UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

IN RE:

KEANE M. ROGERS, CASE NO.: 23-40330-KKS
CHAPTER: 7

Debtor.
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ORDER DENYING, WITHOUT PREJUDICE, *(EXPEDITED) CHAPTER 7 TRUSTEE'S SECOND AMENDED MOTION TO APPROVE THE SALE REAL AND PERSONAL PROPERTY FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS PURSUANT TO 11 U.S.C. § 363(B), (F)(3), AND (M) WITH CONSENT OF SECURED CREDITOR (ECF NO. 40 AND 58) WITH MEMORANDUM OF LAW* (ECF NO. 78)

THIS CASE is before the Court on the *(Expedited) Chapter 7 Trustee's Second Amended Motion to Approve the Sale Real and Personal Property Free and Clear of Liens, Claims, Encumbrances, and Interests Pursuant to 11 U.S.C. § 363(b), (f)(3), and (m) with Consent of Secured Creditor (ECF No. 40 and 58) with Memorandum of Law* ("Sale Motion," ECF No. 78). The Court has reviewed the Sale Motion, the docket, the claims register, applicable statutes, and case law. The Court heard argument of counsel for the Chapter 7 Trustee ("Trustee"), American Commerce Bank, N.A. ("American Commerce"), and Debtor at a hearing

on Trustee's first amended motion on March 26, 2024.[1] For the reasons set forth below, the Court determines that the Sale Motion is due to be denied and that no further hearing is needed.

The proposed sale.

The assets to be sold include 1) real property in Crawfordville, Florida ("Real Property"), titled in the name of Resting Eyes Real Estate, LLC ("Resting Eyes");[2] 2) 7COP Liquor License No. 7500055 ("Liquor License"), owned by Lee's Liquor Mart Inc. ("Lee's Liquor Mart");[3] and 3) personal property located in the businesses (Lee's Liquor Store and Skybox, a liquor package store and bar) previously operated on the Real Property being sold.[4] The proposed sale price is $715,000.00, with a "carve-out" to the estate of $50,000.00.

The proceeds of the sale.

According to the Sale Motion, American Commerce holds a $1,770,707.77 claim secured by a perfected lien on the assets being sold.[5]

[1] ECF No. 62.
[2] Sale Motion, ECF No. 78, ¶ 7.
[3] *Id.* The Sale Motion discusses a "potential loss" as to "two licenses," but the Sale Motion only lists and seeks approval for the sale of one license. *Id.* at ¶ 67.
[4] *Id.* at ¶ 9. The Sale Motion states that it is unclear which entity owns the inventory, equipment, and furnishings, so "the assumption is that it's Lee's Liquor Mart." *Id.* at ¶ 1.
[5] *Id.* at ¶ 40.a. The only information before the Court as to American Commerce's allegedly perfected secured claim are the unsworn representations in the Sale Motion (and its predecessors). None of the documents reflecting American Commerce's alleged perfected secured status are before the Court.

American Commerce holds only an unsecured claim in this case.[6] Resting Eyes, Lee's Liquor Mart, and another LLC, No Cap Holdings, LLC ("No Cap"), are the direct obligors to American Commerce.[7] Debtor personally guaranteed the debts of those entities.[8] The Sale Motion proposes to pay $665,000.00 of the sale proceeds directly to American Commerce. The remaining balance of American Commerce's claim is to share pro rata with other filed unsecured claims from the $50,000.00 carve-out.

<u>Ownership of the assets to be sold.</u>

It is unclear who owned what interests in Resting Eyes and Lee's Liquor Mart when Debtor filed his Chapter 7 petition. At one point, the Sale Motion represents that Debtor is the "sole shareholder" of Resting Eyes.[9] Later, the Sale Motion appears to denominate Debtor as the single member of Resting Eyes.[10] The Sale Motion states that Debtor was President of Lee's Liquor Mart but says nothing specific about Debtor owning shares in that corporation.[11] The Sale Motion reports that Debtor

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[6] Claim No. 16-1.
[7] *Id.*, Ex. A, p. 4; Ex. B, p. 5.
[8] *Id.*, Ex. C, p. 11.
[9] Sale Motion, ECF No. 78, ¶ 9. The Sale Motion provides no explanation for why Debtor or anyone else could be a shareholder in Resting Eyes, which is an LLC.
[10] *Id.* at ¶ 10.
[11] *Id.* at ¶ 14. Portions of the Sale Motion related to "alter ego" and "reverse veil piercing" mention that Debtor was the shareholder of each entity. *E.g.,* Sale Motion, ECF No. 78, ¶¶ 27, 30. The Sale Motion also alleges that Debtor does not agree with all facts set forth. *Id.* at ¶ 29.

testified that No Cap is the sole shareholder of Lee's Liquor Mart, but no documents establish a link between those entities.[12] Then the Sale Motion recites that Debtor also testified that he is the sole shareholder of No Cap.[13] The Sale Motion then concludes that "[t]here appears to be no distinction between No Cap Holdings, Lee's Liquor Mart, Inc., or [sic] the Debtor."[14]

The Sale Motion offers no explanation for that conclusion in light of the representations that Debtor filed annual returns for No Cap with the Florida Secretary of State for 2022 and 2023; Debtor split automobile expenses between No Cap and Lee's Liquor Mart;[15] and No Cap, Lee's Liquor Mart, and Resting Eyes were all current with the Florida Secretary of State as of the petition date.[16]

<u>The assets Trustee seeks to sell are not § 541 property of the estate.</u>

Property interests are defined by state law; federal law determines whether an interest is property of the bankruptcy estate.[17] To permit a

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[12] *Id.* at ¶ 15.
[13] *Id.* at ¶ 19.
[14] *Id.* at ¶ 20.
[15] *Id.* at ¶¶ 17 & 19.
[16] The Court takes judicial notice of those entities' status with the Florida Secretary of State as of the petition date. Fed. R. Evid. 201.
[17] *Witko v. Menotte (In re Witko)*, 374 F.3d 1040, 1042–43 (11th Cir. 2004) ("Although the estate is construed broadly, . . . Congress expressly cautioned that the Bankruptcy Code 'is not intended to expand the debtor's rights against others more than they exist at the

trustee to administer property in bankruptcy, a court must first be assured that the property is property of the estate pursuant to 11 U.S.C. § 541(a), including "all legal or equitable interests of the debtor in property as of the commencement of the case."[18]

It is beyond question that none of the assets covered by the Sale Motion were owned by Debtor when he filed this case.[19] If a debtor has no legal or equitable interest in property, as a matter of law, the property is not property of the estate under 11 U.S.C. § 541(a).[20] That is especially true with assets owned by separate legal entities, such as corporations or LLCs.

> In Florida, an LLC "is an entity distinct from its members." And, a member of an LLC "has no interest in any specific limited liability company property." Thus, in bankruptcy, the estate of a member of a Florida LLC does not include the separate property of the LLC. This is true even if the debtor

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commencement of the case. . . . [The trustee] could take no greater rights than the debtor himself had.'" (quoting S. Rep. No. 95-989, at 82 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5868; H.R. Rep. No. 95-595, at 367–68 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6323)); *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992) ("In the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law." (citation omitted)); *Charles R. Hall Motors, Inc. v. Lewis (In re Lewis)*, 137 F.3d 1280, 1283 (11th Cir. 1998) ("the nature and existence of the debtor's right to property is determined by looking at state law." (quoting *SouthTrust Bank of Ala. v. Thomas (In re Thomas)*, 883 F.2d 991, 995 (11th Cir. 1989) (alteration in original))); *U.S. Bank Nat'l Ass'n v. United Air Lines, Inc., (In re United Air Lines)*, 438 F.3d 720, 736 (7th Cir. 2006) ("State law governs the determination of the nature and scope of the property interests that comprise the 'property of the estate' in bankruptcy . . . ." (citing *Butner v. United States*, 440 U.S. 48, 54 (1979))).

[18] 11 U.S.C. § 541(a)(1).

[19] Claim No. 16-1, p. 4 ("None of the collateral Property is owned by the Debtor individually.").

[20] *See JMJ Bldg. Co. v. Bankers Tr. Co. of Cal., N.A. (In re JMJ Bldg. Co.)*, 250 B.R. 437, 439–40 (Bankr. M.D. Fla. 2000).

is the LLC's sole member and the debtor personally guaranteed a debt secured by the LLC's property.[21]

The Real Property is owned by a non-debtor Florida LLC.

Presumably, Resting Eyes took title to the Real Property by way of a deed. If the language in the deed is not unclear, the deed transferred fee simple ownership of the Real Property to Resting Eyes.[22] Nothing in the Sale Motion sets forth a basis for ruling that the Real Property owned by Resting Eyes is now an asset of this bankruptcy estate.[23]

In *S & A Prop. Inv. Servs., LLC v. Garcia*, two individuals deeded their non-homestead real property to a wholly owned LLC to avoid personal tort liability arising from their ownership of the property.[24] As

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[21] *In re Thompson*, Case No. 8:22–bk–00740–RCT, 2022 WL 2196746, at *2 (Bankr. M.D. Fla. June 10, 2022); *see also Russo v. Delvecchio (In re Del Vecchio)*, Case No. 6:20–bk–05159–LVV, Adv. No. 6:20–ap–00117–LVV, 2022 WL 16828243, at *4 (Bankr. M.D. Fla. Sept. 30, 2022) (finding that "if a Florida LLC member files bankruptcy, the bankruptcy estate does not include property of the LLC." (citing *Thompson*, 2022 WL 2196746, at *2)); *Thakkar v. Greenspoon Marder, P.A. (In re Nilhan Fin., LLC),* 614 B.R. 379, 384 (M.D. Fla. 2020) *aff'd sub nom*, 831 F. App'x 479 (11th Cir. 2020), and *aff'd*, 832 F. App'x 678 (11th Cir. 2021) (holding that an LLC member is not a person aggrieved and could not appeal bankruptcy court order (citing Fla. Stat. § 605.0110(4) ("A member of a limited liability company has no interest in any specific limited liability company property."); *In re Whittle*, 449 B.R. 427, 430 (Bankr. M.D. Fla. 2011) ("The Florida statutory scheme is clear that a limited liability company holds property separate and apart from the property of its members.").

[22] *S & A Prop. Inv. Servs., LLC v. Garcia*, 360 So. 3d 432, 437 (Fla. 3d DCA 2023).

[23] The Trustee asserts that she filed articles of dissolution for Resting Eyes. Sale Motion, ECF No. 78, ¶ 8. But the Florida Secretary of State's website shows Resting Eyes as "active." Sunbiz.org, https://search.sunbiz.org/Inquiry/CorporationSearch/SearchResultDetail?inquirytype=EntityName&directionType=Initial&searchNameOrder=RESTINGEYESREALESTATE%20L200001378410&aggregateId=flal-l20000137841-d8920ea5-2382-4ea5-9924-53cf4455621e&searchTerm=resting%20eyes%20real%20estate%20llc&listNameOrder=RESTINGEYESREALESTATE%20L200001378410 (last visited June 20, 2024).

[24] *Garcia*, 360 So. 3d at 434.

a result, the tax assessed value went from about $104,000.00 to over $273,000.00.[25] The original owners contested the tax assessment, arguing that they retained equitable title to the real property because they owned and controlled the LLC.[26] They lost at the administrative level, then in the courts. In ruling in favor of the tax collector and affirming the trial court, Florida's Third District Court of Appeal stated:

> [O]f import here, the grantee Taxpayer is a Florida limited liability company. Section 605.0110 of the Florida Statutes unequivocally specifies that "[a]ll property originally contributed to the limited liability company or subsequently acquired by a limited liability company by purchase or other method is limited liability company property." § 605.0110(1), Fla. Stat. (2019). "It is basic hornbook law that 'corporate property is vested in the corporation itself, and not in the individual stockholders, *who have neither legal nor equitable title in the corporate property*.'" Consequently, an LLC member has "no interest in any *specific limited liability company property*." § 605.0110(4), Fla. Stat. (2019) (emphasis added).[27]

<u>The Liquor License is owned by a non-debtor Florida corporation.</u>

The Trustee filed Articles of Dissolution for Lee's Liquor Mart on May 22, 2024, just a few days before filing the Sale Motion.[28] A dissolved

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[25] *Id.*
[26] *Id.* at 434–35.
[27] *Id.* at 437 (citing *Brevard Cnty. v. Ramsey*, 658 So. 2d 1190, 1196 (Fla. 5th DCA 1995).
[28] Sale Motion, ECF No. 78, ¶ 8. In the "Articles of Dissolution," the Trustee represents and affirms that: "[n]o debt of the corporation remains unpaid" and that "[t]he net assets of the corporation remaining after winding up, if any, have been distributed." Neither of these statements are true. *See* Sunbiz.org, https://search.sunbiz.org/Inquiry/CorporationSearch/ConvertTiffToPDF?storagePath=COR%5C2024%5C0523%5C30369530.tif&documentNumber

Florida corporation may wind up and liquidate its business and affairs, and in so doing must collect its assets and discharge, or make provisions for discharging, its liabilities.[29] Dissolution of a Florida corporation does not transfer title to the corporation's property.[30]

The Trustee concedes that the dissolution of Lee's Liquor Mart did not transfer title of the Real Property to the bankruptcy estate or debtor, even assuming the owner of the shares in Lee's Liquor Mart can be determined. But the Sale Motion proposes a liquidation of Lee's Liquor Mart's asset without making provisions for discharging Lee's Liquor Mart's liabilities before distributing proceeds to its purported shareholder.

The Trustee has provided no evidence that the creditors of the LLCs or corporation have received notice of the sale.

Notice of proposed sales of assets in bankruptcy is fundamental to due process. To ensure that all creditors *of the debtor* receive adequate notice, the Sale Motion must comply with notice requirements under the Code.[31] Adequate notice to creditors of separate legal entities, here Resting Eyes and Lee's Liquor Mart, mandates additional steps.

=P97000104414 (last visited June 25, 2024).

[29] Fla. Stat. § 607.1405(1)(a) and (c) (2023).

[30] Fla. Stat. § 607.1405(2)(a).

[31] *See* Fed. R. Bankr. P. 6004(a).

The Trustee represents that creditors of the LLCs and corporation have received notice of the proposed sale, based solely on the fact that Debtor's attorney says so.[32] The Sale Motion also indicates that the Trustee has identified the creditors of Resting Eyes.[33] But how the Court can reach such a conclusion is a mystery where, as here, "[t]he Debtor failed to maintain accurate business records."[34]

Even were the Trustee to dissolve Lee's Liquor Mart, she would be required to provide notice to that entity's creditors of her intent to dispose of the Liquor License. A dissolved Florida corporation may dispose of known claims against it only after giving proper notice to its known claimants.[35] A dissolved corporation may give notice to unknown claimants by filing a notice of dissolution on a form prescribed by the Secretary of State that contains all required information, "and request that persons with claims against the corporation which are not known to the dissolved corporation present them in accordance with the notice."[36]

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[32] "*The Trustee has consulted with Debtor's counsel several times to verify that all of the creditors of the business entities were listed on the Petition and Schedules.*" Sale Motion, ECF No. 78, ¶ 50 (emphasis in original).
[33] *Id.* at ¶ 13.
[34] *Id.* at ¶ 12. The statement in the Sale Motion that a debtor is responsible for listing all "of his" creditors is true. But nothing in the official bankruptcy schedules requires an individual debtor to list creditors of separate legal entities. *See* Official Forms B 106D and B 106E/F (https://www.uscourts.gov/services-forms/forms?k=&c=839) (last visited June 17, 2024).
[35] Fla. Stat. § 607.1406 (2023).
[36] Fla. Stat. § 607.1407(1)(a) (2023).

In the alternative, the dissolved corporation may publish a "Notice of Corporate Dissolution" in a newspaper of general circulation.[37] Similarly, a dissolved Florida limited liability company, like Resting Eyes, "shall" wind up its affairs, and "make provision for the company's debts, obligations, and other liabilities . . . ."[38] The Sale Motion makes no such provision. Nothing before this Court shows that all creditors of Lee's Liquor Mart and Resting Eyes received notice of the proposed sale such that procedural due process has been met.[39]

Proceeds of assets of an LLC and corporation must first go to the creditors of the entities.

Even if creditors of Resting Eyes and Lee's Liquor Mart received notice, it is improper to lump those creditors together with creditors of the Debtor. But that is exactly what the Sale Motion proposes:

> It has always been the Trustee's goal to resolve the duplications of creditors of the individual Debtor and Debtor's multi-layered single shareholder corporate entities in the most efficient and fair plan possible. This remedy

[37] Fla. Stat. § 607.1407(1)(b) (2023).

[38] Fla. Stat. § 605.0709(2)(a) (2023).

[39] *See Horizons A Far, LLC v. Webber (In re Soderstrom)*, 484 B.R. 874, 878 (M.D. Fla. 2013) (finding that a party received adequate notice of the trustee's intent to sell a 50% interest in the debtor's LLC, stating "[d]ue process requires notice and an opportunity to be heard." (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985))). *See also Green Tree Servicing, LLC v. Bank of Am., N.A. (In re Fogell)*, Case No. 3:14-bk-0436-JAF, Adv. No. 3:15-ap-0262-JAF, 2017 WL 11569126, at *3–4 (Bankr. M.D. Fla. Feb. 22, 2017) (holding that debtor did not receive adequate notice of an equitable lien on his homestead, and stating "[p]rocedural due process requires notice and an opportunity to be heard." (quoting *Soderstrom*, 484 B.R. at 878)).

> favors "a single coordinated process involving all of the various claimants" of the various insolvent corporate entities under one umbrella. Such a plan reduces the costs and time addressing each individual insolvent entity and claimants that have duplicative claims in one or more corporate entity and the individual.[40]

This proposed treatment of creditors' claims is improper. Most courts adhere to the traditional principle that assets belonging to LLCs and corporations are separate from an individual debtor's assets.[41] Creditors of each LLC and the corporation are entitled to be paid first from the liquidation of that LLC's or the corporation's assets. Only after those creditors are paid may a Trustee disburse the remaining funds to the bankruptcy estate.[42] The Sale Motion proposes to skip the appropriate distribution scheme in the interests of "efficiency," with no citation of statutory or case law authority.

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[40] Sale Motion, ECF No. 78, ¶ 34 (quotations in original with no citation of authority).

[41] *See In re Furlong*, 437 B.R. 712, 721 (Bankr. D. Mass. 2010) (holding "unless a corporation is itself a bankruptcy debtor, the automatic stay afforded to an individual debtor under § 362(a) does not extend to the assets of a corporation in which the debtor has an interest, even if the interest is 100% of the corporate stock." (citations omitted)); *In re Aldape Telford Glazier, Inc.*, 410 B.R. 60 (Bankr. D. Idaho 2009); *In re Penn*, Case No. 09–14624–WHD, 2010 WL 9445533, at *4 (Bankr. N.D. Ga. Apr. 2, 2010) (holding "once the sole owner of an LLC files a bankruptcy petition, the membership interests themselves become property of the owner's estate, but it does not compel the conclusion that the actual assets of the LLC are property of the owner's estate.").

[42] *See* Fla. Stat. § 605.0405(1)(b) (2023); *see also* Fla. Stat. § 607.06401(3)(b) (2023).

The Sale Motion fails to demonstrate a meaningful distribution to unsecured creditors.

It appears that the proposed sale will produce nothing, or virtually nothing, for Debtor's unsecured creditors. Out of the proposed $50,000.00 carve-out will first come administrative expenses, including the Trustee's commission[43] and attorney's fees.[44] Although it is not mentioned in the Sale Motion, next in line for payment appears to be the IRS, which filed a priority claim in the amount of $11,032.47.[45] Many of the filed claims show the primary obligors on the debt as Lee's Liquor Mart and No Cap.[46] Assuming proper distribution first to creditors of Lee's Liquor Mart and Resting Eyes, it is impossible to determine whether any funds will remain.

The Sale Motion actively discourages objections: "*Should any other creditors, having a claim against the LLC or Lee's Liquor Mart, Inc,*

[43] 11 U.S.C. § 326(a).

[44] The Trustee has employed herself as counsel to the Trustee. *See Order Approving Trustee's Application to Employ and Appoint Counsel Under General Retainer*, ECF No. 24.

[45] Claim 6-1, p. 4. The IRS's claim is confusing: 1) it says it amends a previously filed claim (p. 1, ¶ 4) but no other claim appears on the Claims Docket; 2) it says the claim is secured by real estate, a motor vehicle, and "other" but no lien notices are attached (p. 2, ¶ 9); 3) it says the claim is subject to a right of setoff and "see attached," but nothing is attached (p. 2, ¶ 11); and 4) in answer to whether all or part of the claim is entitled to priority under 11 U.S.C. § 507(a), the answer is "no," but the attachment to the claim lists the total amount of "Unsecured Priority Claims" as $11,032.47 (Claim 6-1, *Proof of Claim for Internal Revenue Taxes*, Form 410, p. 4). The IRS also claims $555.55 as a general unsecured claim.

[46] *See, e.g.*, Claim Nos. 3-1 (No Cap), 9-1 (Lee's Liquor Mart), and 12-1 (No cap).

attempt to assert its claim against the carve out payable to the Trustee, American Commerce Bank, N.A. has the right to assert its secured claim ***and there will be no distribution to the Bankruptcy Estate.***"[47]

This Court has previously denied a Chapter 7 Trustee's motion to sell a fully encumbered asset where the sale proceeds would not produce a meaningful distribution to creditors. In *In re Wade Enter. of Leon, LLC*, the debtor's only unsecured creditor was the lender with the first mortgage on the debtor's real property.[48] In denying the trustee's motion to short-sell the real property with a $10,000.00 carve-out to the estate, this Court cited The Handbook for Chapter 7 Trustees, which instructs that: "[a] trustee may sell assets only if the sale will result in a meaningful distribution to creditors or provides some other significant benefit."[49]

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[47] Sale Motion, ECF No. 78, ¶ 43 (italics in original, emphasis added).

[48] *In re Wade Enter. of Leon, LLC*, Case No. 21-40308-KKS (Bankr. N.D. Fla. Apr. 20, 2022), ECF No. 21, *Order Denying, Without Prejudice, Chapter 7 Trustee's Motion to (I) Approve a Short Sale of Real Property Free and Clear of Liens, Claims, Encumbrances, and Interests Pursuant to 11 U.S.C. § 363(b), (f), and (m), (II) Surcharge Agreement Between Secured Lender and the Estate, and (III) Other Relief (ECF NO. 15)*.

[49] *Id.*, at pp. 2–3 (citing *Delannoy v. Colonial (In re Delannoy)*, Case No. 8:17–bk–10243–ES, BAP No. CC–17–1334–SKul, 2018 WL 4190874, at *7 (B.A.P. 9th Cir. Aug. 31, 2018) (noting the "general proposition that bankruptcy trustees should not sell fully encumbered assets, particularly when the estate's unsecured creditors will not benefit from the sale.")); *see also In re Stark*, Case No. 8–20–70948–reg, 2020 WL 5778400, at *6 (Bankr. E.D.N.Y. Sept. 25, 2020) ("[C]hapter 7 trustees are guided in the discharge of their statutory and fiduciary duties by a handbook authored by The Office of the United States Trustees . . .," and "[w]hile the general rule is that a trustee should not administer fully encumbered property only for the benefit of a secured creditor, there is no per se prohibition against a trustee using [her]

After this Court's ruling in *Wade Enter.*, the United States Trustee updated the Chapter 7 Trustee Handbook, in part specifically to address proposed sales of encumbered property. The updated Handbook stresses the importance of a meaningful distribution to creditors:

> As revised, the *Handbook* section 4.C.9.a now states: "A trustee may sell assets only if the sale will result in *a* meaningful distribution to creditors *or provides some other significant benefit*." . . . "If the sale *or carve-out* will not result in a meaningful distribution to creditors, the trustee must abandon the asset. . . . It further states in section 4.C.9.d: '*Trustees should not only consider the commission earned on a sale of estate property in relation to the anticipated distribution to unsecured creditors but also take into account all expenses incurred by the estate . . . . The distribution to creditors should be meaningful.*' [Changes are shown in italics.]
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> In addition, in the interest of promoting transparency, disclosure, and accountability, the following language was added to *Handbook* section 4.C.9.d:
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> . . . .
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> *The sale motion should disclose whether the sale will result in any meaningful distribution to creditors and explain the reasons why the trustee is selling the encumbered property if the sale will not result in a meaningful distribution to creditors. . . .*" [Changes are shown in italics.][50]

Here, the Sale Motion gives mere lip service to a meaningful distribution:

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statutory power to create new value for unsecured creditors" (citing *In re KVN Corp.*, 514 B.R. 1, 6–7 (B.A.P. 9th Cir. 2014)).

[50] *An Overview of the Changes to the Handbook for Chapter 7 Trustees and Updates to the Uniform Transaction Codes*, https://www.justice.gov/ust/blog/overview-changes-handbook-chapter-7-trustees-and-updates-uniform-transaction-codes (last visited June 17, 2024) (emphasis in original).

"[T]he Trustee has determined, based upon a review of the Debtor's schedules and information derived from the 341 meeting, that there will be a meaningful distribution to allowed creditors . . . ."[51] Numbers don't lie. The numbers show that no unsecured creditors *of the Debtor* will receive more than a pittance on their claims, if anything, and American Commerce will receive the majority of that pittance.

<u>Cases cited in the Sale Motion do not support the relief requested.</u>

The Sale Motion cites three cases: *In re Albright*, *In re Modanlo*, and *In re Vital Pharmaceuticals*, none of which support the proposed sale.[52] In *Albright*, the bankruptcy court, relying on Colorado law, did not grant the trustee's motion to sell non-debtor assets.[53] Instead, the *Albright* court authorized the trustee to cause the LLC to sell its property, and in the alternative to "elect to distribute" the LLC's property to the bankruptcy estate and then liquidate the property.[54] The court in

[51] Sale Motion, ECF No. 78, ¶ 65.b.
[52] *In re Albright*, 291 B.R. 538 (Bankr. D. Colo. 2003); *In re Modanlo*, 412 B.R. 715 (Bankr. D. Md. 2006); and *In re Vital Pharmaceuticals*, 651 B.R. 847 (Bankr. S.D. Fla. 2023). The Court could not locate the quote from *Vital Pharmaceuticals* in the Sale Motion. Suffice it to say that *Vital Pharmaceuticals* did not involve a trustee attempting to sell assets belonging to non-debtor LLCs and a corporation, piercing the corporate veil, or alter ego.
[53] *Albright*, 291 B.R. at 542. In *Albright*, unlike here, the parties cited Colorado statutes on which the Colorado Court could rely in making its ruling.
[54] *Id.* This Court suggested a somewhat similar path for the Trustee at a hearing on one of the Trustee's prior sale motions. The Court also suggested as an alternative the Trustee could put the LLCs and corporation into their own Chapter 7 cases, through which those entities'

Modanlo found the result in *Albright* persuasive, but *Modanlo* did not involve a trustee's motion to sell assets of an LLC. Rather, in *Modanlo* the Chapter 11 trustee sought to cause a corporation to hold a special shareholder meeting pursuant to the corporation's bylaws.[55]

The facts here are not unlike those in *In re Hopkins*.[56] The individual debtor in *Hopkins* owned a single-member Michigan LLC.[57] The LLC, in turn, owned real property.[58] The Chapter 7 trustee filed a motion to sell the LLC's real property, which the bankruptcy court denied, stating: "although the Debtor's interest in the LLC was part of the bankruptcy estate, the Property held by the LLC was not."[59] Citing Michigan law, the court in *Hopkins* further held:

> [A] member in a Michigan limited liability company, even a sole member, "has no interest in specific limited liability company property." . . . This explains why the Debtor scheduled his membership interest in the LLC on Schedule B, but did not schedule the Property on Schedule A. . . . Because the Property itself is not included within the bankruptcy estate, the court does not have the authority to issue orders authorizing its sale under 11 U.S.C. § 363(b). Additionally, because 11 U.S.C. § 363(f) and Fed. R. Bankr. P. 6004(h) only apply to the sale of estate property, neither would pertain to

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assets could be sold and the proceeds administered.

[55] *Modanlo*, 412 B.R. at 731–32.

[56] *In re Hopkins*, Case No. DG 10–13592, 2012 WL 423916, at *1 (Bankr. W.D. Mich. Feb. 2, 2012).

[57] *Id.*

[58] *Id.*

[59] *Id.* (citing 11 U.S.C. § 541(a)(1)).

the Trustee's proposed transaction.[60]

The *Hopkins* court, like the *Albright* court, suggested alternative ways the trustee could possibly distribute the net proceeds of the LLC's assets to the debtor's creditors, "to the extent applicable law authorizes" such.[61] Bankruptcy courts in Florida and other states have reached similar conclusions.[62]

Other case law supports denial of the Sale Motion.

"It is universally recognized . . . that the sale of a fully encumbered asset is generally prohibited."[63] "Clearly, the Code never contemplated

[60] *Id.* (citations omitted).
[61] *Id.* (stating "to the extent applicable law authorizes the Trustee to cause the LLC to sell the Property, the court will acknowledge the Trustee's authority to effectuate the sale.").
[62] *See Thompson*, 2022 WL 2196746, at *2 ("The threshold issue here is whether property of a single-member LLC that is owned by a debtor becomes part of that debtor's bankruptcy estate by reason of the debtor's personal guarantee of a debt secured by the property. The Court agrees with North Mill [the creditor] and concludes that it does not."); *see also In re Saunier*, Case No. 11–60997, 2012 WL 5898601, at *2 (Bankr. N.D. Ohio Nov. 20, 2012) (reaching the same result, under Ohio law, as *Albright* and *Hopkins*, stating: "[a]lthough Trustee may have the legal authority to do what she purposes, the court does not have the authority to sanction it. She either has the power or she does not. There is nothing the court can do to add or detract from the rights governed by Ohio law and any operating agreement that exists. The *Hopkins* court recognized its limited powers when it 'acknowledged,' but did not 'order,' the trustee's request to sell property under a similar fact pattern." (citing *Hopkins,* 2012 WL 423916, at *1)); *Omanoff v. Riefler (In re Reifler)*, Case No. 22–CV–10201 (CS), 2023 WL 5510233, at *7 (S.D.N.Y. Aug. 25, 2023) (holding that under Delaware law, a member of an LLC has no interest in specified limited liability company property. "Accordingly, the members of a Delaware LLC do not possess any legal interest in the assets of the LLC." (citations omitted)); *Grochocinski v. Campbell (In re Campbell)*, 475 B.R. 622, 630 (Bankr. N.D. Ill. 2012) (holding that under Illinois law, "any property owned by OPAR [the 100% member of the LLCs], including the subsidiary LLCs, did not automatically become property of the estate, and the Trustee has not yet taken the actions necessary under Illinois law to bring that property into this estate.").
[63] *KVN Corp.*, 514 B.R. at 5.

that a Chapter 7 trustee should act as a liquidating agent for secured creditors who should liquidate their own collateral."[64] Case law and the Chapter 7 Trustee Handbook, taken together, "stand for the proposition that sales of fully encumbered assets are generally improper."[65]

Although there is no per se rule against carve-outs, and the presumption that they are improper is rebuttable, carve-out sales are regarded under a "standard of heightened scrutiny due to past abuses."[66] As the Bankruptcy Court for the Middle District of Florida succinctly stated:

> Congress was aware of the claim that formerly some trustees took burdensome or valueless property into the estate and sold it in order to increase their commissions. Some of the early cases condemned this particular practice of selling burdensome or valueless property simply to obtain a fund for their own administrative expenses. *See e.g. Standard Brass*

[64] *In re Feinstein Fam. P'ship.*, 247 B.R. 502, 507 (Bankr. M.D. Fla. 2000) (also stating "[i]t is not rare that trustees of Chapter 7 estates are approached by secured creditors who seek the trustee's help to liquidate fully encumbered collateral. They realize that before the trustee is willing to go along with the proposition the secured creditor must put a little sweetener in the deal by agreeing to pay sufficient sums to compensate the trustee and to pay other costs of administration. The more sophisticated trustee may demand that the secured creditor throw in a pittance to pay a meaningless dividend to unsecured creditors, making the arrangement more palatable to the Court. The proposition is very attractive from the secured creditor's point of view and economically sound because it may stave off a possible attempt by the Trustee to seek to surcharge the collateral and, most importantly, save the potentially expensive cost of a foreclosure suit. The offered deal is also attractive to the trustee because it assures that he or she will earn a commission in an otherwise no asset case and may seek a commission based on the gross sales price and not on the net distributed to parties of interest. While some courts may find this calculation of the trustee's commission acceptable, there is well reasoned authority to the contrary.").

[65] *KVN Corp.*, 514 B.R. at 6.

[66] *Id.* at 7.

> *Corp. v. Farmers Nat. Bank of Belvidere*, 388 F.2d 86 (7th Cir. 1967); *In re Miller*, 95 F.2d 441 (7th Cir.1938). To prevent such practice Congress gave the courts the power to order the trustee to abandon burdensome or valueless property. *See In re K.C. Mach. & Tool Co.*, 816 F.2d 238 (6th Cir. 1987). It is now almost universally recognized that where the estate has no equity in a property, abandonment is virtually always appropriate because no unsecured creditor could benefit from the administration.[67]

The Sale Motion recites that the proposed sale amounts to a deed in lieu of foreclosure to permit American Commerce to avoid the costs of foreclosure.[68] This Court has previously questioned whether that type of transaction, in an otherwise no asset case, is appropriate.[69] The Sale Motion provides nothing to rebut the presumption that this proposed sale is disfavored and should be denied.[70]

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[67] *Feinstein Fam. P'ship.*, 247 B.R. at 507 (citing *In re Cunningham*, 48 B.R. 509 (Bankr. M.D. Tenn. 1985); *In re Air Vt., Inc.*, 41 B.R. 486 (Bankr. D. Vt. 1984); *In re Karl A. Neise, Inc.*, 31 B.R. 409 (Bankr. S.D. Fla. 1983); *In re Anspach*, 13 B.R. 208 (Bankr. E.D. Pa. 1981)).

[68] Sale Motion, ECF No. 78, ¶ 43.

[69] *See Wade Enter.*, *supra* note 48, at pp. 3–5 (stating "[o]nly two parties will benefit from the short sale proposed by the Motion: McKenzie Trust [the secured creditor] and the Chapter 7 Trustee. . . . But for the short sale proposed in the Motion, this estate is insolvent: a traditional 'no asset' case. The Motion appears to seek relief that is inconsistent with the duties of a Chapter 7 Trustee. Clearly, by offering the carve-out for the Trustee, McKenzie Trust has positioned itself to avoid the time and expense of completing a state court foreclosure. That, alone, has become fairly common in the bankruptcy arena. But the Court questions whether this is an appropriate use of the Bankruptcy Code, the auspices of this Court, and the services and powers of the Trustee where no unsecured 'creditors' exist that may benefit from the proposed sale, other than the secured lender.").

[70] *Cf. In re Reece*, Case No. CV 17–2288–MWF, 2018 WL 11354886 (C.D. Cal. July 20, 2018) (affirming the bankruptcy court's approval of a sale with a carve-out where the carve-out was enough to pay 100% of the unsecured claims); *Hernandez v. Hernandez (In re Hernandez),* BAP No. SC–23–1016–BCF, 2023 WL 8453137, at *7 (B.A.P. 9th Cir. Dec. 6, 2023) (affirming bankruptcy court's approval of a trustee's compromise and sale of estate assets because the assets were not fully encumbered, and stating that "generally fully encumbered property

A § 363 sale motion is not the proper vehicle for asserting alter ego or reverse veil piercing causes of action.

The Trustee suggests in the Sale Motion that under an alter ego or reverse veil piercing theory the assets she seeks to sell may become property of the estate. Asking the Court to rule on alter ego or reverse veil piercing equates to seeking a determination of the estate's and other entities' interests in the property. The Trustee would have to file and pursue an adversary proceeding to have the Court make such a determination.[71]

The Sale Motion sets forth conflicting and confusing "facts."

The Sale Motion avers that Resting Eyes is an LLC, but then denominates Debtor as its sole shareholder.[72] LLC's do not have shareholders. The Sale Motion reports that Resting Eyes "closed business

should not be sold but abandoned" (citing *KVN Corp.*, 514 B.R. at 6)); *In re Jones*, 548 B.R. 658, 661 (Bankr. W.D.N.Y. 2016) (bankruptcy court approved trustee's revised motion to sell fully encumbered assets of the estate and receive a carve-out because trustee's supporting affirmation represented an "expectation that the carve out will produce a meaningful distribution to unsecured creditors," noting "[a]ny administration of property in bankruptcy must aim to effect or enhance the prospects of a distribution on account of unsecured claims. For this reason, a trustee should generally not attempt to sell over-encumbered property for the benefit of a secured creditor or solely as a means to enhance the trustee's own compensation.").

[71] *See* Fed. R. Bankr. P. 7001(2). *E.g.*, *In re First Assured Warranty Corp.*, 383 B.R. 502, 546–47 (Bankr. D. Colo. 2007) (denying a motion styled under § 543(d) and holding the relief requested must be brought as an adversary proceeding because it was, in essence, seeking to determine a party's interest in property).

[72] Sale Motion, ECF No. 78, ¶ 9.

18 months after Debtor purchased the asset" and that "the day prior to this filing Debtor voluntarily surrendered his interest in the Trustee [sic]."[73] What asset did Debtor allegedly purchase? What interest did Debtor allegedly voluntarily surrender to the Trustee? In one place the Sale Motion represents that "the total dollar amount of claims to be filed in this case" is "unknown and can only be estimated."[74] Later, the Sale Motion represents that "*[t]he deadline to file a claim has passed.*"[75] The first statement is false. The second statement is true; the claims deadline expired months before the Sale Motion was filed.[76]

The Sale Motion dictates how the Trustee intends to pass title to the assets being sold: "The Trustee shall pass title as the [sic] *Theresa M. Bender, Chapter 7 Trustee by and for the Bankruptcy Estate of Keane M. Rogers, for*" each separate LLC and the corporation.[77] But nothing in the Sale Motion explains how an individual, even a trustee, may pass title "for" an LLC or corporation.

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[73] *Id.*
[74] *Id.* at ¶ 31.b.
[75] *Id.* at ¶ 50 (emphasis in original).
[76] *See Notice of Need to File Proof of Claim Due to Recovery of Assets*, ECF No. 20.
[77] Sale Motion, ECF No. 78, ¶ 47. The Sale Motion also attempts to dictate specific language for an order approving a sale of the Liquor License owned by Lee's Liquor Mart. Even if the Court were inclined to grant the Sale Motion and permit the Trustee to sell the Liquor License, the proposed language is apparently designed for a foreclosure sale and judgment, and not for a § 363 sale free and clear of liens.

CONCLUSION

The Sale Motion grants American Commerce the myriad benefits of a § 363(b) sale, of assets owned by non-debtors, in exchange for a carve-out to pay the Trustee's commission and attorneys' fees, and possibly a miniscule amount to unsecured creditors. American Commerce remains the largest unsecured creditor, avoids the necessity to foreclose on the assets, and pays nothing to this estate should a creditor of Resting Eyes or Lee's Liquor Mart dare object to the sale. If American Commerce pays the carve-out, money left for unsecured creditors, if any, is to be disbursed without proof of notice to creditors of Resting Eyes or Lee's Liquor Mart, whose claims are to be lumped in with claims against the Debtor.

Some problems with the Sale Motion may be resolved by presentation of evidence, but others are legal issues for which evidence would not be a remedy.

For the reasons stated, it is

ORDERED:

1. The *(Expedited) Chapter 7 Trustee's Second Amended Motion to Approve the Sale Real and Personal Property Free and Clear of Liens, Claims, Encumbrances, and Interests Pursuant to 11 U.S.C. § 363(b), (f)(3), and (m) with Consent of*

Secured Creditor (ECF NO. 40 and 58) with Memorandum of Law (ECF No. 78), is DENIED, without prejudice.

2. If the Trustee files another motion to approve the sale of the Liquor License and Real Property, or for authority to act on behalf of the corporation and LLCs, as appropriate, such motion must address the issues raised in this Order, specifically including a recitation that all creditors of Resting Eyes and Lee's Liquor Mart have been identified, and how, and that they have received notice as required under applicable law.

DONE and ORDERED on July 1, 2024.

KAREN K. SPECIE
Chief U.S. Bankruptcy Judge

cc: Counsel to the Trustee shall serve a copy of this Order on all creditors and parties in interest and file a certificate of service within three (3) days of this Order.