

## **2023 Bankruptcy Bench-Bar Roundtable Chapter 7 and 13 Discussion Topics**

### **1. Video Hearings and Trials**

- a. How are video hearings and trials working for parties and practitioners?

### **2. Zoom § 341 Meeting of Creditors**

- a. Encouraging debtors to use the practice website before the hearing
- b. Common issues (overall Zoom hearings have worked well)
  - i. Setting: other people in the room, background, and noise
  - ii. Tech: turning on video, glitches when connecting using mobile data rather than internet
  - iii. Making sure parties take the meeting seriously
- c. Benefits
  - i. Debtors usually do not have to take time off of work
  - ii. Failure to appear and continuances have dramatically decreased
  - iii. All parties have better access to documents during the hearing so it is easier to discuss specific issues in the filing

### **3. Exemption Law Changes**

- a. Impact on case filings?
  - i. Is Chapter 7 a better option for some debtors now because there is less risk of their assets being liquidated?
  - ii. Is Chapter 13 feasible for more debtors because there are less “best interest of creditor” driven cases?
- b. Tax refunds: *In re Garcia-Morales*, 2023 Bankr. LEXIS 1998 (Bankr. D. Colo. 2023)

### **4. The Circuits Split: Appreciation of Real Property in Converted cases**

- a. *Castleman v. Burman (In re Castleman)*, 75 F.4th 1052 (9th Cir. 2023)(appreciation belongs to the Chapter 7 bankruptcy estate upon conversion)
- b. *Rodriguez v. Barrera (In re Barrera)*, 22 F.4th 1217 (10th Cir. 2022)(appreciation belongs to the debtor upon conversion)

### **5. Conversion to Chapter 13**

- a. Issues to consider
- b. *Marrama v. Citizens Bank*, 549 U.S. 365, 375 n. 11 (2007)(“It suffices to emphasize that the debtor's conduct must, in fact, be atypical. Limiting dismissal or denial of conversion to extraordinary cases is particularly appropriate in light of the fact that lack of good faith in proposing a Chapter 13 plan is an express statutory ground for denying plan confirmation.”)
- c. For a thorough discussion of conversion issues, see *In re Johnson*, 634 B.R. 806 (Bankr. D. Colo. 2021)

## 6. Student Loans

- a. Payments due in October 2023 for most borrowers
- b. New guidance for undue hardship discharge
- c. Incorporating income driven repayment plans into Chapter 13 plans

## 7. *Kinney v. HSBC Bank USA, N.A. (In re Kinney)*, 5 F.4th 1136 (10th Cir. 2021)

- a. Role of debtor's counsel
  - i. Communication with debtors to avoid end of case issues when possible
  - ii. Making the arguments for discharge: motion for discharge or some other appropriate pleading
- b. Unanswered questions
  - i. When does the 5-year clock start and when is the last payment due?
  - ii. Does materiality matter?
  - iii. How many mortgage payments are required: 60 or 61 (maybe even 62)?
- c. Hardship discharge
  - i. Is it appropriate? If so, is it in your client's best interest?

## 8. *In re Doll: Chapter 13 Trustee's Fee in Cases Dismissed Prior to Confirmation*

- a. *Goodman v. Doll (In re Doll)*, 57 F.4th 1129 (10th Cir. 2023)
- b. *Evans v. McCallister (In re Evans)*, 69 F.4th 1101 (9th Cir. 2023)
- c. *In re Soussis*, 624 B.R. 559 (Bankr. E.D.N.Y. 2020), *affid sub nom. Soussis v. Macco*, 2022 U.S. Dist. LEXIS 12386 (E.D.N.Y. 2022), *appeal pending final decision*, No. 22-155 (2d Cir.).

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLORADO**

Bankruptcy Judge Name

In re:

Debtor(s),

Debtor(s).

Case No. YY-NNNNN-FML

Chapter 13

**ORDER REGARDING INTENDED AMENDED CHAPTER 13 PLAN AND  
CONFIRMATION STATUS REPORT**

THIS MATTER comes before the Court on Debtor(s)' Confirmation Status Report filed on [CSR file date] and the Debtor(s)' intention to resolve objections by filing an Amended Chapter 13 Plan. The Court ORDERS:

1. Confirmation of all previously-filed Chapter 13 Plans is DENIED. All pending objections are deemed MOOT. Any party who wishes to object to a future plan must file a new objection by [Objection due date].
2. The previously scheduled confirmation hearing is VACATED. The Court will conduct a non-evidentiary confirmation hearing on a trailing docket on the Amended Chapter 13 Plan (to be filed and served as set forth below) and any objections:
  - [Hearing Date, Time]
  - [Additional courtroom information/instructions]
1. By [Notice due date], the Debtor(s) must file and serve: (a) an Amended Chapter 13 Plan; (b) a notice in substantial conformity to L.B.F. 3015-1.2 (including the objection deadline and information regarding how to participate in the hearing); and (c) file and service any required amended Schedules to support the Amended Chapter 13 Plan. Service must be made to the Chapter 13 Trustee and Service must be made to the Chapter 13 Trustee and appropriate parties.

After completion of service of the foregoing documents, the Debtor(s) must file a certificate of service showing proper service.

3. If objections to the Amended Chapter 13 Plan are filed, the Debtor(s) must file a Confirmation Status Report pursuant to L.B.R. 3015-1(e) and in substantial conformity with L.B.F. 3015-1.4. If no objections to the Amended Chapter 13 Plan are filed, the Debtor(s) must file a Verification of Confirmable Plan pursuant to L.B.R. 3015-1(d) and in substantial conformity with L.B.F. 3015-1.3. Either a Verification of Confirmable Plan or a Confirmation Status Report must be filed by [Verification or CSR due date].
4. If the Debtor(s) fail to timely file and serve the required documents, such failure will be deemed cause for denial of confirmation and dismissal without further notice or hearing.

Dated this DDth day of Month, 20YY.

BY THE COURT:

s/ Name

Judge Name, Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLORADO**

Bankruptcy Judge Name

In re:

Debtor(s),

Debtor(s).

Case No. YY-NNNNN-FML

Chapter 13

**ORDER REGARDING AMENDED CHAPTER 13 PLAN AND  
CONFIRMATION STATUS REPORT**

THIS MATTER comes before the Court on the Debtor(s)' Amended Chapter 13 Plan filed on [Amended plan file date] and Confirmation Status Report filed on [CSR file date]. The Court ORDERS:

1. Confirmation of all previously-filed Chapter 13 Plans is DENIED. All pending objections are deemed MOOT. Any party who wishes to object to the Amended Chapter 13 Plan must file a new objection by [Objection due date].
2. The previously scheduled confirmation hearing is VACATED. The Court will conduct a non-evidentiary confirmation hearing on a trailing docket on the Amended Chapter 13 Plan and any objections:
  - [Hearing Date, Time]
  - [Additional courtroom information/instructions]
3. By [Notice due date], the Debtor(s) must: (a) serve a copy of the already-filed Amended Chapter 13 Plan; (b) file and serve a notice in substantial conformity to L.B.F. 3015-1.2 (including the objection deadline and information regarding how to participate in the hearing; and (c) file and serve any required amended Schedules to support the Amended Chapter 13 Plan. Service must be made to the Chapter 13 Trustee and appropriate parties.

After completion of service of the foregoing documents, the Debtor(s) must file a certificate of service showing proper service.

4. If objections to the Amended Chapter 13 Plan are filed, the Debtor(s) must file a Confirmation Status Report pursuant to L.B.R. 3015-1(e) and in substantial conformity with L.B.F. 3015-1.4. If no objections to the Amended Chapter 13 Plan are filed, the Debtor(s) must file a Verification of Confirmable Plan pursuant to L.B.R. 3015-1(d) and in substantial conformity with L.B.F. 3015-1.3. Either a Verification of Confirmable Plan or a Confirmation Status Report must be filed by [Verification or CSR due date].
5. If the Debtor(s) fail to timely file and serve the required documents, such failure will be deemed cause for denial of confirmation and dismissal, without further notice or hearing.

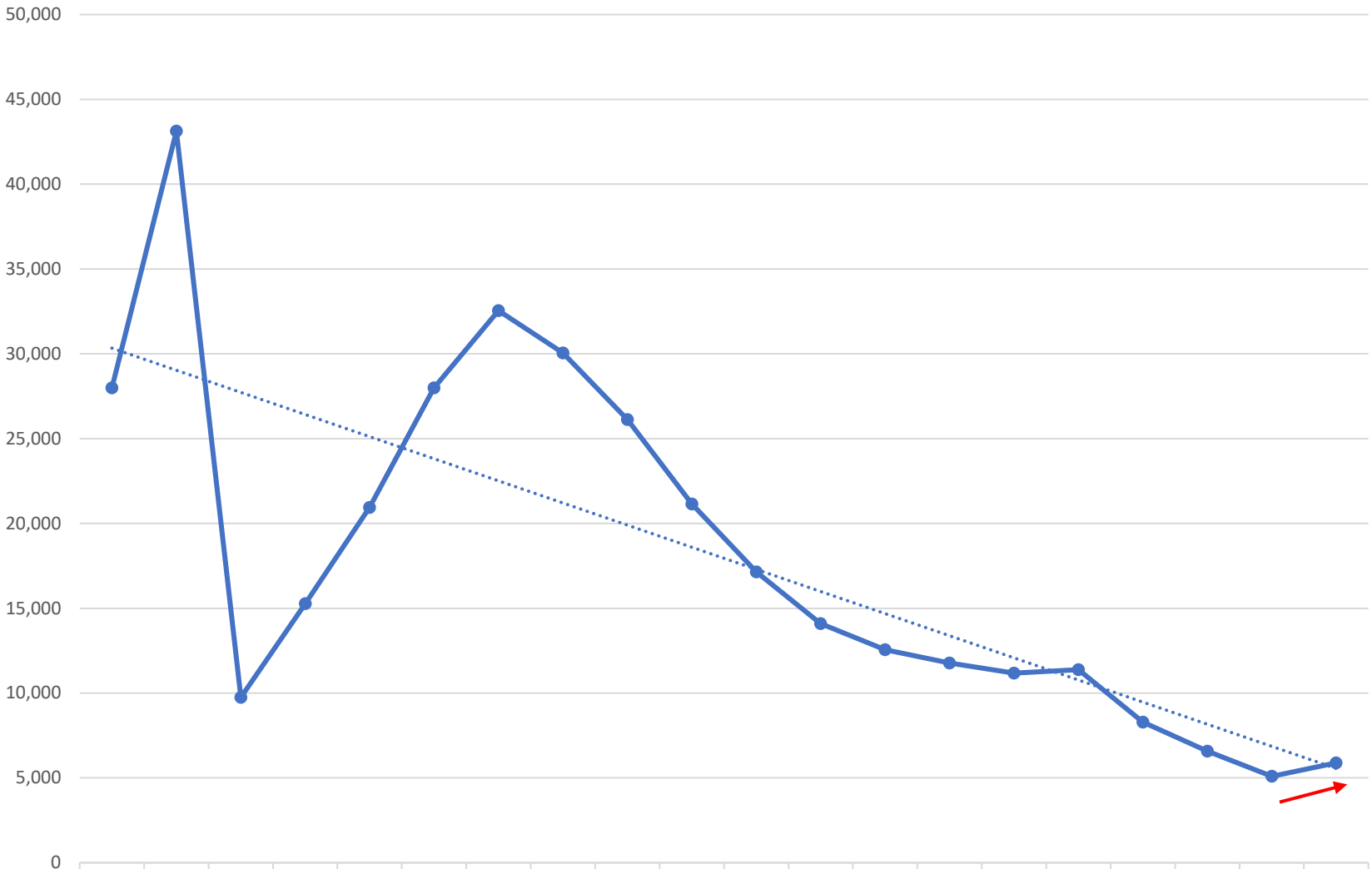
Dated this DDth day of Month, 20YY.

BY THE COURT:

s/ Name

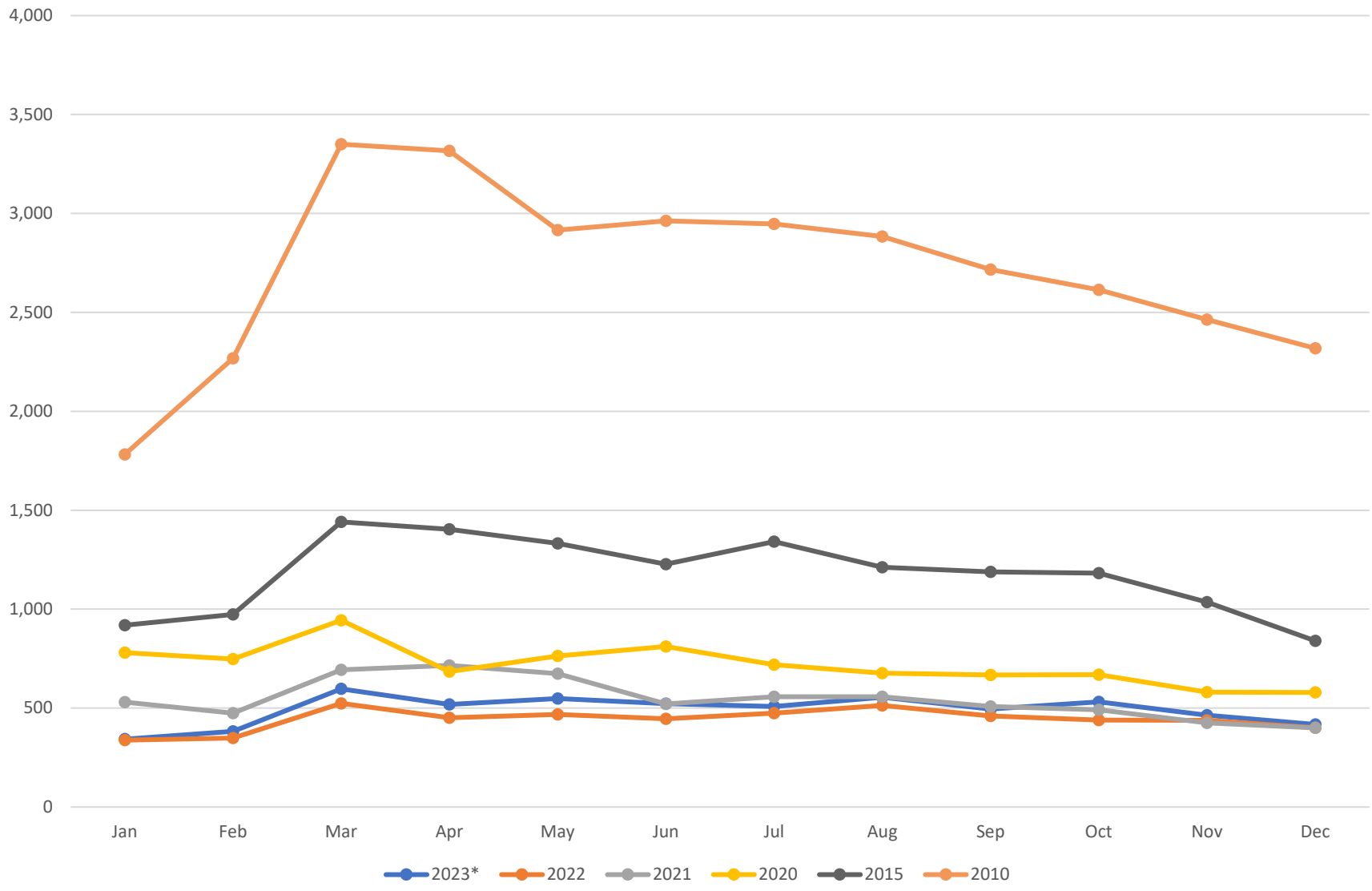
Judge Name, Bankruptcy Judge

### Annual Bankruptcy Filings (2004 - 2023 Predicted)

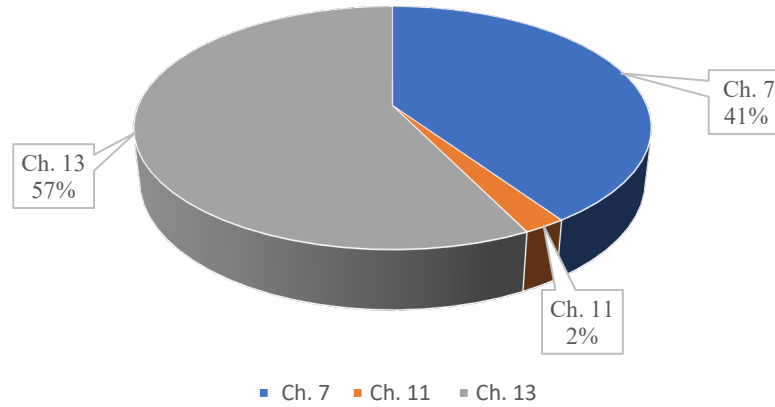


● Total	27,993	43,125	9,741	15,279	20,943	27,997	32,544	30,044	26,125	21,155	17,143	14,103	12,552	11,768	11,182	11,375	8,281	6,579	5,093	5,884
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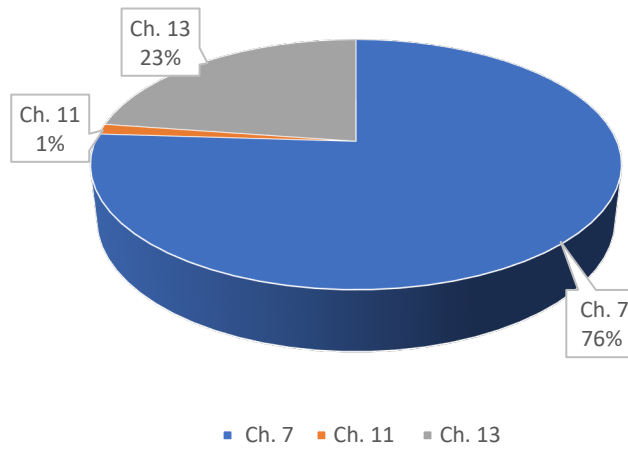
### Annual Bankruptcy Filings (2004 - 2023 Predicted)



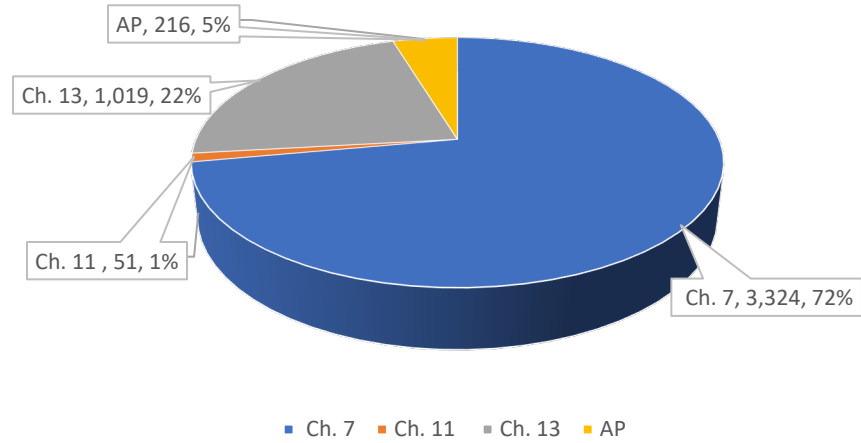
Pending Cases by Chapter



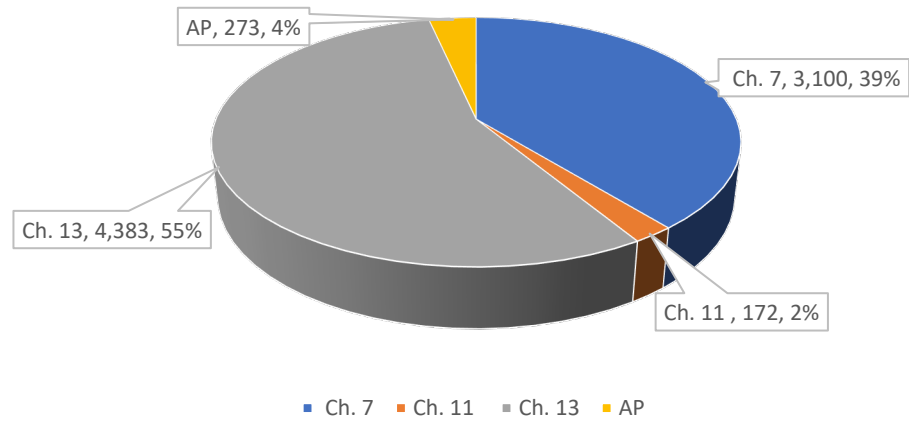
Predicted Filings for 2023 by Chapter



Annual Filings by Chapter and Type  
(1/1/2023 - 10/17/2023)

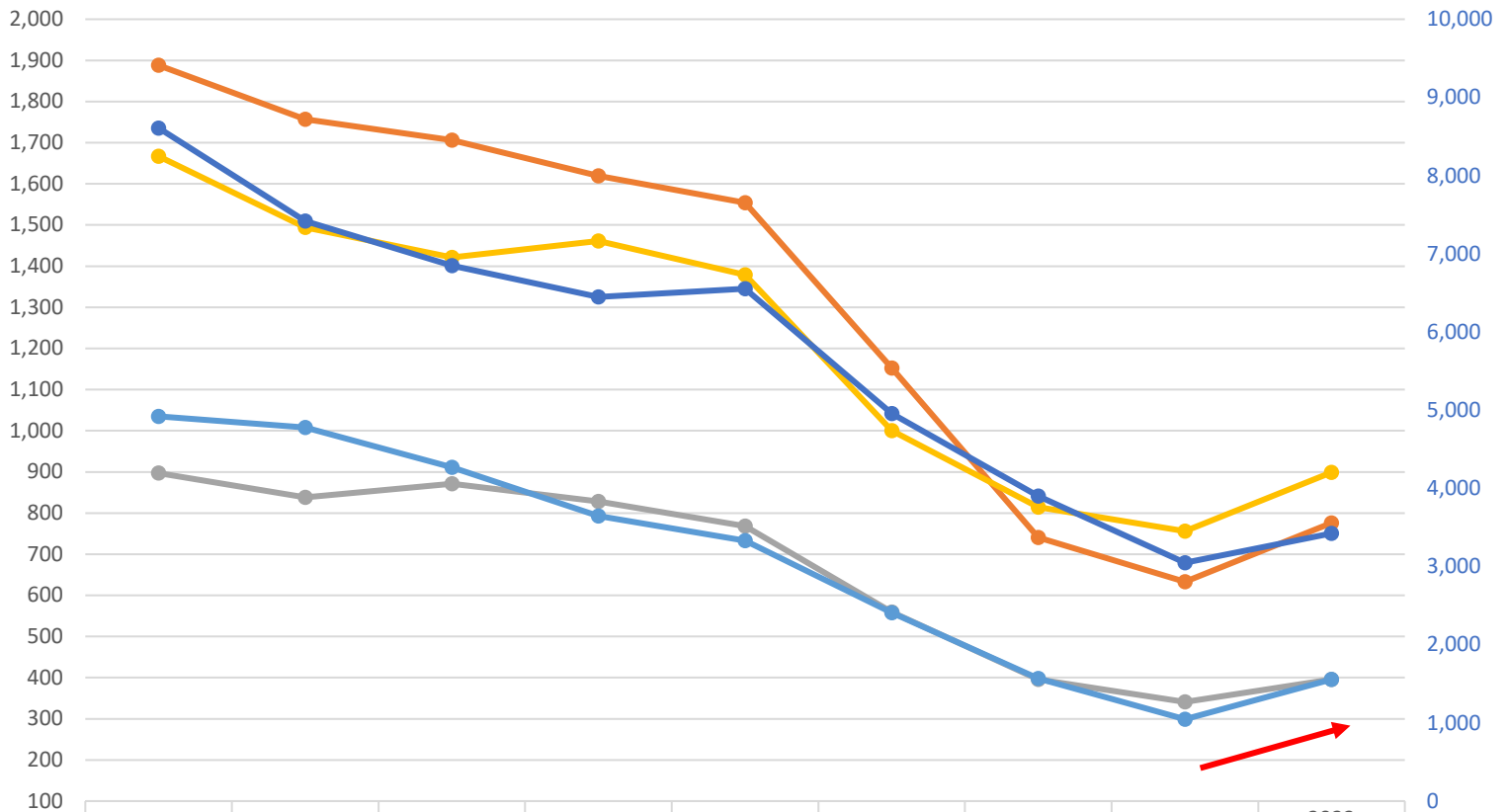


Pending Cases by Chapter and Type  
(as of 10/17/2023)





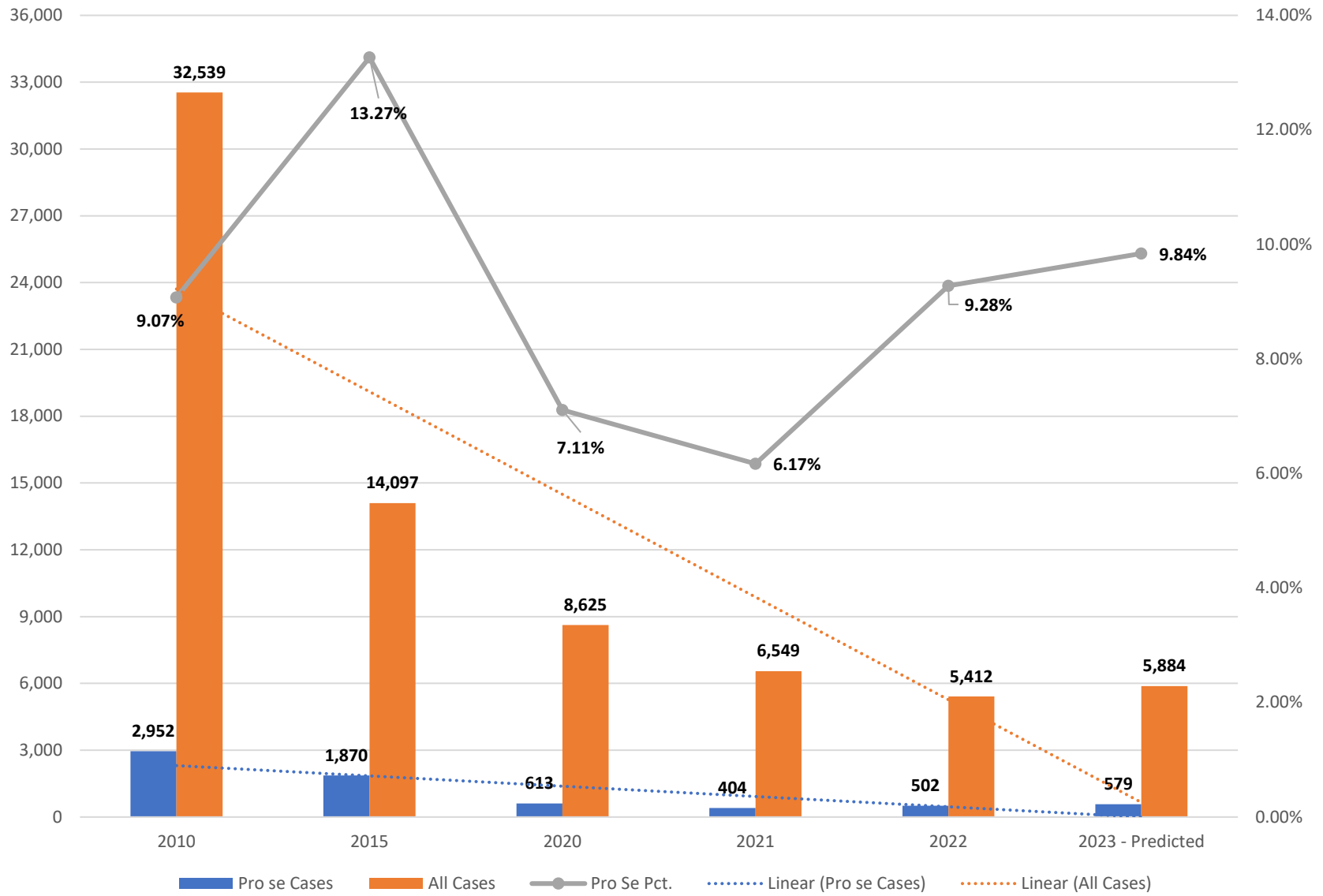
Annual Bankruptcy Filings by Region  
 (2015 - 2023 Predicted with Denver Region on Second Horizontal Axis)



	2015	2016	2017	2018	2019	2020	2021	2022	2023 Predicted
Colorado Springs	1,888	1,757	1,706	1,619	1,554	1,152	741	633	776
Pueblo	897	838	871	828	768	559	396	341	396
Northeast	1,667	1,494	1,421	1,461	1,379	1,000	814	756	899
Western Slope	1,035	1,008	911	793	733	558	398	299	396
Denver	8,609	7,418	6,849	6,449	6,554	4,956	3,902	3,049	3,423

● Colorado Springs   
 ● Pueblo   
 ● Northeast   
 ● Western Slope   
 ● Denver

### Pro se Filings v. All Bankruptcy Filings (2010 - 2023 Predicted)



# Bankruptcy Administration Improvement Act Chapter 7 Trustee Payments

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The [Bankruptcy Administration Improvement Act \(https://www.congress.gov/116/bills/s4996/BILLS-116s4996enr.pdf\)](https://www.congress.gov/116/bills/s4996/BILLS-116s4996enr.pdf) (BAIA) establishes an additional payment for eligible chapter 7 trustees paid annually.

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The legislation (Pub. L. No. 116-325), enacted on Jan. 12, 2021, adds subsection (e) to [11 U.S.C. § 330 \(https://www.law.cornell.edu/uscode/text/11/330\)](https://www.law.cornell.edu/uscode/text/11/330) and establishes a new payment for eligible chapter 7 trustees funded by excess collections in the U.S. Trustee System Fund, if there are funds available.

Eligible chapter 7 trustees may receive an additional payment, up to \$60 for each applicable case, if they rendered services in cases:

- filed under chapter 7 on or after Jan. 12, 2021, to the end of fiscal year (FY) 2026;
- or originally filed under chapters 11, 12, or 13 on or after Jan. 12, 2021, and subsequently converted to chapter 7 on or before the end of FY 2026.

The trustee must certify they have rendered services via the filing of a "Trustee Services Rendered Pursuant to 330(e)" event in an individual bankruptcy court's Case Management Electronic Case Filing (CM/ECF) system.

- [Read the regulations for these payments to learn more about this process \(/file/35130/download\)](#)

Annual payments will be issued after the end of each applicable fiscal year. Amounts available for payment are determined annually based on the available balance in the U.S. Trustee System Fund and the case count of new chapter 7 filings and cases converted to chapter 7 during that fiscal year.

[Sign up to receive notification](#)

[https://public.govdelivery.com/accounts/USFEDCOURTS/subscriber/new?](https://public.govdelivery.com/accounts/USFEDCOURTS/subscriber/new?topic_id=USFEDCOURTS_2332)

[topic\\_id=USFEDCOURTS\\_2332](https://public.govdelivery.com/accounts/USFEDCOURTS/subscriber/new?topic_id=USFEDCOURTS_2332)) annually when payments begin for future fiscal years.

## No Funds Available for FY 2022 Cases

The Department of Justice (DOJ) has announced that there are insufficient funds available for transfer under [11 U.S.C. § 589a\(f\)\(1\) \(https://www.law.cornell.edu/uscode/text/28/589a#f\\_1\)](https://www.law.cornell.edu/uscode/text/28/589a#f_1) to pay chapter 7 trustee compensation under [11 U.S.C. § 330\(e\)](https://www.law.cornell.edu/uscode/text/11/330)

<https://www.law.cornell.edu/uscode/text/11/330>) in applicable FY 2022 cases. In accordance with

[11 U.S.C. § 330\(e\)\(4\)](https://www.law.cornell.edu/uscode/text/11/330) (<https://www.law.cornell.edu/uscode/text/11/330>) and the [regulations \(/file/35130/download\)](#) (pdf), the amount for payment in applicable FY 2022 cases is therefore \$0.

Applicable FY 2022 cases are chapter 7 cases filed on or after Oct. 1, 2021, through Sept. 30, 2022, or chapter 11, 12, or 13 cases filed on or after Jan. 12, 2021, that are subsequently converted to chapter 7, on or after Oct. 1, 2021, through Sept. 30, 2022. Trustees should not contact their local bankruptcy court clerk's office to request payments for any such cases.

## Payments for Applicable FY 2021 Cases

Eligible chapter 7 bankruptcy trustees serving in applicable cases filed or converted in FY 2021 will receive \$60 per case if they have rendered services in [accordance with the regulations \(/file/35130/download\)](#). Applicable cases are chapter 7 cases filed on or after Jan. 12, 2021, through Sept. 30, 2021, or chapter 11, 12, or 13 cases filed on or after Jan. 12, 2021, that are subsequently converted to chapter 7, on or before Sept. 30, 2021.

The Administrative Office of the U.S. Courts issued allotments to bankruptcy courts in June 2022 for payments to eligible trustees for applicable FY 2021 cases. As of Dec. 1, 2022, nearly 98 percent of the \$13 million transferred for FY 2021 cases has been certified for payment to trustees. Please contact your local bankruptcy court clerk's office if you have any questions about the status of payments for applicable FY 2021 cases.

# ChapMobile App

## For U.S. Bankruptcy Courts Latest Version

### Hearing Calendar

View hearings organized by judge. Select your "favorite" judge(s) calendar view. Search by: Debtor case Number

### My Lists

Create "favorites" for attorneys, debtors, and case numbers. "Favorites" are extracted from the Hearing Calendar for easy tracking.

### Locations

View court office locations, contacts, and websites



### 341 Calendar

View all scheduled 341 Meetings by Trustee. Search by Attorney Debtor Case Number

### Attorney Search

Search an Attorney name to view their hearings from the Hearing Calendar.

### Settings

Reset preferences for your favorite court and other settings

Available On:



The ChapMobile App offers a central location for on-demand viewing of bankruptcy hearings and 341 Meetings. Using the App eliminates time-consuming searches on court websites. It offers attorneys, trustees, or other partners of the bankruptcy court, free and efficient tracking for upcoming hearings. App users can save and track their favorite cases, debtors, and view upcoming hearings.

- View each judge's hearing calendar in real-time (for a range of days)
- Search hearings by Case Name or Case Number
- View 341 Meetings by Trustee (for a range of days) and search by Attorney, Case Name, or Case Number
- View court locations and contact information
- Create your own list of attorneys and cases to quickly view upcoming hearings using the My Lists feature.
- Attorney and Debtor search tools
- Navigate to another participating Bankruptcy court's Public Mobile Calendar and much more...

## Improvements:

- Look and feel improvements
- Hearing expand/collapse icons for multiple attorneys
- Simplified searches throughout the App
- Expansion of personalized lists for tracking cases, debtors, and attorney hearings
- Active hearing indicator
- Overall improved speed and performance

**Questions?**

**Contact your Local Bankruptcy Court**

# **2023 FFA Bankruptcy Bench-Bar Roundtable**

## ***Small Business Reorganization Act and Chapter 11 Best Practices: Practice pointers, Procedures and Observations***

**Presenters: Joli Lofstedt, Rachel Sternlieb and Adam Hirsch**

**October 20, 2023**

### **I. Chapter 11 Filing Statistics**

#### a. Chapter 11 Filings

i. As of October 3, 2023, 4,553 total commercial chapter 11 bankruptcies filed across the U.S.

1. 61% increase from the 2,837 chapter 11 commercial cases filed during the same period in 2022

ii. Of those, a total of 1,419 were Subchapter V elections within chapter 11

1. 41% increase from 1,009 Subchapter V cases filed during same period of time in 2022

2. Small business bankruptcies rising at worst pace since pandemic: Q3 of 2023 ended as the third busiest quarter for chapter 11 filings of at least \$10 million of liabilities, following only Q2 and Q3 of 2020.

#### b. Chapter 11 and Subchapter V Filing Trends in the Colorado Bankruptcy Court:

i. 2021: 64 Chapter 11, and 28 Subchapter V cases filed (43.75%)

ii. 2022: 54 Chapter 11, and 36 Subchapter V cases filed (66.67%)

iii. 2023 (as of Aug.): 42 Chapter 11, and 26 Subchapter V cases filed (61.9%)

### **II. Small Business Reorganization Act of 2019**

#### a. Basics and Background – Subchapter V

i. Streamline bankruptcy process for small businesses

ii. Eligibility Threshold

iii. Subchapter V Trustee/No creditors committee

iv. No US Trustee quarterly fees

- v. No Absolute Priority Rule
- b. Subchapter V Plan
  - i. No Absolute Priority Rule
  - ii. Plan Due with 90 days from date of filing
  - iii. No competing plan
  - iv. No disclosure statement
  - v. Consensual vs nonconsensual
  - vi. No requirement that one impaired class vote in favor of plan

### **III. Chapter 11 and Subchapter V Practice Pointers**

- a. Pre-filing practice tips
- b. First day motions
- c. Post-petition practice tips
- d. Subchapter V Trustee
- e. Developing a plan and reorganization strategy; Subchapter V plans

### **IV. Subchapter V Issues of Interest before the Courts**

- a. Eligibility for Subchapter V:
  - i. *Person (includes affiliate debtor)*
  - ii. *Engaged in commercial or business activities at the time of filing*
    - 1. *In re Ikalowych*, 629 B.R. 261, 280 (Bankr. D. Colo. 2021); *In re Offer Space, LLC*, 629 B.R. 299, 305 (Bankr. D. Utah 2021)
    - 2. *In re McCune*, 635 B.R. 409 (Bankr. D. N.M. 2021)
    - 3. *In re RS Air, LLC*, 638 B.R. 403, 406 (B.A.P. 9th Cir. 2022)
  - iii. *Has aggregate noncontingent liquidated secured and unsecured debts as of the date of filing in an amount not more than \$7.5 Million (excluding debts owed to affiliates or insiders)*
    - 1. *In re Macedon Consulting, Inc.*, 652 B.R. 480 (Bankr. E.D. Va 2023)

2. *In re Dobson*, 2023 WL 3520546 (Bankr. W.D. Va. 2023)
- iv. *Not less than 50%* of which arose from the commercial or business activities of the Debtor
  1. *In re: Fama-Chiarizia*, No. 21-42341-ESS, 2023 WL 6051283 (Bankr. E.D.N.Y. Sept. 15, 2023)
- b. Standard for enlarging time to file Subchapter V Plan
  - i. *In re Trinity Legacy Consortium LLC*, 22-10973 (Bankr. D.N.M. Sept. 25, 2023)
- c. Circuit Split: Does 11 U.S.C. § 523 apply to Corporate Subchapter V Debtors?
  - i. *In re Cleary Packaging, LLC*, 36 F.4th 509 (4th Cir. 2022); *Synergetic Oil Tools, Inc. v. Relevant Holdings, LLC (In re Relevant Holdings LLC)*, Case No. 1:21-cv-02213-CNS, 2023 U.S. Dist. LEXIS 53042 (D. Colo. Mar. 28, 2023)
  - ii. *In re Off-Spec Sols., LLC*, 651 B.R. 862 (B.A.P. 9th Cir. 2023); *In re GFS Indus., LLC*, 647 B. R. 337 (Bankr. W.D. Tex. 2022); *In re Satellite Rests., Inc.*, 626 B.R. 871 (Bankr. D. Md. 2021); *In re Hall*, 651 B.R. 62 (Bankr. M.D. Fla. 2023); *In re 2 Monkey Trading, LLC*, 650 B.R. 521 (Bankr. M.D. Fla. 2023)
- d. U.S. Trustee Fee Refund Trend

## **V. Subchapter V Issues in Practice**

- a. Subchapter V Confirmation Issues
  - i. Valuation
  - ii. Feasibility
- b. Merchant Credit Advance Agreements – Loan, purchase and sale, or something else?
- c. ERC Payments



**2023 FFA Bankruptcy Bench-Bar Roundtable**  
***Presenting a case prior to trial / Use of dispositive motions and pretrial statements***

PRESENTED BY:

HON. THOMAS B. MCNAMARA, U.S. BANKRUPTCY COURT FOR THE DISTRICT OF COLORADO  
MATTHEW T. FAGA, MARKUS WILLIAMS YOUNG & HUNSICKER LLC  
AMALIA SAX-BOLDER, BROWNSTEIN HYATT FARBER SCHRECK, LLP

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*[M]otions demand the most creativity of the drafter. Their concerted use (known as “motion practice”) to advance a client’s interest, especially before trial, requires the discipline to master complex factual and procedural scenarios and work through strategic conundrums, the willingness to think outside the box, the patience to await the “aha!” moment, and the flexibility to modify or abandon a strategy that is not working.*

Elizabeth Fajans, Mary Falk and Helene Shapo, Writing for Law Practice (Found. Press 2004)

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**I. Bankruptcy Motions Practice**

- a. Motions should be written with clarity and purpose.
- b. Always consider: “What is the ask for the Court?”
  - i. Preliminary statements or an introduction can be a very powerful tool to set forth what you want the Court to do and why you think the Court should take the requested action.
  - ii. Always prepare an order for the Court. *See* L.B.R. 9013-1(a)(1)(C) (“All motions, applications, or other requests for relief must be accompanied by a proposed order on a separate document.”)
- c. Motions are most often made in writing, although some motions may be made orally, especially at trial, when unexpected events require counsel to seek immediate help from the Court.
- d. Proffers. A proffer is an offer of a witness’s testimony (in written or oral form) by an attorney in lieu of the witness testifying. The witness is present to hear the oral proffer and is available for cross examination and redirect testimony.
  - i. Proffers may be important in certain bankruptcy matters such as relief from stay and motions to dismiss. For example, L.B.R. 2081-3(c) and 4001-1(c) provide for a presumptive proffer process.
  - ii. The Federal Rules of Bankruptcy Procedure contain no express provision for proffers. The closest procedural rule to govern proffers is Fed. R. Civ. P. 43(a), made applicable under Fed. R. Bankr. P. 9017.

- iii. For certain uncontested matters, it might be possible to present evidence by proffer. Examples include motions to approve a sale or to confirm a plan of reorganization.
- iv. Keep in mind the length of the proffer and make sure it is targeted to the needs of the case.
- v. Do not use a proffer as a substitute for an argument.
- e. Always follow the Local Bankruptcy Rules and pay careful attention to notice and service rules under the Local Bankruptcy Rules, Federal Rules of Bankruptcy Procedure and the Bankruptcy Code. *See* L.B.R. 9013-1 and 7007-1.

## II. Adversary Proceedings

- a. Even if it does not result in a complete victory, a successful motion can be very advantageous and shape the path of litigation, *e.g.*,
  - i. Dispose of non-meritorious claims, charges or defenses,
  - ii. Narrow or expand disclosure and discovery,
  - iii. Admit or suppress evidence,
  - iv. Join or sever claims or parties,
  - v. Educate the Court about the issues,
  - vi. Test the Court's reaction to certain issues,
  - vii. Preserve issues for appeal, or
  - viii. Prepare for an advantageous settlement.
- b. Motions to Dismiss
  - i. Can be filed for a variety of grounds based on legal deficiencies, such as:
    - 1. Insufficient service of process,
    - 2. Statute of limitations expiration,
    - 3. Lack of personal jurisdiction,
    - 4. Lack of subject matter jurisdiction,
    - 5. Improper venue, and
    - 6. Failure to state a claim for which relief can be granted.
  - ii. *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997) (“[I]f a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff’s claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss.”).
- c. Motions for Summary Judgment
  - i. Should have clear intent, not be a kitchen sink addressing every issue in the case. A summary judgment motion can be filed with respect to only some causes of action (partial).
  - ii. When setting a discovery plan, make sure to include enough time to adequately consider and file dispositive motions.
  - iii. Extremely important to follow the requirements set forth in L.B.R. 7056-1(a) (motion) and (b) (response in opposition). Failure to follow the local

rules, such as including multiple facts in each numbered paragraph, can result in immediate denial of the motion.

- iv. Consider alternative option of a pre-trial brief, which can be more cost effective and reach the same result, especially if the Court is unlikely to rule on a motion for summary judgment before trial.

### **III. Discovery Motions**

- a. Under L.B.R. 7026-1(d), no written discovery motions are permitted without Court authorization, except that motions for protective orders pursuant to Fed. R. Civ. P. 26(c) may be filed.
- b. Parties should make sure to follow L.B.R. 7026-1(d) process to obtain a discovery dispute hearing. Make sure to meet and confer “in a meaningful way” to try and resolve any issues prior to requesting a hearing.
- c. Discovery dispute reports filed under L.B.R. 7026-1(d)(5) should be clear and concise.

### **IV. Conferrals in Connection with Motions Practice and Rule 26**

- a. L.B.R. 9013-1(c) - when there is a contested matter, the movant or respondent may file a certificate of contested matter after certain deadlines. The certificate of contested matter must include all information required by L.B.F. 9013-1.4. Item 5 on L.B.R. 9013-1.4 states “Movant made a good faith effort to resolve this matter without the necessity of a hearing in the following manner: \_\_\_\_\_ [manner of telephonic or in person conference].”
- b. Failing to confer will not usually result in a serious sanction or a significant delay but may (a) result in unnecessary motions practice; (b) delay resolution of the case to your client’s detriment, and (c) make you look bad in front of your client and the Court. In one example, a Federal District Court stated, “However, the Court emphasizes that conferral requirements are not a mere pro forma requirement but a meaningful step to discourage unnecessary motions practice. The Court strongly advises both parties to confer earlier than the day of the motion in the future, and leave more than 4.5 hours for the parties to discuss. The Court expects that the parties will comply with the letter and spirit of the Federal Rules, Local Rules, and the undersigned’s practice standards for the duration of the litigation. *Carrado v. Daimler AG*, No. 17-CV-3080-WJM-SKC, 2018 WL 4565562, at \*3 (D. Colo. Sept. 24, 2018).
- c. Another opportunity for conferral is Rule 26(f). This rule requires the parties to confer and consider the nature and basis of their claims and to work together to create a proposed discovery plan. The rule states that the court may order the parties or attorneys to attend the conference in person.

### **V. Legal Writing Resources**

- a. *For general and legal writing style:*

- i. William Strunk and E.B. White, *The Elements of Style* (Allyn & Bacon Pub, 4th ed. 2000)
  - ii. Bryan A. Garner, *The Elements of Legal Style* (Oxford Univ. Press 2002)
- b. *For legal writing:*
- i. Ross Guberman, *Point Made: How to Write Like the Nation's Top Advocates* (Oxford Univ. Press 2014)
  - ii. Antonin Scalia and Brian A. Garner, *Making Your Case: the Art of Persuading Judges* (West Pub. 2008)
  - iii. Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*, (Harvard Univ. Press 2009)
  - iv. Elizabeth Fajans, Mary Falk and Helene Shapo, *Writing for Law Practice* (Found. Press 2004)
  - v. Scott Fruehwald, *Exercises for Legal Writers II: Editing for Wordiness*, available at <https://community.pepperdine.edu/law/writing-center/content/editing-exercises.pdf>
- c. *For general popular writing:*
- i. Stephen King, *On Writing: A Memoir of the Craft* (Scribner Pub. 2000)
- d. *To keep in mind when writing/arguing about statutes (like the Bankruptcy Code):*
- i. Antonin Scalia and Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* (West Pub. 2012). *Reading Law* appears to be the most influential treatise on statutory interpretation in modern federal jurisprudence. It has been cited with approval in more than 60 United States Supreme Court cases in the last decade. And, every sitting United States Supreme Court Justice has cited the book (or parts of the book) with approval.

**Effective Presentation of Evidence**  
**FFA Bench-Bar Roundtable**  
**October 20, 2023**  
**By: Keri Riley and Gabrielle Palmer**

**Topics for Discussion**

- I. Forming a Narrative
  - a. Whether a plaintiff or defendant, understanding what the claims are, why they are being brought, and how the client ended up in the litigation is the most important part of case preparation
  - b. To the extent possible, come up with a theme or theory of your case
  - c. Will also help with preparation of the case
    - i. Issue Spotting – what are the focal points of the claims? What hurdles are you going to have in your claims/defenses?
    - ii. Identify Major/Key Witnesses
    - iii. Identify Topics of Discovery
    - iv. Identify key evidence
- II. Preparing your case
  - a. Discovery is Key
    - i. Electronic Discovery Issues
      1. Native Format – what does this mean?
      2. Bates Stamping
      3. Search Terms
    - ii. Electronically Stored Information (ESI)
      1. How are you going to authenticate the information?
      2. How do you produce emails forwarded to attorneys?
      3. PDFs with attachments
    - iii. Depositions
      1. Can be used in place of testimony
      2. Can be used to authenticate evidence
      3. Can also be critical for impeachment or refreshment purposes
  - b. Understand the Issues
    - i. What are the key points of the claims/defenses you need to present evidence on?
    - ii. Has the judge identified possible issues during pre-trial conferences?
    - iii. Do you have the evidence for each element of the claim/defense?
  - c. Stipulated Facts
    - i. What can you agree on ahead of trial?
    - ii. Can you gain any ground in getting stipulations of fact?
    - iii. Can the Court ignore them?
- III. Presentation of Evidence

- a. Make it engaging
  - i. Using your evidence and your witness to form your narrative will make it more engaging and will help to highlight important facts for the finder of fact
  - ii. Demonstratives
    - 1. Must be used to show, not as substantive evidence
    - 2. Must still be relevant
    - 3. Very helpful to simplify complex facts
      - a. Timelines for key events
      - b. Charts to show relationships between parties/events
      - c. Org structures for complex business operations
  - iii. Plan the highs and lows
    - 1. All narrative structures benefit from peaks and valleys- evidence presentation is no different
    - 2. If you bury key points in foundational questions, it can get lost
    - 3. If you are reaching a high point in the questions and then you stop to lay foundation, it can be jarring
- b. Decide How to Present Evidence
  - i. Are you using courtroom technology or not?
  - ii. [Microsoft Word - Courtroom Technology Procedures rev 5-8-19.docx \(uscourts.gov\)](#)
  - iii. What works well?
    - 1. Prepare early, prepare often
    - 2. Test everything in advance!
      - a. This includes flash drives with exhibits
    - 3. Know who is doing what (if you have someone helping you) with the evidence
    - 4. Make it easier on yourself (bookmarks, highlights, page numbers in notes)
  - iv. What makes it harder
    - 1. Multi page documents
    - 2. Poorly organized files
  - v. Know your judge
    - 1. Some judges still want/require a paper copy of exhibits
  - vi. Plan for disasters
    - 1. What if the judge can't open your files?
- c. Preparing Your Witnesses
  - i. Don't let your witness go in cold
  - ii. Discuss basic dos and don'ts early and often
  - iii. Send an outline of your prepared testimony
    - 1. Be careful with coaching
  - iv. Do a run through

1. Run through your direct, and practice having them interact with the evidence
  2. This also includes cross examination
    - a. If you have concerns about your witness, consider having another attorney assist to show a different personality/style on cross examination
  - v. Always do background – why is this witness important and how do they know what to do
  - vi. Don't forget to tell them what to do with objections!
  - d. Making Your Evidence Effective
    - i. If you're introducing it, use it
      1. Decide how you're going to use it. Are you offering it for the truth of the matter asserted or something else?
      2. Even if you don't use it in an examination, use it in opening/closing
    - ii. Focus in on what is important in the evidence
      1. Is it one clause in a contract? Is it one line in an email?
      2. Figure out why the evidence is relevant and highlight that fact
    - iii. Summaries (FRE 1006)
      1. Very effective for voluminous documents
      2. Underlying information must be admissible
      3. All information must be disclosed well in advance
      4. Cannot provide commentary on the evidence
- IV. Evidentiary Issues
- a. Authentication of evidence
  - b. Hearsay issues
    - i. Be prepared with your exception
    - ii. Lay foundation first, not after the objection
  - c. Expert Reports
    - i. These are still hearsay!
    - ii. Consider strategic reasons for letting them in
  - d. Need to object versus should object
  - e. Think of evidentiary issues as you are preparing your testimony, not while you're giving it
    - i. Have case law for the admissibility of important evidence
- V. Start and End Strong
- a. Openings and Closings are more than a formality – use them!
  - b. Visual aides as an effective tool



Neutral

As of: October 3, 2023 6:21 PM Z

## [In re Stockton Golf & Country Club](#)

United States Bankruptcy Court for the Eastern District of California

May 15, 2023, Decided; May 15, 2023, Filed

Case No. 22-22585-B-11, DC No. FWP-16

### Reporter

651 B.R. 39 \*; 2023 Bankr. LEXIS 1305 \*\*; 72 Bankr. Ct. Dec. 142

In re: STOCKTON GOLF AND COUNTRY CLUB, a California Nonprofit Mutual Benefit Corporation, Debtor(s).

property shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property. [11 U.S.C.S. § 506\(a\)\(1\)](#).

### Core Terms

Appraisal, golf club, valuation, deferred maintenance, membership, credible, golf, entirety, projection, capitalization, bankruptcy court, unrealistic, secured claim, conflicts, purposes, spent

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

Bankruptcy Law > ... > Plans > Plan Confirmation > Cramdowns

### Case Summary

#### Overview

HOLDINGS: [1]-In determining the valuation of debtor's golf course under the income capitalization method, the creditor's appraisal report was rejected because its fundamental underlying premise and value conclusion were not anchored in-and in fact contravened-reality, it was internally inconsistent and conflicted with the appraiser's testimony, and it relied on an unrealistic projected course maintenance expense.

[HN2](#) **Secured Claims & Liens, Claim Determinations**

The value of the property to be retained by a debtor in the context of a cram-down plan is the cost the debtor would incur to obtain a like asset for the same proposed use. This valuation standard is commonly referred to as replacement value, though it is consistent with the Ninth Circuit's understanding of the meaning of fair-market value. Replacement value is the price a willing buyer in the debtor's trade, business, or situation would pay to obtain like property from a willing seller.

#### Outcome

Debtor's motion to value collateral granted.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

### LexisNexis® Headnotes

Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Claim Determinations

[HN3](#) **Judges, Discretionary Powers**

Nearly forty years ago, the Ninth Circuit stated that trial courts have particularly broad discretion with respect to questions of valuations. In describing the breadth of this discretion, the Ninth Circuit explained: A trial judge's decisions on qualitative matters of this type are so rarely overturned on appeal that they are, for practical purposes, conclusive.

[HN1](#) **Secured Claims & Liens, Claim Determinations**

[11 U.S.C.S. § 506\(a\)\(1\)](#) states that the value of a secured creditor's interest in the estate's interest in

Bankruptcy Law > ... > Judicial Review > Standards



of Review > Abuse of Discretion

Insurance Law > ... > Coverage > Real Property > Appraisals

Real Property Law > Property Valuations

#### [HN4](#) **Standards of Review, Abuse of Discretion**

The breadth of its discretion gives the bankruptcy court ample authority to reject an appraisal in its entirety. More importantly, the bankruptcy court is not bound to accept valuation opinions or appraisals and may form its own opinion of value based on the evidence presented. A court may accept an appraisal in its entirety, may choose to give weight only to portions of the appraisal, or may reject the appraisal altogether. The court does not necessarily abuse its discretion if it decides to reject an appraisal.

Real Property Law > Property Valuations

#### [HN5](#) **Real Property Law, Property Valuations**

An appraisal may be rejected in its entirety when its value conclusion is based on assumptions fundamental to the conclusion that have no anchors in reality.

**Counsel:** **[\*\*1]** Thomas A. Willoughby, Esq., Felderstein Fitzgerald Willoughby Pascuzzi & Rios, Sacramento, California, for Debtor and Debtor in Possession.

Jamie P. Dreher, Esq., Downey Brand LLP, Sacramento, California, for Bank of Stockton.

**Judges:** CHRISTOPHER D. JAIME, United States Bankruptcy Judge.

**Opinion by:** CHRISTOPHER D. JAIME

## Opinion

### **[\*41] OPINION**

CHRISTOPHER D. JAIME, Bankruptcy Judge:

I.

### **Introduction**

Before the court is a *Debtor in Possession's Motion to Determine the Value of Collateral Securing Claim of Bank of Stockton and the Extent of Bank of Stockton's Secured Claim Pursuant to 11 U.S.C. § 506(A) [sic] and Fed. R. Bankr. P. 3012* filed by debtor and debtor in possession Stockton Golf and County Club, a California Nonprofit Mutual Benefit Corporation ("SGCC"). The motion is opposed by SGCC's primary lender, the Bank of Stockton ("BoS").

SGCC operates the property subject to valuation as a private golf course, country club, and event center in Stockton, California. The property has been operating as a golf course since 1914. It includes an 18-hole course with amenities and improvements, clubhouse, pro shop, maintenance compound, fitness center, pool, cart storage, and practice facilities consisting of putting and chipping greens.<sup>1</sup>

The Golf Club has been described as a gem **[\*\*2]** of the San Joaquin Valley. It is a pillar of the Stockton community. It has survived two world wars, two pandemics, and numerous economic downturns. Faced **[\*42]** with declining membership and significant financial pressure from BoS, on October 11, 2022, SGCC was forced to file for protection under Chapter 11 of the Bankruptcy Code.

BoS is prepared to use all means necessary to satisfy its secured claim with the Golf Club. This apparently includes terminating operation of the Golf Club by acquiring and selling the property without any golf-related commitments or use restrictions, or attempting to compel SGCC to do the same.<sup>2</sup> This was made abundantly clear during a recent evidentiary hearing held before this court to determine the Golf Club's value which, in turn, will determine the extent of BoS's secured claim in SGCC's Chapter 11 case.

This Opinion constitutes the court's findings of fact and conclusions of law.<sup>3</sup> [Fed. R. Civ. P. 52\(a\)](#); [Fed. R.](#)

<sup>1</sup> The real property, its amenities, and all related personal property will be referred to in this Opinion as the "Golf Club."

<sup>2</sup> BoS's apparent hostility towards the continued operation of the Golf Club as a private club appears to be based, in part, on a vehement objection to golf-related use restrictions which SGCC has insisted on as a condition of sale.

<sup>3</sup> The court has reviewed and takes judicial notice of the claims

Bankr. P. 7052, 9014(c). This Opinion also follows rather than sets precedent. However, the court publishes its decision for three reasons: first, to emphasize that a bankruptcy court may reject an appraisal submitted in a valuation proceeding under 11 U.S.C. § 506(a); second, to explain why the appraisal that BoS submitted with its opposition will be **[\*\*3]** rejected in its entirety and not given any evidentiary weight; and third, bankruptcy proceedings of a regional institution of historical significance are a matter of substantial public interest.

## II.

### Background

BoS has a senior priority lien on the Golf Club. According to its proof of claim filed on February 14, 2023, Claim 25-1, BoS asserts it is owed \$8,209,972.15 as of SGCC's Chapter 11 petition date. Although no formal objection to the BoS proof of claim has been filed, SGCC has stated in prior proceedings before the court that it disputes the amount claimed.

SGCC asserts that the Golf Club is worth slightly over \$4,000,000. BoS asserts it is worth nearly \$8,000,000. In addition to reviewing volumes of trial exhibits, on May 3, 2023, the court heard a full day of testimony from several witnesses to resolve this dispute. Specifically, the court heard testimony from three appraisers: (1) Z. Gordon Davidson, President of Z. Gordon Davidson & Associates, Inc. ("Mr. Davidson"); (2) Laurence A. Hirsh, President of Golf Property Analysts, a division of Hirsh Valuation Group, Inc. ("Mr. Hirsh"); and (3) Jason S. Jackson, Senior Managing Director of the Fort Worth, Texas, office of Integra **[\*\*4]** Realty Resources, Inc. ("Mr. Jackson").

Mr. Davidson testified on behalf of SGCC. Mr. Davidson prepared an appraisal which SGCC submitted with its motion ("Davidson Appraisal"). The Davidson Appraisal is dated March 14, 2023. It values the Golf Club under income capitalization and comparable sales approaches with greater emphasis on and weight given to the former. It concludes that as of January 31, 2023, the market value of the as-is fee simple interest in the Golf Club is \$4,150,000 under an income capitalization

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register and the docket, including all documents related to the present motion. See Fed. R. Evid. 201(c)(1). The court's evidentiary rulings stated on the record on May 3-4, 2023, are also incorporated into and made a part of this Opinion.

approach.

**[\*43]** Mr. Jackson testified on behalf of BoS. Mr. Jackson also prepared an appraisal which BoS submitted with its opposition ("Jackson Appraisal"). The Jackson Appraisal is dated January 18, 2023. It values the Golf Club under income capitalization and comparable sales approaches with greater emphasis on and weight given to the former. It concludes that as of December 14, 2022, the market value of the as-is fee simple interest in the Golf Club is \$7,800,000 under an income capitalization approach.

Mr. Hirsh testified on behalf of SGCC. He performed a formal review of the Jackson Appraisal according to USPAP (Uniform Standards of Professional Appraisal Practice) Standards. **[\*\*5]** The Davidson Appraisal was not independently reviewed under the same standards by any other appraiser.

All three individuals have extensive education, training, and professional qualifications, generally, and, particularly, within the golf industry. All three are also qualified as experts and their testimony is admitted as such for purposes of the motion to value.

In addition to the three expert witnesses, Rick Schultz ("Mr. Schultz") testified as a lay witness on behalf of SGCC. Mr. Shultz is a Certified Club Manager with the Club Managers Association of America. He is among 2% of private club managers who hold a PGA Class A certification status. He has substantial knowledge of golf course operations, management, budgeting, and membership based on his employment as the Golf Club's General Manager and similar employment at other golf clubs prior to employment with SGCC.

## III.

### Jurisdiction and Venue

Federal subject matter jurisdiction is founded on 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (B), (L), and (O). The bankruptcy court may enter a final order. 28 U.S.C. § 157(b)(1). Venue is proper under 28 U.S.C. §§ 1408 and 1409.

## IV.

## Analysis

### A. The Section 506(a)(1) Valuation Standard

**HN1**<sup>↑</sup> In relevant part, Bankruptcy Code § 506(a)(1) states that the value of a secured creditor's interest in the estate's **[\*\*6]** interest in property "shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property[.]" 11 U.S.C. § 506(a)(1); Associates Commercial Corp. v. Rash, 520 U.S. 953, 962-63, 117 S. Ct. 1879, 138 L. Ed. 2d 148 (1997). The proposed use of the Golf Club here is its continued operation as a private golf club under a plan of reorganization. Docket 231 at 1:18-22.

**HN2**<sup>↑</sup> The value of the property to be retained by a debtor in the context of a cram-down plan "is the cost the debtor would incur to obtain a like asset for the same 'proposed . . . use.'" Rash, 520 U.S. at 965. This valuation standard is commonly referred to as "replacement value," though it "is consistent with the Ninth Circuit's understanding of the meaning of fair-market value." Id. at 959 n.2. Replacement value "is the price a willing buyer in the debtor's trade, business, or situation would pay to obtain like property from a willing seller." Id. at 960; First Southern National Bank v. Sunnyslope Housing Ltd. Partnership (In re Sunnyslope), 859 F.3d 637, 644 (9th Cir. 2017), cert. denied, 138 S.Ct. 648, 199 L. Ed. 2d 530 (2018).

**[\*44]** The parties agree that the above-referenced standard is the applicable standard to be applied here under § 506(a)(1). Dockets 305 at 5:16-7:24, 326 at 4:24-5:1. The parties also agree the above-referenced standard should be applied to the Golf Club without regard to SGCC's status or organization as a non-profit entity. Dockets 305 at 7:12-18, 326 at 6:17-23. The court agrees with both points. **[\*\*7]**

### B. Specific Valuation Method Under the § 506(a)(1) Standard

The appraisers agree that the "highest and best" use of the Golf Club for valuation purposes is its current use as a private golf course and country club with amenities and that there is no alternative use that could reasonably be expected to provide a higher present value than the current use. Davidson ADT at ¶ 39; Jackson ADT at ¶ 74. The appraisers also agree that for purposes of valuing the Golf Club, the income capitalization approach should be given the most weight because it is the most reliable valuation method for this property. Davidson ADT at ¶ 46; Jackson ADT at ¶ 118.

The parties agree with both above-referenced points. Docket 326 at 4:1-15. The court does as well. The court's analysis and discussion below are therefore limited, and should be read only to refer to valuation of the Golf Club under the income capitalization approach that Messrs. Davidson and Jackson used in their respective appraisals. In other words, when discussing the Davidson and Jackson appraisals and their value conclusions, the court does not rely on the sales comparison approach in either (or both) appraisals.<sup>4</sup>

### C. Valuation Standards Relevant to Appraisals


**HN3**<sup>↑</sup> Nearly forty years ago, the Ninth Circuit **[\*\*8]** stated that "[t]rial courts have particularly broad discretion with respect to questions of valuations." Ebben v. Commissioner, 783 F.2d 906, 909 (9th Cir. 1986). In describing the breadth of this discretion, the Ninth Circuit in Ebben explained: "A trial judge's decisions on qualitative matters of this type are so rarely overturned on appeal that they are, for practical purposes, conclusive." Id. at n.1 (citation and internal quotation omitted).

**HN4**<sup>↑</sup> The breadth of its discretion gives the bankruptcy court ample authority to reject an appraisal in its entirety. Nubia v. Real Times Resolutions, Inc. (In re Nubia), 2021 Bankr. LEXIS 1061, 2021 WL 1561544, \*2 (9th Cir. BAP April 21, 2021) ("More importantly, the bankruptcy court is not bound to accept valuation opinions or appraisals and may form its own opinion of value based on the evidence presented."); see also In re Evans, 492 B.R. 480, 508 (Bankr. S.D. Miss. 2013) ("A court may accept an appraisal in its entirety, may choose to give weight only to portions of the appraisal, or may reject the appraisal altogether."); In re Ahmed, 2011 Bankr. LEXIS 1000, 2011 WL 1004649, \*2 (Bankr. N.D. Cal. March 15, 2011) ("The court does not necessarily **[\*45]** abuse its discretion if it decides to

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<sup>4</sup> Mr. Davidson acknowledged that for some unknown reason there were errors on his comparable sales spreadsheet. He owned up to the errors and, importantly, testified they did not affect his analysis or value conclusion under the income capitalization approach. Mr. Davidson also explained, and Mr. Jackson acknowledged, that the local rather than the national golf market is more relevant for comparables in this case because California golf courses are unique, at the very least, due to favorable weather conditions. Trial Ex. 1 at 96 (TE00096). Support for this latter point is found in the fact that Mr. Jackson changed his testimony from a national to a local focus with regard to a potential buyer of the Golf Club. Docket 343 at 10:23-25. The point here is that the income capitalization approach is the more reliable valuation method.

reject an appraisal.").

**HNS**  An appraisal may be rejected in its entirety when its value conclusion is based on assumptions fundamental to the conclusion that have no anchors in reality. *In re Diamond Beach VP, LP*, 506 B.R. 701, 717 (Bankr. S.D. Tex. 2014), *aff'd*, 551 B.R. 590 (S.D. Tex. 2016). For example, in *Washington Mutual, Inc. v. U.S.*, 856 F.3d 711 (9th Cir. 2017), a case involving asset valuation in the context of a tax refund dispute, the Ninth **[\*\*9]** Circuit affirmed the district court's rejection of the Appellant's expert's income approach valuation analysis and value conclusion in their entirety resulting in the Appellant's inability to meet its burden of establishing asset value. *Id.* at 723. In reaching its decision, the Ninth Circuit noted that the expert's valuation analysis and value conclusion were based on assumptions that contravened the economic realities at the time and conflicted with actual economic projections. *Id.* It also described the expert's assumptions as "overly optimistic" and "unrealistic." *Id.* at 724. In the end, the Ninth Circuit held that the district court was justified in rejecting Appellant's valuation evidence in its entirety because cumulative errors rendered the valuation analysis and value conclusion too flawed to be reliable. *Id.* at 725; see also *Sammons v. C.I.R.*, 838 F.2d 330, 334 (9th Cir. 1988) (affirming rejection of appraisal based on assumptions contrary to actual circumstances established by testimony).

#### D. Burden of Proof in the § 506(a)(1) Valuation Process

The parties agree that, as the moving party, SGCC has the initial burden of producing credible evidence of value, and BoS, as the opposing party, has the burden of defeating SGCC's credible evidence by a preponderance of the evidence. **[\*\*10]** Dockets 305 at 4:10-19, 326 at 4:17-23.

SGCC has satisfied its initial burden with the Davidson Appraisal which values the Golf Club at \$4,150,000. Relatedly, Mr. Davidson's testimony is much more consistent, and therefore much more credible, than Mr. Jackson's testimony. Mr. Davidson's testimony is therefore given substantially more weight.<sup>5</sup>

Rejection of the Jackson Appraisal means that BoS has not satisfied its burden. As explained in detail below, the court rejects the Jackson Appraisal as inherently

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<sup>5</sup> After observing Mr. Davidson testify and carefully listening to his testimony, no consideration is given to BoS's attempt to ethically discredit Mr. Davidson and his appraisal.

unreliable with a value conclusion that is not credible, which means it effectively has no evidentiary weight, because: (i) its fundamental underlying premise and value conclusion are not anchored in-and in fact contravene-reality; (ii) it is internally inconsistent and it conflicts with Mr. Jackson's testimony; and (iii) it relies on an unrealistic projected course maintenance expense.

#### 1. The Underlying Premise of the Jackson Appraisal and its Value Conclusion are not Based in Reality.

The Jackson Appraisal states that there are "[s]ignificant items of deferred maintenance[.]" Trial Ex. 2 at 47 (TE00221). It quantifies the deferred maintenance at \$1,000,000. *Id.* at 48 (TE 00222). Of that **[\*\*11]** amount, \$600,000 is course maintenance. *Id.*

The Jackson Appraisal is based on an underlying premise that the existing deferred maintenance has been completed and its completion *increases* and *stabilizes* membership at 430 members. More precisely, the Jackson Appraisal states as follows:

**[\*46]** As previously mentioned, the decline in membership could be attributed to the items of deferred maintenance, which has led to a decrease in the quality of the club. Once deferred maintenance is cured, we anticipate that membership will be able to suitably rebound to 430 members which is reasonable based on membership numbers dating back to 2018.

Membership at the club has ranged from 404 to 462 members over the last five years. We have utilized a stabilized figure of 430 members which is in the middle of the range. Due to the amount of the previously discussed deferred maintenance, it is likely membership levels have decreased as a direct result. We have appraised as though the identified deferred maintenance has been effectively cured (we deducted from the reconciled value); as such, it is reasonable that some of the lost membership will be recaptured do [sic] to improved course/clubhouse conditions.

Trial **[\*\*12]** Ex. 2 at 62 (TE00236).

The problem with the underlying premise of the Jackson Appraisal is that it contravenes economic reality. In other words, it ignores the actual economic consequence to a golf club that flow directly from completed deferred maintenance.

Messrs. Hirsh and Schultz testified that deferred

maintenance is ultimately paid by member assessments. Hirsh Audio at 1:16:14; Schultz ADT at ¶ 19. Mr. Schultz further testified that assessing members actually decreases membership because it causes members to leave. Mr. Schultz's exact testimony on this point is as follows:

For example, at Oakdale, when I was hired, it did not have enough funds to make payroll, and we had to immediately make an emergency assessment on members, and there was extensive deferred maintenance, which is how clubs handle a shortfall in funds, which then leads directly to lost membership, and further contractions in revenues.

Schultz ADT at ¶ 19.<sup>6</sup>

The salient point here is that the completion of deferred maintenance, as the Jackson Appraisal presumes for purposes of its value conclusion, actually *decreases*-and thence *destabilizes*-golf club membership. In that regard, the fundamental premise on which the Jackson Appraisal bases **[\*\*13]** its valuation analysis to arrive at a value conclusion, *i.e.*, that completed deferred maintenance increases and stabilizes membership, contravenes economic realities making the underlying premise of the Jackson Appraisal overly optimistic and unrealistic. That renders the entirety of the Jackson Appraisal inherently unreliable and its value conclusion not credible. And in addition to the other flaws discussed below, that warrants rejection of the Jackson Appraisal in its entirety.

## 2. The Jackson Appraisal is Internally Inconsistent and it Conflicts with Mr. Jackson's Testimony.

The Jackson Appraisal states that "[t]he value conclusion(s) in this report consider the impact of COVID-19 on the subject property." Trial Ex. 2 at 8 (TE00173). This statement conflicts with Mr. Jackson's testimony about the appraisal and, at best, it appears to be inaccurate.

Mr. Schultz testified that in fiscal years 2021 and 2022 SGCC received nonrecurring Covid-relief revenue. In 2021 SGCC received a \$430,000 Paycheck Protection **[\*47]** Program ("PPP") loan that was ultimately forgiven and in 2021 and 2022 it received \$750,000 in Employee Retention Credits ("ERC"). Schultz Audio at 21:53-

<sup>6</sup>Mr. Schultz's testimony on this point is unchallenged. And given his substantial first-hand experience with golf courses, generally, and his significant experience and knowledge of golf course operations and memberships as a General Manager, in particular, Mr. Schultz's testimony on this particular point is exceptionally credible and the court gives it substantial weight.

22:27, 23:08-23:45, 38:00-38:30. **[\*\*14]** When Mr. Jackson was asked about this nonrecurring Covid-relief revenue and how it factored into his appraisal, he testified that he made no adjustments for the 2021 PPE loan or the 2021-2022 ERC because he assumed that all of SGCC's revenue came from golf operations, he was unfamiliar with the term "ERC credits," and he generally appeared to be unaware that SGCC received the PPP loan and the ERC. Jackson Audio at 46:05-47:48.<sup>7</sup>

In light of Mr. Jackson's testimony, the court is hard-pressed to comprehend how the statement in the Jackson Appraisal that its value conclusion considers the impact of Covid-19 is accurate-or even true. This conflict weighs negatively on Mr. Jackson's credibility. And for this additional reason, it also strips the Jackson Appraisal of all weight and renders it subject to rejection as inherently **[\*\*15]** unreliable with a value conclusion that is not credible.

## 3. The Jackson Appraisal Projects an Unrealistic Course Maintenance Expense.

The Jackson appraisal projects an unrealistic course maintenance expense of \$800,000. Jackson ADT at ¶ 90; Trial Ex. 2 at 64, 72 (TE00238, TE00242). As an

<sup>7</sup>BoS suggested that the 2021 fiscal year revenue figure of \$3,949,731 cited in the Jackson Appraisal accounts for the nonrecurring 2021 PPP loan and the 2021-2022 ERC. Schultz Audio at 22:27-24:58. That appears to not be the case. The Jackson Appraisal does "note that the \$3,949,731 revenue amount for 2021 is considered an outlier due to the impact of COVID-19." Trial Ex. 2 at 59 (TE00233). However, Mr. Jackson attributed the lower revenue figure in fiscal year 2021 to a reduction in food sales and not the PPE or the ERC. He testified as follows:

After analyzing past performance, I determined that the subject property's 2021 revenue of \$3,949,731, the lowest in recent history, should be considered an outlier. The Club's fiscal year 2021 ranged from October 1, 2020 through September 30, 2021, and appears to have been significantly impacted by a reduction in food and beverage revenue, likely related to COVID-19.

Jackson ADT at ¶ 84.

Moreover, that Mr. Jackson was generally unaware SGCC received nonrecurring Covid-relief revenue in 2021 and 2022, and therefore made no adjustments for it, may also stem from the fact that he may have reviewed-and thence relied on-financial statements different from financial statements in the possession of SGCC's CPA. Schultz Audio at 24:40-24:50. That adds an additional layer of reliability and credibility concern.

initial matter, the court notes that the \$800,000 projected course maintenance expense is \$123,818 less than the \$923,818 average the Jackson Appraisal calculates SGCC spent over the past five years. Trial Ex. 2 at 64 (TE00238). It is also less than the amount SGCC spent on course maintenance over twenty years ago. Jackson Audio at 29:24-29:50. In 2002 SGCC spent \$805,302 on course maintenance and in 2003 it spent \$808,741 on course maintenance. Trial Ex. 3 at TE00473, TE00486; Jackson Audio at 28:07-29:04.

Perhaps one explanation for the \$800,000 projection is that the need for course maintenance is reduced after deferred maintenance is completed. Jackson ADT ¶ 90. But that explanation is not credible because it conflicts with Mr. Jackson's testimony on this point.

Mr. Jackson testified that he is familiar with the concept of inflation. Jackson Audio at 25:05-25:55, 29:50-30:00, 33:03-33:18. Indeed, he **[\*\*16]** testified that inflation is a "standard assumption." Jackson ADT at ¶ 20. And against this backdrop, Mr. Jackson also testified, quite emphatically, that "costs always go up." Jackson Audio at **[\*48]** 25:34-36. So when viewed in this context, the projection in the Jackson Appraisal that SGCC will spend less on course maintenance than its five-year average and less than what it spent twenty years ago is not realistic. And it is not credible.<sup>8</sup>

Typically, a single expense item such as this might warrant an adjustment. Here, however, the unrealistic course maintenance projection adds to the cumulative effect and, in the words of *Washington Mutual*, it reinforces that the Jackson Appraisal is too flawed to be reliable or credible.

V.

### Conclusion

At the end of the day, the court's analysis boils down to the burden of proof. SGCC has satisfied its burden. Rejection of the Jackson Appraisal in its entirety means that BoS has not satisfied its burden. That leaves the Davidson Appraisal as the only reliable, credible,

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<sup>8</sup> The \$800,000 projection also defies logic. If SGCC spent an average of \$923,818 on course maintenance over the past five years and \$600,000 in deferred course maintenance remained and is presumed to have been completed, the court can infer that even the \$923,818 was insufficient to maintain the course.

probative, and persuasive evidence of the Golf Club's value.

The court accepts the Davidson Appraisal and adopts its value conclusion under the income capitalization approach as the value of the Golf Club. Accordingly, **[\*\*17]** the court values the Golf Club at \$4,150,000 under [11 U.S.C. § 506\(a\)\(1\)](#).

SGCC's motion to value is GRANTED. A separate order will issue.

**Date:** May 15, 2023

/s/ Christopher D. Jaime

Christopher D. Jaime, Judge

United States Bankruptcy Court

**ORDER ON DEBTOR IN POSSESSION'S MOTION TO DETERMINE THE VALUE OF COLLATERAL SECURING CLAIM OF BANK OF STOCKTON AND THE EXTENT OF BANK OF STOCKTON'S SECURED CLAIM PURSUANT TO [11 U.S.C. § 506\(a\)](#) AND [FED R. BANKR. P. 3012](#)**

An Opinion having been issued,

IT IS ORDERED that the motion of debtor in possession to determine the value of collateral securing the claim of Bank of Stockton and the extent of Bank of Stockton's secured claim is GRANTED.

IT IS FURTHER ORDERED that, pursuant to [11 U.S.C. § 506\(a\)](#), the value of the Golf Club is \$4,150,000.

**Date:** May 15, 2023

/s/ Christopher D. Jaime

Christopher D. Jaime, Judge

United States Bankruptcy Court

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