857 F.2d 1061, 1063 (5th Cir. 1988); *Cohara*, 324 B.R. at 27 (same). In fact, the Court is not aware of any precedent supporting Section 707(a) dismissal where creditors would be harmed.

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[26] For example, in *Turpen*, the court stated:

> Courts generally consider the following factors when ruling on a debtor's motion to dismiss: (1) whether all of the creditors have consented; (2) whether the debtor is acting in good faith; (3) whether dismissal would result in a prejudicial delay in payment; (4) whether dismissal would result in a reordering of priorities; (5) whether there is another proceeding through which the payment of claims can be handled; and (6) whether an objection to discharge, an objection to exemptions, or a preference claim is pending.

Turpen, 244 B.R. at 434. The *Turpen* list also was referenced in: *In re Jabarin*, 395 B.R. 330, 338 (Bankr. E.D. Penn. 2008); *Foster*, 316 B.R. at 720-21; *Schafroth*, 2012 WL 1884895, at *2 n.8.

In assessing whether "cause" is proven under Section 707(a), the Court exercises substantial discretion. *Redmond v. Kester (In re Kester)*, 339 B.R. 749, 751 (10th Cir. BAP 2006); *Turpen*, 244 B.R. at 433.

C. The Debtor Failed to Meet Her Burden to Establish Cause for Dismissal under Section 707(a).

1. The Debtor's Proposed Plan is Structurally Impossible.

The Debtor proposes that her Chapter 7 liquidation case should be dismissed because she intends to pay all of her "legitimate" creditors outside bankruptcy. More specifically, after dismissal, she proposes to pay the two remaining secured creditors: (1) Wilmington Trust, N.A. (Cenlar FSB) in the amount of approximately $454,253.92; and (2) Elevation Credit Union in the amount of approximately $144,467.00. Then, the Debtor also intends to pay all allowed general unsecured claims (except for Claim No. 11-2). Such allowed general unsecured claims (including Claim Nos. 1-1, 2-1, 3-1, 4-1, 6-1, 7-1, 9-1, 10-1, 12-1, and 17-1) aggregate: $82,119.85. So, the Debtor will need to make total payments of at least $680,840.77.

This amount does not include payments for claims the Debtor unilaterally has determined are "illegitimate." Specifically, the Debtor proposes to exclude paying the allowed general unsecured claim of Menehune Ventures and Braber in the amount of $154,845.38. And, the Debtor proposes to exclude the Trustee's administrative expenses for legal counsel and accounting professionals in the amount of approximately $156,500.00 too.

The Debtor does not have the funds to pay what she proposes: $680,840.77. So she intends to get a $660,000.00 loan under the Conditional Commitment Letter pursuant to which, somehow, the Debtor promises her new proposed lender (Ali Rose LLC) a first lien on the Grand Lake Property. The Conditional Commitment Letter is conditioned on "a court order from the bankruptcy court in Case No. 20-18118 approving the refinance."

Assuming everything about the Conditional Commitment Letter in the light most favorable to the Debtor (for example, that Ali Rose LLC has the financial resources to make the loan), structurally, the Debtor's proposal is an obvious legal impossibility. By virtue of the Debtor's Chapter 7 liquidation filing, the Grand Lake Property is property of the bankruptcy estate (subject to the Debtor's homestead exemption and record liens). *See* 11 U.S.C. § 541 (the bankruptcy estate "is comprised of all the following property, wherever located and by whomever held . . . all legal or equitable interests of the debtor in property as of the commencement of the bankruptcy estate"). And, the Trustee (not the Debtor) has the responsibility to "collect and reduce to money property of the estate." 11 U.S.C. § 704(a)(1). Through the Turnover Order, the Trustee has been trying to satisfy her obligations to access the Grand Lake Property and potentially market and sell it (if there is sufficient equity).

The Debtor has not identified any statutory or other legal basis for the Court to be able to approve the Debtor's "refinancing" the Grand Lake Property (which again is property of the bankruptcy estate) during the pendency of the Chapter 7 Case. The Court has carefully reviewed the Bankruptcy Code (focusing especially on Sections 363 and 364) to ascertain whether a Chapter 7 bankruptcy debtor somehow has the right to refinance property of the bankruptcy estate. Since only the Trustee may use, sell, or lease property of the bankruptcy estate under Section 363 and only the Trustee may obtain credit under Section 364 ("to operate the business of the debtor"), it is clear that the Debtor is not entitled to refinance the Grand Lake Property during the bankruptcy proceedings. And, the Court has no authorization to approve any such refinance of the Grand Lake Property by the Debtor (as required by the Conditional Commitment Letter). Accordingly, the Conditional Commitment Letter is purely illusory.

Notwithstanding the impossible requirement in the Conditional Commitment Letter, maybe the Debtor hopes to have her Chapter 7 liquidation dismissed and then, outside of bankruptcy, she would try to secure a new loan for the Grand Lake Property. If that is the Debtor's fallback position, there is no evidence to support it because the Conditional Commitment Letter requires approval from the Court (which cannot be given). So, the Debtor's ability to refinance the Grand Lake Property after dismissal and outside of bankruptcy is pure conjecture.

The foregoing basic structural flaw in the Debtor's position mandates that the Court must deny the Motion to Dismiss even without assessing all the standard dismissal factors. But, there is another threshold barrier to dismissal under Section 707(a). Even if the Debtor could show that she has the funds to repay creditors now (or could show that she would be able to obtain such funds after dismissal), the ability to repay creditors is not sufficient "cause" for dismissal under Section 707(a). Cases so holding are legion. *Isho*, 2013 WL 1386208, at *3 ("a debtor's ability to pay debts outside of bankruptcy is not sufficient cause, by itself, to dismiss."); *Cohara*, 324 B.R. at 27 ("[A] debtor's ability to repay her debts will not, on its own, constitute 'cause' for dismissal.") (quoting *In re Hopkins*, 261 B.R. 822, 823 (Bankr. E.D. Penn. 2001); *Foster*, 316 B.R. at 721 (debtors sought dismissal to repay creditors outside of bankruptcy, but court found: "There are several problems . . . with this position. First, the ability of a debtor to pay his debts does not constitute cause for dismissal. . . ."); *Turpen*, 244 B.R. at 434 ("the ability of the Debtors to repay their debts does not constitute adequate cause for dismissal"); *Kirby v. Spatz (In re Spatz),* 221 B.R. 992, 994 (Bankr. M.D. Fla. 1998) ("It is well established and supported by Legislative History that the fact that a debtor is willing and able to pay his debts outside of bankruptcy does not constitute adequate cause for dismissal under section 707(a)."); *In re Williams*, 15 B.R. 655, 657 (E.D. Mo. 1981) ("The legislative history of [Section 707(a)] makes clear that the ability of the debtor to repay his debts does not constitute adequate cause for dismissal." (citing H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 380 (1977), S. Rep. No. 95-989, 95th Cong., 2d Sess. 94 (1978), U.S. Code Cong. & Admin. News 1978, p. 5787); *Akbarian*, 2013 WL 6710347, at *4 (same as *Spatz*). And, the Debtor has offered nothing more as "cause" under Section 707(a).

Notwithstanding that the Court must deny the Motion to Dismiss for the foregoing reasons, for the sake of completeness, the Court also engages in an assessment of the *Isho* factors for Section 707(a) dismissal. *Isho*, 2013 WL 1386208, at *3.

2. **The Debtor's Proposed Plan Would Prejudice Creditors.**

The Debtor's proposed plan might benefit her — after all, the Debtor has already secured her bankruptcy discharge and she would be able to exit bankruptcy without paying anyone anything based on a promise to satisfy claims of the creditors she deems "legitimate" sometime later. However, the most important inquiry is prejudice to creditors. *Atlas Supply*, 857 F.2d at 1063 ("[i]f dismissal would prejudice the creditors, then it will ordinarily be denied."); *Isho*, 2013 WL 1386208, at *3 ("emphasis is typically given to any prejudice that dismissal might cause the estate's creditors."); *Stairs,* 307 B.R. at 703 ("[p]redominant view [of what constitutes cause], at a minimum, requires that dismissal not cause prejudice to the creditors"); *Komyathy*, 142 B.R. 755 ("The primary consideration courts have used in making this [Section 707(a)] determination is whether dismissal will 'cause some plain legal prejudice to the creditors."); *Schafroth*, 2012 WL 1884895, at *2 ("Even when applying the various factors under a totality of the circumstances approach, by far the most important consideration is whether dismissal will prejudice creditors.").

The Debtor's proposed plan obviously would prejudice creditors and the holders of priority administrative expense claims. The Debtor proposes to pay the allowed general unsecured claim of Menehune Ventures and Braber (Claim No. 11-2 in the amount of $154,845.38) nothing. Since the Debtor already obtained her discharge (on March 31, 2021), Menehune Ventures and Braber would have no ability to recover anything from the Debtor. "Ordinarily a motion to dismiss a voluntary petition should be made before the discharge is entered because the discharge is tantamount to a final judgment in the case and establishes the rights of the parties." *Matter of Shell*, 14 B.R. 1010, 1011 (Bankr. E.D. Wis. 1981). Once a discharge has been entered it can only be revoked only as provided for Section 727(d). So, since the Debtor waited years after the entry of her discharge, granting the Motion to Dismiss would result in prejudice. In *In re Baylies*, 114 B.R. 324 (Bankr. D.D.C. 1990), the court explained:

> The discharge has not been revoked in this case and a dismissal would not nullify the effect of the discharge. The debtor's sole creditor would be barred from collecting its claim of $67,040.00 from non-exempt assets exceeding the amount of the claim.

Id. at 325.

In addition to the prejudice to Menehune Ventures and Braber, the Debtor intends to skip out on the Trustee's administrative expenses for legal counsel and accounting professionals in the amount of approximately $156,500.00. The Debtor

seems to want the Court to ignore the interests of the Trustee and administrative claimants. However, Section 707(a)

> . . . requires the court to consider the prejudice to *all* parties in interest . . . . [T]he pool of interested parties includes administrative claimants, who, unlike the other unsecured (lower-priority) creditors, have not been paid. The pool of interested parties must include the estate itself. Here, the Debtor cannot show that administrative claimants and the estate would not be prejudiced by an outright dismissal of her case.
>
> Indeed, the administrative claimants would clearly suffer prejudice by a dismissal of the Debtor's case since dismissal will necessarily terminate their ability to get paid for rendering services to the estate.

In re Kaur, 510 B.R. 281, 286 (Bankr. E.D. Cal. 2014) (citations omitted, emphasis in original). *See also Gill v. Hall (In re Hall)*, 15 B.R. 913, 915 (9th Cir. BAP 1981) (holding that trustee "has standing to object [to debtor's motion to dismiss] on the grounds that [trustee's] fees, costs or expenses must be paid before the case may be dismissed"); *In re Stephenson,* 262 B.R. 871, 873 n.1 (Bankr. W.D. Okla. 2001) ("It is well established that the Trustee has standing to object [to a Section 707(a) motion to dismiss.]").

Beyond the intentional prejudice to Menehune Ventures, Braber, and the administrative claimants, the Debtor's proposed plan would prejudice all the other unsecured creditors too — even those the Debtor deems "legitimate" and proposes to pay. All the creditors "would lose the statutory protection afforded by a court-appointed trustee in bankruptcy administering the estate for the benefit of all the bankrupt's creditors." *Komyathy*, 142 B.R. at 757 (internal quotations omitted). *See also Schafroth*, 2012 WL 1884895, at *3 ("Absent court oversight of payment by the Debtor to creditors, creditors are prejudiced."). There is no guarantee that the Debtor will pay her debts outside of bankruptcy. *Schafroth*, 2012 WL 1884895, at *2 ("the Debtors' offer to negotiate and pay creditor claims following the dismissal of their bankruptcy case [is insufficient because] [t]here is no guaranty that creditors will be paid following dismissal."). Again, under the Debtor's proposed plan, it would be structurally impossible to pay even the so-called "legitimate" creditors in bankruptcy. Supposing the Court dismisses the Debtor's Chapter 7 liquidation, even the "legitimate" creditors would be left with discharged debts. If the Debtor did not pay such creditors, the creditors would have absolutely no way to enforce their claims outside of bankruptcy against the Debtor.

There is yet another type of prejudice inherent in the Debtor's latest dismissal gambit. As the *Turpen* court aptly explained:

> Creditors can incur prejudice if the motion to dismiss is brought after the passage of a considerable amount of time and they have been forestalled from collecting the amounts owed to them . . . . In the present case, the automatic stay has prevented creditors from collecting their debts for more than two years. To send them back to their state court remedies at this point would constitute prejudice.

244 B.R. at 435 (citations omitted). Just so, but even more in the current circumstances. The Debtor filed for Chapter 7 liquidation more than three years ago. The delay is highly prejudicial.

Finally, the Debtor's proposed plan prejudices the unfavored creditors and administrative claimants because its *raison d'etre* is to remove the Grand Lake Property from bankruptcy administration and possible sale. "Prejudice exists where assets which would be available for distribution are lost as a result of the dismissal." *In re Byam*, 2002 WL 32123991, at *1 (Bankr. C.D. Ill. Aug. 14, 2002). The plain prejudice to creditors bars Section 707(a) dismissal.

3. <u>The Trustee and Creditors Objected</u>.

No creditor or party in interest (except the Debtor) has affirmatively consented to the Debtor's proposed dismissal plan. In fact, several have objected. The Trustee (and by implication the administrative claimants who rendered services to the Trustee) has objected. The Trustee's opposition to dismissal is entirely legitimate. "The trustee as representative of the estate, has expended time and effort in examining into the affairs of the debtor and in uncovering potential assets of the estate. A dismissal would render such efforts wasted." *Akbarian*, 2013 WL 6710347, at *5 (quoting *In re Klein*, 39 B.R. 530, 533 (Bankr. E.D.N.Y. 1984). Creditors Menehune and Braber also objected to the Motion to Dismiss with good reason — the Debtor proposes to shut them out completely even though they hold a judgment against the Debtor for $154,845.38. And, Oka Kope and Gan-Bei-La also object because of their concern about the effect of dismissal on the court-approved Settlement Agreement. The various objections counsel against dismissal.

4. <u>Dismissal May Result in Delay for Creditor Payments</u>.

As the Court already has observed, there is no guarantee under the Debtor's proposed plan that any creditors with be paid. Even if the Debtor followed through and paid the creditors she deems "legitimate," the timing of such payments is uncertain (at best). And the unfavored "illegitimate" creditors and administrative claimants would, by express design of the Debtor, be delayed or barred in trying to recover anything. This factor weighs against the Motion to Dismiss.

5. The Debtor Proposes to Reorder Distribution Priorities.

The Debtor's proposed dismissal plan is to pay the general unsecured creditors she deems "legitimate" ahead of disfavored "illegitimate" general unsecured creditors and administrative claimants. Obviously, this is backward. Per Sections 330(a), 503(b), 507(a)(2), and 726(a)(1), Chapter 7 administrative expenses are entitled to a high priority in the distribution scheme — well ahead of general unsecured claimants. The Debtor's rather blatant attempt to reorder administrative expense distribution priorities through dismissal warrants denial of the Motion to Dismiss. *Akbarian*, 2013 WL 6710347, at *4 ("removing the Code's priority framework could also potentially result in a haphazard distribution where certain creditors receive the debtor's largess while others are not so fortunate. Included in the latter group are . . . the Trustee's administrative claim."). And, the Debtor's proposed dismissal plan upsets the equality of distribution principle too by preferring the so-called "legitimate" general unsecured creditors to Menehune Ventures and Braber. "[I]t would appear that some creditors will be paid and others will not, thus preferring some of the Debtor's creditors over others, a result inconsistent with the Bankruptcy Code's policy of equality of distribution." *Foster*, 316 B.R. at 721.

6. The Court Makes No Determinations of the Debtor's Good Faith or Bad Faith.

One of the *Isho* factors under Section 707(a) is whether the Debtor acted with "good faith or bad faith in seeking dismissal." As set forth above, the case against dismissal is simply overwhelming. The Court cannot grant the Motion to Dismiss. Since an assessment of good faith or bad faith is not necessary under the circumstances, the Court exercises its discretion in declining to make good faith or bad faith determinations against the Debtor at this time.

VI. Conclusion and Order.

Exiting Chapter 7 can sometimes be more difficult than entering. That is the case for the Debtor who has not met her Section 707(a) burden. Dismissal is not permissible for the reasons discussed above. The Chapter 7 liquidation will have to continue until the Debtor's assets are fully administered by the Chapter 7 Trustee — whatever that result may entail. Accordingly, the Court: ORDERS that the Motion to Dismiss is DENIED.

DATED this 31st day of January, 2024.

BY THE COURT:

Thomas B. McNamara

Thomas B. McNamara,
United States Bankruptcy Judge

WEST HUNTLEY GREGORY
BRECKLAW.COM

FELICE F. HUNTLEY
ROBERT N. GREGORY
ADRIENNE C. ROWBERRY
EMILY H. SAUNDERS
JILL D. BLOCK
Paralegal

February 5, 2024

Sherry McGann
1535 Grand Avenue
Grand Lake, CO 80447

Re: Loan Approval – 1st Mortgage on 1535 Grand Avenue, Grand Lake, CO (the "Property")

Dear Ms. McGann:

As you know, the law firm of West Huntley Gregory PC represents Ali Rose LLC, a Delaware limited liability company ("Lender"). As you also know, Ali Rose LLC is solely owned by your close family friend, Renee Schultz.

Lender has approved your refinance loan in a loan amount up to $700,00.00 to be secured by a first lien Deed of Trust on the Property.

This loan approval is not conditional, and the loan is ready to close.

I have enclosed Renee Schultz's Loan Management Account statement with Merrill, a Bank of America, N.A. company. The Loan Management Account statement shows that Ms. Schultz has an available line of credit in the amount of $1,860,530.00, which is secured by pledged collateral with a value of $3,095,261.63.

Sincerely,

/s/ *Adrienne C. Rowberry*
Adrienne C. Rowberry, Esq.
(970) 453-2926
adrienne@brecklaw.com

MERRILL
A BANK OF AMERICA COMPANY

Account Number: [redacted]

RENEE SCHULTZ TTEE
U/A DTD 07/21/2021
BY RENEE R SCHULTZ
223 MONTANT DR
PALM BCH GDNS FL 33410-1614

24-Hour Assistance: (800) MERRILL
Access Code: [redacted]

Your Financial Advisor:
BALBOA & BLEVINS GRP
1152 15TH STREET NW STE 6000
WASHINGTON DC 20005

1-800-825-1521

LMA

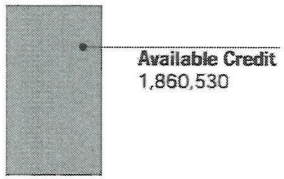
The Loan Management Account® (LMA® Account) is offered by Bank of America, N.A.

October 28, 2023 - December 29, 2023

ACCOUNT ACTIVITY

	December
Opening Monthly Loan Balance	-
Your Borrowings	-
Your Repayments	-
Closing Monthly Loan Balance	-
Interest Charges Paid Month to Date	-
Interest Charges Paid Year to Date	-

LMA LOAN STATUS



SUMMARY

	Dec 29, 2023
Revolving Line of Credit (Variable)	-
Fixed Loans [1]	-
LOAN TOTAL(S)	-

COLLATERAL

Pledged Collateral	3,095,261.63
AVAILABLE CREDIT [2]	1,860,530.33

This LMA account is a Non-Purpose facility. [3]
Proceeds of this loan may not be used to purchase securities or to repay debt used to purchase margin stock such as paying down a margin loan.

[1] *Fixed Loans may include LIBOR contracts and Interest-Only Payment loans, and may be subject to breakage fees that may be significant.*
[2] *Available credit at month end is the lesser of the loan value of the pledged collateral or other limit as determined by the Bank, less outstanding loan balances, accrued interest charges, and any outstanding letters of credit.*
[3] *Additional information and certain restrictions on the use of LMA proceeds are provided on the last page of this statement.*

+

RENEE SCHULTZ TTEE

Account Number: [redacted]

24-Hour Assistance: (800) MERRILL
Access Code: [redacted]

YOUR LMA TRANSACTIONS

October 28, 2023 - December 29, 2023

LOAN ACTIVITY: LMA REV LINE OF CRED **LOAN NUMBER: LM018010816**

Transaction Date	*Effective Date*	*Transaction Description*	*Debit*	*Credit*	*Loan Balance*
		Opening Loan Balance			0.00
		CLOSING LOAN BALANCE			**0.00**

ACCRUED INTEREST CHARGES: REVOLVING LINE OF CREDIT

Daily Periodic Rate	*Average Balance*	*Number of Days*	***Accrued Interest Charges***	
		Subtotal	***$0.00***	
		*Payments and Adjustments**	***0.00***	
		TOTAL ACCRUED INTEREST CHARGES**	**0.00**	**SPREAD AS OF STATEMENT DATE 2.37500% *** **

** Interest Charge Adjustments are the result of prior transactions posted to your account that affect the amount of Interest Charge due.*
*** Interest charges accrue each day of the month according to your loan agreement. Accrued interest charges for this period are due next month and will be reflected in your next statement.*
**** Your LMA interest charges are based on an interest rate determined by adding the spread to the base rate, which resets weekly, and is disclosed in your LMA Agreement.*

YOUR COLLATERAL

PLEDGED COLLATERAL ACCOUNTS

Account No.	*Account Name*	*Account Type*
[redacted]	RENEE TRUST - MASTER	CMA
[redacted]	RENEE TRUST - MNGD	CMA

MERRILL
A BANK OF AMERICA COMPANY

RENEE SCHULTZ TTEE

Account Number: [redacted]

IMPORTANT INFORMATION

October 28, 2023 - December 29, 2023

Interest Charge Computation - The Interest Charge for each billing period is calculated by first determining the Interest Charge for each day in the billing period and then totaling the Interest Charge for all days in the billing period. We calculate the Interest Charge for each day in the billing period by multiplying the daily balance in your account for that day by the daily periodic rate for the same day and divide by 360. To get the daily balance, we take the beginning balance of your account each day, add any new advances and subtract any payments or credits. This gives us the daily balance. For Fixed Loans, principal payments made in advance of their due date will be subject to a breakage fee based on any loss, cost and/or expense to the lender.

Each LMA account is required to be established as either "Non-Purpose" or "Purpose" at account opening based on whether or not loan proceeds will be used to purchase marketable securities or refinance debt incurred to purchase marketable securities. Page 1 of this statement contains a helpful reminder of how your LMA account is designated per the documentation you completed at account opening.

NON-PURPOSE LMA ACCOUNTS: *may NOT be used directly or indirectly to purchase any securities or to carry or repay any indebtedness incurred to buy margin stock. In addition, proceeds of the LMA account must be used in accordance with the parameters established by Bank of America, N.A. and modified from time to time. These limitations and restrictions are set forth in the Use of Proceeds Addendum to the Loan Management Account Agreement. If you have any questions, or would like a copy of the Use of Proceeds Addendum and other terms of the Loan Management Account Agreement, please contact your Financial Advisor.*

PURPOSE LMA ACCOUNTS: *may be used to purchase securities or to carry or repay any indebtedness incurred to buy margin stock as well as for other lawful purposes. In addition, proceeds of the LMA account must be used in accordance with the parameters established by Bank of America, N.A. and modified from time to time. These limitations and restrictions are set forth in the Use of Proceeds Addendum to the Loan Management Account Agreement. If you have any questions, or would like a copy of the Use of Proceeds Addendum and other terms of the Loan Management Account Agreement, please contact your Financial Advisor.*

Prohibited usages of LMA account proceeds, whether Purpose or Non-Purpose, include:

- *Any unlawful purpose*
- *To fund insurance purchases or subsequent premium payments for fixed or variable insurance products made through or arranged by your Merrill Lynch financial advisor and sold through Merrill or its affiliates.*
- *Finance or refinance any campaign-related activities or for any other political purpose including, without limitation, the repayment of debt incurred as part of any political campaign by Members of Political Households.*

Transferring LMA proceeds into a deposit account, CMA or other account with intent to transfer into another account for a prohibited purpose, is not permitted.

If you own London Interbank Offered Rate (LIBOR) linked financial products, the cessation of LIBOR and the transition from LIBOR to alternative reference rates such as SOFR or BSBY, may have significant impacts to those financial products, including impacts to their liquidity, value and potential performance. Additional information is available at www.ml.com/articles/benchmark-interest-rate-reform.html

EXHIBIT 6

(ORDER DENYING MOTION TO DISMISS FOR RECONSIDERATION OF ORDER DENYING MOTION TO DISMISS)

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Thomas B. McNamara

In re: SHERRY ANN MCGANN, Debtor.	Bankruptcy Case No. 20-18118 TBM Chapter 7

ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION TO DISMISS

I. Introduction.

Years ago, the Debtor, Sherry Ann McGann (the "Debtor"), filed for protection under Chapter 7 of the Bankruptcy Code.[1] As of the Petition Date, she owned real property and improvements located at 1535 Grand Avenue, Grand Lake, Colorado 80447 (the "Grand Lake Property"). Chapter 7 Trustee Jeanne Y. Jagow (the "Trustee") has been seeking access to the Grand Lake Property in order to determine whether it may be liquidated for the benefit of the bankruptcy estate. The Trustee filed a "Motion for Order Requiring the Debtor to Turnover Property and Records to the Trustee" (Docket No. 297, the "Turnover Motion")[2] seeking an order compelling the Debtor to provide the Trustee with access to the Grand Lake Property and preventing the Debtor from interfering with the Trustee's efforts to market and potentially sell the Grand Lake Property. The Debtor objected to the Turnover Motion. (Docket No. 297.) The Court conducted a two-day trial on the Turnover Motion as well as the Debtor's request for conversion on October 16 and 17, 2023.

About a week later, the Court issued an Oral Ruling (Docket No. 320, the "Oral Ruling") granting the Turnover Motion. The next day, the Court entered a confirming written "Order Requiring the Debtor to Turnover Property to the Trustee." (Docket No. 321, together with the Oral Ruling, the "Turnover Order.") Among other things, the Turnover Order directed that "the Debtor shall allow the Trustee, her agents and representatives reasonable access to the Grand Lake Property to inspect, market, repair, improve, monitor, visit, and sell it." The Turnover Order was an order for access and did not authorize actual sale of the Grand Lake Property under Section 363(b) of

[1] All references to the "Bankruptcy Code" are to the United States Bankruptcy Code, 11 U.S.C. § 101 et seq. Unless otherwise indicated, all references to "Section" are to sections of the Bankruptcy Code.

[2] The Court uses the convention "Docket No. ___" to refer to documents filed in the CM/ECF system in this bankruptcy case, *In re McGann*, Bankr. Case No. 20-18118 TBM (Bankr. D. Colo.).

the Bankruptcy Code. Thereafter, the Debtor requested reconsideration multiple times and appealed the Turnover Order to the United States Bankruptcy Appellate Panel for the Tenth Circuit (the "BAP"). (Docket No. 327.)

Having failed in her attempts to convert her bankruptcy case to Chapter 11, 12, or 13, and having suffered the entry of the Turnover Order, the Debtor then filed a "Motion to Voluntarily Dismiss Chapter 7 for Cause" (Docket No. 324, the "Motion to Dismiss") in order to stop the Trustee from gaining access to the Grand Lake Property. Through the Motion to Dismiss, the Debtor proposed that her bankruptcy case be dismissed. She further proposed to pay those creditors whom she characterizes as "legitimate" creditors. The Debtor proposed not to pay those creditors she deems "illegitimate." And, she does not intend to satisfy any Chapter 7 administrative expenses either. The Trustee and various creditors objected to dismissal. (Docket Nos. 338-340.) The Court conducted a hearing on the Motion to Dismiss during which the Debtor presented fulsome legal argument and requested that the Court adjudicate the Motion to Dismiss based upon the structure of the proposed dismissal and the docket record. On January 31, 2024, the Court issued a lengthy "Order Denying Motion to Dismiss." (Docket No. 371, the "Order Denying Dismissal.")

The Debtor disagrees with the Order Denying Dismissal. So, a few days later, on February 5, 2024, she filed "Debtor[']s Motion for Reconsideration (Docket No. 371) and Debtor Noting and Correcting the Record – Offers of Proof" (Docket No. 379, the "Motion for Reconsideration"). In the Motion for Reconsideration, the Debtor requests that the Court reconsider (and presumably vacate or reverse) its Order Denying Dismissal. Subsequently, the Debtor also appealed the Order Denying Dismissal to the BAP. (Docket Nos. 389-394.) The Debtor's appeal of the Order Denying Dismissal has been assigned BAP Appeal No. CO-24-4 ("Appeal CO-24-4").

In the Motion for Reconsideration, the Debtor copied each of the section headings of the Order Denying Dismissal and then added her own comments, criticisms, and rebuttals of the Court's Order Denying Dismissal. Through the Motion for Reconsideration, the Debtor mainly rehashes the same arguments that she previously made. The Debtor also tries "another bite at the apple" by offering new theories and presenting new materials (prepared after the Order Denying Dismissal). As with her prior motions seeking reconsideration of other prior orders issued by the Court, the Debtor identifies no legal authority in support of the Motion for Reconsideration. But, presuming the Debtor's Motion for Reconsideration is made pursuant to Fed. R. Civ. P. 59, which is made applicable to these proceedings by Fed. R. Bankr. P. 9023, the Court finds that the Debtor failed to show her entitlement to relief from the Order Denying Dismissal.

II. Procedural Background.[3]

The Debtor's involvement in the bankruptcy system (including this Chapter 7 liquidation case) has a long and tortured procedural history. Having adjudicated a myriad of contested issues over the last months in which the Court described the procedural background, there is no need for the Court to restate the procedural history again. So, the Court simply refers to and reincorporates the Procedural History sections set forth in the "Order Denying Second Motion for Reconsideration of Turnover Order" (Docket No. 342 at 2-7) and the Order Denying Dismissal (Docket No. 371 at 2-8). As set forth above, after the entry of the Order Denying Dismissal, the Debtor filed the Motion for Reconsideration and also appealed the Order Denying Dismissal.[4]

III. Jurisdiction and Venue.

As set forth above, the Motion for Reconsideration pertains to the Order Denying Dismissal under Section 707(a). The Court has jurisdiction over this dispute pursuant to 28 U.S.C. § 1334(b) and (e) and 28 U.S.C § 157(b). This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) (matters concerning administration of the bankruptcy estate); and § 157(b)(2)(O) (other proceedings affecting the liquidation of the assets of the estate). And, venue is proper in this Court under 28 U.S.C. §§ 1408 and 1409. Neither the Trustee nor the Debtor have contested this Court's jurisdiction or venue to decide the Motion for Reconsideration.

However, the Defendant's recent submission of Appeal CO-24-4 throws a bit of a wrinkle into the jurisdictional calculus. Generally, the filing of a motion "to alter or amend the judgment under Rule 9023" or "for relief under Rule 9024 if the motion is filed within 14 days after the judgment is entered" tolls the deadline for filing a notice of appeal until after disposition of the motion. Fed. R. Bankr. P. 8002(b)(1). So, the appellate deadline has been tolled. However, the Debtor filed the Appeal CO-24-4 anyway.

As a general matter of federal practice, "[t]he filing of a notice of appeal is an event of jurisdictional significance — it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (determining under the then-effective version of Fed. R. App. P. 4(a) that a notice of appeal filed while a Fed. R. Civ. P. 59 motion to alter or amend the judgment was

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[3] The Court takes judicial notice of the dockets in *In re McGann*, Case No. 19-18971-EEB (Bankr. D. Colo.) and *In re McGann*, Case No. 20-18118 (Bankr. D. Colo.) for purposes of describing the current procedural status. *See St. Louis Baptist Temple, Inc. v. F.D.I.C.*, 605 F.2d 1169, 1172 (10th Cir. 1979) (a court may *sua sponte* take judicial notice of its docket).

[4] The Court adjudicated several other contested matters in the Debtor's Chapter 7 liquidation case recently. (Docket Nos. 355-359, 372-373, 375-376, 383, and 386.) And, the Debtor also appealed approximately three other recent Orders issued by the Court. (Docket Nos. 387-391.) However, this Order is directed only at the Motion for Reconsideration so the Court need not delve into the myriad other issues at this time.

pending is premature and "shall have no effect"); *see also Lancaster v. Indep. Sch. Dist. No. 5*, 149 F.3d 1228, 1237 (10th Cir. 1998) ("[a]lthough filing a notice of appeal generally divests the district court of jurisdiction over the issues on appeal, the district court retains jurisdiction over collateral matters not involved in the appeal.").

However, because the Debtor is appealing a Bankruptcy Court order and judgment, more specific and specialized rules apply than those typically governing general federal appellate procedure. Fed. R. Bankr. P. 8002(b)(2) covers the exact situation presented here (*i.e.*, a judgment followed by (1) a motion to vacate; and (2) an appeal filed while the motion to vacate is pending). Fed. R. Bankr. P. 8002(b)(2) states:

> Filing an Appeal Before a Motion is Decided. If a party files a notice of appeal after the court announces or enters a judgment, order, or decree — but before it disposes of any motion listed in subdivision (b)(1) — the notice becomes effective when the order disposing of the last such remaining motion is entered.

The reference in Fed. R. Bankr. P. 8002(b)(2) to Federal R. Bankr. P. 8002(b)(1) encompasses a motion "to alter or amend the judgment under Rule 9023" or "for relief under Rule 9024 if the motion is filed within 14 days after the judgment is entered." *See* Fed. R. Bankr. P. 8002(b)(1)(B) and (D).

Thus, Fed. R. Bankr. P. 8002(b) avoids the impropriety of both the Bankruptcy Court and the appellate court addressing the same issue. It means that the Court has jurisdiction and must decide the Motion for Reconsideration before the Appeal CO-24-4 even becomes effective. *Mo v. HSBC Bank USA, N.A. (In re Mo)*, 650 B.R. 193, 201 (Bankr. D.N.J. 2023) (Bankruptcy Court "plainly has jurisdiction to determine the Debtor's pending motions to reconsider [and] to vacate" despite notices of appeal); *Williams v. Williams (In re Williams)*, 2022 WL 349346, at *3 (10th Cir. BAP Feb. 4, 2022) ("The notice of appeal became effective when the Bankruptcy Court entered the Reconsideration Order [after the notice of appeal]."); *In re Verity Health Sys. Of Cal., Inc.*, 2020 WL 7053551, at *2 (Bankr. C.D. Cal. Sept. 3, 2020) ("Court finds that it has jurisdiction to rule upon" motion to alter or amend order under Fed. R. Bankr. P. 7052 despite notice of appeal); *Makeen v. Woodstream Falls Condo. Assoc., Inc. (In re Makeen)*, 2020 WL 5210908, at *5 (10th Cir. BAP Sept. 1, 2020) ("Pursuant to Federal Rule of Bankruptcy Procedure 8002(b)(2), the notice of appeal did not become effective until the Bankruptcy Court disposed of the motion to reconsider.") *See also* Richard Levin and Henry J. Sommer, 10 COLLIER ON BANKRUPTCY ¶¶ 8002.10[2] and 8002.11 (Lexis/Nexis Pub. 16th Ed. Supp. 2023) ("bankruptcy court retains jurisdiction" to decide motion to vacate judgment in spite of notice of appeal; Fed. R. Bankr. P. 8002(b)(2) "negates the rule that the bankruptcy court loses jurisdiction over a matter once a notice of appeal is filed").

IV. Legal Standard for Reconsideration.

As a strict technical matter, "[t]he Federal Rules of Civil Procedure recognize no motion for reconsideration." *Hawkins v. Evans*, 64 F.3d 543, 546 (10th Cir. 1995) (internal quotation omitted). However, when a motion for reconsideration is filed within 14 days of a bankruptcy court's entry of a final order, the motion generally is treated as a motion to alter or amend the order under Fed. R. Civ. P. 59(e), incorporated by Fed. R. Bank. P. 9023. *See Hawkins*, 64 F.3d at 546 (interpreting earlier version of Rule 59, which provided a ten-day period for parties to ask a district court to alter or amend a final order or judgment). The Motion for Reconsideration was filed on February 5, 2024, which date was within 14 days after the entry of the Order Denying Dismissal. As such, the Court believes that the Motion for Reconsideration is properly construed as a motion pursuant to Fed. R. Civ. P. 59(e) (even though the Debtor has not cited Fed. R. Civ. P. 59(e)).

There are three major grounds that justify reconsideration under Fed. R. Civ. P. 59(e): (1) an intervening change in the controlling law; (2) the discovery of new evidence previously unavailable; and (3) the need to correct clear error or prevent manifest injustice. *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000); *Brumark Corp. v. Samson Res. Corp.*, 57 F.3d 941, 944 (10th Cir. 1995); *Mantle Ranches, Inc. v. U.S. Park Serv.*, 950 F. Supp. 299, 300 (D. Colo. 1997). Put another way, "[a] motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Servants of the Paraclete*, 204 F.3d at 1012. But, importantly, a motion for reconsideration "is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Id.*; *see also Mantle Ranches*, 950 F. Supp. at 300 ("a motion for reconsideration is not a license for a losing party's attorney to get a 'second bite at the apple' and make legal arguments that could have been raised before"). *See also U.S. v. Metropolitan St. Louis Sewer Dist.*, 440 F.3d 930, 935 (8th Cir. 2006) ("Rule 59(e) motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to the entry of judgment.").

V. Legal Analysis of the Motion for Reconsideration.

The Court has carefully considered the Motion for Reconsideration in light of the foregoing legal standards. The Court is convinced that Motion for Reconsideration must be denied. The Court believes that the Order Denying Dismissal was correct on the facts and the law. And, if the Court committed error, such error may be corrected by the BAP through the already-pending Appeal CO-24-4.

In respect to the Motion to Dismiss and the Order Denying Dismissal, the Court did not "misapprehend[] the facts,[5] the parties' position, or the controlling law." *Servants*

[5] The Debtor, on the other hand, often misconstrues the "facts" reflected in the record. For example, the Debtor has at various times asserted that the Court's "Order Approving Trustee's Stipulation for Turnover" (Docket No. 41) somehow establishes the value of the Grand Lake Property. *See* Motion to

of the Paraclete, 204 F.3d at 1012. The Court denied the Motion to Dismiss because the facts and the law effectively mandated denial of the Motion to Dismiss. Furthermore, the Debtor has not alleged "an intervening change in the controlling law." *Id.* And, there is no "need to correct clear error or prevent manifest injustice." *Id.*

The Court recognizes that the Debtor has attempted to add "new" evidence through the Motion to Reconsider. For example, apparently in response to the Motion Denying Dismissal, the Debtor obtained a new letter from Adrienne C. Rowberry at the law firm of West Huntley Gregory (the "New Letter") and a bank statement for "Renee Schultz TTEE" (the "New Bank Statement"). The Debtor also presented an unnotarized "Affidavit" (the "New Affidavit") which does not comply with the requirements of 28 U.S.C. § 1746. Leaving aside for the moment the important question whether the New Letter, New Bank Statement and New Affidavit are even admissible in evidence under the Federal Rules of Evidence, none of the new submissions warrants reconsideration of the Order Denying Dismissal. It is apparent from the dates of the New Letter and the New Affidavit that the materials were prepared after the Order Denying Dismissal. So, they cannot establish error with respect to the entry of the Order Denying Dismissal. Instead, such submissions are merely an attempt by a losing litigant to present evidence that could have been presented before the adverse decision but was not. As set forth above, a motion for reconsideration "is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Id.*; *see also Mantle Ranches*, 950 F. Supp. at 300 ("a motion for reconsideration is not a license for a losing party's attorney to get a 'second bite at the apple' and make legal arguments that could have been raised before"). *See also Metropolitan St. Louis Sewer Dist.*, 440 F.3d at 935 ("Rule 59(e) motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to the entry of judgment.").

Just as importantly, the New Letter, New Bank Statement, and New Affidavit change nothing in respect to the Motion to Dismiss. Instead, they reconfirm that the Debtor proposed a structural impossibility in the Motion to Dismiss. The New Letter states that a limited liability company owned by the Debtor's "close family friend" "has approved your refinance loan in a loan amount up to $700,000.00 *to be secured by a first lien Deed of Trust on the Property*." (Emphasis added.) But, by virtue of the Debtor's Chapter 7 liquidation filing, the Grand Lake Property is property of the bankruptcy estate (subject to the Debtor's homestead exemption and record liens). *See* 11 U.S.C. § 541 (the bankruptcy estate "is comprised of all the following property, wherever located and by whomever held . . . all legal or equitable interests of the debtor in property as of the commencement of the bankruptcy estate"). And, the Trustee (not

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Reconsider at 6 ("the value was established in Docket No. 41"). But the Order Approving Trustee's Stipulation for Turnover does nothing of the sort. Instead, it merely approves a "Stipulation for Turnover to the Trustee" entered into on January 27, 2021 by the Trustee and the Debtor (Docket No. 41) in which the Debtor agrees to turnover "Debtor's Valuations of Grant Lake Real Estate by February 3, 2021." Further, the Debtor has repeatedly contended, without citation to any document in the record, that Judge Brown ordered the Trustee to obtain an appraisal at an earlier point in these proceedings, and that Judge Brown "gave her standing" to take some sort of action against the Trustee. Nothing in the record appears to support these contentions.

the Debtor) has the responsibility to "collect and reduce to money property of the estate." 11 U.S.C. § 704(a)(1). Through the Turnover Order, the Trustee has been trying to satisfy her obligations to access the Grand Lake Property and potentially market and sell it (if there is sufficient equity). The Grand Lake Property is simply not the Debtor's to use and collateralize with a new loan as she apparently wishes during the pendency of the Debtor's Chapter 7 bankruptcy liquidation.

But, if the Debtor's idea is to have the Court dismiss the bankruptcy case first and then hope that the Debtor obtains a new loan after dismissal (which she would use to pay some creditors but not others even though the Court already has entered the Debtor's discharge), that approach cannot be approved by the Court either. The ability to repay creditors is not sufficient "cause" for dismissal under Section 707(a). As the Court explained in the Order Denying Dismissal, cases so holding are legion. *Isho v. Loveridge (In re Isho)*, 498 B.R. 391, 2013 WL 1386208, at *3 (10th Cir. BAP Apr. 5, 2013) ("a debtor's ability to pay debts outside of bankruptcy is not sufficient cause, by itself, to dismiss."); *Sicherman v. Cohara (In re Cohara)*, 324 B.R. 24, 27 (6th Cir. BAP 2005) ("[A] debtor's ability to repay her debts will not, on its own, constitute 'cause' for dismissal.") (quoting *In re Hopkins*, 261 B.R. 822, 823 (Bankr. E.D. Penn. 2001). The Debtor has offered nothing more as "cause" under Section 707(a). And anyway, even if the Debtor was able to pass such hurdles, the Debtor's proposed scheme would still fail because: it prejudices creditors (including administrative expense claimants); it is opposed by the Trustee (and her professionals) and some creditors; it may result in delay; and it would improperly reorder bankruptcy distribution priorities. *See* Order Denying Dismissal at 16-20.

Finally, through the Motion for Reconsideration, the Debtor suggests that the Court has committed error by not addressing every single argument presented by the Debtor in support of the Motion to Dismiss. Notwithstanding the virtual avalanche of filings by the Debtor, the Court has tried its level best to review all of the Debtor's submissions (including the Motion to Dismiss) and issue reasoned decisions orally or in writing adjudicating such matters (such as the Order Denying Dismissal). But there is no requirement that the Court specifically address each and every argument raised by the Debtor. *See U.S. v. Palomino-Rodriguez*, 301 F. App'x 822, 824 (10th Cir. 2008) (in criminal sentencing context, court stated that the district court "was not required to specifically address each argument" made by the defendant); *Mainero v. Jordan,* 105 F.3d 361, 365 (7th Cir. 1997) ("Any of the issues...raised and not discussed . . . can be deemed to lack sufficient merit or importance to warrant individual attention."); *Freeman v. Raytheon Techs. Corp.*, 2023 WL 4237087 (D. Colo. Jun. 28, 2023) ("[T]his Court need not have explicitly acknowledged and discussed every one of Plaintiff's contentions in order to have adequately evaluated his filings."); *Fin. Control Assocs., Inc. v. Equity Builders, Inc.*, 812 F. Supp. 198, 202 (D. Kan. 1993) ("[T]here is no requirement that the court's written memorandum and order specifically address and discuss each and every argument advanced by the parties."). To the extent that the Court did not address an argument advanced by the Debtor, the Court implicitly rejected such argument. *See Clemons v. Miss.*, 494 U.S. 738, 747 n.3, (1990) (recognizing that where court does not address an argument, it implicitly rejects the argument).

VI. Conclusion and Order.

The Debtor failed to meet her burden under Fed. R. Civ. P. 59(e). Accordingly, the Court DENIES the Motion for Reconsideration. The Court reaffirms the Order Denying Dismissal which already is the subject of Appeal CO-24-4.

Given that the Debtor has under demonstrated a pattern of submitting oral and written motions for reconsideration of many of the Court's recent Orders, the Court notes for the Debtor's benefit that submission of a motion for reconsideration is not a prerequisite to every appeal.

Since Appeal CO-24-4 already is pending in the BAP, the Court directs the Clerk of the Court to transmit a copy of this Order to the BAP so that the BAP is advised that the Order Denying Dismissal is no longer subject to possible reconsideration.

DATED this 23rd day of February, 2024.

BY THE COURT:

Thomas B. McNamara

Thomas B. McNamara,
United States Bankruptcy Judge

EXHIBIT 7

(ORDER DENYING EMERGENCY MOTION TO STAY PENDING APPEAL)

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Thomas B. McNamara

In re: SHERRY ANN MCGANN, Debtor.	Bankruptcy Case No. 20-18118 TBM Chapter 7

ORDER DENYING EMERGENCY MOTION TO STAY PENDING APPEAL

I. Introduction.

Years ago, the Debtor, Sherry Ann McGann (the "Debtor"), filed for protection under Chapter 7 of the Bankruptcy Code.[1] As of the Petition Date, she owned real property and improvements located at 1535 Grand Avenue, Grand Lake, Colorado 80447 (the "Grand Lake Property"). The Grand Lake Property is property of bankruptcy estate. Chapter 7 Trustee Jeanne Y. Jagow (the "Trustee") has been seeking access to the Grand Lake Property in order to determine whether it may be liquidated for the benefit of the bankruptcy estate. The Trustee filed a "Motion for Order Requiring the Debtor to Turnover Property and Records to the Trustee" (Docket No. 297, the "Turnover Motion"),[2] seeking an order compelling the Debtor to provide the Trustee with access to the Grand Lake Property and to prevent the Debtor from interfering with the Trustee's efforts to market and potentially sell the Grand Lake Property. The Debtor objected to the Turnover Motion. (Docket No. 297.) The Court conducted a two-day trial on the Turnover Motion (along with another motion which was later withdrawn by the Debtor).

On October 23, 2023, the Court issued an Oral Ruling (Docket No. 320, the "Oral Ruling") granting the Turnover Motion. The next day, the Court entered a confirming written "Order Requiring the Debtor to Turnover Property to the Trustee" (Docket No. 321, together with the Oral Ruling, the "Turnover Order"). Among other things, the Turnover Order directed that "the Debtor shall allow the Trustee, her agents and representatives reasonable access to the Grand Lake Property to inspect, market, repair, improve, monitor, visit, and sell it." The Turnover Order was an order for access

[1] All references to the "Bankruptcy Code" are to the United States Bankruptcy Code, 11 U.S.C. § 101 et seq. Unless otherwise indicated, all references to "Section" are to sections of the Bankruptcy Code.

[2] The Court uses the convention "Docket No. ___" to refer to documents filed in the CM/ECF system in this bankruptcy case, *In re McGann*, Bankr. Case No. 20-18118 TBM (Bankr. D. Colo.).

and did not authorize actual sale of the Grand Lake Property under Section 363(b) of the Bankruptcy Code.

Since the entry of the Turnover Order, the Debtor has engaged in an aggressive campaign to stop the Trustee from accessing the Grand Lake Property — even though the Grand Lake Property is property of the bankruptcy estate which must be administered by the Trustee and turned over by the Debtor. The Debtor made an oral motion for reconsideration of the Turnover Order which the Court denied. (Docket No. 320.) Then, the Debtor filed a "Motion for Reconsideration" of the Turnover Order. (Docket No. 323, the "Second Motion for Reconsideration.") The Court denied the Second Motion for Reconsideration. (Docket No. 342.) Meanwhile, the Debtor appealed the Turnover Order to the United States Bankruptcy Appellate Panel for the Tenth Circuit (the "BAP"). (Docket No. 327.) Later, the Debtor filed a "Motion to Stay Pending Appeal," which the Court subsequently denied. (Docket Nos. 337 and 351.) The Debtor also applied for a stay of the Turnover Order from the BAP. (BAP Appeal No. 23-24 Docket No. 32.) The BAP issued an "Order Denying Motion for Stay Pending Appeal" declining to stay the Turnover Order. (BAP Appeal No. 23-24 Docket No. 36.) The Debtor apparently also appealed the BAP's denial of a stay to the United States Court of Appeal for the Tenth Circuit. (BAP Appeal No. 23-24 Docket No. 38-40.)

Despite the Debtor's efforts, no court has stayed the Turnover Order. It has remained in full force and effect since it entered on October 24, 2023. Notwithstanding, the Debtor intentionally refused to comply with the simple dictates of the Turnover Order: mainly, allowing the Trustee access to the Grand Lake Property (including providing the keys to the Grand Lake Property to the Trustee). Given the Debtor's intransigence, the Trustee filed: (1) a "Motion for Order to Show Cause as to Why the Debtor Should Not Be Held in Contempt for Failure to Comply with Turnover Order and for Sanctions" (Docket No. 355, the "Contempt Motion"); and (2) a "Motion for Order Requiring the Debtor to Turnover Property (1535 Grand Avenue) to the Trustee" (Docket No. 356, the "Second Turnover Motion"). The Second Turnover Motion requested that the Court order that the Debtor vacate the Grand Lake Property completely to allow the Trustee to administer such property of the bankruptcy estate. The Debtor opposed both the Contempt Motion and the Second Turnover Motion. (Docket Nos. 357 and 358.)

The Court conducted a hearing on the Contempt Motion and the Second Turnover Motion. (Docket No. 386.) After hearing from both the Debtor and counsel for the Trustee, on February 12, 2024, the Court issued a lengthy Oral Ruling memorialized in a Minute Order. (Docket No. 386, the "Oral Ruling on Contempt and Turnover.") As set forth in the Oral Ruling on Contempt and Turnover, the Court found the Debtor in contempt based upon her willful failure to comply with the Turnover Order and allow the Trustee access to the Grand Lake Property. The Court imposed one of the lowest sanctions available under the circumstances: requiring the Debtor to pay the Trustee's reasonable legal fees for needing to bring the Contempt Motion. The Court did not impose greater sanctions

because, by then, the Debtor has sent a key to the Grand Lake Property to the United States Trustee. The Court's Minute Order directed:

> Counsel for the Chapter 7 Trustee shall file by February 19, 2024, a motion for an award of attorney's fees, with appropriate supporting documentation. The motion must specify hourly rates, hours worked, and the amount of fees incurred by the Chapter 7 Trustee, all as supported by an affidavit of counsel. The Court already has determined that attorney's fees must be paid by the Debtor as a sanction, so the motion must only address the amount requested.
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> . . . The Debtor may, within 7 days after the filing by the Chapter 7 Trustee of a motion for award of attorney's fees, file a response contesting the amount of the request, but only if she has a valid factual and legal basis for doing so.

With respect to the Second Turnover Motion, the Court elected to take a measured approach. Rather than order the Debtor to immediately vacate and turnover the Grand Lake Property (effectively evicting the Debtor), the Court elected to allow the Debtor one last opportunity to comply with the Turnover Order by specifying two specific dates for the Trustee to gain access to the Grand Lake Property. The Court's Minute Order directed:

> Consistent with the Turnover Order, the Debtor shall be required to grant full, unimpeded access to the Grand Lake Property on **February 28 and March 6, 2024**. Neither the Debtor nor her agents shall be present at the Grand Lake Property between the hours of 8:00 p.m. and 5:00 p.m. on those days, unless counsel for the Chapter 7 Trustee advises the Debtor that the Chapter 7 Trustee does not need access on any particular date. All provisions of the Turnover Order remain in effect, including the provisions that require that the Debtor's service animal not be present at the Grand Lake Property during inspections and showings of the Grand Lake Property by the Chapter 7 Trustee.
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> . . . If the Chapter 7 Trustee believes that the Debtor continues not to comply with the Turnover Order, the Chapter 7 Trustee may file a motion to schedule another hearing on the Second Turnover Motion.

> . . . **The Turnover Order (Docket No. 321) remains in full force and effect and is not stayed in any way.**

After the Oral Ruling on Contempt and Turnover, the Debtor conceded that the Trustee would be allowed to access the Grand Lake Property and even pled with the Court to set an access date before February 28, 2024.

Later, the Debtor filed four new appeals with the BAP. (Docket Nos. 389-394.) And, most recently, the Debtor filed an "Emergency Motion to Stay Pending Appeal for Turnover on Feb 28th and March 6th 2024." (Docket No. 395, the "Motion for Stay.") For the reasons set forth below, the Court denies the Motion for Stay.

II. Procedural Background.[3]

The Debtor's involvement in the bankruptcy system (including this Chapter 7 liquidation case) has a long and tortured procedural history. Having adjudicated a myriad of contested issues over the last months in which the Court described the procedural background, there is no need for the Court to restate the procedural history again. So, the Court simply refers to and reincorporates the Procedural History sections set forth in the "Order Denying Second Motion for Reconsideration of Turnover Order" (Docket No. 342 at 2-70), the "Order Denying Motion to Dismiss" (Docket No. 371 at 2-8), as well as the foregoing Introduction.

As set forth above, after the entry of the Oral Ruling on Contempt and Turnover, the Debtor filed the Motion for Stay. The Motion for Stay states:

> Pursuant to Rule 8007 the Debtor is filing a Motion for Stay Pending Appeal for DOC#386 Minutes of Proceeding/Minute Order and DOC#388 Order Granting Trustee's Motion for Award of Attorney's Fee with the Bankruptcy Court the filing originates in. BAP Appeal 24-0007 is believed to be an interlocutory; indicating a lack of finality that does not settle all of the issues of the case and where the further action by the court is needed to settle the controversy.
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> However, believing prose debtor is following the proper Rule, she Motions the Bankruptcy Court pursuant to Rule 8007-1(b) Emergency Motion to Stay Pending Appeal for Turnover February 28th and March 6th 2024, herein. The

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[3] The Court takes judicial notice of the dockets in *In re McGann*, Case No. 19-18971-EEB (Bankr. D. Colo.) and *In re McGann*, Case No. 20-18118 (Bankr. D. Colo.) for purposes of describing the current procedural status. *See St. Louis Baptist Temple, Inc. v. F.D.I.C.*, 605 F.2d 1169, 1172 (10th Cir. 1979) (a court may *sua sponte* take judicial notice of its docket).

> Debtor believes to be compliant with Fed. R. Bankr. P. 8013(d) and 10th Cir. BAP L.R. 8013-1(b). The debtor has addressed below and believes she meets the eligibility for Rule 8007. Stay Pending Appeal.

Motion for Stay at 1-2. Subsequently, on February 23, 2024, the Trustee filed an Objection to the Motion for Stay (Docket No. 396).

The Court confesses to some confusion about the Debtor's request. For example, the Debtor apparently wishes to stay "DOC#388 Order Granting Trustee's Motion for Award of Attorney's Fee." However, Docket No. 388 is the "Trustee's Motion for Award of Attorney's Fees," not an order. And, the Court did not enter an "Order Granting Trustee's Motion for Award of Attorney's Fee" approving a specific amount of attorney's fees. So, at least on that issue, a stay facially is unwarranted. Instead, the Debtor may wish to timely respond to the "Trustee's Motion for Award of Attorney's Fees" filed by the Trustee at Docket No. 388.

However, giving the benefit of the doubt to the Debtor, it appears that the Debtor wants to block the Trustee from having access to the Grand Lake Property on February 28 and/or March 6, 2024. So, the Debtor appears to be appealing the Oral Ruling on Contempt and Turnover and asking for a stay barring the Trustee's upcoming scheduled visit.

III. Legal Analysis and Conclusions of Law.

A. The Legal Standard for a Stay on Appeal.

Requests for stay pending appeal of bankruptcy court orders and judgments are governed by Fed. R. Bankr. P. 8007(a)(1). Fed. R. Bankr. P. 8007(a)(1) states, in part: "Ordinarily, a party must move in the bankruptcy court for the following relief: (A) a stay of a judgment, order, or decree of the bankruptcy court pending appeal." So, the Motion for Stay is properly presented to this Court in the first instance, and it is this Court which must decide the Motion for Stay.

The Motion for Stay contains no actual discussion of the legal standard applicable to stays pending appeal. The Debtor merely states, conclusorily, that she has "addressed below and believes she meets the eligibility for Rule 8007."

"The decision of whether to grant a stay pending appeal is left to the discretion of the bankruptcy court." *Lang v. Lang (In re Lang)*, 305 B.R. 905, 911 (10th Cir. BAP 2004). "However, '[a] stay is an intrusion into the ordinary process of administration of judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Zzyym v. Pompeo*, 2019 WL 764577, at *1 (D. Colo. Feb. 21, 2019) (quoting *Nken v. Holder*, 556 U.S. 418, 427 (2009)). The Debtor "bears the burden of showing that the circumstances justify an exercise of that discretion." *Zzyym*, 2019 WL 764577, at *1 (quoting *Nken*, 556 U.S. at 434). "[I]t is a heavy

burden." *Morreale v. 2011-STP-1 CRE/CADC Venture, LLC (In re Morreale)*, 2015 WL 429502, at * 1 (D. Colo. Jan. 30, 2015).

In exercising the Court's discretion, the Court is guided by four well established factors:

> (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will suffer irreparable injury unless the stay is granted; (3) whether granting the stay will result in substantial harm to the other parties to the appeal; and (4) the effect of granting the stay upon the public interest.

Lang, 305 B.R. at 911. *See also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (confirming similar standard for stay pending appeal under analogous Fed. R. Civ. P. 62(c)); *F.T.C. v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 852 (10th Cir. 2003) (utilizing similar factors to evaluate stay on appeal under Fed. R. App. P. 8 and 18).

As an overlay of the standard formulation, the Court also considers the importance and novelty of the issues being appealed. *See* Charles Alan Wright et al., 11 FEDERAL PRACTICE AND PROCEDURE § 2904 (West 2012) ("Many courts also take into account that the case raises substantial difficult or novel legal issues meriting a stay."). In any event, all the factors are "interconnected" and may be considered in sliding scale fashion. *In re Revel AC, Inc.*, 802 F.3d 558, 571 (3d Cir. 2015); *see also Mainstream Mktg.*, 345 F.3d at 852-53 (noting that "probability of success" factor may be relaxed if the other three factors tip decidedly in favor of stay).

B. <u>The Debtor Failed to Establish Likelihood of Success on Appeal</u>.

"It is not enough that the chance of success on the merits be 'better than negligible.'" *Nken*, 556 U.S. at 434 (quoting *Sofinet v. INS,* 188 F.3d 703, 707 (7th Cir. 1999)). There must be more than a "mere possibility" of success on the merits. *Id.* The "probability of success is demonstrated when the petitioner seeking the stay has raised 'questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.'" *Morreale*, 2015 WL 429502, at *3 (quoting *Mainstream Mktg.,* 345 F.3d at 853).

The Debtor does not expressly contend that she is likely to succeed on the merits of her appeal. However, the Court infers that the Debtor believes this to be the case. Nevertheless, the Court has already thoroughly examined the Debtor's legal arguments and has rejected them multiple times, including in the Turnover Order, the Order Denying Second Motion for Reconsideration (Docket No. 342), the Order Denying Motion to Stay Pending Appeal (Docket No. 351), and the Oral Ruling on Contempt and Turnover.

The Court's ruling in the Turnover Order and the Oral Ruling on Contempt and Turnover merely confirms what is generally a noncontroversial proposition: that the Grand Lake Property is property of the Debtor's bankruptcy estate and that, as such, the Trustee must have access to the Grand Lake Property so that the Trustee can determine whether it can be liquidated for the benefit of creditors. The Court also confirmed that the Debtor had a duty to cooperate with the Trustee pursuant to 11 U.S.C. § 521(a)(3) that predated the Turnover Order, such that the Turnover Order both serves to remind the Debtor of her obligation and clarifies that she cannot interfere with the Trustee's efforts to potentially sell the Grand Lake Property.[4]

The Debtor must be able to demonstrate that she likely will prevail on the merits of her appeal of the Oral Ruling on Contempt and Turnover. As noted in *Morreale*, the Debtor bears a "heavy burden" of proof. *Morreale*, 2015 WL 429502, at *2-3 (debtor who sought a stay pending appeal did not meet its heavy burden to show likelihood of success on appeal given the record in the case and "particularly given the deferential standard of review" to be undertaken by the appellate court [factual findings of the trial court will not be overturned on appeal unless the reviewing court is left with the definite and firm conviction that a mistake has been committed]). In the Motion for Stay, the Debtor did not identify serious and substantial factual or legal arguments showing error in the Oral Ruling on Contempt and Turnover. As such, the Debtor has failed to show that she likely will succeed on appeal.

Notably, in the Oral Ruling on Contempt and Turnover, the Court specified two dates for the Debtor to allow access to the Grand Lake Property: February 28 and March 6, 2024. Per the Turnover Order, the Debtor already was obligated to provide access to the Grand Lake Property. However, given the history of the Debtor's intransigence, the Court effectively was offering the Debtor another opportunity to comply with the Turnover Order on specific dates. The Court's measured step in trying to allow another opportunity for the Debtor to comply (rather than ordering that the Debtor immediately vacate and surrender the Grand Lake Property to the Trustee) is unlikely to be overturned on appeal. After all, the Grand Lake Property is property of the bankruptcy estate.

C. <u>The Debtor Failed to Show Irreparable Harm</u>.

The Supreme Court in *Nken* held that the showing of irreparable harm, like the showing required for the likelihood of success on the merits, must be more than simply showing some "possibility of irreparable injury." *Id.* at 434. "The 'possibility' standard is too lenient." *Id.* at 435. The movant must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *In re Stewart*, 604 B.R. 900, 907 (Bankr. W.D. Okla.

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[4] The Debtor seems to suggest that the Court should stay the Oral Ruling on Contempt and Turnover because of alleged misconduct or conflicts of interest on the part of the Trustee. The Trustee asserts that the Debtor's allegations are belied by the record and have no bearing on the propriety of the Court's Oral Ruling on Contempt and Turnover. The allegations are, indeed, unproven, but even if the Court were to assume they were true, they do nothing to show that the Debtor is likely to prevail on the merits of her appeal.

2019) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008)) (emphasis in original). The *Nken* Court also observed that there is "substantial overlap between [the standards used for stays pending appeal] and the factors governing preliminary injunctions; not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." *Nken*, 556 U.S. at 434.

The Tenth Circuit has interpreted the concept of "irreparable harm" in the context of that required for imposing a preliminary injunction under Fed. R. Civ. P. 65. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). The Tenth Circuit stated:

> To constitute irreparable harm, an injury must be certain, great, actual 'and not theoretical.' . . . Irreparable harm is not harm that is 'merely serious or substantial.' '[T]he party seeking injunctive relief must show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm."

Heideman, 348 F.3d at 1189 (quoting *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2002) (emphasis in the original) (internal citations omitted).

In the Motion for Stay (and the attached Affidavit), the Debtor argues that she is "violently ill and have increased my trauma therapy trying to deal with the fact that the Trustee and Mr. Miller will be entering my home on February 28 and March 6th unnecessarily . . . . I am outraged the court is allowing this . . . . I am not sleeping or eating and each day approaching the 28th of February has increased the terror and anxiety of the unnecessary intrusion in my home . . . ." (Docket No. 395 at 26.)

The Debtor seems to be implying that simply allowing the Trustee to access the Grand Lake Property will cause her to suffer some irreparable harm to her mental health. But, the Grand Lake Property is property of the estate. As such, and unless the Trustee abandons the Grand Lake Property, the Debtor can only use the Grand Lake Property to the extent she is allowed to do so by the Trustee. *See In re Cook v. Wells Fargo, N.A. (In re Cook)*, 2012 WL 1356490 (10th Cir. BAP 2012) (internal citations omitted), *aff'd*, 520 Fed Appx. 697 (10th Cir. 2012) (unpublished) ("Upon the filing of a bankruptcy petition, an estate is created, which is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case. The Trustee is a representative of the estate in a Chapter 7 case. The Trustee shall collect and reduce to money the property of the estate. It is the Trustee to whom the obligation to turn over property of the estate runs. And it is the Trustee who has the right to use property of the estate. A Chapter 7 debtor has none of these rights."); *In re Trujillo*, 438 B.R. 238, 249-50 (Bankr. D. Colo. 2012) (recognizing that Chapter 7 debtors sometimes continue to use property of the estate post-petition, but noting that they have a duty to surrender estate property in light of trustee's superior right to it; further noting that a debtor who

uses estate property may be required to compensate the estate for its use); *Irons v. Maginnis (In re Irons)*, 572 B.R. 877, 886 (Bankr. N.D. Ohio 2017) ("The right to 'use' property of the estate is a right held by the Chapter 7 Trustee.").

The Court finds that the Debtor has not shown irreparable harm justifying a stay of the Oral Ruling on Contempt and Turnover. And, the Debtor can take appropriate steps to alleviate any potential emotional distress, such as by leaving the Grand Lake Property on the inspection dates.

D. <u>The Debtor Failed to Address Harm to the Trustee</u>.

"Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest." *Nken*, 556 U.S. at 435. To establish this third factor of the test for stays pending appeal, the Debtor "must establish that the [Trustee] will not suffer substantial harm if the stay is granted. 'In other words, the moving party must show that the balance of harms tips in favor of granting the stay.'" *Stewart*, 604 B.R. at 908 (quoting *ACC Bondholder Grp. v. Adelphia Commc'n Corp. (In re Adelphia Commc'n Corp.)*, 361 B.R. 337, 349 (S.D.N.Y. 2007)).

The Debtor does not even mention the harm to the Trustee or the creditors whose interests the Trustee serves. The Debtor speaks only to the harm she herself may suffer. The Debtor argues that having to turnover the Grand Lake Property will be detrimental to her fragile emotional state. Maybe. But the Court cannot ignore the harm to the Trustee and creditors that will result from a stay. As the Court explained in the Order Denying Second Motion for Reconsideration:

> While the Court supposes that all debtors who file for bankruptcy and thereby agree to turnover property of the estate experience some psychological distress at the intrusion that results from a Trustee's inspection of such property, that is the bargain that a debtor makes in order to discharge their debts and make a fresh start. It is the bargain the Debtor made here when she filed for relief under Chapter 7. That the Debtor continues to reside and work in the Grand Lake Property does not change the fact that the Grand Lake Property is property of the estate and therefore must be turned over for administration. While this may seem unjust to the Debtor, allowing the Debtor, who has already received her discharge, simply to retain the Grand Lake Property without determining whether it could be liquidated to repay a portion of her debts would most certainly be more unjust to creditors who have waited for more than three years to receive any payment from the Debtor's estate. Contrary to the Debtor's implicit argument, the Turnover Order does not effect a manifest injustice — it is entirely

> consistent with the purposes of Chapter 7 and is necessary to enable the Trustee to meet her obligations to creditors.

Because the harm to the estate and creditors is likely to outweigh any harm to the Debtor, the Debtor has not demonstrated her entitlement to a stay.

E. A Stay Is Not in the Public Interest.

The fourth factor courts must consider is where the public interest lies. The notion of the "public interest" in this context is one that transcends the interests of the parties in the case. *Revel AC*, 802 F.3d at 569. The United States District Court for the District of Colorado has recognized that "the public interest is furthered by the timely conclusion of legal disputes." *Board of Cty. Comm'r of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 2019 WL 4926764, at *7 (D. Colo. Oct. 7, 2019) (citing *Desktop Images v. Ames*, 930 F. Supp. 1450, 1452 (D. Colo. 1996)).

Once again, the Debtor makes no viable argument in support of this factor. She relies instead on general references to her own interest, her right to rehabilitate with a fresh start (even though this case is a Chapter 7 liquidation rather than a reorganization case), and her conclusory assertions of harm.

This bankruptcy case has been pending since December 22, 2020, and comes on the heels of another case filed by the Debtor on October 17, 2019, and dismissed on September 1, 2020. While the cases were pending, creditors were barred from engaging in any collection efforts, the Debtor received her discharge, and creditors are now barred by the discharge injunction from collecting on their claims, though they have not yet received any payment from the estate. Meanwhile, the Debtor has continued to enjoy living in the Grand Lake Property.

Believing that there might be some equity in the Grand Lake Property above and beyond the amounts needed to pay the remaining liens against the Grand Lake Property and the Debtor's homestead exemption, the Trustee sought the Debtor's cooperation in providing access for marketing and selling the Grand Lake Property. The Debtor fought the Trustee at every step. So, the Trustee sought entry of an order requiring the Debtor to turnover the Grand Lake Property so that the Trustee could inspect and market it for sale. Allowing the Trustee to determine whether sale of the Grand Lake Property would, in fact, bring value to the estate will help resolve an important question in the case[5] and further will allow the Trustee to fulfill her own obligation to liquidate the Debtor's assets in order to partially satisfy the claims of the

[5] As the Trustee notes in her Objection to the Motion to Stay, contrary to the Debtor's contention in the Motion to Stay at 8 ("The value was established of the property at DOC#41."), the value of the Grand Lake Property was not established by any prior ruling of the Court, including the "Order Approving Trustee's Stipulation for Turnover" (Docket No. 41). The Court's Order Approving Stipulation for Turnover merely approves a "Stipulation for Turnover to the Trustee" entered into on January 27, 2021, by the Trustee and the Debtor (Docket No. 41) in which the Debtor agreed to turnover "Debtor's Valuations of Grant Lake Real Estate by February 3, 2021." It does nothing to establish the value of the Grand Lake Property.

Debtor's creditors, consistent with the purpose of Chapter 7. A stay would unnecessarily delay resolution of that question and prolong administration of the estate.[6] Thus, the Court finds that this fourth factor weighs heavily in favor of denying the Debtor's request for entry of a stay.

IV. Conclusion and Order.

The Debtor has not met her burden to show that the Court should exercise its discretion and impose a stay of the Oral Ruling on Contempt and Turnover. Accordingly, the Court:

ORDERS that the Motion for Stay is DENIED; and

FURTHER ORDERS that the Bankruptcy Court Clerk shall transmit a copy of this Order to the Bankruptcy Appellate Panel for the Tenth Circuit in BAP Case No. CO 24-7; and

FURTHER ORDERS that unless the Oral Ruling on Contempt and Turnover is stayed by an appellate court, the Trustee shall be permitted access to the Grand Lake Property on February 28 and March 6, 2024, as set forth in the Oral Ruling on Contempt and Turnover (as well as the Turnover Order and the confirming Minute Order (Docket No. 386)).

DATED this 26th day of February, 2024.

BY THE COURT:

Thomas B. McNamara

Thomas B. McNamara,
United States Bankruptcy Judge

[6] As the Court noted at the hearing on the Turnover Motion and in the Order Denying Second Motion for Reconsideration, the Trustee will not be allowed to sell the Grand Lake Property without first filing a motion to sell the Grand Lake Property (which will require a showing that the estate will receive value from the sale) and obtaining an order granting such motion per Section 363(b).