



Honorable Gary Spraker
United States Bankruptcy Judge



Entered on Docket
May 31, 2016

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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|-----------------------------|---|-------------------------|
| In re: |) | Case No.: 13-19117-gs |
| |) | Chapter 11 |
| CM REED ALMEDA 1-3062, LLC, |) | |
| |) | |
| Debtor. |) | Date: February 10, 2016 |
| |) | Time: 9:30 a.m. |

**MEMORANDUM ON DEBTOR'S MOTION TO DETERMINE TAX LIABILITY
PURSUANT TO 11 U.S.C. § 505, AND HARRIS COUNTY'S
REQUEST FOR ABSTENTION¹**

On February 10, 2016, the court heard debtor CM Reed Almeda 1-3062, LLC's Motion to Determine Tax Liability Pursuant to 11 U.S.C. § 505 (ECF No. 144) ("the 505 Motion"). In the 505 Motion, the debtor asks this court to determine its tax liability to "the Houston I.S.D, Harris County entities, and City of Houston Districts," with respect to real property consisting of 16.0638 acres of vacant land in Harris County, Texas.² Harris County, who has filed Proof of Claim Nos. 1-1 and 3-2, opposes the requested relief, and asks this court to abstain from determining the debtor's tax liability. For the reasons stated below, the court finds that it lacks jurisdiction to determine certain of the tax years encompassed in Harris County's two claims, under § 505(a)(2)(C), and that abstention is appropriate as to any tax liability which it might otherwise be permitted to determine under § 505(a)(1).

¹ In this Memorandum, all references to "Section" or "§" are to provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532, unless otherwise indicated. All references to "ECF No." are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court.

² ECF No. 144 at 1.

FACTS**A. History of the Property.**

Debtor CM Reed Almeda 1-3062, LLC (“CM Reed”) is a holding company. It has no employees, and conducts no regular business. Its sole asset is 16.0638 acres of vacant land in Harris County, Texas (“the Property”). The Property has had a checkered past, resulting in both environmental and title issues. It is currently platted for residential development, but the debtor, who acquired this asset through foreclosure, has never intended to develop it.

Between 1940 and 1990, the Property was used for oil and gas exploration, and had more than 20 operating wells located on it.³ These operations ceased by 2004, although the wells and their supporting infrastructure remained on the Property.⁴ In March 2006, Consolidated Mortgage, LLC (“Consolidated”), as servicer and agent for Desert Capital REIT, Inc. (“DCR”) as lender, extended two loans, secured by deeds of trust, to Juliet Homes, L.P. (“Juliet Homes”).⁵ Juliet Homes was a Texas developer and home builder, who platted the Property for residential development.⁶ Juliet Homes defaulted on the loans, and the second, but not the first, deed of trust was foreclosed in September 2007.⁷ Juliet Homes filed for bankruptcy, but the Property was not included in that proceeding, which is still pending under chapter 7.

Consolidated acquired title to the property in its own name, and not as agent for DCR, as a result of the foreclosure on the second deed of trust.⁸ In October 2007, Consolidated transferred the Property to Hayden Almeda, L.L.C., an entity that it owned, and sold the equity interests in Hayden Almeda to SRG Real Estate.⁹ Consolidated then extended a loan to SRG so

³ Decl. of David White, ECF No. 177, ¶ 5.

⁴ *Id.*, ¶ 6.

⁵ Mem. in Supp. of [§ 505 Motion], ECF No. 161 at 2-3.

⁶ Decl. of David Bagley, ECF No. 182, ¶ 6.

⁷ Mem. in Supp. of [§ 505 Motion], ECF No. 161 at 3.

⁸ *Id.*

⁹ *Id.*; *see also* Decl. of David Bagley, ECF No. 182, ¶¶ 7, 8.

1 this entity could develop the Property, taking back a deed of trust that was junior to the first deed
2 of trust extended to Juliet Homes in 2006.¹⁰ SRG retained Alpine Environment Technologies
3 Corporation (“Alpine”) to test for petroleum contamination, in light of the anticipated residential
4 development of this parcel.¹¹ Liens for such work, in excess of \$1.4 million, remain on the
5 Property to this date, held by Alpine and also Phase I Technologies.¹²

6 In September 2009, Hayden Almeda issued two deeds of trust, one to Larry Ramming
7 and the other to Dick Wheeler, secured by the Property.¹³ The debtor asserts these individuals
8 were the owners of SRG, and that neither of them gave consideration for the deeds of trust.¹⁴

9 SRG defaulted on the loan from Consolidated, who foreclosed its junior deed of trust and
10 reacquired the equity interests in Hayden Almeda.¹⁵ In November 2009, the Property was then
11 transferred to CM Capital Services, LLC, a successor in interest to Consolidated.¹⁶ By special
12 warranty deed, the debtor acquired ownership of the Property on December 23, 2009, subject to
13 the first deed of trust.¹⁷ That deed of trust was subsequently foreclosed, and a Substitute
14 Trustee’s Deed in favor of the debtor was executed March 1, 2011.¹⁸ However, it appears
15 Ramming and Wheeler “also purported to foreclose” their deeds of trust on the Property three
16 days later, on March 3, 2011.¹⁹ The debtor notes that the transfers to Ramming and Wheeler, as
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19 ¹⁰ Mem. in Supp. of [§ 505 Motion], ECF No. 161 at 3.

20 ¹¹ Decl. of David White, ECF No. 177, ¶¶ 8, 9.

21 ¹² See Am. Discl. Statement, ECF No. 211 at 13.

22 ¹³ Mem. in Supp. of [§ 505 Motion], ECF No. 161 at 4.

23 ¹⁴ *Id.*

24 ¹⁵ *Id.*

25 ¹⁶ *Id.*

26 ¹⁷ Mem. in Supp. of [§ 505 Motion], ECF No. 161 at 4:18-20.

27 ¹⁸ *Id.* at 4:22-23.

28 ¹⁹ *Id.* at 5:4-7.

well as transfers to other entities, have clouded title to the Property.²⁰

B. The Bankruptcy.

The debtor filed a chapter 11 petition on October 29, 2013. It filed its schedules on November 12, 2013.²¹ In them, it placed a value of \$950,000.00 on the Property. The schedules also reflect that the debtor has reached a settlement with the lien claimants in which they will share 31.57% of net sale proceeds from the Property in satisfaction of their secured claims. The debtor's schedules also disclose priority tax claims arising in 2012 owed to the City of Houston c/o Harris County Tax Assessor in the amount of \$68,630.79, and directly to the Harris County Tax Assessor for \$79,611.72. The debtor also includes a priority claim from 2012 in the amount of \$126,280.65 owed to the Houston Independent School District. No other explanation or detail is provided for these debts on the debtor's Schedule E – Creditors Holding Unsecured Priority Claims. Moreover, none of the priority creditors are included as general, unsecured creditors on the debtor's Schedule F – Creditors Holding Unsecured Nonpriority Claims.

The debtor explains that the bankruptcy was filed for the express purpose of selling the Property free and clear of liens and claims, because such a sale would be the best means of resolving the title issues associated with this asset.²² The debtor has, in fact, twice obtained court authority to sell the property, free and clear of liens. The first sale, authorized in December 2013, was for \$950,000.00.²³ That sale was not consummated. A second sale, for \$1,605,000.00, was authorized on March 1, 2016.²⁴ However, that sale has now fallen through as well. A third Motion for Authority to Sell Property Free and Clear of Interests, Liens, Mortgages, Privileges and Encumbrances is now pending, in which CM Reed seeks authority to

²⁰ Decl. of David Bagley in Supp. of Mot. to Approve Auction Procedures, ECF No. 138, ¶ 7.

²¹ ECF No. 44.

²² Am. Discl. Statement, ECF No. 211 at 14-15.

²³ Order (1) Approving Sale of Debtor's Assets Free and Clear of Liens, Claims and Interests; and (II) Granting Related Relief, ECF No. 69.

²⁴ Order Approving Sale of Property Free and Clear of Liens, Claims, Interests, and Encumbrances, ECF No. 205.

1 sell the Property for \$950,000.00.²⁵

2 Harris County has filed two of the three proofs of claim filed in this case.²⁶ It filed Proof
3 of Claim No. 1-1 on November 26, 2013, for prepetition ad valorem real property taxes owed
4 under Texas Tax Code §§ 32.01 and 32.07 in the amount of \$556,275.07. This sum represents
5 taxes due for tax years 2007 to 2013, secured by the Property. The claim is supported by
6 voluminous documentation, well over 400 pages, consisting of copies of partial tax statements
7 from the Harris County Tax Assessor-Collector. The statements reflect that the taxes have been
8 assessed per lot within the parcel, rather than upon the Property as a whole. Each statement
9 includes the 2013 assessed value and itemizes the tax liability for tax years 2007 through 2013,
10 for a particular parcel. These statements identify Dick Wheeler and Larry Ramming as the
11 “certified owners” of the lots for the tax years encompassed within the claim, with a PO Box
12 mailing address in Haslet, Texas.²⁷ None identify the debtor or its predecessors in interest as
13 certified owners. The statements include liabilities to various “tax units,” including Harris
14 County, Harris County Flood Control District, Port of Houston Authority, Harris County
15 Hospital District, Harris County Department of Education, Houston I.S.D., Houston Community
16 College System, and City of Houston. All statements are dated either November 12 or 13, 2013.

17 Harris County has also filed an administrative expense claim, Proof of Claim No. 3-2, in
18 the amount of \$111,492.52 for ad valorem taxes incurred post-petition, in 2014 and 2015. As
19 with its Claim No. 1-1, the taxes have been assessed per lot, rather than upon the Property as a
20 whole. According to this claim, the Property has a value of \$1,697,400.00.²⁸ The supporting
21 documentation to Claim No. 3-2 mirrors that included with Harris County’s Claim No. 1-1; it
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23 ²⁵ ECF No. 235 at 2.

24 ²⁶ The third claim is an unsecured priority tax claim under § 507(a)(8) for \$2,566.79, filed by the
25 Texas Comptroller of Public Accounts. It is based, at least in part, on estimated liability due to the
26 debtor’s non-filing of tax returns for 2012 and 2013. *See* Proof of Claim No. 2-1.

27 ²⁷ Copies of three partial tax statements for tax year 2006 are also included with Claim No. 1-1.
28 These statements identify Juliet Homes LP as the certified owner. *See* Proof of Claim No. 1-1, Part 5
at 12-14.

²⁸ Proof of Claim No. 3-2, filed Feb. 24, 2016, at 2.

1 consists of copies of partial tax statements that again identify Dick Wheeler and Larry Ramming
2 as “certified owners” of the lots for the tax years encompassed within the claim. Again, none of
3 the statements identify the debtor as a certified owner. The statements are dated February 18
4 or 19, 2016, and Claim No. 3-2 was filed on February 24, 2016.

5 The debtor filed its 505 Motion on November 20, 2015, just over two years after the
6 filing of its petition. It contends the taxing authorities have inaccurately valued and classified
7 the Property, and that they failed to serve proper notice of their tax assessments on the debtor
8 and the prior owners of the Property. In spite of the time period covered by the tax statements,
9 the debtor contends the time for it to protest the taxes under state law has not expired.

10 Harris County opposes the 505 Motion, and asks that this court abstain from determining
11 the debtor’s tax liability under 28 U.S.C. § 1334(c)(1). The County also asserts the debtor lacks
12 standing to protest the taxes based on lack of notice for any of the tax years during which it did
13 not own the Property.

14 DISCUSSION

15 A. 11 U.S.C. § 505.

16 Section 505(a)(1) permits, but does not require, the bankruptcy court to determine a
17 debtor’s tax liability. It provides that “the court *may* determine the amount or legality of any tax,
18 any fine or penalty relating to a tax, or any addition to a tax,” whether or not such tax has been
19 previously assessed or paid.²⁹ This authority is restricted under § 505(a)(2), however. The court
20 may not determine “the amount or legality of a tax, fine, penalty, or addition to tax if such
21 amount or legality was contested before and adjudicated by a judicial or administrative tribunal
22 of competent jurisdiction before the commencement of the case under this title.”³⁰ This
23 provision is inapplicable here; it is undisputed that the debtor has never contested the taxes at
24 issue before any Texas court or administrative tribunal.

25 The court’s authority to determine taxes is further restricted with respect to ad valorem
26 taxes under § 505(a)(2)(C), in that it cannot determine “the amount or legality of any amount

27 ²⁹ 11 U.S.C. § 505(a)(1) (emphasis added).

28 ³⁰ 11 U.S.C. § 505(a)(2)(A).

1 arising in connection with an ad valorem tax on real or personal property of the estate, if the
 2 applicable period for contesting or redetermining that amount under applicable nonbankruptcy
 3 law has expired.”³¹ In other words, “if the liability for an *ad valorem* tax has become fixed and
 4 the debtor’s time to contest it outside of the bankruptcy court has expired, the debtor may not
 5 contest the liability in bankruptcy.”³² Section 505(a)(2)(C) is applicable here, because the
 6 505 Motion asks this court to determine the proper amount of ad valorem taxes to be assessed on
 7 the Property.

8 **B. The “Has Expired” Restriction in § 505(a)(2)(C).**

9 Section 505(a)(2)(C), added to the Bankruptcy Code in 2005 as part of BAPCPA,
 10 expressly restricts a debtor’s ability to contest “stale property tax claims.”³³ The subsection is
 11 meant to respond to concerns expressed by state and local taxing authorities that § 505(a)(1)
 12 gave the bankruptcy court discretion to address “tax liabilities (such as real property or *ad*
 13 *valorem* tax claims) that arose many years ago and with respect to which the debtor never filed
 14 timely objection.”³⁴ The restriction on the court’s authority is not completely clear, however.
 15 The court may not determine a debtor’s ad valorem tax liability “if the applicable period for
 16 contesting or redetermining that amount under applicable nonbankruptcy law has expired.” The
 17 question becomes, “expired” as of when? As of the date the petition was filed, or as of the date
 18 the debtor seeks § 505 relief? Further, if the petition date is the determinative deadline, would §
 19 108 apply to extend the “has expired” deadline?

20 These issues were directly addressed in *In re the Village at Oakwell Farms, Ltd.*³⁵ That

21 ³¹ 11 U.S.C. § 505(a)(2)(C) (emphasis added).

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 23 ³² Carl M. Jenks, *The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Summary of Tax Provisions*, 79 Am. Bankr. L.J. 893, 896 (Issue 4 Fall 2005)(emphasis in original).

24 ³³ *Id.*; see also *Dubov v. Read (In re Read)*, 692 F.3d 1185, 1192 (11th Cir. 2012).

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 26 ³⁴ Jenks, *supra* note 32, at 896. For example, in *New Haven Projects Ltd. Liability Co. v. City of New Haven (In re New Haven Projects Ltd. Liability Co.)*, 225 F.3d 283, 286 (2nd Cir. 2000), the court
 27 noted that § 505 “empowers a bankruptcy court to redetermine the amount of a debtor’s tax liability even
 28 when a debtor has failed to comply with state law procedures for challenging such liabilities, including
 applicable state law statutes of limitations.”

³⁵ 428 B.R. 372 (Bankr. W.D. Tex. 2010).

1 bankruptcy, like the instant one, involved a distressed parcel of Texas real property, specifically,
 2 “an apartment building good for little more than razing,” and a debtor’s motion for a
 3 determination of tax liability under § 505.³⁶ When the debtor filed its petition in 2009, the time
 4 period within which it could seek review of its 2009 tax liability under state law had not yet
 5 expired. For this reason, the debtor argued that the court retained jurisdiction to determine its
 6 § 505 motion. The taxing authority, Bexar County, disagreed, because the applicable state law
 7 period for the debtor to contest the 2009 taxes had expired postpetition, but before the debtor’s
 8 § 505 motion was filed.³⁷ The court concluded that § 108 did not trump the more specific
 9 language of § 505(a)(2)(C), and because the time within which the debtor could contest its tax
 10 liability under state law had expired, “the court has lost the right to redetermine the debtor’s
 11 property tax liability for tax year 2009.”³⁸

12 The Eleventh Circuit reached the same conclusion in *In re Read*.³⁹ That decision defined
 13 the issue as “whether the bankruptcy court erred in holding that the time period for the filing of
 14 the Debtor’s request for a redetermination of the amount of the *ad valorem* taxes was timely
 15 [under § 108(a)], notwithstanding the fact that the time to contest the tax assessment had expired
 16 under state law.”⁴⁰ The court noted that this issue had been addressed by only three other
 17 bankruptcy courts, who uniformly held that they had lost the right to determine the debtor’s *ad*
 18 *valorem* tax liability because the debtor had not sought relief “prior to the expiration of time for
 19 the bringing of an action under state law.”⁴¹ The Eleventh Circuit agreed with these decisions. It

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 21 ³⁶ *Id.* at 374.

22 ³⁷ *Id.* at 375-76.

23 ³⁸ *Id.* at 380.

24 ³⁹ *Dubov v. Read (In re Read)*, 692 F.3d 1185 (11th Cir. 2012).

25 ⁴⁰ *Id.* at 1188.

26 ⁴¹ *Id.* at 1189. The three lower court decisions referenced by the court were *In re the Village at*
 27 *Oakwell Farms*, 428 B.R. at 372; *In re Breakwater Shores Partners, L.P.*, 2012 WL 1155773, at *3
 28 (Bankr. E.D. Tex. Apr. 5, 2012); and *In re ATA Airlines, Inc.*, 2010 WL 3955574, at *2 (Bankr. S.D. Ind.
 Oct. 4, 2010). In all three decisions, the courts concluded they were barred from determining the debtor’s
ad valorem tax liabilities because the § 505 motions were brought after the applicable state law deadline
 to seek redetermination of such taxes had expired.

1 concluded that “when Congress amended § 505(a) by adding § 505(a)(2)(C), it intended to create
2 an exception to the general time limits for contesting a tax assessment set forth in § 108(a).”⁴²

3 **C. Analysis of the “Has Expired” Deadline to the Taxes at Issue.**

4 Before this court can look to the merits of the debtor’s 505 Motion, or evaluate whether it
5 should abstain from determining the tax liability, it must consider whether it has jurisdiction over
6 any of the tax years encompassed in Harris County’s two filed claims.⁴³ The taxes in issue cover
7 the years from 2007 through the present. Consistent with *In re the Village at Oakwell Farms* and
8 *In re Read*, the court finds that § 505(a)(2)(C) precludes it from determining the debtor’s ad
9 valorem tax liability for any year in which the applicable period to contest or seek
10 redetermination of such taxes had expired, under applicable state law, before the 505 Motion
11 was filed.

12 **1. Texas Law is Applicable.**

13 Because the Property is located in Texas, the law of that state governs. “Under Texas
14 law, a property owner’s liability for ad valorem taxes for any given year arises as of January 1 of
15 that year regardless of when the tax is assessed.”⁴⁴ The entity who owns the property on
16 January 1 of the year for which taxes are assessed is considered the “property owner” for the
17 purpose of taxation, and is personally liable for the taxes assessed.⁴⁵ A notice of appraised value
18 for non-residential real property must be delivered to the property owner “by May 1 or as soon
19 thereafter as practicable.”⁴⁶ Owners of real property other than a single family residence may

20 ⁴² *In re Read*, 692 F.3d at 1187.

21 ⁴³ *In re Altegrity, Inc.*, 544 B.R. 772, 777 (Bankr. D. Del. 2016).

22 ⁴⁴ *Midland Cent. Appraisal Dist. v. Midland Indus. Serv. Corp. (In the Matter of Midland Indus.*
23 *Serv. Corp.)*, 35 F.3d 164, 167 (5th Cir. 1994)(citing Texas Tax Code § 32.01). A tax lien attaches to the
24 property on January 1 of the tax year, and the lien is perfected on attachment. Texas Tax Code § 32.01(a),
25 (d).

26 ⁴⁵ *HUD v. Nueces Cnty. Appraisal Dist.*, 875 S.W.2d 377, 378 (Tex. Ct. App. 1994).

27 ⁴⁶ Texas Tax Code § 25.19(a). Annual appraisal notices are not required by the statute; instead,
28 “a clear and understandable written notice . . . of the appraised value of the property owner’s property”
must be issued to the property owner if: (1) the appraised value of the property has increased over the
preceding year, (2) the appraised value of the property is greater than the value rendered by the property
owner, (3) the property was not on the appraisal roll for the preceding year, or (4) when an exemption for

1 challenge an appraisal by filing a notice of protest with the appropriate appraisal review board by
 2 “June 1 or not later than the 30th day after the date that notice was delivered to the property
 3 owner as provided by Section 25.19 . . . whichever is later.”⁴⁷ Subsequent owners of taxed
 4 property, however, lack standing to contest tax assessments based on lack of notice to prior
 5 owners.⁴⁸

6 After the assessment period elapses, the assessor for each taxing unit is required to mail a
 7 tax bill “to each person in whose name the property is listed on the tax roll and to the person’s
 8 authorized agent . . . by October 1 or as soon as thereafter as practicable.”⁴⁹ Property taxes
 9 generally become delinquent if they are not paid before February 1 of the year following the year
 10 in which the tax is imposed.⁵⁰

11 Pertinent to the debtor’s situation, Texas Tax Code § 41.411 provides a remedy for a
 12 property owner to protest “the failure of the chief appraiser or the appraisal review board to
 13 provide or deliver any notice to which the property owner is entitled.”⁵¹ This section provides
 14 the exclusive remedy for a property owner to contest an appraisal based on lack of notice to
 15 which the property owner is entitled.⁵² Neither the validity of the appraisal, the imposition of
 16 any tax on the basis of an appraisal, nor the existence of the tax lien, is affected by a property
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 19 the property for the preceding year has been cancelled or reduced for the current tax year). *Id.*

20 ⁴⁷ Texas Tax Code § 41.44(a)(2). Subsection (a)(1) governs the deadline to file notice of a protest
 21 concerning a single family residence that qualifies for an exemption under Texas Tax Code § 11.13. *See*
 22 Texas Tax Code § 41.44(a)(1).

23 ⁴⁸ *Houston Land & Cattle v. Harris Co.*, 104 S.W.3d 622, 625 (Tex. Ct. App. 2003).

24 ⁴⁹ Texas Tax Code § 31.01(a).

25 ⁵⁰ Texas Tax Code § 31.02(a); *see also Bello v. Tarrant Cnty.*, 2010 WL 5019517, at *4 (Texas
 26 Ct. App. Dec. 9, 2010). Texas Tax Code § 31.04 provides for postponement of the delinquency date
 27 under certain circumstances, none of which appear to be applicable here.

28 ⁵¹ Texas Tax Code § 41.411(a).

⁵² *Cameron Appraisal Dist. v. Rourk*, 194 S.W.3d 501, 502 (Texas 2006)(per curiam); *see also*
Denton Cent. Appraisal v. CIT Leasing, 115 S.W.3d 261, 265-66 (Tex. Ct. App. 2003); *Mag-T, L.P. v.*
Travis Cent. Appraisal Dist., 161 S.W.3d 617, 631 (Tex. Ct. App. 2005); Texas Tax Code § 42.09(a).

owner's failure to receive an assessment notice.⁵³ The property owner must still file a written protest based on lack of notice under § 41.411, "prior to the date the taxes on the property to which the notice applies become delinquent."⁵⁴ However, subsection (c-3) further defines when taxes become delinquent for purposes of timely protesting an appraisal where the property owner was not given proper notice:

Notwithstanding Subsection (c), a property owner who files a protest under Section 41.411 on or after the date the taxes on the property to which the notice applies become delinquent, but not later than the 125th day after the property owner, in the protest filed, claims to have first received written notice of the taxes in question, is entitled to a hearing solely on the issue of whether one or more taxing units timely delivered a tax bill. If at the hearing the appraisal review board determines that all of the taxing units failed to timely deliver a tax bill, the board shall determine the date on which at least one taxing unit first delivered written notice of the taxes in question, and for the purposes of this section the delinquency date is postponed to the 125th day after that date.⁵⁵

The pendency of a protest under § 41.411 does not affect the delinquency date for the subject tax.⁵⁶ This is consistent with the affirmative duty placed upon a property owner under Texas law to contest a property appraisal, notwithstanding an alleged lack of notice.⁵⁷ A property owner who files a § 41.411 protest is required to pay the amount of taxes not in dispute, although it may seek relief from this prepayment requirement by filing an oath of inability to pay

⁵³ Texas Tax Code § 25.19(d); *see also Denton Cent. Appraisal*, 115 S.W.3d at 265 ("the failure to provide notice of appraised value is not jurisdictional and does not render an appraisal void.").

⁵⁴ Texas Tax Code § 41.44(c).

⁵⁵ Texas Tax Code § 41.44(c-3).

⁵⁶ Texas Tax Code § 41.4115(a).

⁵⁷ *See Dan's Big & Tall Shop, Inc. v. Cnty. of Dallas*, 160 S.W.3d 307, 311 (Tex. Ct. App. 2005) ("Appellant cannot defend [its failure to pay ad valorem taxes] on the ground that a required notice was sent to the 'wrong' addressee, when appellant failed to give the appraisal district the necessary information to change the tax roll and to send notices to appellant."); *Mag-T, L.P.*, 161 S.W.3d at 632 ("In view of the cases placing the burden on the property owner to pursue his administrative remedy in a timely manner, we cannot accept the Taxpayer's argument that would permit a property owner to do nothing when confronted with an obviously erroneous tax bill."); *Denton Cent. Appraisal*, 115 S.W.3d at 266 ("CIT's failure to timely protest the . . . alleged lack of notice precluded CIT from obtaining judicial review of the . . . tax assessment for the aircraft.").

1 the taxes at issue.⁵⁸

2 **2. The Debtor Cannot Protest Liability for Certain Tax Years.**

3 Based on the above Texas authorities, the court concludes that it lacks jurisdiction to
 4 consider the debtor's tax liability for several of the years at issue. First, it appears the debtor
 5 lacks standing to protest the taxes assessed for 2007 through 2009. The debtor acquired the
 6 Property on December 23, 2009.⁵⁹ Because it was not the owner of the Property on January 1 of
 7 that year, under applicable Texas law, it cannot protest the ad valorem taxes assessed for tax year
 8 2009 based on lack of notice.⁶⁰ For the same reason, the debtor lacks standing to protest the
 9 taxes assessed in 2007 and 2008; it was not the owner of the Property for any portion of those
 10 years.

11 As for the taxes assessed for years 2010 through 2014, these are now "stale tax claims"
 12 under applicable Texas law, and § 505(a)(2)(C) precludes the court from addressing them here.
 13 From the court's understanding of the Texas tax scheme, the debtor's time to protest such taxes
 14 appears to have expired. Ordinarily, any notice of protest would have been due by either June
 15 1st of that tax year or within 30 days of delivery of the required notice, whichever was later.⁶¹
 16 However, relying on Texas Tax Code § 41.411, the debtor argues that because it has never
 17 received the required notices, its right to protest the assessments has not expired. Such position
 18 could arguably be supported by Texas Tax Code § 41.44(a)(2), which extends the time for filing
 19 a protest until 30 days after receipt of the required notice. Thus, if no notice was ever received,
 20 the protest period may never expire. But, the debtor ignores § 41.44(c), which governs the time
 21 in which protests under Texas Tax Code § 41.411 must be brought. This subsection entitles a
 22 property owner to file a notice of protest under § 41.411 only if "the property owner files the
 23

24 ⁵⁸ Texas Tax Code § 41.4115(b), (d).

25 ⁵⁹ Based upon the debtor's recitation of facts, it obtained title in 2009, and the cloud upon title
 26 arose in March, 2011. It is unclear why the debtor did not receive the required tax notices for 2010 at
 27 least.

28 ⁶⁰ *Houston Land & Cattle*, 104 S.W.3d at 625.

⁶¹ Texas Tax Code § 41.44(a)(2).

1 notice prior to the date the taxes on the property to which the notice applies become
 2 delinquent.”⁶² By statute, the delinquency date is February 1 of the year after the taxes were
 3 assessed.⁶³

4 Texas Tax Code § 41.44(c-3) provides the debtor potential relief with respect to this
 5 delinquency date deadline if an appropriate notice of protest was filed “not later than the 125th
 6 day after the property owner, in the protest filed, claims to have received written notice of the
 7 taxes in question.”⁶⁴ Even then, the only issue the appraisal review board considers, initially, is
 8 whether there was a failure to timely deliver a tax bill. If the board determines that all of the
 9 taxing units failed to timely deliver a tax bill, it will then “determine the date on which at least
 10 one taxing unit first delivered written notice of the taxes in question, and for the purposes of this
 11 section the delinquency date is postponed to the 125th day after that date.”⁶⁵

12 Neither party addresses Texas Tax Code § 41.44(c-3) in its briefing. Harris County relies
 13 upon the dates it sent the required notices under Texas Tax Code § 25.19, and calculates the
 14 deadlines to file a protest under § 41.44(a)(2) from these dates.⁶⁶ However, it failed to provide
 15 copies of the notices it says were sent, and the debtor denies that it has ever received an
 16 assessment or tax notice.⁶⁷ The tax statements attached to Harris County’s proof of claim name
 17 Dick Wheeler and Larry Ramming as the certified owners, with a Post Office Box address in
 18 Texas. This suggests that the notices detailed by Harris County were mailed to Wheeler and
 19 Ramming, rather than the debtor, and lends credence to the debtor’s lack of notice argument.
 20 Yet, the record also clearly establishes that the debtor was aware that some taxes were owed to
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22 ⁶² Texas Tax Code § 41.44(c).

23 ⁶³ Texas Tax Code § 31.02.

24 ⁶⁴ Texas Tax Code § 41.44(c-3).

25 ⁶⁵ *Id.*

26 ⁶⁶ Harris County’s Obj. to [505 Motion], ECF No. 150 at 6.

27 ⁶⁷ The debtor’s denial of receipt is supported by a general statement to this effect from David
 28 Bagley, the liquidating trustee for DCR Liquidating Trust, who is the owner of the debtor. *See* Decl. of
 David Bagley, ECF No. 174, ¶ 12.

1 Harris County as of the petition date, because it lists Harris County as a priority creditor for an
2 unspecified 2012 debt.⁶⁸ Harris County removed any question regarding the debtor's tax liability
3 for the Property by filing its proof of claim on November 26, 2013. The proof of claim included
4 the requisite written information for each parcel; the 2013 appraised value, and taxes, penalties,
5 and interest for each lot year since 2007. At a minimum, the debtor received written notice of
6 the taxes in question by November 26, 2013.

7 Under Texas Tax Code § 41.44(c-3), the debtor was required to file its notice of protest
8 under § 41.411 within 125 days of first receiving notice of the outstanding taxes. The debtor
9 was aware it had some tax liability to Harris County when it filed its schedules, and
10 unquestionably received notice of the ad valorem taxes assessed against the Property when
11 Harris County filed its initial claim on November 26, 2013. The debtor has not challenged the
12 assessments or taxes in any Texas forum, and has waited two years to bring the instant motion
13 under § 505 of the Bankruptcy Code. Under Texas law, the debtor's challenge to Harris
14 County's ad valorem taxes for tax years 2010 through 2014 is untimely.⁶⁹ The deadline for the
15 debtor to seek relief as to such taxes is determined by state law, and is not extended by § 108.
16 These are now stale tax claims, which the court cannot consider under § 505(a)(2)(C).

17 In summary, the debtor lacked standing to protest the taxes assessed for tax years 2007
18 through 2009, because it did not own the Property on January 1 of those years. Additionally, the
19 time for the debtor to protest or seek redetermination of the taxes for the years 2010 through
20 2014 expired before the 505 Motion was filed. For these reasons, the court finds that it lacks
21 jurisdiction under § 505(a)(2)(C) to determine the debtor's ad valorem tax liability for tax years
22 2007 through 2014.

24 ⁶⁸ Because the debtor listed the Property as its sole asset, it is reasonable to infer that such priority
25 debts are for property tax.

26 ⁶⁹ While the protest period under Texas Tax Code § 41.411 was still "open" for the 2013 and
27 2014 taxes when the proof of claim was filed, these tax years have now become stale under Texas Tax
28 Code § 41.44(c) or (c-3) by virtue of the debtor's awareness of its prior tax obligations, despite the
wrongful designation of the property owner. Armed with knowledge that Harris County had wrongly
named Wheeler and Ramming as property owners, as reflected in Proof of Claim No. 1-1, the debtor was
responsible for correcting that error with the appropriate taxing authorities.

D. Abstention is Appropriate.

The debtor's 2015 tax year was still "open" at the time the 505 Motion was filed, and its 2016 taxes have not yet been billed.⁷⁰ Although the court has jurisdiction to determine the ad valorem tax liability for these years, it concludes abstention is appropriate. Additionally, in the event the court's analysis with respect to tax years 2007 through 2014 is incorrect, its abstention analysis would apply to those years as well.

The court's exercise of jurisdiction, with respect to the 2015 and 2016 tax years, is discretionary under § 505.⁷¹ Harris County asks that this court abstain from considering the motion under 28 U.S.C. § 1334(c)(1), which provides:

Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.⁷²

Many courts have applied the following factors when considering whether to determine a § 505 motion:

- (1) the complexity of the tax issues to be decided;
- (2) the need to administer the bankruptcy case in an orderly and efficient manner;

⁷⁰ The 505 Motion was filed on November 20, 2015, before the taxes for that year became delinquent. Harris County's Proof of Claim No. 3-2 does not include the 2016 tax year. However, those taxes were assessed, and became a lien, upon the property as of January 1, 2016.

⁷¹ Section 505(a)(1) says "the court *may* determine the amount or legality of any tax." The discretionary aspect of this statute has been noted by several courts. *See, e.g., Central Valley Ag Enterprises v. United States*, 531 F.3d 750, 764 (9th Cir. 2008)(§ 505(a)(1) "is a permissive empowerment" rather than a "mandatory directive."); *Internal Revenue Service v. Luongo (In re Luongo)*, 259 F.3d 323, 330 (5th Cir. 2001)("The bankruptcy court's ability to abstain is premised on Congress' use of the word '*may*'" in § 505."); *New Haven Projects Ltd. Liability Co. v. City of New Haven (In re New Haven Projects Ltd. Liability Co.)*, 225 F.3d 283, 288 (2nd Cir. 2000)("we interpret the verb '*may*' in 11 U.S.C. § 505(a)(1) as vesting the bankruptcy court with discretionary authority to redetermine a debtor's taxes."); *In re Breakwater Shores Partners, L.P.*, 2012 WL 1155773, at *2 ("the exercise of jurisdiction under § 505 is discretionary with this Court."); *In re Gordon*, 2011 WL 3878356, at *5 (Bankr. S.D.N.Y. Aug. 30, 2011)("As the verb '*may*' indicates, the Court's ability to determine a debtor's tax liability is discretionary."); *In re Galvano*, 116 B.R. 367, 372 (Bankr. E.D.N.Y. 1990) (§ 505 is discretionary, and "the Court may decline to review a debtor's tax liability.").

⁷² 28 U.S.C. § 1334(c)(1).

- (3) the burden on the bankruptcy court's docket;
- (4) the length of time required for trial and decision;
- (5) the asset and liability structure of the debtor; and
- (6) the prejudice to the taxing authority.⁷³

Applying those factors to the instant case, the court is not convinced that the tax issues are as straightforward as the debtor asserts. The debtor proposes that value be determined by using the assessed value of the Property as a starting point, and then deducting the cost of remediation, to come up with an overall value of between \$1,000,000.00 "on the high side" and \$250,000.00 "on the low end."⁷⁴ However, Harris County's proofs of claim reflect that the Property has been valued per lot, rather than as a whole. There are also environmental issues that impact the Property, but it cannot be said that each lot is equally affected by these issues. It appears that valuation of the Property will be complex and fact-intensive.

Additionally, the debtor has not shown that its suggested approach to valuation is consistent with Texas law, which the court must apply if it were to consider the 505 Motion.⁷⁵ There is no basis for the court to analyze the debtor's tax liability differently simply because it has filed bankruptcy.⁷⁶ Further, because there is a review process available to the debtor in Texas, "it seems most appropriate that the debtor in chapter 11 proceed with the systems already in place" for determining its state tax liability, "rather than substituting this court for that

⁷³ *In re Luongo*, 259 F.3d at 330; *In re New Haven Products Ltd. Liability Co.*, 225 F.3d at 289; *Sarfani, Inc. v. Miss. Dept. of Revenue (In re Sarfani, Inc.)*, 527 B.R. 241, 252 (Bankr. N.D. Miss. 2015); *In re Breakwater Shores Partners, L.P.*, 2012 WL 1155773, at *5; *In re Lyondell Chem. Co.*, 2010 WL 1544411, at *2 (Bankr. S.D.N.Y. Apr. 19, 2010); *ANC Rental Corp. v. Dallas County (In re ANC Rental Corp.)*, 316 B.R. 153, 159 (Bankr. D. Del. 2004)(citing *In re Biesel*, 195 B.R. 378, 380 (Bankr. S.D. Ohio 1996)); *In re Galvano*, 116 B.R. at 372 (citing *In re Hunt*, 95 B.R. 442, 445 (Bankr. N.D. Tex. 1989)).

⁷⁴ Response to Harris Co.'s Mem. in Supp. of [its] Obj. to [505 Motion], ECF No. 176 at 7; Decl. of David White, ECF No. 177, ¶ 14.

⁷⁵ Because the Property has been subdivided into residential lots, it may be "residential real estate inventory" under Texas law. See *In re Breakwater Shores Partners, L.P.* 2012 WL 1155773, at *5-6. This court has no familiarity with the Texas statutory scheme applicable to such property.

⁷⁶ *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 20 (2000)(quoting *Butner v. United States*, 440 U.S. 48, 55 (1979)).

1 process.”⁷⁷ This is particularly so when the debtor is asking a Nevada bankruptcy court to
2 determine Texas tax issues; why should this court “start from scratch” when there is a more
3 efficient tribunal that can determine the valuation issues under applicable state law?⁷⁸

4 Next, the debtor has not demonstrated that administration of this chapter 11 case would
5 benefit from this court’s determination of the 505 Motion. Although Harris County filed its first
6 proof of claim the month after the petition was filed, the debtor did not bring the 505 Motion
7 until the case had already been pending for more than two years. The debtor has not actively
8 sought to determine its tax liability, even post-petition. Given this delay, the court is already
9 foreclosed from considering the debtor’s 2013 and 2014 tax liability, under state law.

10 Even assuming this were not the case, there is no basis to find that the court’s
11 consideration of the 505 Motion would result in a more efficient administration of this estate.
12 The debtor’s plan has not yet been confirmed. Although payment to secured creditors in this
13 case hinges on sale of the Property, that asset has not yet sold. Another motion to sell the
14 Property is pending, the previously approved sales having fallen through.

15 As for the asset and liability structure of the debtor, the Property is its sole asset and it
16 has always contemplated liquidation of the Property to pay its creditors. As demonstrated by the
17 debtor’s prior efforts to sell the Property, any delay associated with the determination of the tax
18 claims will not affect the sale of the Property. Assuming a sale of the Property is ultimately
19 consummated, the secured tax claim held by Harris County and the other liens encumbering this
20 asset will attach to the proceeds until such time as the debtor’s tax liability is determined.
21 Moreover, the debtor has no general unsecured creditors who would be affected by any delay in
22 distribution of the proceeds from a sale of the Property pending determination of the ad valorem
23 taxes at issue here.

24 _____
25 ⁷⁷ *In re the Village at Oakwell Farms, Ltd.*, 428 B.R. at 375.

26 ⁷⁸ *In re Lyondell Chem. Co.*, 2010 WL 1544411, at *2 (New York bankruptcy court abstained
27 from determining debtor’s tax liability with respect to an oil refinery in Texas); *see also In re Altegrity,*
28 *Inc.*, 544 B.R. at 778 (Delaware bankruptcy court abstained from determining debtor’s Oklahoma tax
liability, because debtor was already pursuing relief before Oklahoma Tax Commission); *In re ANC*
Rental Corp., 316 B.R. at 159 (Delaware bankruptcy court abstained from determining debtor’s Texas tax
liability).

1 The debtor correctly notes that state law generally requires a property owner to pay the
 2 uncontested portion of its taxes when challenging an assessment based on lack of notice. While
 3 it infers that this is a good reason to have the bankruptcy court determine the 505 Motion, it also
 4 notes that the Texas statutes would permit it to seek relief from this prepayment requirement by
 5 filing an oath of inability to pay the taxes at issue.⁷⁹ If the court abstains in this instance, the
 6 debtor would not be foreclosed from seeking relief in the state forum due to its inability to
 7 prepay any portion of its taxes.

8 An evidentiary hearing would be required if this court were to hear the 505 Motion.
 9 Given this court's other commitments, there is no reason to believe that it could hear and
 10 determine the issues the debtor has raised more efficiently than the state forum. Finally, the
 11 court feels that there is a potential for prejudice to the state taxing authorities if it were to
 12 determine the 505 Motion. As noted by Harris County, many courts have found abstention to be
 13 appropriate when uniformity of assessment is at issue.⁸⁰ Additionally, it would be prejudicial to
 14 Harris County to have a Nevada bankruptcy court determine the state tax issues implicated in the
 15 505 Motion.⁸¹ These factors weigh heavily in favor of abstention.

16 The factors discussed above have not been expressly adopted in the Ninth Circuit.
 17 Instead, courts within this Circuit apply the following "Tucson Estates" factors when considering
 18 whether abstention is appropriate under § 1334(c)(1):

- 19 (1) the effect or lack thereof on the efficient administration of the
- 20 estate if the court recommends abstention,
- 21 (2) the extent to which state law issues predominate over

22 ⁷⁹ Texas Tax Code § 41.4115(b), (d).

23 ⁸⁰ *Central Valley Ag Enterprises*, 531 F.3d at 764 (recognizing that uniformity of assessment is a
 24 basis for abstention); *In re New Haven Products Ltd. Liability Co.*, 225 F.3d at 288 (same); *In re Cable &*
 25 *Wireless USA, Inc.*, 331 B.R. 568, 577-78 (Bankr. D. Del. 2005) ("Each tax authority must enjoy and
 26 apply a uniformity of assessment within its tax jurisdiction."); *In re ANC Rental Corp.*, 316 B.R. at 159
 27 (abstention is often used where uniformity of assessment is an issue); *Metromedia Fiber Network, Inc. v.*
Various State and Local Taxing Authorities (In re Metromedia Fiber, Inc.), 299 B.R. 251, 281 (Bankr.
 S.D.N.Y. 2003).

28 ⁸¹ A Delaware bankruptcy court similarly found that a local taxing authority in Texas would "be
 significantly prejudiced by having the taxes at issue determined by a Delaware court." *In re ANC Rental*
Corp., 316 B.R. at 159.

1 bankruptcy issues,

2 (3) the difficulty or unsettled nature of the applicable law,

3 (4) the presence of a related proceeding commenced in state court
4 or other nonbankruptcy court,

5 (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334,

6 (6) the degree of relatedness or remoteness of the proceeding to the
7 main bankruptcy case,

8 (7) the substance rather than form of an asserted “core”
9 proceeding,

10 (8) the feasibility of severing state law claims from core
11 bankruptcy matters to allow judgments to be entered in state court
12 with enforcement left to the bankruptcy court,

13 (9) the burden on the bankruptcy court’s docket,

14 (10) the likelihood that the commencement of the proceeding in
15 bankruptcy court involves forum shopping by one of the parties,

16 (11) the existence of a right to a jury trial, and

17 (12) the presence in the proceeding of nondebtor parties.⁸²

18 Factors 1, 2, 3, 8, and 9 have essentially been discussed in connection with the court’s
19 review of the § 505 abstention factors above. The 505 Motion involves only state law issues.
20 Resolution of those issues is more complex than asserted by the debtor, and administration of the
21 bankruptcy estate would not be affected if the court were to abstain. There are no “core”
22 bankruptcy matters to be severed, and the evidentiary hearing required to determine the 505
23 Motion would place a burden on the court’s docket.

24 Factor 4 requires the court to consider whether a related proceeding is pending in a
25 nonbankruptcy forum. No such proceeding is pending, and for the reasons discussed above, the
26 debtor is foreclosed from seeking relief under state law as to tax years 2007 through 2014.
27 However, with respect to tax years 2015 and 2016, and to the extent the court’s analysis is
28 incorrect as to the prior tax years, Texas statutes offer the debtor a procedure for challenging the
amount of its ad valorem taxes. As the court observed in *In re the Village at Oakwell Farms*,

⁸² *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162, 1167 (9th Cir. 1990)(adopting the factors set out in *Republic Readers Service, Inc. v. Magazine Serv. Bureau, Inc. (In re Republic Reader’s Serv., Inc.)*, 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987)).

1 *Ltd.*, “[o]nce a debtor files for bankruptcy, it must manage and operate its property according to
2 the requirements of valid non-bankruptcy law just as would an owner of that property out of
3 bankruptcy.”⁸³ As in that case, it is appropriate here that the debtor seek relief in the state forum,
4 rather than substituting a Nevada bankruptcy court for determination of its taxes.⁸⁴

5 As to Factor 5, while § 505(a)(1) and 28 U.S.C. § 1334(b) provide a jurisdictional basis
6 for the court to hear this matter, such jurisdiction is permissive. The debtor cannot overcome the
7 permissive nature of § 505(a)(1) by characterizing its motion as a claim objection.⁸⁵

8 Factor 9 requires the court to consider the likelihood that the debtor commenced this
9 bankruptcy in an attempt to “forum shop.” Strictly applied, this factor is inapplicable because
10 the debtor states that it filed bankruptcy to efficiently liquidate the Property in light of ongoing
11 state court litigation to quiet title. Viewed in a broader context, however, the debtor’s delay in
12 seeking to challenge to the assessments underlying Harris County’s tax claims strongly suggests
13 some element of forum shopping is involved. Its basis for challenging years of tax assessments
14 stretches back long prior to its bankruptcy. Yet, it took no action prepetition, nor did it seek
15 § 505 relief promptly after Harris County’s initial claim was filed. Charitably construed, the
16 debtor has attempted to squeeze another two years of nonpayment of such taxes pending its
17 attempts to liquidate the Property. Its lack of notice argument can only be stretched so far, and it
18 is insufficient to overcome a strong sense of forum shopping with respect to the taxes.

19 Looking at the final two “Tucson Estates” factors, there is no right to a jury trial.
20 However, Harris County asserts that the 505 Motion involves nondebtor parties, because the
21 Harris County Appraisal District (“HCAD”) is the entity who conducts property appraisals,
22 sends out the appraisal notices, and conducts the appraisal appeals. Harris County contends that
23 the HCAD is a necessary party who was not served with the 505 Motion. Because the court
24 finds abstention is proper, it need not discuss this point further.

25 CONCLUSION

26 ⁸³ *In re the Village at Oakwell Farms, Ltd.*, 428 B.R. at 372 (citing 28 U.S.C. § 959(b)).

27 ⁸⁴ *Id.*

28 ⁸⁵ *See, e.g., In re Gordon*, 2011 WL 3878356 at *4.

1 The debtor has filed a motion under § 505 of the Bankruptcy Code to have the court
2 determine the proper amount of ad valorem taxes for tax years 2007 through the present with
3 respect to its sole asset, real property located in Texas. Section 505(a)(2)(C) precludes the court
4 from determining ad valorem tax liability for any tax year in which the debtor's right to contest
5 such taxes, under state law, had expired before the time the debtor's 505 Motion was filed. In
6 this instance, the court is prohibited from determining several of the tax years at issue, because
7 the debtor never had, or no longer has, the ability to contest those taxes under state law.
8 Furthermore, § 505(a)(1) is permissive. The court will exercise its discretion and abstain from
9 determining the debtor's 2015 and 2016 tax liability, as permitted under § 505(a)(1), and in the
10 interests of comity under 28 U.S.C. § 1334(c)(1). For the reasons set forth above, even absent its
11 conclusion that it lacks jurisdiction to determine the debtor's ad valorem taxes for 2007-2014
12 under § 505(a)(2)(C), the court would abstain from determining those taxes. The debtor must
13 seek relief with respect to its state property taxes in the appropriate state forum.

14 An order will be entered consistent with this Memorandum.

15 * * * *

16 **Copies sent via BNC to:**

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