

FILED

AUG 24 2011

DIVISION III
STATE OF WASHINGTON
By _____

NO. 297209

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

DEERE CREDIT, INC.

Respondent,

v.

CERVANTES NURSERIES, LLC, CERVANTES PACKING &
STORAGE, LLC, MANCHEGO REAL, LLC AND JOSE & CYNTHIA
CERVANTES,

Appellants.

APPEAL FROM YAKIMA COUNTY SUPERIOR COURT

THE HONORABLE DAVID A. ELOFSON

BRIEF OF RESPONDENT

ROGER W. BAILEY
JOSHUA J. BUSEY
BAILEY & BUSEY PLLC
411 N.2nd Street
Yakima, Washington 98901

ORIGINAL

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TABLE OF CONTENTS

Issue PresentedPage 4

Statement of the CasePage 4

Argument Page 7

ConclusionPage 23

TABLE OF AUTHORITIES

Cases

Hays v. Miller, 1 Wash. Terr. 143, 146 (1861)8

In Re Warburton Avenue Realty Corp., 127 B.R. 333
(Bkcy. S.D. N.Y. 1991)11, 12, 13, 14, 15

Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett,
146 Wn.2d 29 (2002) 15, 16

Les Placements v. Rosenberg 1997 WL 1048897
(E.D. N.Y 1997)⁷ 13, 15

Reeves v. McClain, 56 Wn.App 301, 311 (Div III 1989) 23

Thorgaard Plumbing & Heating Co. v. King County,
71 Wn.2d 126 16, 17

Statutes

RCW 61.12.120 4, 6, 11, 17, 19, 23

RCW 61.12.020 8

RCW 61.24.120 9

RCW 49.48.030 16

RCW 7.04.030 16

RCW 4.04.020 17

RCW 4.84.330 22, 23

RAP 18.1 23

11 U.S.C. §114119

I. ISSUE PRESENTED

Whether Deere Credit, Inc. (“DCI”) violated the one action rule, embodied in RCW 61.12.120, by prosecuting an action for a judgment and decree of foreclosure against Cervantes Nurseries, LLC, Cervantes Packing & Storage, LLC, Manchego Real, LLC and Jose & Cynthia Cervantes (“Cervantes Defendants”) in Yakima County Superior Court at the same time bankruptcy proceedings of Cervantes Orchards & Vineyards, LLC, a related company, were pending?

II. STATEMENT OF THE CASE

A. Introduction.

On April 11, 2007, Cervantes Orchards & Vineyards, LLC (“COV”) confirmed a plan of reorganization (“Plan”) in Eastern District of Washington Bankruptcy Cause No. 05-06600-JAR11 (“Bankruptcy Case”) (CP 393-415). On or about April 30, 2007, COV, the Cervantes Defendants and DCI entered into a Second Forbearance Agreement (“Agreement”). (CP 416-437). Both the Plan and Agreement contained provisions requiring COV and/or the Cervantes Defendants to make quarterly payments and fully pay their obligations to DCI on or before December 31, 2009 (CP 341-342). The Cervantes Defendants failed to timely make certain payments called for by the Agreement. (CP 240). COV also failed to make payments when due under the Plan (CP 756).

B. The State Court Action.

On November 16, 2009, DCI filed suit in Yakima County Superior Court (Cause No. 09-04256-9) against the Cervantes Defendants for judgment under the Agreement and other debt instruments as well as foreclosure of several mortgages (“**State Court Action**”). (CP 4-21). Repayment of the Cervantes Defendants’ obligations were secured by a variety of real and personal property security interests. (CP 265-316, 325-392). On February 22, 2010, DCI filed a motion for summary judgment as to all claims brought in the State Court Action. (CP 232-233). The motion was supported by the Declaration of Michael P. Kuehn. (CP 234-444). The hearing on the summary judgment motion was initially held on March 24, 2010. (RP 1). The Cervantes Defendants did not file any pleadings in response to the summary judgment motion (*See Generally*, Designation of Clerk’s Papers).¹ While not filed with the Superior Court, either prior to or subsequent to the hearing, the Cervantes Defendants submitted, on the date of the summary judgment hearing, a motion for acceptance of late filed brief and request for continuance.² At the initial

¹ The Designation of Clerk’s Papers makes reference to Docket No. 56, which appears to be an opposition to a summary judgment motion filed by some of the Cervantes Defendants in a different case. It appears that the opposition was filed in this case in error.

² This motion does not appear to have been filed with the Court – and in any case – is not included in the Designation of Clerk’s Papers. While the motion was not filed it was considered by the trial court (See RP 1).

summary judgment hearing, the Cervantes Defendants also made reference to a motion to dismiss pursuant to RCW 61.12.120.³ The Superior Court, after hearing the argument of counsel and reviewing the pleadings, granted a limited continuance for the purpose of considering the Cervantes Defendants' argument that the State Court Action was barred by RCW 61.12.120. (CP 454-456, RP 28).

Counsel for the parties submitted briefing regarding whether RCW 61.12.120 barred prosecution of the State Court Action by DCI. (CP 457-464, 466-473, RP 37-64). The Superior Court, by letter ruling dated May 24, 2010, ruled that DCI was not prohibited from proceeding with its State Court foreclosure action by virtue of RCW 61.12.120 and directed DCI to submit an order granting summary judgment (CP 476)⁴. The Superior Court entered an order granting summary judgment as well as a judgment and decree of foreclosure in favor of DCI on January 7, 2011. *See*, Summary Judgment Order and Judgment attached to the Cervantes Defendants' Notice of Appeal).

³ The motion to dismiss does not appear to have been filed with the trial court, although it is clear that the Court considered the substantive issue regarding the single action rule which was raised by the Cervantes Defendants. (See RP 37-65, CP 457-465, 466-473).

⁴ The Cervantes Defendants' express some confusion as to the meaning of the Superior Court's May 24, 2010 letter ruling which indicates that "there is no bar to Plaintiff's current action." It is clear from the letter ruling and the Superior Court's subsequent entry of judgment that the Superior Court ruled that the one-action rule did not constitute a bar to DCI's State Court Action.

C. The COV Bankruptcy Proceedings.

The Plan provided that if COV failed to pay its obligations to DCI in full on or before December 31, 2009, the Bankruptcy Case could be re-opened for purposes of having a liquidating agent appointed. (CP 399). The Bankruptcy Court re-opened the Bankruptcy Case and ultimately granted DCI's motion for appointment of a liquidating agent. (CP 482-493). The Liquidating Agent, under the direction of the Bankruptcy Court, proceeded to auction a variety of real and personal property owned by COV and distributed the proceeds of the auction sales to creditors of COV, including AmericanWest Bank, DCI, Yakima County and the U.S. Department of Labor. (CP 494-524). The Liquidating Agent has now been discharged from further obligations with the exception of certain administrative duties reserved by the Bankruptcy Court.⁵

III. ARGUMENT

A. Standard of Review.

DCI agrees that the issue posed by the Cervantes Defendants is one of law and that no material facts required to resolve this matter are in

⁵ The Bankruptcy Court entered an Interim Discharge Order dated June 20, 2011 in Cause No. 05-06600-JAR11 discharging the Liquidating Agent from further responsibility with the exception of certain administrative tasks described in the Order.

dispute. While perhaps not germane to the outcome of this appeal, DCI does take issue with certain of the factual assertions contained in the Cervantes Defendants' opening brief. Because the Cervantes Defendants assert that the Superior Court committed an error of law, this Court's review is de novo.

B. The One Action Rule.

RCW 61.12.020, which codifies the one-action rule, provides:

The plaintiff shall not proceed to foreclose his mortgage while he is prosecuting any other action for the same debt or matter which is secured by the mortgage, or while he is seeking to obtain execution of any judgment in such other action; nor shall he prosecute any other action for the same matter while he is foreclosing his mortgage or prosecuting a judgment of foreclosure.

The Washington Supreme Court, in discussing a predecessor of the current one-action rule, explained that

By the common law, and in many if not most of the States, a mortgagee, while he can have only one satisfaction, "may exercise all his rights at the same time, and pursue his remedy in equity upon the mortgage and his remedy at law upon the bond or covenant accompanying it concurrently." (4 Kent, p. 195.) Our statute prohibits concurrent action in such cases, and in the matter of remedies is a restraining act, and in derogation of common-law rights, and as such must be strictly construed.

Hays v. Miller, 1 Wash. Terr. 143, 146 (1861).

C. *The Cervantes Defendants' Contentions.*

The Cervantes Defendants assert that the Bankruptcy Court's appointment of the Liquidating Agent and the Liquidating Agent's subsequent liquidation of collateral for the benefit of multiple creditors, as called for by the Plan, is an "action" in violation of the one-action rule because it constitutes a *de facto* foreclosure. The Cervantes Defendants are wrong for a number of reasons, each of which is discussed below. First, COV's bankruptcy was a chapter 11 case in which COV voluntarily proposed and obtained confirmation of the Plan. The bankruptcy proceedings were "prosecuted" by COV – not by DCI. Second, the chapter 11 proceedings conducted by the Bankruptcy Court do not constitute an "action" within the meaning of RCW 61.24.120. Finally, the debt involved in the state court action (i.e. those created by the notes and Agreement) are separate from the debt created by the Plan which was at issue in the Bankruptcy proceedings.

D. *COV's Bankruptcy Proceedings Were Not Prosecuted by DCI.*

The Cervantes Defendants concede, as they must, that "an ordinary bankruptcy proceeding is not a foreclosure proceeding" within the meaning of the one-action rule. (Cervantes Brief, pg. 9). However, the Cervantes Defendants seek to carve out from this general rule an

exception in “those very rare cases where a creditor seeks to force a liquidation by foreclosure.” (Cervantes Brief, pg. 9). The concept of a “liquidation by foreclosure” is one invented by the Cervantes Defendants for purposes of this case and has no recognized meaning or definition. No guidance is offered by the Cervantes Defendants as to what circumstances would constitute a “liquidation by foreclosure.” While unstated, the Cervantes Defendants implicit assumption is that when a bankruptcy proceeding is a “liquidation by foreclosure” it is by definition “prosecuted” by a creditor.

In April, 2007, COV confirmed the Plan. COV, not DCI or other creditors, was the Plan proponent. As part of the Plan the Debtor agreed that if DCI was not paid in full prior to December 31, 2009, that a liquidating agent could be appointed under the Plan to sell certain collateral for the benefit of all lien-holders and creditors. The liquidation was to be done under the supervision of the Bankruptcy Court. The Cervantes Defendants do not dispute that they failed to pay DCI in full prior to December 31, 2009 (Cervantes Brief, pg. 2). As a direct result of COV’s default under the Plan, a liquidating agent was appointed. The liquidating agent did exactly those things that COV’s Plan called for, i.e. liquidated certain real and personal property owned by COV pursuant to several Bankruptcy Court orders. The Cervantes Defendants now seek to

re-characterize what they voluntarily agreed to as a “liquidation by foreclosure.” This re-characterization fails not only because the liquidation contemplated by the Plan was voluntary but because no “foreclosure” ever occurred. What did occur was a Bankruptcy Court ordered sale of certain properties owned by COV. Those sales were made, not by DCI, but by the Liquidating Agent, for the benefit of numerous creditors. The fact that DCI and other creditors supported the appointment of a liquidating agent did not convert the bankruptcy proceedings into an action “prosecuted” by DCI (or the other creditors) under the one-action rule.

E. COV's Bankruptcy Proceedings Do Not Constitute an Action for Purposes of RCW 61.12.120.

In addition to the fact that DCI did not prosecute the Bankruptcy Case, federal bankruptcy proceedings do not constitute an “action” for purposes of RCW 61.12.120. While no Washington case resolves the question, cases from other jurisdictions are instructive. The case of *In Re Warburton Avenue Realty Corp.*, 127 B.R. 333 (Bkcy. S.D. N.Y. 1991), involved a creditor (along with several other creditors) bringing involuntary bankruptcy proceedings against the borrower at the same time that a state court proceeding for collection was pending against guarantors of the borrower’s loan. The borrower contended that the bankruptcy

proceedings should be dismissed as a result of New York's version of the one-action rule because the bankruptcy was "tantamount to a foreclosure." *Warburton*, 133 B.R. at 336. In holding that the one-action rule did not prohibit the creditor from bringing the involuntary bankruptcy proceedings, the Court noted that:

The debtor reasons that this involuntary Chapter 11 case is tantamount to a foreclosure action, and therefore, National is circumventing [New York's one-action rule], so that it must be concluded that the involuntary Chapter 11 petition which was filed against the debtor was filed in bad faith because National was one of the petitioning creditors. This syllogistic reasoning must crumble because the two predicate propositions are unsound. First, the involuntary Chapter 11 petition is not tantamount to a foreclosure proceeding. . . . Merely because National orchestrated the involuntary petition and also holds a secured mortgage claim does not mean that this case is simply a two-party dispute which is the equivalent of a mortgage foreclosure proceeding by National. The three other petitioning creditors have claims and interests which must be considered in the Chapter 11 process, in addition to the interests of all other creditors in this case.

Warburton, 127 B.R. at 336 (emphasis added). While the Cervantes Defendants are correct that the *Warburton* Court held that State Courts do not have the right to pass procedural rules to force dismissal of bankruptcy proceedings (Cervantes' Brief, pg. 8), the above quoted language demonstrates that the holding is broader than just that.

In fact, the Cervantes Defendants acknowledge that the "ordinary" bankruptcy proceeding is "a multiparty debt reorganization procedure, not

a foreclosure,” going on to note that the one-action rule would apply to bankruptcy proceedings only in “rare cases.” Cervantes’ Brief, pg. 9. The fact that DCI may have moved to have the Liquidating Agent appointed or that DCI had a security interest and stood to benefit (along with other creditors) from a liquidation do not distinguish this case from *Warburton*. Bankruptcy often involves liquidation of assets, with the proceeds distributed according to the priorities established by the Bankruptcy Code. In this case the liquidation was done pursuant to the provisions of the Plan sponsored and confirmed by COV, whereas in *Warburton* the case was an involuntary bankruptcy brought by creditors. Contrary to the Cervantes Defendants’ theory, whether a bankruptcy case is brought, sponsored or supported by a particular creditor does not transform the case into an “action” prosecuted by that creditor for purposes of the one-action rule.

The case of *Les Placements v. Rosenberg* 1997 WL 1048897 (E.D. N.Y 1997)⁶ provides further analysis as to why a bankruptcy proceeding should not be considered an action for purposes of state law election of remedies statutes such as the one-action rule. In *Rosenberg*, a creditor

⁶ The *Rosenberg* decision is an unpublished decision reported only through Westlaw. The case is cited to the Court in accordance with RAP 14.1(b) as such citation is allowed by Eastern District of New York Civil Rule 7.1 and 7.2. A copy of the decision is attached hereto as Appendix A.

filed an involuntary bankruptcy petition against the borrower on a secured loan. The bankruptcy proceedings ultimately resulted in the proposal of a chapter 11 plan of liquidation which called for the sale of the secured creditor's collateral. Prior to confirmation of the liquidation plan⁷, the secured creditor filed suit against certain guarantors of the borrower's loan. The guarantors argued that dismissal of the non-bankruptcy proceeding was required as a result of the New York's election of remedies statute (the same statute at issue in *Warburton*). The guarantors argued that the bankruptcy proceeding should be considered akin to a foreclosure since the collateral for the debt was being liquidated.

The Court rejected the guarantors' arguments, holding that:

Even if the bankruptcy court had not held the amended plan of liquidation to be un-confirmable, the defendants cite no authority, nor has this Court found any, for the proposition that a debtor's Chapter 11 reorganization should be treated as an election of remedies under §1301 [New York's election of remedies statute]. The debtor's Chapter 11 proceeding is a voluntary one. As such, the plaintiffs can hardly be deemed to have "elected" whatever plan the bankruptcy court eventually confirms, even if they are responsible for proposing that plan in the first instance.

Moreover, a variant of the defendants' interpretation of New York's election of remedies statute has already been considered-and rejected-in *In re 1020 Warburton Ave. Realty*, 127 B.R. 333 (Bankr.S.D.N.Y.1991). In that case, the debtor argued that the creditors who had filed an

⁷ Ultimately the Bankruptcy Court refused to confirm the liquidation plan, although that fact was not significant to the non-bankruptcy Court's decision not to consider the bankruptcy proceeding as an action that triggered the election of remedies statute.

involuntary bankruptcy petition against it had done so in bad faith because one of the creditors was attempting to circumvent the election of remedies statute by filing the petition after already having chosen to proceed against the guarantor in district court. The bankruptcy court rejected the debtor's argument. In so doing, it held, *inter alia*, that “the involuntary Chapter 11 petition is not tantamount to a foreclosure proceeding,” because, unlike a foreclosure, an involuntary proceeding is not “simply a two-party dispute.”

Rosenberg, 1997 WL at 4 (emphasis added) (internal citations omitted).

The *Rosenberg* Court went on to indicate that “a number of other creditors have outstanding claims against the debtor.” *Id* at 5. Consequently, unlike a foreclosure action, the on-going proceeding in the Bankruptcy Court is more than “simply a two-party dispute.” *Id*. The Cervantes Defendants ignore the true holding of cases like *Rosenberg* and *Warburton*, failing to recognize that COV’s bankruptcy proceedings are not an “action” because they involve the relationship between COV and a number of its creditors rather than a simple two party dispute.

Instead, the Cervantes Defendants attempt to fashion an argument that bankruptcy proceedings constitute an “action” based upon a broad construction of the word action, citing *Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29 (2002). In *Int’l Ass’n of Fire Fighters*, the Washington Supreme Court was asked to determine whether an arbitration was an “action” for purposes of awarding attorneys’ fees to

a prevailing party under RCW 49.48.030. The Court held that an arbitration was an “action” for purposes of the statute. The City of Everett argued that the Supreme Court had already decided that an arbitration was not an action in the case of *Thorgaard Plumbing & Heating Co. v. King County*, 71 Wn.2d 126, in which the Court held that “RCW 7.04.030 makes it clear that there is a difference between an action and an arbitration proceeding” *Thorgaard* at 131.

The Supreme Court harmonized the holding in *Thorgaard* with its ruling in *Int’l Ass’n of Firefighters*, pointing out that:

"[l]egislative definitions generally control in construing the statutes in which they appear, but when the same word or phrase is used elsewhere the meaning depends on common usage and the context in which it is used, unaffected by the other statutory definitions . . . Because the statutory scheme at issue in *Thorgaard* serves a different purpose than the statutory scheme at issue here, we find that *Thorgaard's* definition of "action" does not control.

Int’l Ass’n of Firefighters at 40. The Court’s point was that when a term is not specifically defined by the Legislature its meaning depends upon the context in which it is used. In the context of the one-action rule the meaning of the word “action” should be read to mean a lawsuit prosecuted by one party, against the other, for purposes of obtaining a judgment. As the Court in *Thorgaard* pointed out:

An *action* is a prosecution *in a court* for the enforcement or protection of private rights and the redress of private

wrongs. It is clear that by using the word "action" in the foregoing section the legislature had a *lawsuit* in mind. This is consistent with RCW 4.04.020, which provides:

There shall be . . . but one form of *action* for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a civil *action*.

Thorgaard, 126 Wn.2d at 130 (emphasis in original)(internal citations omitted). While RCW 4.04.020, referred to in the *Thorgaard* decision, has been repealed there is no reason to believe that the meaning of the word action in that statute (or in RCW 61.12.120) – as meaning a civil action within the purview of Washington law – has changed. A bankruptcy proceeding is not a lawsuit between two parties in which a creditor elects what remedies it will pursue against a borrower. The one-action rule is designed to require creditors to elect, in very limited circumstances, the order of remedies it will pursue. As a policy matter, the Court should not expand the rule to cover circumstances where a creditor was not the party who made the election.

There are other reasons the Court should hold that a bankruptcy proceeding is not an “action” for purposes of the one-action rule.

The Bankruptcy Court does not normally acquire jurisdiction over claims of creditors against non-debtors. DCI did not have the ability to bring its claims for judgment and foreclosure against the Cervantes Defendants in

the Bankruptcy Court; it was required to bring those claims in State Court. On the other hand, the Bankruptcy Court had previously confirmed the Plan, which dealt with the remedies of creditors against COV in the event a default under the Plan occurred. The State Court did not have the right to grant the remedy of the liquidating agent as provided in the Plan. DCI simply sought to enforce its remedies against COV and the Cervantes Defendants in the Courts where such remedies could be obtained.

In addition, holding that a bankruptcy proceeding is an action for purposes of the single-action rule, would create an unnecessary inconsistency between bankruptcy law and state law. Except in rare circumstances, which are not applicable to this case, a non-debtor in bankruptcy does not obtain the benefits (or become subject to the duties and obligations) of bankruptcy law. For instance, bankruptcy law does not prohibit a creditor from pursuing action against non-debtors even when those non-debtors are jointly liable with the debtor on an obligation. The Cervantes Defendants urge the Court to adopt a rule in which the filing of a bankruptcy proceeding by one co-debtor would prohibit a creditor from pursuing other non-bankruptcy co-debtors. Apparently recognizing the breadth of what they are suggesting, the Cervantes Defendants attempt to temper their request by limiting it to bankruptcies which amount to a “liquidation by foreclosure.” As pointed out above the term “liquidation

by foreclosure” has no recognized meaning either under state law or bankruptcy law. A creditor would have no way of knowing whether any particular bankruptcy case would be deemed a “liquidation by foreclosure.” This would effectively grant non-debtors the benefits of the bankruptcy stay without ever having to file bankruptcy. The Court should decline the Cervantes Defendants invitation to create such a rule. If the Cervantes Defendants want the benefit of the bankruptcy laws they should file for bankruptcy protection.

F. The Debts Owed by COV and the Cervantes Defendants are not the Same for Purposes of RCW 61.12.120.

The one-action rule only prohibits multiple actions if those actions are based upon the same debt. It is true that both COV and the Cervantes Defendants owe money to DCI, however, the source of those obligations are different. In the State Court Action DCI sought judgment against the Cervantes Defendants pursuant to the terms of the Agreement. In the Bankruptcy Case, DCI took action against COV pursuant to the terms of the Plan. It is a fundamental tenant of bankruptcy law that a Debtor’s pre-bankruptcy obligations to creditors are superseded by a confirmed chapter 11 plan. After confirmation, it is the plan which obligates the Debtor to its creditors. The plan becomes the Debtor’s new “contract” with its creditors. *See Generally*, 11 U.S.C. §1141. When COV confirmed the

Plan on April 11, 2007, the Plan became the source of COV's obligations to DCI. It was the Plan, not the Agreement, that the Bankruptcy Court enforced in appointing the liquidating agent and approving the liquidating agent's actions. In contrast, the State Court Action involved the enforcement of the Agreement against the Cervantes Defendants. Because the debts embodied by the two actions are distinct, the one-action rule does not apply.

G. *The Cervantes Defendants' Appeal is Moot.*

At its most basic level the Cervantes Defendants argue that DCI should not be allowed to seek a "deficiency judgment" until DCI's collateral in the Bankruptcy Case has been liquidated.⁸ Subsequent to the Superior Court issuing its letter ruling granting DCI's motion for summary judgment, the Liquidating Agent in COV's bankruptcy proceedings completed the auction sales of all of the real and personal property which constituted collateral for DCI's loans. In November, 2010, the Bankruptcy Court authorized the distribution of the funds generated by those auction sales to creditors in accordance with the Plan (*See, Order Approving Accounting and Disbursement of Proceeds*, CP 524-525).

⁸ DCI disagrees that it attempted to gain "an additional remedy in anticipation of a deficiency judgment" (See Cervantes Defendants' Opening Brief at pg. 5). A deficiency judgment is commonly used to refer to an amount owed by a debtor after any collateral for the indebtedness has been exhausted. In this case DCI has not sought to enforce a deficiency judgment, rather it is just sought to foreclose upon its collateral. If the collateral is insufficient to pay the debt then a deficiency judgment would remain.

The Judgment & Decree of Foreclosure entered by the Superior Court specifically provided that the Cervantes Defendants would be entitled to a credit against the Judgment based upon the amounts received by DCI from the Liquidating Agent in the COV bankruptcy proceedings (Judgment, ¶3.1). However, even after application of those funds the Cervantes Defendants owe DCI in excess of \$4.9 million.

The reality is that the Cervantes Defendants, although they are not legally entitled to it, have obtained the very benefit that they now seek through this appeal – i.e. the collateral owned by COV has been liquidated prior to any action being taken to collect on the Judgment against the Cervantes Defendants. Even if this Court determined that the COV bankruptcy proceedings did constitute an action prosecuted by DCI on the same debt at issue in the State Court proceedings, the fact is that the COV bankruptcy proceedings, in so far as they seek to liquidate collateral, are finished.

On June 20, 2011, the Bankruptcy Court entered an Interim Discharge Order, which, with certain limited exceptions, discharged the Liquidating Agent from further obligation (see Eastern District of Washington Bankruptcy Cause No. 05-06600-JAR11, Docket No. 1110, ¶8, a true and correct copy of which is attached hereto as Appendix B).

The Cervantes Defendants ask the Court to reverse the Superior Court's Order Granting DCI Summary Judgment and remand this matter with instructions for the Superior Court to dismiss this case. However, if the case were remanded at this point in time, the one-action rule would not dictate the case be dismissed. The Superior Court has already decided, on the merits, that DCI is entitled to summary judgment. There is no reason this Court should, even if it agrees with the Cervantes Defendants, require the underlying issues to be re-litigated. The Cervantes Defendants' appeal has, through the passage of time, become moot. But again, the reality is that the Cervantes Defendants have already managed through the delay attendant in this appeal to obtain the exact relief that they have requested, i.e. requiring that COV's assets be liquidated and those amount applied against the debt owed by the Cervantes Defendants prior to any further collection action taking place.

H. *DCI is Entitled to its Attorneys' Fees on Appeal.*

RCW 4.84.330 provides that:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

The Agreement provides, in part, that:

In the event that DCI consults an attorney in connection with any default by [the Cervantes Defendants] regarding the enforcement of any of DCI's rights under this Agreement . . . [the Cervantes Defendants] jointly and severally agree to pay all costs, expenses and attorneys' fees incurred by DCI in connection therewith.

(CP 416-437 at ¶26). The Superior Court determined as part of the Judgment & Decree of Foreclosure that DCI was entitled to its reasonable attorneys' fees and costs incurred in attempting to enforce its rights under the Agreement. The award of fees has not been challenged on appeal. A contractual provision for an award of attorney fees at trial supports an award of attorney fees on appeal. *Reeves v. McClain*, 56 Wn.App 301, 311 (Div III 1989). Pursuant to RCW 4.84.330 and RAP 18.1, DCI requests this Court award it attorneys' fees upon appeal.

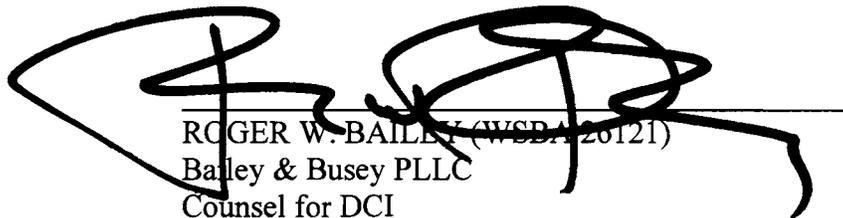
IV. CONCLUSION

The issue presented by this appeal is whether the one-action rule, codified in RCW 61.12.120, prohibited DCI from prosecuting a State Court action for judgment and foreclosure at the same time COV was a debtor in its own bankruptcy case. The one-action rule, which should be given a narrow application because it is in derogation of the common law rights of creditors, does not prohibit DCI from prosecuting the State Court action. The Cervantes Defendants ask this Court to expand the scope of

the rule to frustrate DCI's legitimate collection efforts merely because another party who is obligated to DCI is in bankruptcy. The language of the statute itself gives this Court a variety of reason to reject the Cervantes Defendants' arguments. Bankruptcy proceedings, by definition are not "prosecuted" by an individual creditor. The sales of collateral in the COV bankruptcy proceeding were prosecuted, if at all, by the Liquidating Agent, not DCI. In addition, for the reasons stated above, a bankruptcy proceeding is not an "action" within the contemplation of the one-action rule. Finally, the debts at issue in the bankruptcy proceedings and the State Court action were distinct.

DCI respectfully requests the Court affirm the Superior Court's entry of the summary judgment order and judgment and decree of foreclosure in favor of DCI.

DATED this **22** day of August, 2011



ROGER W. BAILEY (WSBA 20121)
Bailey & Busey PLLC
Counsel for DCI

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on this date I caused to be served in the manner indicated, a copy of the foregoing Brief of Respondent.

By First Class Mail Postage Pre-Paid To:

R. Bruce Johnston
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Emanuel Jacobowitz – mannyj@rbrucejohnston.com

Dated at Yakima, Washington this **22** day of August, 2011



ROGER W. BAILEY

Only the Westlaw citation is currently available.

United States District Court, E.D. New York.
Les PLACEMENTS, Jeton Bleu (1986), Inc., and I.M.
Corp., Plaintiffs,

v.

Isack ROSENBERG and Abraham Rosenberg, De-
fendants.

No. 96-CV-6140 (JG).

Dec. 1, 1997.

Royh. Carlin, Zivyak Klein & Liss, New York, for the
Plaintiffs.

Moshe Katlowitz, Law Offices of Moshe Katlowitz,
New York, for the Defendants.

MEMORANDUM AND ORDER

GLEESON, District J.

*1 On December 17, 1996, plaintiffs Les Placements, Jeton Bleu (1986), Inc. ("Jeton") and I.M. Corp. ("I.M.") commenced the instant action against defendants Isack Rosenberg and Abraham Rosenberg, seeking to collect on two separate guarantees of payment that the defendants gave in a successful effort to induce the plaintiffs to loan money to 54 Eldridge St. Corp. In a motion dated September 15, 1997, the plaintiffs moved for summary judgment on the ground that 54 Eldridge St. Corp. ("debtor") had failed to honor its obligations, and that, as such, the defendants are jointly and severally liable for the amounts due. For the reasons set forth below, the motion is granted.

FACTS

In connection with the purchase, rehabilitation, and renovation of condominiums at 54 Eldridge Street in the Lower East Side of Manhattan, 54 Eldridge St. Corp. issued several notes. On May 18, 1992, in order to induce Jeton to extend the debtor \$1,500,000 in credit so that it could restate and reconsolidate the notes, the defendants, who are the sons of the debtor's

principal, each executed and delivered to Jeton a guarantee, guaranteeing payment of the balance of the loan. On the same day, in an effort to induce I.M. to extend the debtor \$300,000 in credit for the same purpose, the defendants each executed and delivered to I.M. a guarantee, guaranteeing payment on the balance of the loan. As a result of the foregoing, Jeton obtained a first mortgage on the premises and I.M. obtained a second mortgage on the premises. Under the terms of the Jeton mortgage, the debtor was to pay 83 1/3% of the proceeds realized from the sale of each of the units to the plaintiffs to be applied to its indebtedness.

The timing of the completion of the premises coincided with the height of the real estate crash in the lower east side of Manhattan. As a result of that crash, the debtor was not able to sell the units at its projected prices and, as such, was unable to meet its financial obligations under the Jeton note and the I.M. note. Consequently, the debtor began to rent the units rather than sell them and to apply the rental income to decrease its obligations under the mortgages.^{FN1} In addition, on June 5, 1996, the plaintiffs commenced involuntary bankruptcy proceedings against the debtor. Although the debtor at first opposed the filing of the petition, it later consented to an order of relief in a Chapter 11 reorganization in the United States Bankruptcy Court for the Southern District of New York.

^{FN1}. According to the defendants, the decision to rent rather than sell was "unilaterally" made by the plaintiffs.

Thereafter, the plaintiffs brought the instant action to collect on the defendants' guarantees of payment. The plaintiffs have now moved for summary judgment on the ground that the debtor has failed to honor its obligations, and that, as such, the defendants are jointly and severally liable for the amounts due.

In opposing the plaintiffs' motion for summary judgment, the defendants make two arguments. First, the defendants argue that the plaintiffs' decision to rent the units rather than sell them constituted a modification of the original mortgage and that, because the Jeton and I.M. made the modification without either notifying the defendants or obtaining their consent, the

ORIGINAL

defendants are no longer obligated on the guarantees. Second, the defendants assert that, because the amended plan of liquidation contemplates the sale of the premises, New York's election of remedies statute precludes the plaintiffs from seeking payment on the guarantees.^{FN2}

FN2. The defendants also contend that they are no longer obligated on the mortgage because the plaintiffs are in control of the premises. This argument first appeared in the defendants answer, where they contended that, “by controlling the rental and management of the property and by controlling the payment of expenses on the property,” the plaintiffs took “*de facto*” control of the premises and, as such, that the plaintiffs “can no longer enforce the guarantee thereof.” Other than to state that “a question of fact exists as to plaintiffs' taking control of the mortgaged premises,” the defendants made no further mention of this defense in their memorandum of law opposing the plaintiffs' motion for summary judgment, although the plaintiffs did address the defense in their briefs. The argument did, however, resurface at oral argument, where the defendants contended that the plaintiffs are in control of the property because, upon the conversion of the case to a voluntary Chapter 11 reorganization proceeding, the plaintiffs were allowed to select a new managing agent for the premises and to open a bank account requiring the joint signatures of that managing agent and Isack Rosenberg, from which budgeted expenses would be paid.

The defendants have yet to cite any authority for the proposition that the plaintiffs are in control of the premises. As a debtor in possession, the debtor has operating authority pursuant to 11 U.S.C. §§ 1107-08. I therefore find that, as a matter of law, the plaintiffs have not taken control of the premises.

DISCUSSION

A. The Summary Judgment Standard

*2 Summary judgment must be granted where “the

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). In determining when material facts are in dispute, all ambiguities must be resolved and all inferences drawn in favor of the non-moving party. See Local 74, Serv. Employees Int'l Union v. Ecclesiastical Maintenance Servs., 55 F.3d 105, 108 (2d Cir.1995).

The initial burden is upon the moving party to demonstrate the absence of any genuine issues of material fact. See Gallo v. Prudential Residential Servs., Ltd., 22 F.3d 1219, 1223 (2d Cir.1994). “When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule, the nonmoving party must come forward with “specific facts showing that there is a genuine issue for trial.” Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citations omitted). The non-moving party cannot survive a properly supported motion for summary judgment by resting on his pleadings “without ‘any significant probative evidence tending to support the complaint.’” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (quoting First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968)).

B. The Alleged Modification of the Underlying Obligation

The defendants argue that, by instructing the debtor to rent the units rather than sell them, the plaintiffs modified the underlying mortgage and that, as a result, they are no longer obligated under the guarantees. I disagree.

Courts must interpret guarantee agreements such as the ones in the present case under general contract principles. See Bier Pension Plan Trust v. Schneiderson, 74 N.Y.2d 312, 546 N.Y.S.2d 824, 826, 545 N.E.2d 1212 (1989). Accordingly, as with other contracts, such guarantees “may not be altered without the consent of the party who assumed the obligation.” *Id.* In the guarantee context, this means that a creditor and the principal debtor may not alter the guarantor's obligations absent her consent. See *id.* If they attempt to

do so, even in a relatively minor way, the guarantor is relieved of her responsibilities. *See id.*; *Congregation Ohavei Shalom, Inc. v. Comyns Brothers, Inc.*, 123 A.D.2d 656, 507 N.Y.S.2d 28, 29 (App.Div.1986); *Depositors Trust Co. v. Hudson General Corp.*, 485 F.Supp. 1355, 1362 (E.D.N.Y.1980). In the text of a guarantee, however, a guarantor may consent to remain bound by future modifications to an underlying agreement. *See Crossland Federal Savings Bank v. A. Suna & Co., Inc., 935 F.Supp. 184, 200 (E.D.N.Y.1996)*.

In the present case, each guarantee explicitly gives the lender the right to “sell, exchange, release, surrender, realize upon or otherwise deal with in any manner and in any order” the mortgaged property (emphasis added). Each guarantee further gives the lender the right to do so “without consent of, or notice to, the Guarantor.” Given that these consent-to-modification clauses explicitly give the lenders the right to “deal with” the units “in any manner,” no rational juror could find that, when signing his guarantee, each defendant did not consent to the modification at issue here. I therefore find that the modification did not relieve the defendants’ of their obligations under the guarantees.

*3 At oral argument, the defendants maintained that the words “otherwise deal with in any manner and in any order” does not embrace the possibility that the guarantors might rent the units rather than sell them. According to the defendants, that phrase must be interpreted as a reference to “how [the parties to the guarantees] will ... deal with the sales, how [the parties] will ... apply the funds and in what order [the parties] will ... apply the funds.” The defendants sought to bolster that interpretation of the consent to modification by stating that “[t]he attorneys that drafted the document are rather sophisticated” and that, as such, had they intended the foregoing language to contemplate a change from sale to rental, they would have stated so explicitly.

I disagree. A reading of the consent-to-modification provision leaves no question that the phrase “otherwise deal with in any manner” is meant to be an alternative to, not a modification of, the terms “sell, exchange, release, surrender, [and] realize upon.” Consequently, no rational juror could construe the language of the guarantees to support the defendants’ position. Moreover, it is entirely plausible that, in an

effort to induce the plaintiffs’ to loan the debtor money, the authors of the guarantees intentionally drafted broad consent-to-modification clauses, clauses which contemplate, among other possibilities, the rental rather than sale of the units. The defendants’ “sophisticated attorneys” argument therefore proves too much.

C. New York's Election of Remedies Statute

The defendants also contend that, because the amended plan of liquidation that the plaintiffs submitted to the bankruptcy court contemplates the sale of the premises in satisfaction of the debt to the plaintiffs, under New York’s election of remedies statute, the plaintiffs may not also seek payment on the guarantees. Again, I disagree.

Under § 1301 of New York's Real Property Actions and Proceedings Law, upon a mortgagor’s default, a mortgagee “must elect between pursuing a legal remedy or foreclosing on the property, but may not prosecute both actions without leave of court.” ^{FN3} *Manufacturer's Hanover v. 400 Garden City*, 150 Misc.2d 247, 568 N.Y.S.2d 505, 507 (Sup.Ct.1991). A court will grant leave to commence a separate legal action only where the applicant demonstrates that “special circumstances” exist to justify a separate proceeding at law. *See Stein v. Nellen Dev. Corp., 123 Misc.2d 268, 473 N.Y.S.2d 331, 333 (Sup.Ct.1984)*. The terms of § 1301 apply in the guarantee context. *See In re 1020 Warburton Ave. Realty Corp., 127 B.R. 333, 334 (Bankr.S.D.N.Y.1991)* (“[A] foreclosure action is not maintainable without leave of the court while an action is pending against the mortgage guarantors.”). Section 1301’s purpose is “to avoid multiple suits to recover the same debt and to confine the proceedings to one court and one action.” *Dollar Dry Dock Bank v. Piping Rock Builders, Inc.*, 181 A.D.2d 709, 581 N.Y.S.2d 361, 362-63 (App.Div.1992). Given, however, that § 1301 is “in derogation of a plaintiff’s common law right to pursue the alternate remedies of foreclosure and an action on the debt,” New York courts have held that it must be “strictly construed.” *Id.* at 363.

^{FN3}. Specifically, § 1301(3) states as follows:

While the action is pending or after final judgment for the plaintiff therein, no other

action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought.

*4 The defendants attempt to bring themselves within the protection of § 1301 by arguing that “there is no substantive difference between an ordinary foreclosure action” and the manner in which the amended plan of liquidation contemplates the sale of the premises. In making their argument, the defendants rely heavily on *Manufacturers Hanover Trust Co. v. 400 Garden City Assocs.*, 150 Misc.2d 247, 568 N.Y.S.2d 505 (Sup.Ct.1991). In that case, the court refused to relieve the plaintiff of its election of remedies despite the fact that the debtor filed for bankruptcy after the plaintiff already had commenced an equitable foreclosure action. According to the defendants, *Manufacturers Hanover* stands for the proposition that “the fact that the mortgagor is in the middle of a Chapter 11 proceeding in the Bankruptcy Court does not rise to the level of ‘special circumstances’ necessary to relieve the mortgagee of its election of remedies, such that it could commence a legal action to recover under the guarantee after having commenced an equitable action in the bankruptcy [sic] Court similar in every way to a foreclosure action.”

At oral argument, the defendants conceded that the amended plan of liquidation on which they rely in making their argument had not yet been confirmed by the bankruptcy court. Since oral argument, the Court has learned that the bankruptcy court held the amended plan of liquidation to be unconfirmable as a matter of law. Given that the amended plan of liquidation has not been confirmed, I decline to find that New York's election of remedies statute prevents the plaintiffs from proceeding against the guarantors at law.^{FN4} Consequently, that statute does not prevent the plaintiffs from prevailing on the instant motion for summary judgment.

^{FN4}. Both parties informed this Court that the bankruptcy court found the amended plan to be unconfirmable. The defendants, however, argued that § 1301 nevertheless prevents the plaintiffs' recovery in this case because “[the] plaintiffs' plan was rejected ... on procedural grounds and not substantive grounds” and because “[the p]laintiffs will undoubtedly file an amended Plan which will

still call for the sale of the mortgaged premises in the manner set forth in the rejected Plan.” Not surprisingly, the plaintiffs have contested the defendants' position, informing the Court that “[t]he mortgagees have withdrawn their plan and have no intentions of offering a new plan.”

I find that, whether or not the plaintiffs offer a new plan, the bankruptcy court's finding that the amended plan is unconfirmable precludes the defendants from succeeding in their § 1301 argument.

Even if the bankruptcy court had not held the amended plan of liquidation to be unconfirmable, the defendants cite no authority, nor has this Court found any, for the proposition that a debtor's Chapter 11 reorganization should be treated as an election of remedies under § 1301. The debtor's Chapter 11 proceeding is a voluntary one. As such, the plaintiffs can hardly be deemed to have “elected” whatever plan the bankruptcy court eventually confirms, even if they are responsible for proposing that plan in the first instance.

Moreover, a variant of the defendants' interpretation of New York's election of remedies statute has already been considered-and rejected-in *In re 1020 Warburton Ave. Realty*, 127 B.R. 333 (Bankr.S.D.N.Y.1991). In that case, the debtor argued that the creditors who had filed an involuntary bankruptcy petition against it had done so in bad faith because one of the creditors was attempting to circumvent the election of remedies statute by filing the petition after already having chosen to proceed against the guarantor in district court. *See id.* at 334. The bankruptcy court rejected the debtor's argument. In so doing, it held, *inter alia*, that “the involuntary Chapter 11 petition is not tantamount to a foreclosure proceeding,” because, unlike a foreclosure, an involuntary proceeding is not “simply a two-party dispute.” *Id.* at 336.^{FN5}

^{FN5}. The bankruptcy court gave three other reasons for rejecting the debtor's argument. First, it noted that “[t]he commencement of [a] chapter 11 case immediately invokes 11 U.S.C. § 362(a) which automatically stays any foreclosure proceedings against property of the estate.” *Warburton Ave.*, 127 B.R. at 336. Second, the court held that, because “[t]he United States Constitution specifically

mandates that only Congress has the authority to promulgate laws with respect to bankruptcy[,] ... state statutes may not impose conditions for the filing of bankruptcy cases in Federal Courts.” *Id.* Finally, the court reasoned that “the commencement of the involuntary Chapter 11 case does not constitute a circumvention of [New York’s election of remedies statute] because there is no state court foreclosure action pending by [the creditor] which conflicts with the state statute.” *Id.* According to the court, the election of remedies statute “governs state procedures and has no application to bankruptcy cases which are constitutionally within the exclusive province of Congress.” *Id.*

*5 At oral argument, the parties agreed that, in addition to the plaintiffs, a number of other creditors have outstanding claims against the debtor. Consequently, unlike a foreclosure action, the on-going proceeding in the bankruptcy court is more than “simply a two-party dispute.” I therefore find that New York’s election of remedies statute does not preclude the plaintiffs from proceeding against the guarantors in this action.

CONCLUSION

For the foregoing reasons, the plaintiffs’ motion for summary judgment is granted. The parties are directed to attempt to determine between themselves the amount due plaintiffs. The parties are further directed to inform this Court, by January 9, 1998, as to whether agreement as to such amount has been reached.

So Ordered.

E.D.N.Y., 1997.
Les Placements v. Rosenberg
Not Reported in F.Supp., 1997 WL 1048897
(E.D.N.Y.)

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**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON**

IN RE:

CERVANTES ORCHARDS &
VINEYARDS, LLC,

Debtor(s):

Case No. 05-06600-JAR11

INTERIM ORDER

- 1. Discharging and Releasing Liquidating Agent;**
- 2. Providing for Turnover and Distribution of Property;**
- 3. Setting Claims Bar Date**
- 4. Establishing Tax Obligations Of Liquidating Agent; and**
- 5. Distributing Funds Held By or Subsequently Received by the Liquidating Agent.**

This matter came before the Court on the joint motion (“**Motion**”) of Deere Credit, Inc. (“**DCI**”) and T16 Management Co., Ltd., in its capacity as Liquidating Agent for Cervantes Orchards & Vineyards (“**Liquidating Agent**”) for an order: (a) discharging and releasing the Liquidating Agent from

ORIGINAL

any claims or obligations; (b) providing for the orderly turnover and distribution of property, including the Remaining DCI Collateral; (c) setting a claims bar date for any claims or actions to be filed against the Liquidating Agent; (d) establishing the tax reporting and payment obligations of the Liquidating Agent; (e) authorizing distribution of property held or subsequently received by the Liquidating Agent; and (f) re-closing the case. The following appearances were made: (a) Roger W. Bailey of Bailey & Busey, PLLC for DCI; (b) Michael G. Wickstead of Ogden Murphy Wallace PLLC for the Liquidating Agent; (c) Bradford J. Axel and Dustin E. Yeager of Stokes Lawrence Velikanje Moore & Shore, P.S. for NW Management & Realty Services, Inc.; (d) Kari D. Larson for the United States Dept. of Justice/Internal Revenue Service; (e) Gary W. Dyer for the United States Trustee; and (f) Jeffrey Simpson for AmericanWest Bank. After reviewing the pleadings filed herein and having heard the argument of counsel, the Court finds and orders as follows:

1. Notice: Notice of the Motion was proper pursuant to FRBP 2002 and LBR 2002-1;
2. Approval of Motion: The Motion is hereby granted;
3. Liquidating Agent's Reports: The Liquidating Agent shall, within thirty (30) days of the entry of this Order: (a) submit all of the monthly reports required by the Appointment Order; (b) submit all requests for payment of services by the Liquidating Agent and the Liquidating Agent's counsel (through the procedure described in the Appointment Order); and (c) file a final

report of its financial and business activities. Each of the foregoing reports and requests shall cover the period ending on the date of this Order. For purposes of filing the requests and reports contemplated by this paragraph, the Liquidating Agent shall not be: (a) required to report on any activities subsequent to the date of this Order; or (b) required to submit or obtain approval of its fees and costs (or those of its professionals) incurred subsequent to the date of this Order;

4. Bar Date Order: Any party who wishes to assert a claim against the Liquidating Agent (other than COV, Jose & Cynthia Cervantes or DCI) shall be required to file a claim with the Bankruptcy Court within thirty (30) days of the entry of this Order ("**Claims Period**") and deliver copies of the same to counsel for DCI and the Liquidating Agent. Any such claim shall include a short and plain description of the basis of the claim, the amount of such claim and attach any documents supporting the claim. **Any party failing to file such claims with the Court within the Claims Period shall be forever barred from making claims against the Liquidating Agent.** DCI shall send notice ("**Bar Date Notice**") to all parties on the Master Mailing List of the Claims Bar Date. The Bar Date Notice shall be substantially in the form filed with the Court under Docket No. 1104. The Bar Date Notice shall be sent no later than five (5) days after entry of this Order. Claims against the Liquidating Agent asserted by DCI, Cervantes Orchards & Vineyards, LLC ("**COV**") or Jose & Cynthia Cervantes ("**Retained Claims**")

shall be retained by those parties notwithstanding the entry of this Order and notwithstanding the discharge and release provided to the Liquidating Agent herein. The Court specifically maintains jurisdiction to resolve any such Retained Claims and to approve any agreement reached by those parties concerning those claims ("**Settlement Agreement**"). This case shall remain open until the Retained Claims have been resolved by agreement or Court order.

5. Tax Obligations: The Liquidating Agent shall, within thirty (30) days of the entry of this Order, provide the Debtor and the Internal Revenue Service a cash basis statement of all income and expenditures of the Liquidating Agent for the years 2010 and 2011, through the date of this Order. In the event the IRS or any other taxing agency believes that the Liquidating Agent has a duty to prepare or file any returns or pay any tax resulting from such returns, such taxing agency shall be required to file a claim against the Liquidating Agent within sixty (60) days of the entry of this Order ("Tax Claims Period"), specifying in such claim: (a) the returns which the taxing agency believes must be filed; (b) the amount of tax which the taxing agency contends is due from the Liquidating Agent; and (c) the basis for imposition of the obligation to file returns or pay taxes. Failure of any taxing agency to file such a claim during the Tax Claims Period shall bar such taxing agency from later asserting any obligation of the Liquidating Agent to file returns or pay tax relating to its activities as Liquidating Agent. In the event a claim is filed by a

taxing agency during the Tax Claims Period the Court will establish procedures for resolving such claims by subsequent order;

6. Turnover of Remaining Property: Except as otherwise provided herein, the Liquidating Agent is authorized and directed to turn over any funds or property currently subject to the control of the Liquidating Agent or constituting a portion of the Remaining DCI Collateral (as that term is defined in the Debtor's confirmed plan) as follows (any capitalized terms shall have the meaning ascribed to those terms in the Motion):

A. Subject to Court approval of a settlement agreement between DCI, the Liquidating Agent, Monson Fruit and the Worker Group, the first \$6,934.45 received by the Liquidating Agent from the 2010 COV Crop Claims or any proceeds resulting from a settlement of claims with Monson shall be distributed to Columbia Legal Services as counsel for the Worker Group in full and complete satisfaction of the claims of the Worker Group. Columbia Legal Services will be responsible for distribution of those monies among the members of the Worker Group, withholding of any taxes, and reporting those distributions as required by law.

B. Any remaining proceeds received by the Liquidating Agent from the settlement of claims with Monson would be distributed to DCI. Any settlement with Monson would be subject to Bankruptcy Court approval by separate motion.

C. The 2010 LA Crop Proceeds, including any rights to make or receive the proceeds from insurance claims, shall be paid or transferred to DCI, after payment of the Liquidating Agent's fees and expenses (including the fees and expenses of its legal counsel), unless otherwise agreed between DCI and the Liquidating Agent. To the extent certain of the 2010 LA Crop Proceeds are received by the Liquidating Agent after entry of the Final Discharge Order, the Liquidating Agent is authorized and directed to pay those funds, or assign its rights thereto, less any fees or expenses incurred by the Liquidating Agent, to DCI without further order of the Court.

D. To the extent that the 2010 COV Claims became subject to the control of the Liquidating Agent, and not otherwise dealt with in the settlement with Monson, they should be disposed of as provided in the Court approved Settlement Agreement between the Liquidating Agent, DCI, COV and Cervantes regarding the Retained Claims.

E. Any rights of the Liquidating Agent or DCI to the 2009 AGR Claim shall be disposed of pursuant to the terms of the Settlement Agreement.

F. Any claims to COV equipment by the Liquidating Agent shall be released or transferred as set out in the Settlement Agreement.

G. Any other items of the Remaining Property, or any rights related thereto, currently asserted by the Liquidating Agent or subsequently coming under the control or into the possession of the Liquidating Agent, other

than those described above, shall be disposed of in accordance with the terms of the Settlement Agreement.

H. Any claims or rights of action held by the Liquidating Agent as of the date of this Interim Discharge Order or which may arise thereafter shall be retained by the Liquidating Agent until disposed of in accordance with the terms of the Settlement Agreement or terms of the Final Discharge Order.

8. Discharge of Liquidating Agent: The Liquidating Agent is hereby discharged and released from any further obligations or responsibilities under the Appointment Order or otherwise (subject to the requirements imposed upon the Liquidating Agent by this Order);

9. Release of Liquidating Agent: Other than claims made against the Liquidating Agent within the Claims Period and other than the Retained Claims, the Liquidating Agent is hereby released and discharged from any claims, causes of action or liability arising from or related to its activities as Liquidating Agent.

10. Payment of Liquidating Agent (and its professionals) After Entry of this Order: With respect to any compensation to be paid to the Liquidating Agent or professionals retained by the Liquidating Agent, after the date of this Order, such compensation shall not be subject to this Court's approval. Compensation for any period prior to entry of this Order would continue to be governed by the Appointment Order.

11. Final Discharge Order and Re-Closure of Case: In the event that no claims are filed against the Liquidating Agent during the Claims Period, the Retained Claims have been resolved or the Settlement Agreement has been approved, and the Liquidating Agent has complied with its obligations under this Order, the Court shall enter a Final Discharge Order and enter an order re-closing this case. In the event that claims are made against the Liquidating Agent within the Claims Period, the Court will resolve any such claims, and upon such resolution, and approval of the Settlement Agreement (or other resolution of the Retained Claims), the Court shall enter a Final Discharge Order releasing the Liquidating Agent from any further obligations and an order re-closing the COV bankruptcy case. Notwithstanding anything to the contrary in this Order, the case shall not be re-closed until such time as the U.S. Trustee's Motion Requesting Final Decree Not Be Entered ("UST Motion") has been resolved. Notwithstanding entry of this Order, T16 will

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Co-operate with and provide the U.S. Trustee's office with any information in T16's possession reasonably requested by the U.S. Trustee.

Jointly Presented By:

/s/ Roger W. Bailey
ROGER W. BAILEY (WSBA 26121)
Bailey & Busey, PLLC
Counsel for DCI

/s/ via E-Mail approval
MICHAEL G. WICKSTEAD (WSBA #5402)
Ogden Murphy Wallace, PLLC
Counsel for the Liquidating Agent



John A. Rossmey
Bankruptcy Judge

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