

Small (or Large) Businesses and the Chapter 7
Trustee

“Who’s running this show?!?”

*Idaho State Bar
Business & Corp Law Section CLE*

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Important Cases

- *In re Albright*
- *In re A-Z Electronics*
- *Fursman v. Ulrich (In re First Protection, Inc.)*
- *Movitz v. Fiesta Investments, LLC (In re Ehmman)*
- *Aldape Telford Glazier/Young*
- *In re Hoyle*
- *In re Wallace*

In re Albright,
291 B.R. 538 (Bankr. D. Co. 2003)

- Debtor files a Ch. 13 case – later converted to Ch. 7.
- At time of filing (and thereafter), Debtor was sole member and manager of an LLC (Western Blue Sky, LLC). LLC owned certain real property.
- Ch. 7 Trustee = Debtor is sole member/manager, so the estate now = sole member/manager.
- Debtor = estate is like a creditor, entitled to a charging order against the Debtor's distributions from LLC



In re Albright,
291 B.R. 538 (Bankr. D. Co. 2003)

- Court:
 - CO statute = LLC interest is personal property – therefore property of BK estate (11 U.S.C. § 541)
 - As personal property, Trustee gets all the same rights and control that the Debtor had.
 - Charging Order = protects other members of the LLC from having a creditor of one member become the new member. Here – no other LLC members.

In re A-Z Electronics, LLC
350 B.R. 886 (Bankr. D. Id. 2006)

- Ron Ryan = Ch. 7 Debtor. Ryan = Sole member of A-Z Electronics.
- In 2005, while Ch. 7 case still is ongoing (and while LLC membership interest is still property of Ch. 7 estate), Ryan causes A-Z Electronics to file Ch. 11 petition.
- Ct (Judge Myers) = Trustee is sole member of A-Z Electronics, now controls all governance of that entity. Trustee = sole person with authority to direct BK filing for A-Z Electronics. Dismisses Ch. 11 case.

Fursman v. Ulrich (In re First Prot. Inc.)
440 B.R. 821 (9th Cir. BAP 2010)

- Debtors file Ch. 11 petition, later converted to 7. At time of filing, Debtors were 100% members of Redux Development, LLC. During Ch. 11 portion of case, Debtors personally transferred 50% of their membership interest to Joint Debtor's mother.



- After conversion to Ch. 7, Trustee seeks to avoid the transfer of the LLC interest under 11 U.S.C. § 549.

Fursman v. Ulrich (In re First Prot. Inc.)
440 B.R. 821 (9th Cir. BAP 2010)

- Court (Judge Pappas on panel):
 - Looks to AZ statutes – finds that LLC interest = personal property. See 11 U.S.C. §541.
 - Debtors = under LLC OA, Trustee = “Assignee”, not a full member.
 - Court: 11 U.S.C. §541(c)(1)(A) overrides the OA restrictions on Assignee status.
 - “Trustee was not a mere assignee, but stepped into Debtors’ shoes, succeeding to all of their rights, including the right to control Redux.”

Movitz v. Fiesta Invs., LLC (In re Ehmann)
319 B.R. 200 (Bankr. D. Az. 2005)



- Debtor files BK. At time of filing, Debtor = member of LLC (NOT sole member). Debtor ≠ manager – just a member with economic, voting and information rights.
- Ch. 7 Trustee pursues adversary proceeding against LLC, seeking declaration that he is a member of the Company, and a determination that assets are being wasted, misapplied or diverted, and an order for dissolution and liquidation of LLC.
- Company files Mtn to Dismiss – arguing that Trustee has no rights other than distribution
- Issue = is the membership interest governed by §541 or §365?

Movitz v. Fiesta Invs., LLC (In re Ehmann)
319 B.R. 200 (Bankr. D. Az. 2005)

•Court:

- Here - no duties on the part of the Debtor/member. Therefore §365 doesn't apply - it's a §541 case.
- §541(c) = restrictions in OA are not applicable against the BK estate.
- Because Trustee could prove facts supporting his claims, Mtn to Dismiss denied.
- (Opinion later withdrawn based on parties settlement and request to withdraw. Court: "History cannot be rewritten.")



Aldape Telford Glazier/Young

- Idaho cases confirming that assets of non-debtor LLC are separate from assets of Debtor.

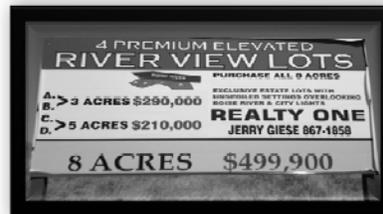
In re Hoyle (Case No. 10-01484-TLM)

- Debtor filed Ch. 11. Later converted to Ch. 7. At time of filing (and afterward), Debtor has multitude of real property (owned individually), as well as several LLC interests. Debtor = sole member and manager of LLCs.
- One LLC (Brundage Inn, LLC) owns and operates the Brundage Inn, located in McCall, Idaho.



In re Hoyle (Case No. 10-01484-TLM)

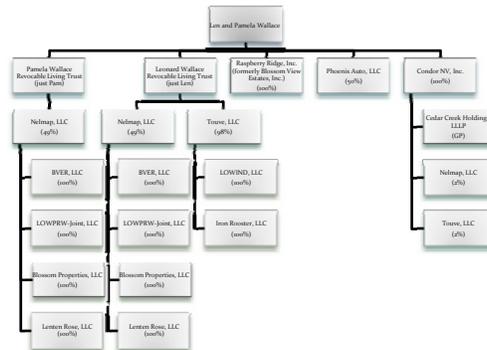
- Another LLC (Hoyle Investment, LLC) owns bare ground on the Boise river near Barber Park.



- Trustee seeks and obtains order from court confirming her authority to operate and wind up the LLCs.

In re Wallace (Case No. 11-21077-TLM)

- Debtors file Ch. 11 – later converted to Ch. 7. At time of filing, the Debtors had a multitude of entities:



In re Wallace (Case No. 11-21077-TLM)

- Trustee pursues adversary proceeding against various entities, seeking various alternative things (declaratory relief, fraudulent transfers, post-petition transfers).
- No Answer to adversary proceeding
- Court (Judge Myers) grants default judgment on declaratory relief (re: authority to revoke revocable trusts) and unauthorized post-petition transfers (to trusts)

Miscellaneous Issues

- §541 vs. §365 – no real Idaho decision on that issue yet
- Approval of sales of entity assets
- Single-member vs. Multi-member entities
- Small companies vs. large companies
- Assets vs. Liabilities and Idaho law

Questions?

- “Judge a man by his questions, rather than his answers.” - Voltaire
- “We hear only those questions for which we are in a position to find answers.” - Friedrich Nietzsche

Unofficial Transcript of February 21, 2013 Oral Ruling on various Motions

Good afternoon, this is Judge Myers. Thank you for getting on the line. This is in the matter of Richard Hoyle, Case 10-1484. On May 17 of 2010, Richard Hoyle, the Debtor, filed a voluntary chapter 11 case, and at the time he filed that case, he was the sole owner, sole member, and the managing member of two Idaho LLCs, Brundage Inn, LLC and Villa Verona, LLC. After a lengthy period of time in which the Debtor was and acted as a debtor in possession and attempted to reorganize, the U.S. Trustee brought and prosecuted a motion to dismiss and convert, or convert the case. On January 17 of this year, I converted the case to a chapter 7 and Janine Reynard was appointed as the Chapter 7 Trustee. I'll simply refer to her as Trustee throughout these comments.

On February 19, several motions and matters came on for hearing. Applications for Compensation of Accountants Coles and Sanders were allowed and approved subject to withdrawal of certain claim fees for services performed prior to the effective date of their employment. Application for Compensation of Account William Corbett was continued for further hearing on March 18. I granted Trustee's Motion for Turnover of all DIP accounts and the funds therein but ordered that any issues as to the characterization of those funds and any adjudication of the Debtor's alleged interest therein, whether through exemption or otherwise, would be heard at a later date. So that motion was therefore granted over objection and the Trustee's providing me with an appropriate order.

That leaves before me two motions. First is the Trustee's "Motion for an Order Authorizing the Trustee to Operate the Debtor's Businesses and/or Properties" as Docket 382 and for simplicity I'll call that the Section 721 Motion. The second is the Trustee's "Motion to Allow Trustee to Take Any and All Necessary Actions to Operate and Control Limited Liability Companies." That's Docket 390. I'll call that the LLC Motion.

The parties stipulated to certain facts in Docket 399 and testimony was elicited from the Debtor, the Trustee, and one of Trustee's attorneys. After oral argument, I deemed the matters under advisement and my oral comments today constitute findings and conclusions in the resolution of the same. Given the nature of the arguments that I heard and those that I read, I deem it appropriate to make some preliminary observations and comments.

The first area that needs to be mentioned involves a firm and intractable limitation on this court's power and jurisdiction. The parties were aware that this court's jurisdiction flows from 28 U.S.C. § 1334's grant of jurisdiction to the District Court and by that court's referral. Federal courts are courts of limited jurisdiction. Article III, Section 2 of the Constitution confines federal courts to decide cases and controversies. One aspect of the case or controversy requirement is that a litigant must show an invasion of a legally protected interest that is in the words of the Supreme Court "concrete and particularized and actual or imminent." That's from *Arizonans for Official English v. Arizona*, 520 U.S. 43 at 64. [*Arizonans for Official English v. Arizona, et al.*, 520 U.S. 43 (1997).]

As the Supreme Court stated in *O’Shea v. Littleton*, 414 U.S. 488 at 494 [*O’Shea v. Littleton*, 414 U.S. 488 (1974)], abstract injury is not enough. The threat of injury must both be real and immediate and neither conjectural nor hypothetical. As it also stated in *Barr v. Matteo*, 355 U.S. 171 at 172 [*Barr v. Matteo*, 355 U.S. 171 (1957)], an advisory opinion cannot be extracted from a federal court by agreement of the parties and no matter how much they might favor the settlement of an important question, broad considerations of the appropriate exercise of judicial power prevents such determinations unless actually compelled by the litigation before the court.

Judge Wedoff in the Bankruptcy Court of the Northern District of Illinois in the *United Airline Corporation* case, 336 BR 370 at 372-73 [*In re: UAL Corp*, 336 B.R. 370 (Bankr. N.D. Ill. 2006)], stated very simply as follows: “The judicial power accorded by Article III of the Constitution applies only to cases and controversies and so does not allow federal courts to decide abstract, hypothetical or contingent questions. To be judiciable, controversy must be one that calls for an adjudication of present right upon established fact.” The case where the real and substantial controversy must be distinguished from opinions advising on what the law would be upon a hypothetical state of facts. There is wisdom in adhering to these teachings even if they were not already strictly commanded by the fact that from the Supreme Court on down they’re directed to the court’s jurisdiction. The simple fact is the court cannot predict the future.

Both the Trustee and Debtor are tempted to divine what would, could or might happen in the future and argue about what the court’s ruling should be under applicable bankruptcy or state law depending upon the occurrence of one or more of these potential events. Whether or not there is legitimate concern that Trustee or Debtor would take an act or acts that might trigger such controversies, the present fact is that the events have yet to occur and may not occur at all.

A simple example will illustrate. Much of the examination of witnesses in the hearing this week was concerned with whether and how the Trustee might seek to effectuate a short sale of property of the estate. At the moment, Trustee is still trying to determine what real estate is property of the estate. There are alleged omissions in the schedules provided by the Debtor including some that were actually addressed in testimony at the hearing. And as noted by the court, the Debtor has failed to provide the required final reports and accounts the Bankruptcy and Local Rule require to be filed after the conversion of a chapter 11 to a chapter 7. So it should come as no surprise to anyone that the Trustee has yet to propose any short sale of any property. The gist of the assertion can be characterized this way: the Trustee might propose a short sale, and if she does, it will be improper for this reason or that reason. This illustrates the hypothetical nature of the alleged controversy I’m being asked to decide. There is no jurisprudential basis for the court to be blessing or prohibiting or conditioning or circumscribing before the fact potential actions of the Trustee. They are, in a word, potential. Until they are real and actual, there is no controversy and there will be no advisory opinion.

This is true on the short sale debate that I heard, and for clarity, the same principle extends to every other aspect of the arguments on the two pending motions or the parties engaged in speculation on what the other might do and whether the conjectured actions would or would not be objectionable for one reason or another.

Having identified this precondition, this undergirding principle, I turn to the 721 Motion and I do so in regard to the Debtor's personally-held real estate. The Debtor, at the filing of the case in 2010, owned personally numbers of parcels of real property. The record in this case includes several inconsistent assertions by the Debtor as to his precise holdings. The conversion decision entered by the court actually discusses some of the problems that existed in the quality, clarity, and transparency of disclosure. In any event, Debtor at one point provided an attachment to Docket 278, an Amended Disclosure Statement, which is the form of an Amended Schedule A. A copy is attached to Trustee's Section 721 Motion, evidently in the sense that she had to start somewhere in the absence of other rule required disclosures. That particular schedule shows that the Debtor claims a fee simple interest in a residence in Eagle, Idaho, in 15 separate parcels in McCall, Idaho, in a condo property in Boise, Idaho, in a parcel in Donnelly, Idaho, and in a property in Ontario, Oregon, which the testimony reflects is an apartment building or complex.

Some basics can now be noted at this point. All these parcels of real property are property of the estate. *Section 541(a)(1)*. All of the rents, proceeds, and profits of these properties are property of the estate. *Section 541(a)(6)*. Upon the conversion of the case and the appointment of Trustee, Debtor was absolutely required to surrender to Trustee all property of the Estate and any recorded information including books, documents, records, and papers related to the property of the estate. *Section 521(a)(4)*. Like the amounts in the DIP accounts, on February 19 I ordered turned over immediately to the Trustee possession and control of the real property described on this schedule and the rents and profits and proceeds thereof and all documents and records related thereto must be surrendered to Trustee. The same principles apply as to any and all other real property that was previously owned personally by the Debtor but for whatever reason is omitted from the sworn schedules. Debtor has an affirmative duty to be fully and completely candid in completing his disclosures and his schedules. And even before the schedules are corrected to accord with fact, Debtor also has the affirmative duty under Section 521 to provide all property of the estate and all records to the Trustee. The failure to comply with any aspects of these requirements can lead to serious consequences including, but not limited to, possible loss of discharge. Under the structure of the code, the chapter 7 debtor has no right to possession or control of property of the estate or the rents and incomes generated off such property. Indeed, as *Collier*, among others, points out, unlike chapter 11, which expressly allows debtors to continue operating businesses, in chapter 7 the bankruptcy court may only authorize a chapter 7 trustee to operate the debtor's businesses, and not the Debtor.

The Debtor has to deal with the fact that because of the conversion, he lacks any ability to control the property of the estate, administer the property of the estate or operate the business of the estate. He has merely the right to earn future post-conversion income from personal services or employment and the right to exempt property he is ultimately determined to be entitled to. All of the legal and equitable interest of the Debtor and property as of the commencement of the case under 541(a)(1) and certain community under 541(a)(2) and rents and profits and proceeds of property under 541(a)(6) is property of the estate and that is the property that's liquidated, reduced to cash, and distributed to creditors by the chapter 7 Trustee. That there are real property rents in this case that constitute property of the estate under 541(a)(6) is unmistakable.

Indeed, the Debtor's chapter 11 proposals were premised in large part on the generation of rents from the then-personally held properties. All rents are to be turned over to Trustee.

The Debtor at no time to my recollection ever prepared and filed a proper, complete, and cognizant Schedule G that listed all executory contracts and unexpired leases. There was an initial Schedule G filed in June 2010 disclosing 12 leases. It would now appear unlikely to be accurate as of the conversion of the case in January 2013. There were some other schedules, rent rolls if you will, discussed during the conversion process and the attempted confirmation process. There is ambiguity, but this is one reason that the rules and the local rules require final reports and accounts to be made by debtors in possession upon conversion of the chapter 11. The absence of accurate and complete disclosure of all unexpired leases must be immediately remedied by the Debtor along with the schedule of any omitted properties. The Trustee absolutely requires such information in order that she can comply with Section 365 requirements in treating those leases.

I conclude that the Trustee's 721 Motion is well taken as to this property of the Estate. The Trustee is entitled to conduct the property rental business of Debtor as to these parcels and properties that I've summarized. The function of Section 721 is to allow a Trustee to maximize the value of the estate and increase creditor recoveries. *Collier* discusses this at paragraph 721.01 and .02. Courts have granted such authority as well to protect innocent third parties or the public and that might be deemed to include here third party tenants and others. And courts have also granted such authority to preserve the going concerned value of the business or of property or to otherwise maximize the value of the property for ultimate liquidation.

For instance, in *Quarter Moon Livestock*, in 1990 [*In re Quarter Moon Livestock Co., Inc.*, 90 IBCR 246 (Bankr. D. Id. 1990)], this court allowed a chapter 7 trustee to operate a cattle ranching business until a fall roundup in order to maximize the value for the sale of the herd. Trustees have discretion in determining how to administer property of the estate including the real property. As *Collier* points out, while Section 721 grants the bankruptcy court the power to authorize the trustee to operate the chapter 7 debtor's business, Section 721 does not address or govern the powers and duties of the trustee that is granted that operating authority. Rather, the powers of a chapter 7 operating trustee are expressly governed by other sections of the Code and the Federal Rules of Bankruptcy Procedure. This is at paragraph 721.02 of the treatise.

All this is to say that operation of a business is extraordinary and it's temporal. The trustee's goal is not to, in the long term, operate business but it's to liquidate assets as Section 704 commands. Trustees may, of course, sell property, abandon property, whatever's in the best interest of the estate, and in doing so, must comport the conduct with the other applicable provisions of the Code and the Rules.

The Trustee's given the authority under 721 to operate this business in order that she can ultimately accommodate and perform her other duties under 704. Trustee's job in this case is not necessarily an easy one. She must attend to the rights of tenants, the other parties to the unexpired leases with the leases, and code limitations on how unexpired leases must be addressed. She must evaluate the interest of secured creditors on these properties that are encumbered, potentially including any asserted collateral rights of the creditors to rents. She

must reserve and safeguard the property of the estate pending its disposition, and as noted she is hobbled out of the gate by Debtor's inadequate compliance with Section 521 and incomplete scheduling and the lack of the required post-conversion reports and accounting.

In order to evaluate the situation and determine how her discretion should be exercised, the Trustee needs documents and records and the Debtor's cooperation. But she also has to be able to operate the rental of the real properties pending her analysis and evaluation and that's why she is given Section 721 authority she requests in order to be able to do that job.

The 721 Motion will therefore be granted as to that real property rental business. I will do so for a period of six months. This period of time should be ample for the Trustee to determine the situation and evaluate how she wishes to administer the various properties. However, I will also order that that period of time is subject to a timely request for extension of authority on motion and a hearing on notice, should cause exist.

In reaching these conclusions on the motion, I note that the Debtor's arguments and contentions that focused on whether the Trustee personally ever ran a property management business or operated as apartment landlord, etc. are rejected. The question is not who is best suited to operate the business. Section 721 provides authority only for the Trustee to operate the business, and in fact in that regard, the Debtor's qualifications, or what he might charge for the service, are matters that are entirely immaterial and irrelevant. The Debtor has no authority to retain assets or to operate businesses in a chapter 7. The focus of the 721 analysis rather is whether allowing the Trustee to continuing operate the business would potentially maximize the return to creditors as opposed to simply discontinuing the business and immediately liquidating. It's not a requirement of Section 721 in that regard that the Trustee establish personal experience with a particular business or prove a level of skill in that business. The Code presumes that the Trustee will use business judgment and business skills to effectuate the running of the business for the limited period of time pending her decisions on how to ultimately administer the assets.

Here, the record establishes that it is in the best interest of creditors in the estate for her to continue operating the real property rental business and that's why the motion is granted. In doing so, it should be clear but I will emphasize that I am not, need not, will not in a ruling prescribe precisely how the Trustee will conduct that business. That would be inherently speculative and advisory in nature and there are no issues regarding the conduct of the business that are sufficiently concrete as to be judicable today.

I'll turn next to the LLC Motion. The LLC Motion is Trustee's request to the court "to clarify and/or allow her to take any and all necessary actions to operate and control LLCs owned by Debtor including actions to dissolve the companies." That's at Docket 390 at page 1. In attacking that rather sweeping request, I'll first address certain arguments made that the Debtor made that the outcome here on the question is controlled by the court's prior decision in several cases. I'll then speak to the authorities on single member LLCs where the single member files bankruptcy and I'll complete my comments on the Motion at that point.

The Debtor argues repeatedly that aspects of the present dispute are controlled by this court's prior decisions. There are certainly prior decisions of this court in bankruptcy cases that

discuss or are related to LLCs or corporations, but they are distinguishable and do not directly address the precise issue presented in the instant case. In *Adalpe Telford Glaser, Inc.*, 410 BR 60 [*In re Adalpe Telford Glazier, Inc.*, 410 B.R. 60, 09.3 IBCR 97 (Bankr. D. Id. 2009)], the court was concerned with a chapter 7 debtor corporation, ATG, which was the sole and managing member of two Idaho LLCs. Both of the LLCs were putatively dissolved before ATG's bankruptcy filing but they were never wound up. ATG had obligations as the sole member of the two LLCs to the creditors of the two LLCs to ensure the wind up process was completed. It failed to do so. Instead of keeping the assets of the LLCs and ATG, the corporation, distinct and separate, ATG and its officers allowed the assets to be co-mingled. In fact, ATG's bankruptcy filing claimed, as its own assets, assets that actually belonged to the LLCs and thus ultimately, in winding up, would belong to the LLC's creditors. At the bottom of ATG, the decision recognizes that setting up LLCs separates those entities and their assets, debts, and affairs from those of its member. If there is relevance of ATG to the present case, it's simply that non-controversial proposition.

And the starting point of ATG also remains relevant. In *ATG*, the court found that ATG's member interest in the LLCs was personal property owned by ATG and thus property of the estate under 541(a)(1). Secondly, because the nature and extent of that interest is determined under state law rather than federal law, per *Butner v. United States* [*Butner v. United States*, 440 U.S. 48 (1979)], the court looks to state law to determine the interest. That's the extent, in this court's view, of the relevance of *ATG*.

In *In re: Young*, 409 BR 508 [*In re Young*, 409 B.R. 508, 09.3 IBCR 93 (Bankr. D. Id. 2009)], this court addressed a case which involved individual chapter 11 debtors who acted as debtors in possession. The Youngs were the sole shareholders of an Idaho corporation, EquipRent, Inc. Before their bankruptcy, they filed articles of dissolution for that corporation. The very same day, they filed a certificate of assumed business name for a dba of EquipRent. From and after December 30, the Youngs had possession and control of the assets of the corporation. After they filed the bankruptcy petition, they scheduled the corporation's assets as their own personal assets and they proposed then a chapter 11 plan with differing treatment of the so-called corporation creditors and personal creditors. The court found that cause existed under 1112 of the Code to dismiss or convert given the Youngs' conflating of the separate assets of their personal estate and the assets that were the corporation which they had possession of solely as shareholders of the dissolved Idaho corporation. Their holding of the corporate assets under those circumstances and under Idaho law was solely limited to the purpose of effectuating the wind up of the affairs of the dissolved corporation.

Finally, I turn to *Village Square Annex, LLC* (Bankruptcy Case No. 11-02909-TLM). In 2010, William and Anita Corbett filed a voluntary chapter 7 petition. They scheduled in their case a 100% membership interest in Village Square Annex, LLC. Several months later, Village Square Annex, LLC filed a petition for chapter 11 relief. The Corbetts were the signatories on that filing. At that point, the Corbetts' chapter 7 trustee had not abandoned or otherwise administered the member interest in Village Square that was owned by the Corbetts when they filed their personal chapter 7. The US Trustee sought to dismiss the Village Square chapter 11 because the Corbetts lacked the authority to file the petition for the LLC. In late January 2012, Corbetts' trustee filed a notice of potential sale of that estate's membership interest in the LLC.

The US Trustee's motion to dismiss was heard in late February prior to the scheduled sale. In an oral ruling, this court granted the US Trustee's motion and dismissed the chapter 11 case.

Under the circumstances of that case, the sole issue was whether the Corbetts sustained their burden of showing that they personally had the authority to cause the LLC to file a chapter 11. They failed to meet that burden. Either the Corbetts were disassociated and had only an economic interest in the LLC and thus could not manage or control the LLC and authorize the chapter 11, or their rights to manage and control belonged to the chapter 7 trustee and he had sole authority to file the chapter 11. Either way, the US Trustee's motion was well taken. Under either of these two views, the debtor loses, and the debtors did not credibly present a third view which would have sustained their burden to show there was proper authorization for the filing. The oral decision is not precedential on the points that are now before me.

While the foregoing cases add at best some helpful background, they don't fully or directly address the type of dispute that I have under the LLC motion now. There are other case authorities that do. In *A-Z Electronics*, 350 BR 886 [*In re A-Z Electronics, LLC*, 350 B.R. 886 (Bankr. D. Id. 2006)], this court's decision in 2006, the situation presented was as follows.

Ron Ryan and his wife were chapter 7 debtors. Ron Ryan was the declared sole member of A-Z Electronics, LLC. In late 2005 while the Ryans' trustee was still administering the case, Ryan caused a voluntary chapter 11 to be filed for A-Z, signing as its managing member. Ryan trustee had not, as of that date, administered the member interest that was property of the Ryans' estate. In determine what LLC member interest or interests became property of the Ryans' chapter 7 estate, this court relied on *In re: Albright*, 291 BR 538 [*In re Albright*, 291 B.R. 538 (Bankr. D. Co. 2003)], a bankruptcy decision from the District of Colorado in 2003. *Albright* pointedly addressed the differences between multi-member and single member LLCs. In doing so, *Albright* found that certain concerns about transfer, involuntary changes in management, separation of ownership or economic interest from operational authority, and so on, were not implicated. That court held that where "there are no other members in the LLC, the debtor's bankruptcy filing effectively assigned her entire membership interest in the LLC to the bankruptcy estate and the trustee obtained all her rights, including the right to control the management of the LLC." This distinction was important and it was applied by this court to the single member LLC in *A-Z Electronics* at page [890] of that decision. This court stated that because trustee became the sole member of the LLC on the debtor's bankruptcy filing, the trustee now controls directly or indirectly all governance of that entity including decisions regarding liquidation of the entity's assets. This is at [891].

Thus, in *A-Z Electronics*, the court found that the member interest of Ryan and the LLC belonged to the Ryans' bankruptcy estate and were exercisable solely by the chapter 7 trustee therein, and that the A-Z chapter 11 filing by Ryan was unauthorized and therefore had to be dismissed.

Albright was addressed further by the Bankruptcy Appellate Panel in *Fursman v. Ulrich*, the case of *First Protection, Inc.*, 440 BR 821, in 2010 [*Fursman v. Ulrich (In re First Protection, Inc.)*, 440 B.R. 821 (9th Cir. BAP 2010)]. In that case, the Fursmans were the sole owners of First Protection, a corporation, and of Redux Development, LLC. The Fursmans filed

a chapter 11 case and on the same date a corporate case under chapter 11 for First Protection. Those cases were jointly administered by court order. In the Fursmans' individual case, they listed their 100% membership interest in Redux and characterized the Redux operating agreement as an executory contract. Six months after filing, the Fursmans transferred half of their membership interest in Redux to Mrs. Fursman's mother. Six months after that the joint chapter 11 was converted to chapter 7, and the chapter 7 trustee attacked the transfer of the 50% membership interest in Redux under Section 549 as an improper and unauthorized postpetition transfer. The bankruptcy court agreed with the trustee. The BAP addressed Fursmans' contentions that while their economic interest, that is to say the member share of profits and losses and the right to receive distribution of assets, were personal property and property of the estate, but they claimed their non-economic rights, such as the rights to manage and control Redux, did not become property of the estate. The Fursmans contended that the trustee's rights in regard to the non-economic rights of management and control were simply limited to those with an assignee or a transfer under state law, not unlike those of a creditor with a charging order. In resolving the issue, the BAP noted that the arguments made by these debtors were similar to those raised in and rejected by the court in *Albright*. It noted that *Albright* held the filing of the bankruptcy there "effectively assigned her entire membership interest in the LLC to the bankruptcy estate, and the trustee obtained all her rights including the right to control the management of the LLC." In the footnote, the BAP recognized that *Albright* distinguished the situation of ownership of a single member LLC from that of membership in a multi-member LLC, and it noted that its case, *First Protection*, like that in *Albright*, did not involve multi-member LLCs. The Panel then held "we agree with the outcome in *Albright* but we reached the same conclusion by way of another path."

This present case of Mr. Hoyle's, like *Albright* and *First Protection*, does not involve a multi-member LLC. This case, like those two, addresses the single member LLC situation. I've already followed *Albright* and *A-Z Electronics*, and I will also follow *First Protection* in its recognition that *Albright*'s outcome was correct and also in the BAP's independent conclusions. In that latter regard, the BAP stated and held as follows: "we conclude that all of debtor's contractual rights and interest in Redux became property of their estate under 541(a)(1) by operation of law when they filed their petition. Section 541(c)(1)(a) overrides both contract and state law restrictions on the transfers or assignment of debtor's interest in Redux in order to sweep all of their interest into the estate." [440 B.R. at 830] This is at 830 of the reported decision. It further stated there that the restrictions the Fursmans pointed to in the operating agreement and under Arizona statutory law "did not prevent the vesting of their contractual rights in their bankruptcy estate." And, "as a result, the trustee was not a mere assignee, but stepped into debtors' shoes, succeeding to all of their rights, including the right to control Redux." [*Id.*]

This court finds consistent with *First Protection* and the outcome in *Albright* and *A-Z Electronics* that all of the Debtor's interest in Brundage Inn, LLC and Villa Verona, LLC, including both economic rights and management rights are property of the estate and under the control of the trustee. The parties appreciate this is a complicated and constantly developing area of law. There is more that could be said. Indeed, there is more that I could say about the BAP's decision in *First Protection*. But I don't need to explain it with everything the Panel considered or held. Its conclusions that I've already stated are clear enough. I would note that in rejecting

the Fursmans' reliance on executory contract analysis, the Panel stated as follows, which may be helpful. "Debtors ignore the fact that they are the sole members and 100% owners of Redux and thus there are essentially no other parties to the operating agreement. Therefore, application of an executory contract analysis in this context does not make sense. Debtors could decide to have Redux withhold profits and distributions and otherwise control the underlying assets, thereby hamstringing the chapter 7 trustee into a perpetual stalemate at the expense of their creditors. Executory contract law does not work to produce such an absurd result." [*Id. at 831*] This is at 831 of the decision. Similar principles apply to other like or analogous arguments.

So to repeat, the motion is well taken in that Hoyle's 100% membership interest in the two single member LLCs, Brundage Inn, LLC and Villa Verona, LLC, is property of the estate and the Trustee is entitled to both the economic interest and the right to control and management of those entities. That motion will be granted. In granting the motion, I note that the question of the right of the trustee to the membership interests and the panoply of rights because of the sole member filing is something that was directly presented under the motion, though perhaps articulated differently. In effect, the motion could be seen as something akin to an adversary proceeding to determine the interest in property of the estate under Rule 7001(2), or perhaps a declaratory judgment related to the same under Rule 7001(9). Either way, the parties here expressly agreed that no adversary proceeding was required and consensually presented the issue through the hearing on the motion earlier this week. But I mention this characterization because my ruling today relates to the characterization of the nature of the interest and the trustee's rights to that interest, both economic and management and control.

Today, I do not need to and will not go beyond this finding, conclusion, and determination. I'm aware that the Trustee's motion seeks not just a declaration of the extent of the property of the estate as to the LLC member interest. The Trustee asks the court to also bless in advance acts that have yet to occur, and in some cases that the Trustee has asked me to bless are blatantly contradictory or inconsistent, such as in the concept of allowing and approving and authorizing operation of business, while at the same time simultaneously authorizing and blessing and approving the idea of dissolution. In so doing, the Trustee has moved its motion from the judiciable to the realm of advisory opinions. These problems arise, I think, because of the Trustee's attempt to deal with all of the questions in one fell swoop rather than addressing them incrementally as the situation and the facts develop. But for the reasons I stated at the outset of the decision today, I will not try to predict the future in all its varied and possible nuances and prospectively rule on disputes that are not adequately formed in ways that create cases and controversies. In effect, this could be seen as a failure to meet the burden to establish that I could go further than simply declaring the interest in the member interest in the LLC and somehow approve further and other actions or to justify Section 721 business operations for those entities.

I've tried to state this several ways because I know that this is a developing area that is a concern to parties and that it's formed under the pleadings and the briefing. So to be clear again, I unambiguously hold and conclude that the Trustee's right to the membership interest in the LLCs includes both economic rights and the rights to control and manage those LLCs as the Panel in *First Protection* found, but that doesn't require me to go further and delineate precisely what can or cannot flow from that conclusion. So I grant the LLC Motion in part. I have granted

the 721 Motion in part. I will undertake preparation of my own orders on both of these matters rather than asking the parties to attempt the difficult task of drafting that language for me. The decision is effective as of today. Hopefully, the orders will also be issued yet this afternoon. That concludes the entry of the opinion and decision on these various matters. Thanks for your patience and your assistance in getting this on the record today. We're adjourned.

UNITED STATES BANKRUPTCY COURT

DISTRICT OF IDAHO

IN RE)	
)	Case No. 10-01484-TLM
RICHARD W. HOYLE,)	
)	Chapter 7
Debtor.)	
_____)	

SUMMARY ORDER

On March 8, 2013, Richard Hoyle (“Debtor”) filed “Debtor’s Motion for Clarification and Direction to Trustee.” Doc. No. 447 (“Motion”). The Motion relates to findings of fact and conclusions of law orally entered on February 21, 2013, *see* minute entry Doc. No. 414 (the “Oral Ruling”), and an Order entered thereon, Doc. No. 415 (“Order”). Debtor’s Motion was heard on March 18.

1. The Oral Ruling and Order¹

Two matters were previously heard. One was the Trustee’s “Motion for an Order Authorizing the Trustee to Operate the Debtor’s Businesses and/or Properties,” Doc. No. 382 (what this Court called the “§ 721 Motion”). The other was Trustee’s “Motion to Allow Trustee to Take Any and All Necessary Actions to Operate and Control Limited Liability Companies,” Doc. No. 390 (the “LLC Motion”). Both motions were opposed by Debtor, who had been a debtor in

¹ The facts, circumstances and details of this case, including those surrounding the Oral Ruling and Order, are well known to the parties and will not be repeated at length here.

possession for 2 years and 8 months when his unconfirmed chapter 11 was converted to chapter 7 over his opposition. The Court's Oral Ruling on the motions was lengthy. The Order stated:

Pursuant to the Court's findings of fact and conclusions of law orally entered on February 21, 2013,

IT IS HEREBY ORDERED that:

1. The § 721 motion is GRANTED to the extent it requests authority to operate Debtor's personally-held, real property rental business, and DENIED without prejudice to the extent it requests authority to operate the business of Debtor's wholly-owned limited liability companies.
2. The LLC Motion is GRANTED to the extent it requests confirmation that the extent of the bankruptcy estate's interest in Brundage Inn, LLC and Villa Verona, LLC includes all of Debtor's economic rights and management rights. The balance of the LLC Motion, requesting approval of specific acts by the Trustee regarding those limited liability companies, is DENIED without prejudice.

Doc. No. 415.

2. Authority

Debtor's Motion seeking to clarify the Oral Ruling and Order lacks citation to authority. Applicable Bankruptcy Rules and Local Rules make no reference to a motion "for clarification." However, the Court's research indicates that such motions do occasionally arise, and often are characterized as motions for "reconsideration" or "modification" in conjunction with "clarification." Thus courts may consider such motions under Bankruptcy Rule 9023 incorporating Fed.

R. Civ. P. 59(a)(2) and/or (e). *See, e.g., Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009); *Hammer v. Damme (In re Van Damme)*, 2011 WL 3298955 at *9 (9th Cir. BAP Feb. 1, 2011); *Wallace v. Hayes (In re Wallace)*, 2013 WL 782721 at *2 (Bankr. D. Idaho Feb. 27, 2013); *In re WorldCom, Inc.*, 2007 WL 4179316 at *1 (Bankr. S.D.N.Y. Nov. 27, 2007) (addressing a motion for clarification or modification). The elements of a Rule 59(a) or (e) motion are laid out in the case law, along with the standards by which they are weighed and determined within the trial court’s “considerable discretion.” *McDowell v. Calderon*, 197 F.3d 1253, 1254 n.1 (9th Cir. 1999).

3. Nature of the request

Debtor’s Motion asks the Court “for an order specifically instructing the Trustee” in several regards.² Under Rule 59, the Court can consider and, if appropriate, alter or amend its rulings for certain reasons.³ But the Court has no obligation to “instruct” (or advise, coach, critique or warn) parties how to act in light of a ruling. A request for instruction is thus outside the realm of Rule 59 relief.

That said, Debtor’s Motion makes specific requests as to what this Court

² The areas raised all have to do with how Trustee is undertaking management, control and/or operation of two single-member LLCs owned by Debtor. Other aspects of the Oral Ruling and Order are not (or at least are not clearly) implicated.

³ However case law indicates Rule 59 relief shall be sparingly used and not granted “absent highly unusual circumstances.” *In re Wallace*, 2013 WL 782721 at *2.

should tell Trustee. Debtor's rationale is laid out in his Motion and oral argument at hearing. Trustee's rejoinder, *see* Doc. No. 459, argues Debtor is misguided in advancing the Motion, but she then falls prey to temptation and asks the Court to elaborate on the Oral Ruling.⁴

4. Resolution

The Court first disposes of Debtor's argument that the Order "trumps" the Court's orally entered findings of fact and conclusions of law. Contextually, this makes little sense.⁵

Findings and conclusions are required to be specifically stated because Fed. R. Civ. P. 52(a)(1) is incorporated by Rule 7052 and made applicable in contested matters by Rule 9014(c). The Order is also required because of how the "separate order" requirement of Rule 9021 is construed in the Ninth Circuit.⁶ But the presence of the required separate order or judgment does not diminish or devalue the Court's findings and conclusions. Moreover, the Order is directly based upon the findings and the conclusions and the reasoning of the Court in reaching those findings and conclusions. To say that one "trumps" the other is to deny the

⁴ Trustee's response states that while the Order was sufficiently clear, she "does not object to the court entering a written decision sufficiently detailing the Trustee's authority and right[s]." Doc. No. 459.

⁵ The Court finds the authorities provided by Debtor inapposite and unhelpful.

⁶ *See, In re Schimmels*, 85 F.3d 416, 420-21 (9th Cir. 1996) (discussing the requirement of a separate order or judgment; also noting that the function of Rule 9021 is identical to Fed. R. Civ. P. 58); *see also Bond v. CIT Group (In re Bond)*, 2006 WL 6810941 at *3 (9th Cir. BAP Apr. 26, 2006); *Garland v. Maloney (In re Garland)*, 295 B.R. 347, 350-51 (9th Cir. BAP 2003).

inherent linkage between the two.

In responding to such an argument, the Court is not going to pick one over the other. It cannot disavow one or the other. If it were to find them inconsistent, it would rectify that problem. But, the Court does not find them inconsistent (even if the litigants herein, for their own purposes, might).

The presence of the Motion reflects that the parties read the Order, or the Oral Ruling, differently. They each have their agendas. They each would like to see their agenda advanced, if possible, through interpretation and construction of the Court's Oral Ruling and Order. Debtor argues, in this vein, that Trustee "fails to [accurately] distinguish" the relief she obtained under the motions, and is "overstepping" or "ignoring" the Order, and "needs to be stopped" (while, of course, Debtor "on the other hand is reading the order literally").

This is not the first, nor likely the last, case where opposing parties interpret judicial rulings differently. But differences of opinion do not compel the Court to advise the parties where it sees the errors in either or both of their views.

To resolve the Motion, it is helpful to recall what the Court actually said.⁷ In the Oral Ruling, and following an explanation of the judicial prohibition on issuing "advisory opinions," the Court turned to the § 721 Motion and found it well taken as to the property rental business Debtor conducted personally, and granted Trustee authority under § 721 to run that business for 6 months, subject to

⁷ Utilizing its notes, the Court paraphrases certain of its comments from the Oral Ruling.

a timely request for extension. But the Court stated that it need not, and would not, enter rulings prescribing how Trustee was to conduct that business, because that would inherently be speculative and advisory in nature, and there were no issues about how the Trustee would conduct that business that were sufficiently concrete as to be then justiciable.

Turning to the LLC Motion, and after distinguishing several decisions Debtor felt relevant to the matter, the Court adopted and based its ruling on the BAP decision in *Fursman v. Ulrich (In re First Protection Inc.)*, 440 B.R. 821 (9th Cir. BAP 2010).⁸ This Court quoted *First Protection*, which stated “We conclude that all of Debtor’s contractual rights and interest in [the LLC] became property of their estate under § 541(a)(1) by operation of law when they filed their petition. Section 541(c)(1)(A) overrides both contract and state law restrictions on the transfers or assignment of Debtors’ interest in [the LLC] in order to sweep all their interests into the estate.” *Id.* at 830 (emphasis added). “As a result, the trustee was not a mere assignee, but stepped into Debtors’ shoes, succeeding to all of their rights, including the right to control [the LLC].” *Id.* (emphasis added).

Accordingly, this Court found “that all of the Debtor’s interests in Brundage

⁸ *First Protection* validated the distinctions drawn between single-member LLCs and multi-member LLCs seen in *In re Albright*, 291 B.R. 538 (Bankr. D. Colo. 2003). This Court noted that *Albright* had found the bankruptcy filing of a debtor that controlled a single-member LLC “effectively assigned [the debtor’s] *entire* membership interest in the LLC to the bankruptcy estate, and the Trustee obtained *all* her rights, including the right to control the management of the LLC.” (emphasis added). The Court further noted that *First Protection* was consistent with this Court’s decision addressing single-member LLCs in *In re A-Z Electronics, LLC*, 350 B.R. 886 (Bankr. D. Idaho 2006).

Inn, LLC and Villa Verona, LLC – including both economic and management rights – are property of the estate and under the control of the Trustee. . . . [Debtor’s] 100% membership interest in the two single-member LLCs . . . is property of the estate. Trustee is entitled to both the economic interest and the right to control and management of those entities.”

The Court observed that the question of Trustee’s entitlement “to the membership interests and the panoply of rights because of the sole member filing was [an issue] directly presented” and, thus, could be properly ruled upon.

However, it further noted:

Today I do not need to and will not go beyond this finding, conclusion and determination. I’m aware that the Trustee’s motion seeks not just a declaration of the extent of the property of the estate as to the LLC member interest. The Trustee asks the Court to also bless, in advance, acts that have yet to occur. And, in some cases, the acts that the Trustee has asked me to bless are blatantly contradictory or inconsistent, such as in the concept of allowing and approving and authorizing operation of business while at the same time, simultaneously, authorizing and blessing and approving the idea of dissolution. In so doing, the Trustee has moved its motion from the justiciable to the realm of advisory opinions. These problems arise, I think, because of the Trustee’s attempt to deal with all the questions in one fell swoop, rather than addressing them incrementally. But, for the reasons already stated, I will not try to predict the future, in all its varied and possible nuances, and prospectively rule on disputes that are not yet formed in ways that create cases and controversies.

In effect, this could be seen as a failure [of Trustee] to meet the burden to establish that I should go further than simply declaring the member interest in the LLC and to somehow approve further and other actions or to justify § 721 business operations for those entities. . . . So to be clear again, I unambiguously hold and conclude that the Trustee’s rights to the membership interests in the two LLCs includes both the

economic rights and the right to control and manage the LLCs, as the Panel in *First Protection* found. But that does not require the Court to attempt to go further and delineate precisely what can or cannot flow from that conclusion. So I grant the LLC Motion in part; I have granted the § 721 motion in part.

The Order was consistent with these findings, conclusions and ruling.

Chapter 7 trustees are liquidators. Their duties are prescribed in § 704. As the Oral Ruling noted, on occasion trustees will seek authority to operate a debtor's business, as § 721 permits, for limited periods and in order to preserve or enhance the value to be obtained for creditors through liquidation.

After Trustee's acquisition of Debtor's economic and management rights in the LLCs through the Order, she has not renewed her § 721 requests in whole or in part as to those entities' activities and, evidently, has decided not to take a "belt and suspenders" approach. That is her prerogative and, like all litigants, she assumes the consequences of her decisions.

But Trustee's decisions and actions do not create any error in this Court's Oral Ruling and Order that requires alteration or amendment. Nor do Trustee's decisions and actions render the Court's Oral Ruling and Order ambiguous such that they require clarification.

The Court will decline Debtor's request in the Motion to "instruct" the Trustee. It will also decline the Trustee's invitation in Doc. No. 459 to opine further. Either would require the Court to wade further into the treacherous waters of advisory rulings. And, for additional clarity, this Summary Order is not

intended as either a validation or an indictment of Trustee's decisions and actions.

Finding that no grounds or bases exist that require the Court to alter or amend its findings, conclusions or Order under applicable Rules, the Motion is HEREBY DENIED.⁹

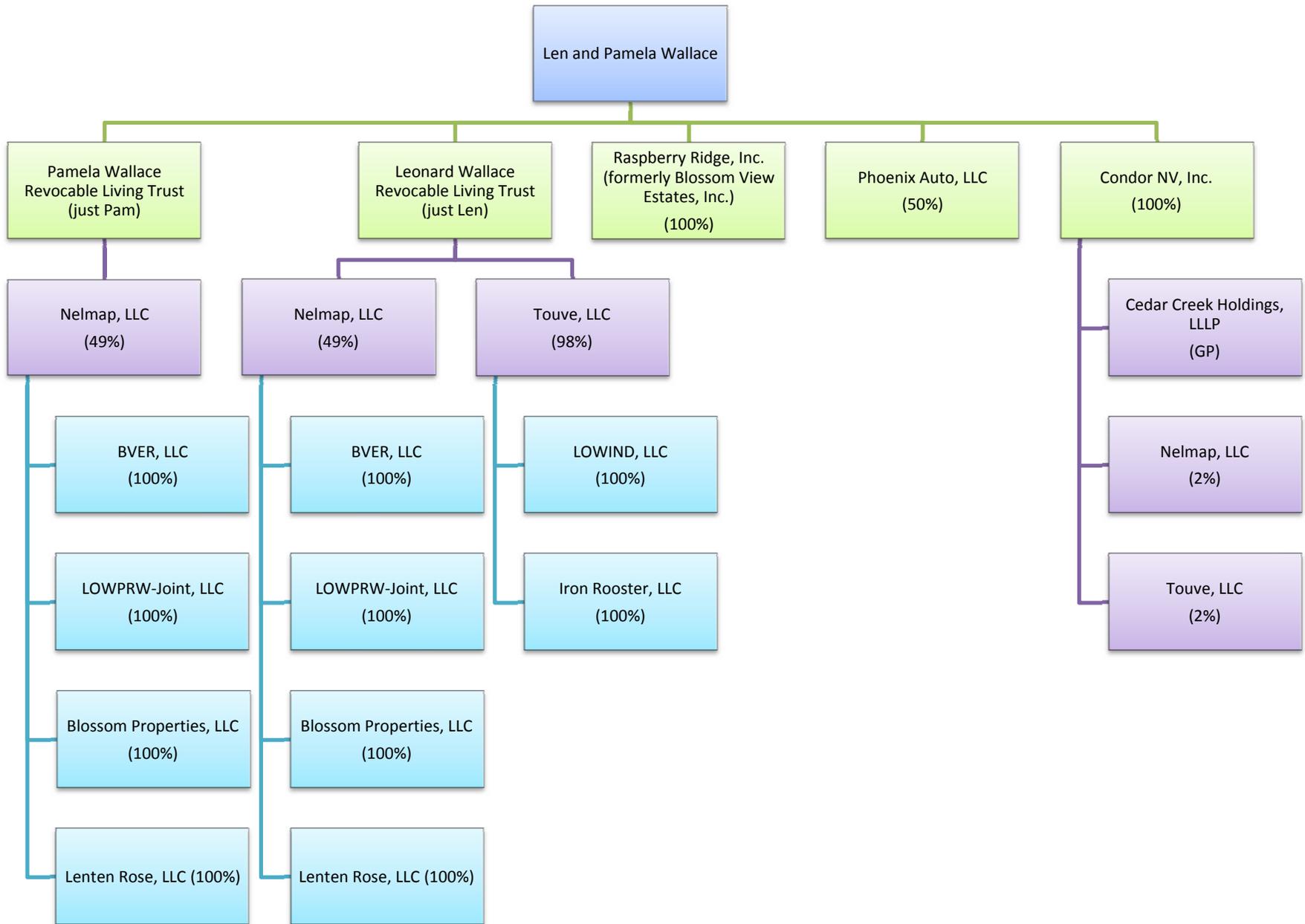
DATED: April 4, 2013



A handwritten signature in black ink that reads "Terry L. Myers".

TERRY L. MYERS
CHIEF U. S. BANKRUPTCY JUDGE

⁹ As the Ninth Circuit noted, Rule 9021 is the analogue of Fed. R. Civ. P. 58. *See Schimmels*, 85 F.3d at 420. Under Civil Rule 58(a), the separate document requirement does not apply to orders disposing of motions to amend or make additional findings under Civil Rule 52, or to alter or amend a judgment under Civil Rule 59. This Summary Order therefore suffices.



DESCRIPTION OF ENTITIES PURPOSE/ASSETS:

NELMAP, LLC: Sole assets = membership in other LLCs (BVER, LOWPRW-Joint, Blossom Properties and Lenten Rose)

BVER, LLC: Formerly owned a ranch in Montana, which was sold in various parcels. Sole asset = promissory note in the amount of approximately \$120K

LOWPRW-Joint, LLC: Allegedly owned/managed properties at 561 Kinetic Dr. and 6059 A & B King Dr., Ventura CA. Property transfers were declared fraudulent as to the Hayes creditors.

Blossom Properties, LLC: Owns appx 700 acres of land near Post Falls.

Lenten Rose, LLC: No current assets (house was foreclosed in 2011)

Touve, LLC: Sole assets = membership in other LLCs (LOWIND and Iron Rooster)

LOWIND, LLC: Owns and manages commercial/retail buildings at 5555 Pioneer and 500 W. Dalton in Coeur d'Alene. Also holds 135 acres near Post Falls.

Iron Rooster, LLC: Owns and manages apartment buildings in Cheney, WA.

Blossom View Estates, Inc./Raspberry Ridge, Inc.: Holds appx 12 acres near Post Falls and 20 acres located at 4940 S. Greensferry Road, Coeur d'Alene.

Phoenix Auto, LLC: Used car dealer. Has some stock of used cars and a dealer license, but no real other assets.

Condor NV, Inc.: Sole assets appear to be a partnership interest in Cedar Creek Holdings, LLLP, and a 2% interest in Touve and NELMAP.

Cedar Creek Holdings, LLLP: Does not appear to have any assets.