Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
July 25, 2022

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * * *

In re:	) Case No.: 19-14796-MKN
	) Chapter 11
GYPSUM RESOURCES MATERIALS, LLC,	)
	) Jointly Administered with
☐ Affects Gypsum Resources Materials, LLC	) Case No.: 19-14799-MKN
☐ Affects Gypsum Resources, LLC	)
☒ Affects All Debtors	) Date: March 29, 2022
	) Time: 9:30 a.m.
Debtors.	)
	)

ORDER ON DEBTORS' MOTION TO DETERMINE VALUE OF [QE PARCEL AND LAND ROYALTY PARCEL] SECURING CLAIM OF REP-CLARK, LLC PURSUANT TO 11 U.S.C. § 506[a] AND FED. R. BANKR. P. 3012[1]

On March 29, 2022, an evidentiary hearing was held on Debtors' Motion to Determine Value of [QE Parcel and Land Royalty Parcel] Securing Claim of Rep-Clark, LLC Pursuant to 11 U.S.C. § 506[a] and Fed. R. Bankr. P. 3012 ("Valuation Motion"), brought on behalf of the Debtors in the above-captioned proceedings. The appearances of counsel were noted on the record. After conclusion of the evidentiary hearing, the matter was taken under submission.

[1] In this Order, all references to "GR ECF No." are to the numbers assigned to the documents filed in the Gypsum Resources, LLC case as they appear on the docket maintained by the clerk of the court. All references to "GRM ECF No." are to the numbers assigned to the documents filed in the jointly administered case of Gypsum Resources Materials, LLC as they appear on the docket maintained by the clerk of the court. All references to "AECF No." are to the documents filed in any adversary proceeding identified in this Order. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "FRE" are to the Federal Rules of Evidence. All references to "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure. All references to "Civil Rule" are to the Federal Rules of Civil Procedure.

BACKGROUND[2]

On July 26, 2019, Debtors[3] filed a voluntary Chapter 11 petition in this bankruptcy court. (ECF No. 1).

On July 29, 2019, Debtors filed their motion for joint administration of the Chapter 11 cases supported by the declaration of their primary manager, James M. Rhodes. (ECF Nos. 11 and 14). The manager attested that GR owns approximately 2,200 acres of land in Clark County, Nevada, commonly known as "Blue Diamond Hill." He also attested that GRM operates a gypsum mine on the same real property, and that GRM is wholly-owned by GR.

On August 9, 2019, Debtors commenced an adversary proceeding against Rep-Clark, LLC, a Colorado limited liability company ("Rep-Clark"), denominated Adversary Proceeding No. 19-01083-MKN ("Rep-Clark Adversary"). Debtors' adversary complaint ("Complaint") sought a judgment declaring that a certain Mining Lease Agreement between the parties should be characterized as a secured financing transaction rather than an agreement subject to the assumption or rejection requirements of Section 365. (AECF No. 1).

On August 26, 2019, Debtors filed separate schedules of assets and liabilities ("Schedules"), as well as separate statements of financial affairs. (ECF Nos. 104, 105, 106, and 107). On its Schedule "E/F," GRM listed Rep-Clark as an unsecured creditor.

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[2] Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the docket in the above-captioned Chapter 11 proceeding, as well as the docket in Case No. 19-16172-MKN. See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980). See also Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1364 (9th Cir. 1998) (taking judicial notice of court filings in a state court case where the same plaintiff asserted similar claims); In re Blas, 614 B.R. 334, 339 n.27 (Bankr. D. Alaska 2019)("This court may take judicial notice of the dockets of other courts."); Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) ("The Court may consider the records in this case, the underlying bankruptcy case and public records.").

[3] A voluntary Chapter 11 proceeding was commenced by Gypsum Resources Materials, LLC ("GRM"), denominated Case No. 19-14796-MKN. A related Chapter 11 proceeding was commenced by Gypsum Resources, LLC ("GR"), denominated Case No. 19-14799-MKN. The two cases are jointly administered but not substantively consolidated. Where appropriate in this Memorandum Decision, the two Chapter 11 debtors are referred to jointly as the "Debtors."

On September 3, 2019, an official committee of unsecured creditors ("UCC") was appointed for the jointly administered Chapter 11 estates. (ECF No. 120).

On November 8, 2019, Rep-Clark filed an answer denying the allegations of the Complaint. (AECF No. 22).

On November 14, 2019, Debtors filed amended Schedules. (ECF Nos. 357 and 358). On its amended property Schedule "A/B," GR listed assets having a total value of $1,142,331,000 consisting of fee simple interests in the Blue Diamond Hills real property. On its amended Schedule "D," GR listed Rep-Clark as having a disputed claim in the amount of $54,000,000 secured by "Asserted Mineral [Rights] and Mined Ore [R]ights on Blue Diamond Hill – Disputed." On its amended Schedule "E/F," GR listed Rep-Clark as having a disputed priority unsecured claim in the amount of $1,409,375. On its amended creditor Schedule "D," GRM listed Rep-Clark as having a disputed claim in the amount of $54,000,000 secured by "Asserted Mineral Rights and Mined Ore Rights on Blue Diamond Hill – Disputed." On its amended Schedule "G," GRM listed Rep-Clark as having a "Purported Mining Lease Agreement – Disputed." On its amended Schedule "H," GRM lists various co-debtors that also are obligated to some of its creditors, including GR, the James Rhodes Dynasty Trust I, James Rhodes Dynasty Trust II, and James M. Rhodes.

On November 26, 2019, Rep-Clark filed a proof of claim number 48-1 in the GRM proceeding in the unsecured amount of "at least $1,412,723" based on a certain "Mining Lease Agreement dated February 12, 2018" and related documents.

On November 26, 2019, Rep-Clark filed a proof of claim number 19-1 in the GR proceeding in the unsecured amount of "at least $1,412,723" based on a "Guaranty of Mining Lease Agreement dated November 9, 2018" and related documents.

On November 27, 2019, Rep-Clark filed a proof of claim in the GR proceeding ("POC 20-1") in the secured amount of "at least $117,734,611" based on a "Gypsum Reserves Agreement and Joint Escrow Instructions dated February 8, 2018," as well as amendments to that agreement ("Reserves Agreement") dated August 8, 2018, October 31, 2018, and November 14, 2018. POC 20-1 also is based on documents related to the Reserves Agreement, including a

"Memorandum of Land Royalty Agreement recorded February 15, 2018" and a Deed of Trust, Assignment of Rents, Security Agreement and Fixture Filing (QE Payment) recorded February 15, 2018.[4]

On July 1, 2021, Debtors filed a motion ("Sale Motion") to sell 90.72 acres of industrial real property ("Parcel A") as well as 88.97 acres of residential real property ("Parcel B"). (ECF No. 1390). Both Parcel A and Parcel B are part of the Blue Diamond Hills property. Appraisal Reports to support the sales, both prepared by appraiser Evan Ranes ("Ranes"), were submitted. (ECF No. 1391).

On July 12, 2021, the Sale Motion was amended. (ECF No. 1430).

On July 23, 2021, an order was entered on the Sale Motion approving certain bidding procedures for the marketing and sale of Parcel A and Parcel B. (ECF No. 1466).

On October 8, 2021, Debtors filed its proposed Fourth Amended Joint Chapter 11 Plan of Reorganization ("Fourth Amended Plan"), along with an approved Disclosure Statement ("Fourth Disclosure Statement"). (ECF Nos. 1662 and 1664). Article II of the Fourth Amended Plan addresses the classification and treatment of creditor claims. Under Subsection 2.3(b), secured creditors are placed into several subclasses. The treatment of Rep-Clark's secured claim is specified in Class 2(c). See Fourth Amended Plan at Art. II, Sec. 2.3(b)(iii). The outcome of

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[4] Recital "G" to the Reserves Agreement states that the Land Royalty obligation will be secured by the real property parcels identified in Exhibit "C" to the Reserves Agreement. Exhibit "C" designates 351.96 acres of real property identified by the following Assessor's Parcel Numbers (APN): 164-30-201-001, 164-30-301-001, 164-30-301-003, 164-30-401-001, 164-30-401-003, 164-30-401-004, 164-30-401-005, 164-31-101-001, 164-31-101-003, 164-31-101-004, 164-31-201-001, 165-25-000-003, 165-25-000-004, 165-36-000-003, and 165-36-000-004. See also Valuation Motion at 4:7-17. Recital "H" to the Reserves Agreement states that the QE Payment obligation will be secured by the parcels identified in Exhibit "D-2" to the Reserves Agreement. Exhibit "D-2" lists ten parcels identified by the following parcel numbers: 164-20-000-002; 164-29-000-001; 164-29-000-002; 164-30-501-002; 164-30-601-002; 164-30-601-003; 164-30-701-002; 164-30-701-003; 164-30-701-004; and 164-30-801-003. With respect to the QE Parcel, however, there is a discrepancy between the APN listing on Exhibit D-2 of the Reserves Agreement and the APN listing appearing in the Valuation Motion. Compare Valuation Motion at 4:1-6. The Valuation Motion lists only eight parcels having entirely different APNs. Apparently, the total acreage of the QE parcels is approximately 372 acres, but it is not clear whether than acreage matches the APN listing on Exhibit D-2.

the Rep-Clark Adversary will determine the ultimate amount of the Rep-Clark secured claim that will have to be satisfied. Whatever the amount is,[5] Debtor proposes to give Rep-Clark "**such amount of** the QE Parcel and up to $16,000,000 of the Land Royalty Collateral (as Valued by the Bankruptcy Court and in that order) **necessary to satisfy**" the Rep-Clark secured claim in full. That provision of the Fourth Amended Plan emphasizes: "**For avoidance of doubt, the Bankruptcy Court shall partition the QE Parcel and/or the Land Royalty Collateral, as necessary.**" In other words, Debtors propose to satisfy Rep-Clark's secured claim in full by forcing Rep-Clark to take less than all of the real property[6] that currently secures its claims.[7]

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[5] Under Section 506(a), a secured claim is allowed in an amount equal to the value of the secured creditor's collateral. If the amount of the debt exceeds the value of the collateral, the allowed secured amount is still limited to the value of the collateral: any additional amount owed is simply an unsecured debt. Accordingly, if the holder of a secured claim receives all of its collateral, it necessarily is receiving at least the allowed amount of its secured claim. Thus, giving the creditor all of its collateral would satisfy all of the secured claim that is allowed under Section 506(a).

[6] While the parcels securing the Land Royalty and QE Payment obligations are specifically identified in the Reserves Agreement, see note 4, supra, "such amount" of those parcels that are "necessary to satisfy" Rep-Clark's obligations are not specifically identified in the Fourth Amended Plan. Nor are those parcels specifically identified in the Fourth Disclosure Statement. Likewise, those parcels are not specifically identified in the instant Valuation Motion.

[7] Assuming that Rep-Clark rejects this form of treatment, it can be "crammed down" under Section 1129(b)(2)(A) only if the Debtors demonstrate that giving Rep-Clark the subject property constitutes the "indubitable equivalent" of Rep-Clark's secured claim. See 11 U.S.C. § 1129(b)(2)(A)(iii). Giving a creditor real property in full satisfaction of its allowed secured claim, rather than repayment of the debt in cash, is known as a "dirt-for-debt" treatment. See generally 7 COLLIER ON BANKRUPTCY, ¶¶ 1129.04[c][i] (Richard Levin & Henry J. Sommer, eds., 16th ed. 2021). If the secured creditor's collateral is something other than real property, giving the creditor its collateral also would satisfy the creditor's allowed secured claim. See, e.g., Wiersma v. Bank of the West (In re Wiersma), 227 F.3d Appx. 603 (9th Cir. 2007) (Chapter 11 plan for a dairy farm offered a security interest in cows as the indubitable equivalent of a lender's claim, i.e., "cows for cows"). Cramdown disputes arise under the indubitable equivalent alternative when the Chapter 11 plan proposes to give the secured creditor less than all of its collateral in full satisfaction of the claim. See generally I. Walker and J. Grasso, "Can a Debtor Force a Secured Creditor to Accept 'Dirt for Debt'?", 31 No. 4 Prac. Real Est. Law 41 (ABI 2015)(discussing, e.g., successful and unsuccessful partial dirt for debt Chapter 11 plans). The leading case in this circuit is Arnold & Baker Farms v. United States (In re Arnold & Baker Farms), 85 F.3d 1415 (9th Cir. 1996), cert. denied, 519 U.S. 1054 (1997). In that case, the

On October 14, 2021, Debtors filed the instant Valuation Motion to determine the value of the collateral securing Rep-Clark's claims in anticipation of seeking cramdown treatment under the proposed Fourth Amended Plan. (ECF No. 1675).[8] As originally filed, the Valuation Motion sought, *inter alia*, to determine the value of the collateral securing the QE Payment at $184,274,000, and the collateral securing the Land Royalty Payment at $195,278,000.[9]

On October 29, 2021, an order was entered approving a stipulation between the Debtors and Rep-Clark setting the deadlines, *inter alia*, for alternate direct testimony ("ADT") declarations to be submitted in connection with an evidentiary hearing on the Valuation Motion. (ECF 1699).

On November 19, 2021, an order was entered approving a stipulation for an evidentiary hearing to be conducted on the Valuation Motion. (ECF No. 1747). Hearing dates of March 28 and March 29, 2022, were reserved for the parties.[10]

On December 1, 2021, Debtors filed a notice cancelling the auction sale of residential Parcel B, electing to proceed with the sale only of industrial Parcel A. (ECF No. 1756).

On December 13, 2021, a trial was conducted in the Adversary Proceeding.

On January 3, 2022, an order was entered approving the sale of industrial Parcel A. (ECF No. 1807).

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circuit panel reversed the bankruptcy court's confirmation of a plan giving the objecting creditor only part of its farmland collateral in full satisfaction of its claim, while acknowledging that such treatment may be permitted in other circumstances. See 85 F.3d at 1423-24.

[8] The hearing on the Valuation Motion initially was noticed to be held on November 17, 2021, but was continued on several occasions.

[9] Debtors also sought to determine the value of the collateral securing the mining claims alleged by Rep-Clark at $112,786,000.

[10] The stipulation also reserved the same dates for confirmation of the Debtor's proposed Chapter 11 plan of reorganization. Thereafter, the hearing on plan confirmation was continued, but the evidentiary hearing on the Valuation Motion went forward.

On January 11, 2022, a memorandum decision and a separate judgment were entered in the Adversary Proceeding denying Debtors' request to recharacterize the Mining Lease Agreement as a secured financing transaction. (AECF Nos. 193 and 194).

On February 18, 2022, an order was entered, *inter alia*, confirming the evidentiary hearing on the Valuation Motion for March 29, 2022, and reserving an August 9, 2022, date for an evidentiary hearing to value certain mineral related matters.[11] (ECF No. 1867).

On February 22, 2022, Debtor filed notice of its intent to rely on the testimony of Evan Ranes set forth in three prior declarations filed in the Chapter 11 proceeding. (ECF No. 1875). Those declarations were signed under penalty of perjury on February 25, 2021 ["First Ranes Declaration"] (ECF No. 1124), April 15, 2021 ["Second Ranes Declaration"] (ECF No. 1216), and October 14, 2021 ["Third Ranes Declaration"]. (ECF No. 1676).

On February 22, 2022, Rep-Clark filed the Direct Examination Declaration of Glenn M. Anderson ("Anderson Declaration") in support of the Valuation Motion signed under penalty of perjury on the same date. (ECF No. 1876).

On March 3, 2022, Rep-Clark filed an errata to the Anderson Declaration. (ECF No. 1904).

On March 8, 2022, Rep-Clark filed a second errata to the Anderson Declaration. (ECF No. 1911).

On March 9, 2022, Rep-Clark filed an opening brief regarding the Valuation Motion ("Rep-Clark Opening Brief"). (ECF No. 1912).

On March 9, 2022, Debtors filed an opening brief in support of the Valuation Motion. (ECF No. 1913).

On March 15, 2022, Debtors filed a reply brief along with a request for judicial notice. (ECF Nos. 1929 and 1930).

On March 15, 2022, Rep-Clark filed a reply brief. (ECF No. 1931).

[11] Due to the outcome of the Adversary Proceeding, Debtors intend to reject the Mining Lease Agreement.

On March 17, 2022, the parties filed a joint list of proposed exhibits and witnesses. (ECF No. 1938).

THE EVIDENTIARY RECORD

At the hearing, the parties offered the ADT declarations of two expert witnesses as well as complete or partial documents as Exhibits 1 through 59. Counsel stipulated to the qualifications of each expert and to the admissibility of their testimony. Counsel also stipulated to the authenticity and admission of each of the exhibits.

A. The Expert Witness Testimony.[12]

1. Evan Ranes.[13]

a. First Ranes Declaration (signed February 25, 2021)

In the First Ranes Declaration, Ranes attests that he performed an "updated" appraisal of 2,192.76 acres of residential land located on Blue Diamond Road Northwest of Highway 160. The updated appraisal results are set forth in an Appraisal Report marked as Exhibit 1 to that declaration ("Ranes Appraisal Report").[14] The valuation is dated as of January 21, 2021. On that valuation date, the entire Blue Diamond Hills property had an as-is market value of $1,120,376,000, and a liquidation value of $784,263,000. The average market value per acre was $525,000 and average liquidation value per acre was $367,500. Page 7 of the Ranes Appraisal Report provides a property identification for 54 separate APNs comprising the usable portion (2,134.05) of the entire 2,192.76 acres. The property identification indicates a geometric

[12] Given the disparity in testimony between the two experts, the court inquired at the hearing whether the UCC would seek to employ a separate appraiser to evaluate whether to support confirmation of the Fourth Amended Plan, including the Debtors' proposed use of the estate's dirt to satisfy the Rep-Clark debt.

[13] As previously mentioned, Debtors relied on three declarations previously filed by Ranes as its ADT declaration in support of the Valuation Motion. At the hearing, Rep-Clark elected to waive cross-examination of Ranes and the testimony in his three prior declarations constituted his direct testimony in this matter.

[14] While Ranes attests he is making an "updated appraisal" of the subject properties, he does not specify when a prior appraisal was performed. The Ranes Appraisal Report does not reference a prior appraisal.

shape for each parcel (rectangular, irregular, square) as well as a basic description of whether the parcel provides a view toward the Red Rock area or Las Vegas. The 54 parcels range in size from a low of 9.71 usable square acres to a high of 192.12 usable irregular acres. Page 125 of the Appraisal Report lists the same 54 separate APNs as having the same total market value ($1,120,376,000) and total liquidation value ($784,263,000) figures. Those total figures comport with the average values per acre.[15] A 30 percent discount between market value and liquidation value is used for each of the 54 separate parcels.

Exhibit 2 to the same declaration is a chart that identifies the APNs for the collateral securing the Land Royalty obligation as well as the collateral securing the QE Payment. Out of the 54 separate parcels appearing in the list on Exhibit 1, the chart identifies 15 parcels for the Land Royalty obligation and 8 parcels for the QE Payment.[16] For those 15 parcels and 8 parcels, respectively, the market value and liquidation value figures match those appearing on Exhibit 1. The chart shows a total market value of $195,278,000 and a total liquidation value of $136,696.000 for the Land Royalty parcels. It also shows a total market value of $184,274,000 and a total liquidation value of $128,992,000 for the QE Payment parcels.

b. Second Ranes Declaration (signed April 15, 2021)

In the Second Ranes Declaration, Ranes attests that he prepared a supplement to rebut the testimony of Rep-Clark's appraiser ("Ranes Rebuttal Report") that was provided to Rep-Clark on

[15] The list appearing on Page 125 of the Appraisal Report shows the parcel consisting of 9.71 usable square acres with a Red Rock view as having a market value of $5,098,000 based on $525,000 per acre and a liquidation value of $3,568,000 based on $367,500 per acre. The same list also shows the parcel consisting of 192.12 usable irregular acres with a Red Rock view as having a market value of $100,863,000 based on $525,000 per acre and a liquidation value of $70,604,000 based on $367,500 per acre. The same list also shows a different parcel consisting of 63.99 acres but only 38 usable rectangular acres with a Las Vegas view as having a market value of $19,950,000 based on $525,000 per usable acre and a liquidation value of $13,965,000 based on $367,500 per usable acre.

[16] As previously discussed at note 4, supra, there appears to be a discrepancy between the APN listing on Exhibit D-2 to the Reserves Agreement and the APN listing appearing in the Valuation Motion. The APN listing in the Valuation Motion appears to be consistent with APN listing for the QE Payment set forth in the chart attached as Exhibit 2 to the First Ranes Declaration.

January 9, 2020, and which apparently was attached to a document filed with the court on February 25, 2021, as Docket No. 1130. The same Ranes Rebuttal Report also responds to separate testimony of Rep-Clark's appraiser provided to Rep-Clark on April 2, 2021, and which apparently was attached to a document filed with the court on June 16, 2021, as Docket No. 1336. In his rebuttal report, Ranes refers to his prior appraisal dated September 21, 2019, which apparently was updated on January 28, 2021. Not surprisingly, the Ranes Rebuttal Report disputes the appraisal results reached by Rep-Clark's expert, including the comparables used and assumptions made. Page 22 of the Ranes Rebuttal Report includes a discussion of the substantive differences between the lower appraisals performed in 2017, and higher appraisals subsequently performed in 2019 and 2021.

c. Third Ranes Declaration (signed October 14, 2021)

In the Third Ranes Declaration, Ranes attested that as of July 29, 2021, the market for residential homes had "heated up" with year-to-year increases in median home prices. A graph is attached as Exhibit 3 to the declaration. Also attached as Exhibit 1 is a copy of the prior Ranes Appraisal Report. Attached as Exhibit 2 is a chart of Ranes' market and liquidation values for the Land Royalty and QE Payment parcels that contains amounts that are identical to those appearing in the chart provided as Exhibit 2 to the First Ranes Declaration.

2. Glenn Anderson.[17]

In the Anderson Declaration, Anderson mentions appraisal reports dated April 2, 2020, April 2, 2021, October 29, 2021 ("Anderson 2021 Appraisal Report"), as well as certain addenda filed on November 4, 2021, and February 8, 2022. Exhibits 1, 2, and 3 consist of copies of the Anderson 2021 Appraisal Report and the two addenda. Exhibits 4, 5, 6, and 7 consist of various emails concerning the sales of certain real property of the bankruptcy estate.

Anderson disagrees with Ranes' use of average prices per acre for the entire 2,192.76 acres of the Blue Diamond Hills property, including the parcels securing the Land Royalty obligation and the QE Payment. He attests that the unique characteristics of the individual

[17] Unlike Ranes, Anderson was cross-examined by the Debtors regarding the direct testimony contained in the Anderson Declaration.

parcels do not support an average price analysis. Anderson further attests that a market value approach is unreliable especially given Rane's inflated estimates of the anticipated sale prices for Parcel A and Parcel B, for which only industrial Parcel A sold for far less than the anticipated sale price. Anderson further attests that use of only a liquidation analysis for Rep-Clark's collateral is appropriate. He concludes that the as-is liquidation value of the Land Royalty collateral is between $11,160,000 and $14,880,000. Anderson also concludes that the as-is liquidation value of the QE Payment collateral is between $12,635,000 to $16,850,000.

B. The Exhibits.

The 59 exhibits admitted by stipulation of counsel included copies of a variety of historical and other documents referenced by the witnesses and in this order. Transcripts of depositions of various individuals who were not called as witnesses are included.

Also included is a copy of Anderson's report dated January 9, 2020 (Ex. 58),[18] that responded to Ranes' appraisal of the entire Blue Diamond Hills real property. That Ranes appraisal appears to be the appraisal report that was "updated" by Ranes according to the First Ranes Declaration. Although Ranes' earlier appraisal report is not among the exhibits, Anderson's report of January 9, 2020 ("Anderson January 2020 Report"), appears to respond to Ranes' earlier appraisal, and both express a total value of all of the acres as of August 28, 2019. In the Anderson January 2020 Report, Anderson sets a market value of all 2,192.76 acres at $275,000,000. Additionally, Anderson also sets market values and liquidation values for the Land Royalty collateral and QE Payment collateral, respectively, at $46,495,000 and $32,546,500, and $43,875,000 and $30,712,500.

DISCUSSION

Section 1129(b)(2)(A) provides three alternatives for the fair and equitable treatment of a dissenting class of secured claims: (1) retention of liens and deferred cash payments equal to the allowed amount of the claims, (2) sale of the collateral and attachment of the creditor liens to the proceeds of sale, and (3) realization by the claimant of the indubitable equivalent. See 11 U.S.C.

[18] Ex. 58 originally was filed as an attachment to a separate Anderson declaration filed as Docket No. 1130.

§1129(b)(2)(i, ii and iii). In the present case, Debtors proclaim that for "avoidance of doubt the Bankruptcy Court shall partition" the collateral that secures Rep-Clark's claims. Partition, however, is not one of the three expressed alternatives for fair and equitable treatment of a dissenting secured class. Nor is the term "partition" defined under the Bankruptcy Code.

Under Nevada law, partition actions may be brought when there are multiple parties that hold and are in possession of the same real property. See Nev.Rev.Stat. 39.010. Joint possession of the subject real property is a prerequisite to seeking partition in Nevada. No suggestion is made, however, that both the Debtors and Rep-Clark are in possession of the real property collateral securing the Land Royalty obligation and the QE Payment.

Even when possession of real property is held by both or all parties, courts typically will order a partition of real property either through an in-kind division into physical parcels of equivalent value, or, through a sale and division of the proceeds. See generally REST. (FIRST) OF THE LAW OF PROPERTY, Div. III, Pt. II, Chap. 11, Top. 1, Partition in Specie or by Sale, Intro. Note (1936). Where an in-kind division of real property is sought, it is well established that the subject land should be divided into "parcels of equal *value*, instead of making the division itself into…parcels of equal *area*." Dondero v. Van Sickle, 11 Nev. 389, 393 (Nev. 1876). When an in-kind division of property in possession of the parties results in an unequal allocation of ownership interests, the court may award compensation to the dispossessed party in the form of an "owelty award." See Nev.Rev.Stat. 39.440; Kent v. Kent, 835 P.2d 8, 10 (Nev. 1992). Where an in-kind division or a sale of real property is entirely impracticable or inconvenient, partition may be denied altogether. See, e.g., Morrissey v. Pjzzo, 2019 Nev. Dist. LEXIS 1107 (8th Jud. Dist., Clark Cnty. Nev. Nov. 15, 2019) (denial of partition of residential dwelling by in-kind division or sale). Partition by sale of the subject property to the highest bidder typically minimizes disputes over the market value of the real property. See, e.g., Albrecht Invs. U.S. LLC v. Kalinko Enterprises LLC, 2019 Nev. Dist. LEXIS 2681 (8th Jud. Dist., Clark Cnty. Nev. Apr. 10, 2019) (partition of net proceeds after sale of three separate real property parcels).[19]

[19] In the present case, Debtors could seek cramdown treatment of Rep-Clark's claims by selling the collateral under Section 1129(b)(2)(A)(ii) and having Rep-Clark's lien attach to the sale proceeds. Debtors do not want to pursue that alternative. Additionally, Debtors clearly do

So even though the Debtors say they want to partition the subject collateral, the undoubted conclusion is that they are attempting to force a type of in-kind division of the collateral that is uniquely available, if at all, through the Chapter 11 cramdown process.[20] Equally undoubted is that this treatment is not your grandparent's partition. But the principles underlying an equitable partition of real property are relevant. Application of those principles require the court to deny the current Valuation Motion without prejudice.

As previously mentioned, neither the Fourth Amended Plan nor the Fourth Disclosure Statement identify the collateral by APNs that would be provided to Rep-Clark in full satisfaction of its allowed secured claim for Land Royalty payments or its allowed secured claim for the QE Payment obligation. While the notion that all 15 of the Land Royalty parcels are of equal value per acre has a certain egalitarian appeal, it is no more true for real estate values than it is in other contexts. All land is not created equal and even the property descriptions set forth in the Ranes Appraisal Report acknowledge that the parcels differ by size, usable acreage, shape, and view. All 8 of the QE Payment parcels have dissimilarities of a similar nature.

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not want Rep-Clark to retain its liens and be paid in full over time under Section 1129(a)(b)(2)(A)(i). Rather, Debtors want to keep at least some of the real property collateral for themselves while discharging any personal liability for Rep-Clark's allowed secured claims. But the certainty of value provided by a sale and the certainty of protection provided by retention of liens conflicts with the Debtors' desire to use Rep-Clark's collateral for their own purposes. The so-called partition treatment proposed by the Debtors as the "indubitable equivalent" under Section 1129(b)(2)(A)(iii) must be measured against those certainties. If the proposed treatment does not measure up, then it would be not fair and equitable under Section 1129(b) and cannot be crammed down over Rep-Clark's objection.

[20] Real estate secured creditors generally are not in possession of the real estate securing their claims. As previously mentioned in note 5, supra, Section 506(a) bifurcates a secured creditor's claim into an "allowed secured claim" and an "allowed unsecured claim." Outside of bankruptcy, a secured creditor generally can enforce its rights against all of the available collateral notwithstanding the objections of the debtor. For a real estate secured creditor, the enforcement typically occurs through a foreclosure sale. In Chapter 11, however, cramdown allows the debtor to force treatment of the allowed secured claim of a dissenting secured creditor class as long as the bankruptcy court finds the treatment to be fair and equitable. Outside of bankruptcy, there generally is no method to compel an extension of the time to pay a secured claim, to sell the collateral over the objection of the creditor, or to force the creditor to accept less than all of the collateral as payment in full.

The flaw in valuing dissimilar real property similarly was at the heart of the circuit's decision in Arnold & Baker Farms. There the Chapter 11 debtor attempted to satisfy the lender's entire allowed secured claim by transferring 566.5 acres out of the 1,320 acres of farmland securing the debt. See 85 F.3d at 1420. The Chapter 11 plan initially proposed to transfer 515 acres of land to the dissenting creditor in full satisfaction of its secured claim. See 177 B.R. at 656. The debtor's evidence estimated the value of the subject property at an average of $7,322 per acre while the secured creditor estimated the property at an average of $1,381 per acre. See 177 B.R. at 656. The bankruptcy court agreed with the debtor and valued the property at an average of $7,300 per acre. Id. To compensate the dissenting creditor for the costs of selling the 515 acres to apply to its claim, the bankruptcy court increased the transfer by 10 percent, i.e., an additional 51.5 acres, to compensate for the costs of selling the real property. Id. Based on that adjustment, the bankruptcy court concluded that a transfer of approximately 566.5 acres at a value of $7,300 per acre, constituted fair and equitable treatment of the creditor's secured claim under Section 1129(b)(2)(A)(iii). On appeal, however, both the Bankruptcy Appellate Panel ("BAP") and the Ninth Circuit disagreed with the bankruptcy court's legal conclusion that the dissenting creditor would "realize the indubitable equivalent of its secured claim."

If the Chapter 11 debtor in Arnold & Baker had transferred all of the collateral to the dissenting creditor, both the BAP and the Ninth Circuit would have accepted such treatment as the indubitable equivalent of the creditor's allowed secured claim under Section 506(a). See 85 F.3d at 1423; 177 B.R. at 660-661. Where a Chapter 11 debtor proposes to provide the dissenting secured creditor with less than all of its collateral in full satisfaction of its claim, however, both the BAP and the Ninth Circuit agreed that "a partial distribution must insure the safety of or prevent jeopardy to the principal." See 85 F.3d at 1422; 177 B.R. at 662. Both the BAP and the Ninth Circuit observed that "Because each parcel of real property is unique, the precise value of land is difficult, if not impossible, to determine until it is actually sold." See 85 F.3d at 1421; 177 B.R. at 661. Both the BAP and the Ninth Circuit agreed that "The large

disparity in the parties' valuation of the same property[21] illustrates the obvious uncertainty in attempting to forecast the price at which real property will sell at some uncertain future date." See 85 F.3d at 1422; 177 B.R. at 662. Both the BAP and the Ninth Circuit agreed that the bankruptcy court's valuation of $7,300 per acre was not clearly erroneous, see 85 F.3d at 1422 and 177 B.R. at 657-58, and also agreed that the valuation is not determinative of whether a partial distribution will jeopardize payment of the full amount of the dissenting creditor's claim. Thus, although the BAP and the Ninth Circuit did not reject the bankruptcy court's finding of the average value per acre, it could not agree that a partial distribution insured the safety or prevented jeopardy of the principal.

Debtors' approach in the instant case mirrors the flaws reflected by the record of the Arnold & Baker case. Neither the BAP nor the Ninth Circuit opinions indicate whether evidence was presented valuing each of the parcels constituting the 566.5 acres distributed to the creditor under the proposed Chapter 11 plan. There is no indication in the opinions whether the bankruptcy court reached a valuation as to each of the parcels. There is no indication whether the evidence before the bankruptcy court addressed any possible differences in topography or water access that might impact the value of any parcels as farmland or for investment purposes.[22] Instead, the bankruptcy court determined an average value for the acres encompassed by the creditor's collateral and simply carved out enough acres to account for the total amount of the creditor claim plus additional acreage to account for the risk. Given the disparity in the evidence of value presented to the bankruptcy court, the BAP and the Ninth Circuit in Arnold & Baker were not satisfied that the additional acreage supported a conclusion as to the safety or lack of jeopardy afforded to the secured creditor's interest in full payment.

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[21] In Arnold & Baker, the debtor valued the disputed real property at $7,322 per acre while the secured creditor value the property at $1,381 per acre.

[22] The debtor and the secured creditor did dispute whether the highest and best use of the subject collateral was as farmland or for land investment. See 177 B.R. at 656 n.3. In the present case, both appraisers came to disparate value determinations based on the residential development on the collateral.

In the instant case, Debtors have not specified the number of acres included in the 8 QE Payment parcels that will be transferred to Rep-Clark in satisfaction of its claims. Nor have the Debtors specified the number of acres included in the Land Royalty collateral that might be transferred to Rep-Clark in satisfaction of its claims. Nor have the Debtors even identified the APNs for any parcels from which any acres will be carved out to satisfy the allowed secured claims of Rep-Clark. In other words, there is no specific identification of what Rep-Clark will receive, in lieu of cash, in full satisfaction of its secured claim. Without such specificity, an evidentiary vacuum exists that precludes this court from determining whether the transfer of partial dirt of unknown quantity and unknown value can satisfy the indubitable equivalent concerns addressed in Arnold & Baker.

Moreover, Debtors' request also appears to be inconsistent with notions of a "partition" promised by the Debtors. As previously discussed at 11-12, supra, the Nevada partition statute would not apply because Rep-Clark is not in possession of any of the parcels. Also as previously discussed, the caselaw for partition of real property in Nevada suggests that (1) in-kind partitions of real property require divisions of land of equal value rather than equal area; (2) in-kind divisions resulting in unequal value might be approved if there is a compensatory award to make up the difference; (3) partitions of real property through sale and equal division of net proceeds minimize disputes as to market value; and (4) partition by in-kind division or sale may be denied altogether if either alternative is entirely impracticable. See discussion at 12, supra.[23] Based on the evidence presented in connection with its Valuation Motion, it is not entirely clear that the Debtors could obtain by partition under Nevada law the proposed treatment of Rep-Clark's secured claims sought by the proposed Fourth Amended Plan.

Inasmuch as confirmation of the Fourth Amended Plan is not before the court, the court makes no finding on whether it can be confirmed on a proper evidentiary showing. Suffice it to

[23] Where a trial court makes a valuation determination based on unacceptable assumptions, appellate courts in Nevada may direct the trial court to re-value the subject property and order an owelty payment. See Kent v. Kent, 835 P.2d at 11.

say that the instant Valuation Motion cannot be granted on this record. The court also makes no finding or determination as to the credibility of the expert witness testimony.[24]

CONCLUSION

The foregoing discussion constitutes the court's findings of fact and conclusions of law under Civil Rule 52 made applicable in this contested matter under Bankruptcy Rule 9014.

IT IS THEREFORE ORDERED that the Debtors' Motion to Determine Value of [QE Parcel and Land Royalty Parcel] Securing Claim of Rep-Clark, LLC Pursuant to 11 U.S.C. § 506[a] and Fed. R. Bankr. P. 3012, Docket No. 1675, be, and the same hereby is, **DENIED WITHOUT PREJUDICE.**

Copies sent to all parties via BNC

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[24] Ranes was not cross-examined and did not testify at the evidentiary hearing. The court had no opportunity to consider his testimony as a live witness. Anderson was cross-examined. The court has considered the Anderson January 2020 Report that addressed the market values and liquidation values for the Land Royalty collateral and QE Payment collateral as of August 28, 2019. See discussion at 11, supra. Those values are significantly less than the range of liquidation values for both sets of collateral that Anderson addressed for the evidentiary hearing. See discussion at 10-11, supra. In other words, Anderson's valuation testimony itself reflects disparities relevant to an eventual determination of indubitable equivalence.