Natalie C. Scott, OSB #024510
nscott@scott-law-group.com
SCOTT LAW GROUP
PO Box 70422
Springfield, OR 97475
Telephone: (541) 868-8005
Facsimile: (541) 868-8004

Appellate Counsel for Debtor

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

In re: Michael Buu Truong, Debtor.	Case No. 3:23-cv-01063-MO Bankr. Case No.: 22-30770-pcm13 Chapter 13 **REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE INTERLOCUTORY APPEAL**

Debtor, by and through the undersigned, files this Reply in opposition to the Response filed by Creditor Crandall ("Crandall") (Doc. No. 4) and in support of Debtor's Motion for Leave to File Interlocutory Appeal (Doc. No. 1, p. 3-10) ("the Motion") as follows:

PRELIMINARY NOTE

The bankruptcy court is scheduled to deliver ruling orally at a hearing on August 10, 2023 on Debtor's motion to extend the deadline to file the appeal. In addition, Debtor has ordered the transcript of the June 5th hearing, which should be available to the court in 7-10 days. If leave is granted, Debtor will order the other transcripts relevant to the issues on appeal.

REPLY to CRANDALL'S FACTUAL & PROCEDURAL BACKGROUND

Crandall attempts to cast Debtor in a bad light by reciting several "facts" that are both irrelevant and not true. Debtor briefly addresses two of those here. The relevant facts are those set forth in Debtor's previously filed Motion.

PO Box 70422
Springfield, OR 97475
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Fax: 541-868-8004
www.scott-law-group.com

First, Judge McKittrick expressly noted that the bankruptcy court would not revisit the facts found by the arbitrator in a pre-bankruptcy arbitration involving Debtor, Creditors Merrells ("Merrells"), and Crandall, or address the binding effect of such findings on Debtor. Opinion, BK Doc. No. 62, p. 5 n 10. In the facts section of the Response, Crandall nonetheless states that Merrells were "[e]xcited to move into their new home[.]" Response, p. 2. The arbitrator concluded Merrells were "less than candid" regarding their intent to purchase Debtor's property as a primary residence "when in truth it was a[n] investment opportunity that might someday lead to a construction of a home for the family[.]" Exh 2, p. 3-4. The arbitrator made an actual finding that the Merrells "had no intention of using the six acre parcel as their primary residence[.]" Crandall's recitations can only be an effort to cast Debtor in a negative light by implying he backed out of a deal that caused a family to lose a home as opposed to well-funded, sophisticated buyers who intended to continue to run the property as an AirBnB.

Next, Crandall cites to the bankruptcy court's opinion for the statement that Debtor filed bankruptcy "seemingly as a ruse to avoid the arbitration decision." Response, p. 3. Judge McKittrick never made any such statement. Creditors argued those facts as part of their bad faith objection to Debtor's initially filed plan, which the court rejected. Passannante Memo, Doc. No. 50, p. 8-11; BK Doc. No. 59 (pdf audio of 10/20/2022 hearing). As to the matters it took under advisement, the court held that the real estate contract *was*, in fact, executory and, had the evidentiary standard been met, it could have been rejected, a valid reason to seek protection in Chapter 13. BK Doc. No. 62 (Opinion dated December 15, 2022). The court opined that many chapter 13 filings involve efforts to avoid a foreclosure, which is not a manipulation of the Bankruptcy Code but rather an effort to take advantage of an opportunity to retain property. BK Doc No. 59 (pdf audio of 10/20/2022 hearing).

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Crandall's remaining recitation of facts inaccurately summarizes the bankruptcy court's rulings, providing portions of some quotes and inserting irrelevant facts in footnotes. For example, Crandall states that the bankruptcy court "expressed skepticism" that it would confirm the plan if it considered the supplemental evidence. Response, p. 4. Judge McKittrick did no such thing. He quoted a case to note that a court "may" decline to permit rejection of a contract if there is no benefit to creditors as part of his analysis of the fifth factor of the law of the case doctrine. BK Doc. 95 (pdf audio of June 5th Ruling). He did not make a back-up ruling that, even if law of the case did not apply, the supplemental evidence was insufficient. Crandall may wish that the court had done so but the record speaks for itself. This Court should view Crandall's Response with skepticism.

REPLY TO ARGUMENT & REASONS SUPPORTING INTERLOCUTORY APPEAL

The Motion acknowledges and addresses the burden on Debtor to demonstrate why an interlocutory appeal should be permitted to proceed. Debtor understands that even if he shows the factors, the ultimate decision is still a matter of discretion with this Court. Debtor addresses Crandall's arguments in turn.

First, Crandall mischaracterizes the two questions Debtor identified in the Motion. One of those is not "whether [Debtor] submitted sufficient evidence to justify rejection." Response, p. 7 and p. 8. It appears Crandall is referring to the second of Debtor's questions presented which is, whether the "law of the case" doctrine prevents the bankruptcy court from considering additional evidence in support of a modified plan. Motion, p. 3. Debtor is neither seeking review of an issue that is a "mixed" question of law nor asking this Court to evaluate sufficiency of the evidence should it permit this appeal to proceed. Debtor makes clear in the "Relief Sought" section that he seeks an order confirming the plan or directing the bankruptcy court to consider evidence already in the record that the bankruptcy court concluded it would not consider due to the law of the case doctrine.

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With respect to the law of the case issue, although subject to an abuse of discretion standard of review,[1] the controlling question here is whether law of the case should have been applied in the first instance in the context of an amended chapter 13 plan -- i.e., can evidence be excluded based on law of the case when the Bankruptcy Code expressly permits a debtor to amend a chapter 13 plan (and where, as here, the bankruptcy court grants permission to do so). The issue is one of law.

The other controlling question is also purely legal – whether the business judgment rule applies to contract rejection in chapter 13. Crandall appears to concede the question is subject to review for errors of law. There are no factual findings to review in connection with either of the two questions presented. As properly understood, both questions involve purely legal issues.

The controlling question inquiry also ties in to the third factor governing leave to appeal -- whether immediate review will materially advance the bankruptcy case. Crandall asserts that there are "many alternative grounds" to affirm a decision to deny confirmation and suggests that there are other appealable issues that merit waiting for entry of a final order in this case. Response, p. 7. As the bankruptcy court recognized, debtors often seek relief in chapter 13 for the sole purpose of saving property from foreclosure. That is what Debtor is trying to do with respect to his AirBnB property.

Although the Bankruptcy Code requires a chapter 13 plan meet other requirements for confirmation, the threshold issue in this case is whether Debtor can keep that property or not. The court has indicated it will reject any further amended plan that seeks to keep the AirBnB property. That is the central issue in this case, the very transaction Crandall needs to close in order to be entitled to a real estate commission. If interlocutory review is permitted, then Debtor will know if saving the property can be accomplished in this chapter 13 or not. That will dictate any and all subsequent steps and lead to resolution of this case.

[1] Debtor agrees that Crandall is correct that an abuse of discretion standard applies to review of a court's application of law of the case but, as explained above, that is not the "controlling question" presented.

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Crandall next asserts that Debtor "will be unable to show" that rejection benefits creditors. Response, p. 8-9. That is an incredulous assertion that Crandall apparently wishes this Court to confirm by combing the bankruptcy court record and making several leaps of logic. A debtor's interests are not irrelevant in a chapter 13. Interlocutory appeal should not be denied based on Crandall's unjustified conclusion that Debtor cannot meet other standards Crandall believes apply in this case.

Crandall then points to a contention of the Merrells, who have not appeared in this matter nor filed an objection to the Motion, that could effect reversal if they seek and prevail on appeal – that the bankruptcy court erred in concluding that the real estate contract is executory. Response, p. 8. That a non-appearing party "may" later appeal a ruling or make certain arguments does not make an appeal "piecemeal." Neither Crandall nor Merrells have to take action now. Debtor does. If Debtor is not permitted to appeal the June 5th ruling now, then Debtor either has to file an amended plan that gives up the property (i.e., accepts and goes through with the real estate contract to sell the AirBnB to Merrells), convert to chapter 7 (in which he would still give up the property) or accept dismissal of his chapter 13 and face state court proceedings. Each scenario effectively eviscerates Debtor's right to seek review of the June 5th ruling whether by mooting the appeal (if the sale closes, an appellate court could not "unscramble the eggs") or by ending the chapter 13 such that state court proceedings create issues of jurisdiction and practical relief when Debtor will no longer have the protections of a chapter 13.

Regarding the factor of substantial grounds for difference of opinion, Debtor has accurately cited and analyzed the relevant case law in the Motion. Application of the business judgment rule to contract rejection in chapter 13 is undecided. Showing "substantial grounds for difference of opinion" is not a matter of math – i.e, debtor finding one case in his favor where there are less than a handful of cases addressing the issue nationwide. Contrary to Crandall's contention that "all case

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law on point is adverse" to Debtor, there are only a few cases on point at all (4-5 per the citations in the ruling and briefing). As Debtor noted, there is an older Ninth Circuit decision regarding lower thresholds applicable to contract rejection in chapter 13 as well as out-of-jurisdiction authority to similar effect. Satisfaction of the substantial grounds for difference of opinion factor does not require the parties offer extensive analysis of the issues on appeal. That is for the briefing process. Debtor has met his burden to show a substantial difference of opinion regarding application of the business judgment rule to contract rejection in chapter 13.

Debtor also has met that burden with respect to the other issue -- whether law of the case applies to consideration of evidence offered in support of an amended chapter 13 plan. As noted, this is a novel issue of first impression. It is unsurprising that there is no case on this point. Crandall asserts that application of law of the case is "fact-specific" and "highly discretionary." Response, p. 10. This argument suffers from the same flaw discussed above; Crandall misunderstands the question presented. Again, it is <u>not</u> whether Judge McKittrick improperly exercised his discretion to apply law of the case to prevent re-litigation of previous facts and issues. Rather, it is whether Judge McKittrick should have applied law of the case at all where Debtor submitted additional evidence in support of confirmation of an amended chapter 13 plan. *See* Motion, p. 3.

Crandall hangs his hat on lack of case law. However, the controlling Ninth Circuit cases cited by the parties expressly provide that interlocutory review is appropriate for "novel and difficult issues of first impression[.]" *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). No court would ever grant interlocutory review if the requirement were that there had to be at least one case addressing the issue. Indeed, the Ninth Circuit has expressly rejected such a position. In *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681 (9th Cir. 2011), the court observed,

> "Reese contends that there exists no substantial ground for difference of opinion because there are no cases directly conflicting with the district

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Fax: 541-868-8004
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> court's construction of the law. But, as we see it, 'this appeal involves an issue over which reasonable judges might differ' and such 'uncertainty provides a credible basis for a different of opinion' on the issue. *In re Cement Antitrust Litig.*, 672 F.2d 1020, 1028 (9th Cir. 1982) (Boochever, J., dissenting on other grounds). … Our interlocutory appellate jurisdiction does not turn on a prior court's having reached a conclusion adverse to that from which appellants seek relief. A substantial ground for difference of opinion exists where reasonable jurists *might* disagree on an issue's resolution, not merely where they have already disagreed."

Id. at 688 (emphasis added). In a footnote the court further observed that adopting the "formalistic requirement" that adverse authority develop around an issue before it may be reviewed on interlocutory appeal "could lead to unnecessary, protracted litigation and a considerable waste of judicial resources." *Id.* at 688 n. 5. The focus of the requirement is that the decision sought to be appealed involves an issue over which reasonable judges might differ. Here, the bankruptcy court acknowledged that there is "tension between the liberal standard for modification of chapter 13 plans and the law of the case doctrine." BK Doc. No. 95 (pdf audio). The question presented is novel and difficult and is one about which "reasonable" judges might differ. Debtor has met his burden to seek interlocutory review of that decision.

Regarding the final factor of "materially affect the outcome" of the case (also addressed *supra* as part of the "controlling question" analysis), Crandall asserts that Debtor should simply wait for the passage of time, stating that there is "no prejudice in [Debtor] waiting a matter of days" for entry of final order. Response, p. 11. Incredibly, Crandall suggests there would be "no prejudice" to a debtor in having his chapter 13 case dismissed, which is the only outcome that would occur in a matter of days. As noted, Debtor's options are to file a further amended plan, convert his case, or dismiss it. The "final" order, as Crandall well knows, would not be a confirmation order into which the prior order merges; the "final" order would be dismissal.

Crandall drops a footnote that loss of the automatic stay on dismissal of the chapter 13 could be addressed by filing a motion to stay the dismissal order. Response, p. 12 n. 10. Crandall

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Fax: 541-868-8004
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contends that this result is somehow preferable to "forcing the parties to expend resources litigating multiple appeals[.]" Response, p. 12. This analysis turns logic on its head. The discretionary review process permits parties to seek interlocutory review of critical issues *before* making a decision that is case ending. If Debtor waits for dismissal, then the option of filing a further amended plan is off the table. If Debtor files an amended plan, then the case will not be resolved in a matter of days and, as noted above, the court has already informed Debtor that the any plan proposing to keep the AirBnB property will be rejected. Debtor is taking action now on the key reason for filing the chapter 13 – saving his property – the issue these parties have been litigating for years. If appeal is permitted now, before having to file a plan or dismiss or convert,[2] all options remain available as part of this Court's consideration.

CONCLUSION

For the reasons set forth above and in Debtor's previously filed motion, Debtor requests entry of an order granting leave to appeal the bankruptcy court's June 5th order.

DATED this 4th day of August, 2023.

THE SCOTT LAW GROUP

By: /s/ Natalie C. Scott
Natalie C. Scott, OSB #024510
Appellate Attorneys for Debtor

[2] Debtor recognizes that this result will be impacted by whether or not he can obtain stay pending appeal. His motion for stay is currently in abatement pending the bankruptcy court's ruling on the motion to extend the appeal deadline.

PO Box 70422
Springfield, OR 97475
Phone: 541-868-8005
Fax: 541-868-8004
www.scott-law-group.com

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2023, the foregoing **REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE INTERLOCUTORY APPEAL** was served on the following:

☒ **Via First Class Mail to:**

ODR Bkcy
955 Center St NE
Salem, OR
97301-2555

Mark G. Passannante
Grayson Law LLP
7959 SE Foster Rd.
Portland, OR 97206

Alexzander CJ Adams
14705 SW Millikan Way
Beaverton, OR 97006

Chapter 13 Trustee Wayne Godare
222 SW Columbia St., #1700
Portland, OR 97201

Garrett S. Ledgerwood
MILLER NASH LLP
US Bancorp Tower
111 SW Fifth Ave, Ste 3400
Portland, OR 97204

Michael Buu Truong
17980 SW Shadypeak Lane
Beaverton, OR 97007

☐ Via Facsimile to: N/A

☒ **Via ECF Notification to: ECF Recipients**

☐ **Via E-mail to:**

DATED: August 4, 2023

/s/ Natalie C. Scott
Natalie C. Scott, OSB# 024510

SCOTT LAW GROUP LLP
PO Box 70422
Springfield, OR 97475
Phone: 541-868-8005
Fax: 541-868-8004
www.scott-law-group.com