



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
September 08, 2022

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:)	Case No.: 20-12409-MKN
)	
HARTLAND MMI, LLC,)	Chapter 11
)	
Debtor.)	Date: July 20, 2022
)	Time: 9:30 a.m.
)	

**ORDER ON MOTION FOR ORDER FOR DISGORGEMENT OF ATTORNEY FEES
AND MOTION TO DISMISS CHAPTER 11 CASE¹**

On July 20, 2022, the court heard the Motion for Order for Disgorgement of Attorney Fees and Motion to Dismiss Chapter 11 Case (“Dismissal Motion”) brought by Robert W. Lueck, Esq. (“Attorney Lueck”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND²

On April 16, 2014, a proceeding to probate a holographic will was commenced in the

¹ In this Order, reference will be made to documents filed in both federal and state judicial proceedings. All references to “ECF No.” are to the numbers assigned to the documents filed in the proceedings before the bankruptcy court.

² Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the docket in the above-captioned bankruptcy proceeding as well as the public records of other judicial proceedings. 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 docket 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.”).

1 probate department of the Eighth Judicial District Court, Clark County, Nevada (“Probate
2 Court”), styled as In the Matter of the Estate of Ailene E. Hart, aka, Toni Hart, Deceased, Case
3 No. P-14-080879-E (“Probate Matter”).³ One of the assets of the decedent’s estate (“Probate
4 Estate”) consisted of the decedent’s interest in a Nevada limited liability company known as
5 Hartland MMI, LLC (“Hartland” or “Debtor”).⁴ The primary asset of the Debtor consisted of
6 real property located at 1040 S. Sixth Street, Las Vegas, Nevada, commonly known as the
7 Hartland Mansion.

8 On or about February 25, 2015, the Probate Court conducted a hearing concerning a
9 report of the probate commissioner. Thereafter, the Probate Court’s oral rulings were
10 memorialized in an “Order From February 25, 2015” that was entered on or about March 31,
11 2015 (“Probate 2015 Order”). Among other things, the Probate Court found “that Hartland
12 MMI, LLC is a separate legal entity, and that as Manager of the LLC, Larry Hart had the
13 authority to borrow money on behalf of the LLC without Court approval; and that the Decedent
14 was the sole Member of the LLC, and upon her death, her interest in the LLC became an asset of
15 the Estate.” Probate 2015 Order at 2:22-26 (emphasis added).

16 On December 5, 2016, the Probate Court entered an order providing that Garry Hart, as
17 co-executor, would remain as the sole manager of Hartland. (Probate ECF No. 303).

18 On February 8, 2017, Hartland commenced a voluntary Chapter 11 reorganization
19 proceeding, denominated Case No. 17-10549 (“First Chapter 11”). (First ECF No. 1). Debtor
20 filed the Chapter 11 proceeding to prevent a pending foreclosure sale of the Hartland Mansion.
21 Bankruptcy counsel for Hartland in the First Chapter 11 case was the Law Offices of David

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23 ³ All references to “Probate ECF No.” are to the numbers assigned to the documents filed
in the Probate Matter.

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25 ⁴ The petition to commence the probate proceeding was filed by Larry D. Hart, Linda S.
Hart, and Garry L. Hart. All three petitioners were appointed as the co-personal representatives
26 and executors of the probate estate. (Probate ECF No. 11). Thereafter, Linda Hart voluntarily
resigned as a co-personal representative and executor. Upon her resignation, Larry Hart and
27 Garry Hart agreed to the appointment of Larry Bertsch (“Bertsch”), certified public accountant,
as the third co-executor to replace Linda Hart. That agreement was approved by an order of the
28 Probate Court entered on September 9, 2015. (Probate ECF No. 209). Thereafter, Larry Hart
died, leaving Garry Hart and Bertsch as the remaining co-executors of the Probate Estate.

1 Winterton (“Attorney Winterton”).

2 On July 26, 2018, an order was entered approving the sale of the Hartland Mansion for a
3 gross purchase price of \$2.9 million. (First ECF No. 258). The order provided, *inter alia*, for a
4 variety of claims secured by the property to be satisfied upon the close of the sale, as well as
5 various amounts to be paid to other parties, including to Jeff Manning of Manning Auctions,
6 LLC (together “Manning”) and to Attorney Lueck.

7 On December 10, 2018, an order was entered approving the final application for
8 compensation of Attorney Winterton. (First ECF No. 301).

9 On December 26, 2018, an order was entered granting the motion of the Office of the
10 United States Trustee (“UST”) to dismiss the First Chapter 11 proceeding. (First ECF No. 305).

11 On March 5, 2019, Debtor filed a civil complaint in the Eighth Judicial District, Clark
12 County, Nevada (“State Court”), denominated Case No. A-19-790498-C (“State Action”).
13 Debtor’s complaint sought damages against Manning, for their conduct in connection with the
14 sale of the Hartland Mansion in the First Chapter 11.

15 On April 3, 2019, Attorney Lueck filed a motion in the Probate Matter seeking to compel
16 Attorney Winterton to turnover to the Probate Estate certain funds held in his attorney-client trust
17 account from the sale of the Hartland Mansion (“Lueck Turnover Motion”). (Probate ECF No.
18 383).

19 On April 8, 2019, the First Chapter 11 proceeding was closed. (First ECF No. 308).

20 On May 2, 2019, Manning filed a petition removing the State Action to the bankruptcy
21 court,⁵ (First ECF No. 309), and thereafter filed a motion to reopen the First Chapter 11
22 Proceeding. (First ECF No. 311).

23 On June 24, 2019, an order was entered reopening the First Chapter 11 Case. (First ECF
24 No. 321).

25 On September 3, 2019, this court entered an order remanding the First Adversary to the
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27 ⁵ The removed State Action was denominated Adversary Proceeding No. 19-01068
28 (“First Adversary”). (First ECF No. 309). All references to “AECF No.” are to the numbers
assigned to the documents filed in the adversary proceedings commenced in the bankruptcy
court..

1 State Court because, *inter alia*, the State Action asserted a claim for breach of contract governed
2 by Nevada law. (First Adversary ECF No. 26).

3 On September 4, 2019, an order was entered re-closing the First Chapter 11 case. (First
4 ECF No. 333).

5 On March 31, 2020, the Probate Court conducted a hearing on a variety of matters,
6 including the Lueck Turnover Motion.⁶ A written order memorializing the Probate Court’s
7 determinations was entered on or about April 7, 2020 (“Lueck Turnover Order”). (Probate ECF
8 No. 435). That Order states, in pertinent part, that “...it appearing to the court that the net
9 remaining funds in the trust account of David Winterton, Esq. is \$382,849.96 from the sale of the
10 Hart Mansion in the Chapter 11 bankruptcy, that a recent accounting of the trust fund indicates
11 that there has been some dissipation of the funds in the trust account during the time the funds
12 have been in his trust account, and that the funds belong to the estate...” Lueck Turnover Order
13 at 1:24 to 2:4 (emphasis added). Based on that determination, the Probate Court ordered, *inter*
14 *alia*, “that David Winterton, Esq., shall forthwith issue a trust account check payable to the
15 Shumway Van Trust Account in the amount of \$382,849.96 and shall forthwith remit this check
16 to the Shumway Van law firm without deduction of any other expenses or claims....” *Id.* at 2:5-
17 8 (emphasis added).

18 On April 17, 2020, Attorney Winterton filed a motion for partial reconsideration of the
19 Lueck Turnover Order (“Winterton Reconsideration Motion”). (Probate ECF No. 440).

20 On May 18, 2020, Debtor commenced the instant Chapter 11 proceeding (“Second
21 Chapter 11”). (Second ECF No. 1). The voluntary Chapter 11 petition is accompanied by the
22 Debtor’s schedules of assets and liabilities (“Schedules”) and statement of financial affairs
23 (“SOFA”). The Chapter 11 petition, Schedules and SOFA are signed by Garry Hart, as manager
24 of the Debtor. Debtor’s property Schedule “A/B” lists three categories of property of the Second
25 Chapter 11 bankruptcy estate: cash in the amount of \$382,849.96 held in the trust account of
26 Attorney Winterton; miscellaneous office equipment and furnishings having a value of
27 \$151,664.00; and various contingent and unliquidated claims against multiple parties, including

28 ⁶ See Probate Court Minutes – All Pending Motions (03/31/2020).

1 Manning, attorneys and other professionals, and service providers having an aggregate value of
2 \$1,536,000.00. The total current value of all assets of the Debtor is scheduled at \$2,070,513.96.
3 Debtor's secured creditor Schedule "D" lists Attorney Winterton as having a claim in the amount
4 of \$30,004.18, secured by a statutory lien against the cash held in Attorney Winterton's trust
5 account. No other secured creditors are listed.

6 Debtor's unsecured creditor Schedule "E/F" lists 14 claimants or notice-only parties
7 having priority and non-priority claims totaling \$75,950.00. Debtor's co-debtor Schedule "H"
8 lists the Estate of Ailene Hart, the Estate of Larry David Hart, and Garry Hart as co-debtors of
9 various obligations owed by the Debtor, with Garry Hart as the executor, co-executor, or
10 principal of the co-debtor party. Debtor's SOFA, at Item 11.1, discloses that its current
11 bankruptcy counsel, Johnson & Gubler, P.C. ("Johnson Firm"), was not paid a retainer before the
12 filing of the Chapter 11 petition, but received jewelry from Garry Hart's spouse as collateral for
13 payment. At Item 13.1, the SOFA lists only one transfer of money or property outside of the
14 ordinary course of business to another person within 2 years: the sale of the Hartland Mansion on
15 September 10, 2018, for the amount of \$2.9 million. At Item 28, the SOFA lists Garry Hart and
16 the Estate of Ailene Hart (with Garry Hart as co-executor), respectively, as the only manager and
17 member of the Debtor. On the same date the Chapter 11 petition was filed, a notice of
18 bankruptcy was entered ("Bankruptcy Notice") scheduling a meeting of creditors for June 25,
19 2020. (Second ECF No. 4).

20 On May 21, 2020, the Probate Court heard the Winterton Reconsideration Motion and
21 orally ruled that the proceeds from the sale of Hartland Mansion were assets of the Probate
22 Estate.

23 On June 11, 2020, Debtor filed its operating report for the month of May 2020. (Second
24 ECF No. 18).

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1 On June 17, 2020, the Probate Court entered a written order on the Winterton
2 Reconsideration Motion (“Probate Reconsideration Order”). (Probate ECF No. 454). That order
3 provides “that the net proceeds remaining in the trust account of David Winterton, Esq. as of
4 March 26, 2020, \$382,849.96 are deemed to be an asset of the probate estate and therefore usable
5 for payment of the administrative claims of the probate.” (Emphasis added). Probate
6 Reconsideration Order at 2:14-17.

7 On June 17, 2020, Attorney Lueck filed a “Motion to Exclude Funds as Property of the
8 Estate” (“Exclusion Motion”). (Second ECF No. 21). Attorney Lueck seeks entry of an order
9 determining that the funds held by Attorney Winterton on the commencement of the Second
10 Chapter 11 proceeding are assets of the Estate of Ailene Hart under the jurisdiction of the State
11 Court. The Exclusion Motion was noticed to be heard on July 22, 2020 but was continued to be
12 heard concurrently with the Dismissal Motion. (Second ECF Nos. 22 and 43).

13 On June 25, 2020, Debtor filed an amended Chapter 11 petition. (Second ECF No. 25).
14 The amended Chapter 11 petition bears the electronic signature of Garry Hart as manager of the
15 Debtor.

16 On June 25, 2020, an order was entered granting the employment of the Johnson Firm as
17 Chapter 11 counsel to represent the Debtor (“Employment Order”).⁷ (Second ECF No. 26). The
18 Employment Order provides that “of the proceeds obtained from the Law Offices of David J.
19 Winterton post-petition, Johnson & Gubler, P.C. will hold \$15,000.00 for its retainer, plus the
20 filing fee of \$1,717.00 in trust until further Order of this Court, and the balance shall be returned
21 to the Debtor to be deposited inter the Debtor In Possession account.” Employment Order at
22 2:16-19.

23 On June 26, 2020, Attorney Lueck filed an “Emergency Ex Parte Motion to Stay Order
24 (#26) Entered on June 25, 2020 Requiring Turnover of Funds From Trust Account of David
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26 ⁷ On May 18, 2020, Debtor filed an application to employ the Johnson Firm as Chapter
27 11 counsel. (Second ECF No. 5). Attached to the Application is the Declaration of Mathew
28 Johnson attesting that a retainer of \$15,000 plus \$1,717 for filing fees would be provided from
funds held by Attorney Winterton.

1 Winterton.” (Second ECF No. 29).⁸

2 On June 26, 2020, Manning filed a motion under Section 1104(a) to appoint a Chapter 11
3 trustee (“Trustee Motion”). (Second ECF No. 30). The Trustee Motion was noticed to be heard
4 on August 5, 2020. (Second ECF No. 31). By stipulation, the hearing was continued to August
5 12, 2020. (Second ECF No. 38).

6 On June 29, 2020, Attorney Lueck filed a petition in the Probate Court seeking to remove
7 Garry Hart as a co-executor of the Probate Estate and to replace Garry Hart as the manager of
8 Hartland (“Lueck Replacement Motion”). (Probate ECF No. 456).

9 On July 7, 2020, Debtor filed an opposition to the Exclusion Motion, along with a
10 declaration of Garry Hart. (Second ECF Nos. 34 and 35).

11 On July 15, 2020, the Probate Court heard and orally granted the Lueck Replacement
12 Motion. See Probate Court Minutes – Show Cause Hearing (07/15/2020).

13 On July 17, 2020, Attorney Lueck filed his reply to the opposition to the Exclusion
14 Motion. (Second ECF No. 41).

15 On July 23, 2020, the Probate Court entered a written order memorializing its decision
16 granting the Lueck Replacement Motion (“Lueck Replacement Order”). (Probate ECF No. 490).

17 That Order included a number of findings, including that “the estate was the proper owner of
18 those funds in the trust account of David Winterton,” see Lueck Replacement Order at 5:8-19
19 (emphasis added), and that the “court has always held that the estate was the owner of the LLC
20 and that any net income from any sale of the property would be an estate asset.” Id. at 5:12-14
21 (emphasis added). Moreover, the Probate Court expressly ordered the removal of Garry Hart as
22 co-executor of the Probate Estate as well as the immediate suspension of Garry Hart as manager
23 of the Debtor. Id. at 10:13-16. The Probate Court also temporarily appointed Bertsch as sole
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28 ⁸ The motion was not accompanied by a supporting declaration or affidavit, nor by a proposed order.

1 manager of the Debtor inasmuch as there were no remaining executors of the Probate Estate. Id.
2 at 10:16-17.⁹

3 On July 29, 2020, Debtor filed its opposition to the Trustee Motion. (Second ECF No.
4 44).

5 On August 5, 2020, Manning filed its reply to Debtor's opposition to the Trustee Motion.
6 (Second ECF No. 45). On August 12, 2020, Attorney Lueck filed a joinder to Trustee Motion
7 ("Lueck Joinder"). Attached to the Lueck Joinder are various documents filed the Probate
8 Matter. (Second ECF No. 54).

9 On August 12, 2020, Manning again removed the State Action to this bankruptcy court,
10 which was assigned Adversary Proceeding No. 20-01090-mkn ("Second Adversary"). (Second
11 AECF No. 1).

12 On August 20, 2020, an order was entered granting the Trustee Motion ("Trustee
13 Order"). (Second ECF No. 57). On the same date, an order was entered denying the Exclusion
14 Motion ("Exclusion Order"). (Second ECF No. 59). The Exclusion Motion was denied without
15 prejudice in light of the appointment of a Chapter 11 trustee to investigate the acts, conduct,
16 assets, liabilities and financial condition of the Debtor.

17 On August 31, 2020, an order was entered approving the appointment of Timothy W.
18 Nelson ("Trustee Nelson") as the Chapter 11 trustee in the instant case. (Second ECF No. 66).

19 On September 17, 2020, the 341 Meeting was concluded. (Second ECF No. 76).

20 On October 15, 2020, Attorney Lueck filed the instant Dismissal Motion, along with a
21 declaration of Robert W. Lueck. (Second ECF Nos. 81 and 82).

22 On October 19, 2020, the Dismissal Motion was noticed to be heard on November 18,
23 2020. (Second ECF No. 83)

24 On October 23, 2020, the Johnson Firm filed its first and final interim application for
25 compensation for services provided to the Debtor. On this same date, the Johnson Firm filed an
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27 ⁹ Among other things, Bertsch was directed to consider whether he wanted to be the full-
28 time manager of Hartland and whether Hartland should continue to pursue the Second Adversary
Proceeding against Manning. Id. at 10:18-22.

1 amended first and final interim application for compensation (“Johnson Fee Application”) which
2 was noticed to be heard on November 25, 2020. (Second ECF Nos. 86, 87 and 88).¹⁰

3 On October 26, 2020, Manning filed a summary judgment motion (“Manning MSJ”) in
4 the Second Adversary, along with a statement of undisputed facts. The Manning MSJ was
5 noticed to be heard on December 17, 2020. (Second AECF Nos. 5, 6 and 7).

6 On November 4, 2020, a stipulated order was entered continuing both the Johnson Fee
7 Application and the Dismissal Motion to December 17, 2020, to be heard along with the
8 Manning MSJ in the Adversary Proceeding. (Second ECF No. 93).

9 On December 17, 2020, the Manning MSJ hearing was continued to February 10, 2021.
10 (AECF No. 13). Additionally, the hearing on both the Johnson Fee Application and the
11 Dismissal Motion were continued to February 10, 2021. (Second ECF Nos. 103 and 104).

12 On December 23, 2020, a global settlement conference (“Global Settlement Conference”)
13 was scheduled for January 29, 2021, before U.S. Bankruptcy Judge Christopher Jaime, regarding
14 the Johnson Fee Application and the Dismissal Motion. (Second ECF No. 105; Second AECF
15 No. 15).¹¹

16 On January 21, 2021, Attorney Lueck filed a Petition for Writ of Mandamus before the
17 United States District Court for the District of Nevada (“USDC”), assigned Case No. 21-cv-
18 00114-GMN-NJK (“Mandamus Proceeding”).¹² (USDC ECF No. 1). Attorney Lueck sought an
19 order from the USDC to compel this bankruptcy court to dismiss the instant Chapter 11
20 proceeding with prejudice and to vacate all other orders entered in the case. Due to the pendency
21 of the Mandamus Proceeding, the Global Settlement Conference was continued on multiple
22 occasions.

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25 ¹⁰ By stipulation, the hearing on the Dismissal Motion was continued to December 17,
2020. (Second ECF No. 91).

26 ¹¹ The Global Settlement Conference was continued several times before ultimately being
27 vacated on June 14, 2022 (Second ECF No. 203; Second AECF No. 87).

28 ¹² All references to “USDC ECF No.” are to the numbers assigned to the documents filed
in the Mandamus Proceeding.

1 On February 23, 2021, an order was entered denying Manning’s amended ex parte
2 application to have the Manning MSJ heard on shortened time. (Second AECF No. 29).

3 On February 25, 2022, orders were entered continuing the Global Settlement Conference
4 to June 23, 2022, and continuing status conferences on the Dismissal Motion and the Johnson
5 Fee Application to July 6, 2022. (Second ECF Nos. 170 and 171).

6 On March 11, 2022, the USDC entered an order in the Mandamus Proceeding denying all
7 requested relief. (USDC ECF No. 37).

8 On May 18, 2022, Trustee Nelson filed a motion for an extension of time to commence
9 actions encompassed by Section 546(a) (“Extension Motion”) that was noticed to be heard on
10 June 22, 2022. (Second ECF Nos. 183, 184 and 185).

11 On June 10, 2022, Attorney Lueck filed notices rescheduling the hearings on the
12 Dismissal Motion and the Exclusion Motion for July 13, 2022, along with additional points and
13 authorities regarding both matters. (Second ECF Nos. 197, 198 and 199).

14 On June 14, 2022, an order was entered vacating the Global Settlement Conference and
15 scheduling a status conference for July 20, 2022. (Second ECF No. 203).

16 On June 22, 2022, the Extension Motion was heard. At the hearing, the court ordered
17 that the Exclusion Motion, the Dismissal Motion, the Johnson Fee Application, and the Manning
18 MSJ would be heard on July 20, 2022, that any additional oppositions must be filed by July 6,
19 2022, and that any additional replies be filed by July 13, 2022.

20 On July 5, 2022, Debtor filed its opposition to the Dismissal Motion. (Second ECF No.
21 214).

22 On July 6, 2022, Trustee Nelson filed an omnibus opposition to the Dismissal Motion,
23 the Exclusion Motion, and the Johnson Fee Application as well as a declaration of Elizabeth
24 Fletcher. (Second ECF Nos. 215 and 216).

25 On July 6, 2022, Manning filed a limited joinder to Trustee Nelson’s omnibus opposition.
26 (Second ECF No. 217).

27 On July 7, 2022, an errata to Trustee Nelson’s omnibus opposition was filed. (Second
28 ECF No. 218).

1 On July 12, 2022, Attorney Lueck filed a Reply Points and Authorities in Support of the
2 [Dismissal Motion], the [Exclusion Motion], and Trustee’s Response to Amended [Johnson Fee
3 Application] (“First Dismissal Reply”) along with a declaration of Attorney Lueck, and
4 supplemental exhibits in support of the First Dismissal Reply. (Second ECF Nos. 222, 223 and
5 224).

6 On July 14, 2022, Attorney Lueck filed another “Reply Points and Authorities” in
7 support of the Dismissal Motion, but this time it relates only to the Dismissal Motion (“Second
8 Dismissal Reply”). (Second ECF No. 225).

9 On July 15, 2022, Debtor filed a joinder to Trustee Nelson’s opposition to the Dismissal
10 Motion, the Exclusion Motion, and Trustee Nelson’s response to the amended Johnson Fee
11 Application. (Second ECF No. 226).¹³

12 On July 20, 2022, arguments were heard regarding the Johnson Fee Application, the
13 Dismissal Motion, the Manning MSJ, and the Exclusion Motion, whereupon all matters were
14 taken under submission.¹⁴

15 DISCUSSION

16 By the instant Dismissal Motion, Attorney Lueck seeks to dismiss the Second Chapter 11
17 case and the entry of an order requiring the Johnson Firm to disgorge \$15,000 that the firm was
18 provided as a retainer to file the Debtor’s Chapter 11 petition. The court has considered the
19 written and oral arguments of counsel and the parties, as well as the materials submitted and the
20 record in the First Chapter 11 and the Second Chapter 11. The court concludes that dismissal of
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22 ¹³ The Debtor’s joinder was filed by the Johnson Firm as attorneys for the Debtor. It is
23 not entirely clear how the Johnson Firm had authority on July 15, 2022, to file a document on
24 behalf of the Debtor when Trustee Nelson already had been appointed. By that time, Garry Hart
25 also had been removed as a co-executor and as the manager of the Debtor. Bertsch was the only
26 remaining executor of the Probate Estate and he was represented by the Shumway Van law firm.
27 Bertsch also had been appointed as the sole manager of the Debtor. In other words, the Johnson
28 Firm apparently had no authority to file anything on behalf of the Debtor at the time the joinder
was filed. Presumably, the joinder was intended by the Johnson Firm to address only the
Johnson Fee Application.

¹⁴ Separate orders have been entered contemporaneously herewith on the Johnson Fee
Application, the Manning MSJ, and the Exclusion Motion.

1 the Second Chapter 11 case is unwarranted. The court also concludes that disgorgement is
2 appropriate of any funds over which the Probate Court exercised jurisdiction prior to the
3 commencement of this Chapter 11 proceeding. Several reasons require these results.

4 First, pendency of the Probate Matter does not preclude the bankruptcy court's exercise
5 of jurisdiction over the Debtor. Debtor is a fictitious entity separate and apart from the decedent
6 in the Probate Matter. The Probate Estate is not a "person" that is eligible to seek bankruptcy
7 protection, see Estate of Taplin, 641 B.R. 236, 241-43 (Bankr.E.D.Cal. 2022), but a limited
8 liability company is eligible. See In re CWNevada LLC, 602 B.R. 717 725 (Bankr.D.Nev.
9 2019). The Probate Court expressly recognized that the Debtor is an entity separate from the
10 decedent in its 2015 Order. The First Chapter 11 was commenced by Garry Hart as the Debtor's
11 manager and the Hartland Mansion was sold. No one contested that the Debtor was able to seek
12 Chapter 11 relief without interfering with the jurisdiction of the Probate Court. At the time the
13 Second Chapter 11 was commenced, Garry Hart was still the sole manager of the Debtor.
14 Debtor remains a separate entity separate and apart from the decedent in the Probate Matter. No
15 one suggests that the Debtor has been dissolved under Nevada law. After the instant proceeding
16 was commenced, Garry Hart was replaced by Bertsch as the manager of the Debtor. Thereafter,
17 Trustee Nelson was appointed to serve as Chapter 11 trustee of the Debtor.

18 Second, the so-called "probate exception" to federal court jurisdiction applies when a
19 state probate court exercises jurisdiction over specific property of the decedent, i.e., it asserts in
20 rem jurisdiction. See Bergeron v. Loeb, 100 Nev. 54, 58 (Nev. 1984); see also Pal v. Hafter,
21 2020 WL 7409589, at *3 n.45. The probate exception prevents conflicts from arising where a
22 state court and a federal court assert in rem jurisdiction over the same res. See Marshall v.
23 Marshall, 547 U.S. 293, 308-312 (2006). This is particularly important in bankruptcy cases
24 where bankruptcy jurisdiction itself is in rem. See Estate of Tapin, 641 B.R. at 244, citing 28
25 U.S.C. §1334(e)(1)[exclusive jurisdiction over property of the bankruptcy estate] and 11 U.S.C.
26 §541(a)(1) [bankruptcy estate property includes all legal and equitable interests wherever located
27 on commencement of case]. The Probate Matter clearly was pending when the First Chapter 11
28 was commenced. No one suggests that the probate exception was applicable in the First Chapter

1 11 proceeding that resulted in the sale of the Hartland Mansion. No one suggests that the
 2 bankruptcy court lacked jurisdiction in the First Chapter 11 case unless they also are suggesting
 3 that the sale of the Hartland Mansion is void.¹⁵

4 Third, after the First Chapter 11 was dismissed, the Probate Court entered an order
 5 finding that the remaining net proceeds from the sale of the Hartland Mansion, held in trust by
 6 Attorney Winterton, belong to the Probate Estate. See Lueck Turnover Order at 2:4. The
 7 Probate Court's order was issued orally on March 31, 2020, and entered in writing on April 7,
 8 2020. Although reconsideration of the Lueck Turnover Order was sought from the Probate
 9 Court, that order was still in effect when the Second Chapter 11 Case was commenced on May
 10 18, 2020.¹⁶ In other words, after the First Chapter 11 was dismissed and before the Second
 11 Chapter 11 was commenced, the Probate Court determined that the funds held in Attorney
 12 Winterton's trust account constituted the identifiable res of the Probate Estate.¹⁷ The Probate
 13 Court's determination has not been vacated or stayed. As a result, the probate exception applies
 14 to the sale proceeds that were held by Attorney Winterton at the commencement of this
 15 bankruptcy proceeding and the probate exception still applies as of the date of hearing on the
 16 instant Dismissal Motion.

17 Fourth, the Debtor remains a person eligible for bankruptcy relief because it has not been
 18 dissolved.¹⁸ For the reasons discussed above, the proceeds of the Hartland Mansion sale are

20 ¹⁵ The probate exception requires federal courts to defer to state courts for "(1) probate or
 21 annulment of a will; (2) administration of a probate estate; and (3) disposition of property that is
 22 in the in rem custody of a state probate court." Estate of Tapin, 641 B.R. at 244. See also Matter
of Nolan, 2022 WL 327927, at *1 (9th Cir. Feb. 3, 2022).

23 ¹⁶ As previously discussed at 4-6, supra, the Winterton Reconsideration Motion was filed
 24 in the Probate Matter on April 17, 2020, and was denied by the Probate Court by its oral ruling
 25 on May 21, 2020, and in its written order entered June 17, 2020. The Probate Court expressly
 26 confirmed its prior rulings that the proceeds of the Hartland Mansion sale are an asset of the
 Probate Estate.

27 ¹⁷ Thereafter, the Probate Court entered a further order confirming that the Probate Estate
 28 is the owner of the funds held in trust by Attorney Winterton." Lueck Replacement Order at 5:8-
 19.

1 subject to the prior in rem jurisdiction of the Probate Court and cannot be administered in the
2 Debtor's bankruptcy proceeding. If the Debtor has other legal or equitable interests over which
3 the Probate Court had not taken jurisdiction prior to the commencement of the Chapter 11
4 proceeding, however, those interests would be property of the current bankruptcy estate under
5 Section 541(a).¹⁹ Because there may be property of the Debtor's bankruptcy estate that is not
6 encompassed by the probate exception, dismissal of the Chapter 11 proceeding is not required.

7 Fifth, the commencement of a Chapter 11 proceeding in "bad faith" may constitute
8 "cause" for dismissal or conversion of a case under Section 1112(b)(1), see, e.g., Marsch v.
9 Marsch (In re Marsch), 36 F.3d 825 (9th Cir. 1994), but appointment of a Chapter 11 trustee
10 under Section 1104(a) also is permitted as an alternative. See 11 U.S.C. §1112(b)(1) (the court
11 shall convert or dismiss a case "for cause unless the court determines that the appointment under
12 section 1104(a) of a trustee...is in the best interests of creditors and the estate."). A Chapter 11
13 trustee has been appointed as being in the best interests of creditors and the estate under Section
14 1104(a)(2). See Trustee Order at 8:3-4 & n. 12. Thus, irrespective of whether the instant
15 Chapter 11 was commenced in bad faith or for lack of good faith, those circumstances have been
16 addressed through the appointment of Trustee Nelson.

17 Finally, the Employment Order requires the Johnson Firm to hold in trust any retainer
18 funds received from the Debtor. See discussion at 6, supra. Counsel is not permitted to draw
19 any such funds until its compensation is approved by the court. Until such time as resolution of
20 the Johnson Fee Application authorizes counsel to draw on such funds, disgorgement of the
21 funds held in the Johnson Firm trust account is premature.²⁰

22
23 ¹⁸ The bankruptcy court cannot dissolve the Debtor as only Nevada courts have exclusive
24 authority to dissolve a Nevada limited liability company. See State of Montana v. Blixseth (In re
Blixseth), 484 B.R. 360, 369-70 (B.A.P. 9th Cir. 2012).

25 ¹⁹ The bankruptcy court's subject matter jurisdiction over this Chapter 11 proceeding is
26 distinct from considerations of its in rem jurisdiction over the sale proceeds or even personal
27 jurisdiction over the parties. See Superpumper, Inc. v. Leonard, Trustee for Bankruptcy Estate
of Morabito, 499 P.3d 101, 105-07 (Nev. 2021). Before this Chapter 11 proceeding was
28 commenced, the State Court established its in rem jurisdiction over the sale proceeds held by
Attorney Winterton.

1 Under these circumstances, the court concludes that dismissal of this Chapter 11
2 proceeding is unwarranted and that disgorgement of the retainer funds held by the Johnson Firm
3 is premature.

4 **IT IS THEREFORE ORDERED** that Motion for Order for Disgorgement of Attorney
5 Fees and Motion to Dismiss Chapter 11 Case, brought by Robert W. Lueck, be, and the same
6 hereby is, **DENIED**.

7 Copies sent via CM/ECF ELECTRONIC FILING

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20 415 S. 6TH ST., #100
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²⁰ The Probate Court, of course, has in rem jurisdiction over any funds of the Probate Estate in possession of the Johnson Firm.