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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

In re Michael B. Truong, Debtor.	Case No. 3:23-cv-01063-MO Bankruptcy Case No. 22-30770-pcm13 Chapter 13 **RESPONSE TO MOTION FOR LEAVE TO FILE INTERLOCUTORY APPEAL**

I. INTRODUCTION

Pursuant to Federal Rule of Bankruptcy Procedure 8004(b)(2), Creditor Mark L. Crandall ("Crandall") files this response to Debtor Michael B. Truong ("Truong")'s motion for leave to appeal an interlocutory ruling denying confirmation of Truong's latest Chapter 13 plan (the "Motion"). Truong has not met his high burden to show that the issues he seeks leave to appeal merit interlocutory review. The bankruptcy court's ruling is well supported by precedent and Truong has failed to locate any contrary authority; moreover, the issues Truong seeks to appeal are not purely issues of law nor are they controlling, given the multiple other grounds for

denying plan confirmation in this case. Finally, Truong will not be prejudiced if forced to wait to appeal until final judgment, and an appeal at this stage will only serve to delay the bankruptcy case and increase litigation costs for all parties. Accordingly, the Court should deny the Motion.

II. FACTUAL AND PROCEDURAL BACKGROUND

When moving back to Oregon from the Midwest in 2021, Kenneth and Echo Merrell (the "Merrells") entered into a purchase and sale agreement with Truong to buy a home located at 17980 SW ShadyPeak Lane, Beaverton, Oregon (the "Contract"). Declaration of Mark G. Passannante ("Passannante Decl."), Ex. 1[1]; Dkt. 70-1(¶15). Crandall was the Merrells' real estate agent and is owed a commission from Truong under the Contract. *Id.* Excited to move into their new home, the Merrells sought and obtained financing, and were ready, willing, and able to close the transaction. *See* Dkt. 48 (Exs. 104, 105); Dkt. 70-1(¶15). The Merrells deposited their earnest money and down payment into escrow and had their lender prepared to fund the transaction, but the sale did not occur because Truong "had second thoughts" and inexplicably refused to execute the deed conveying the home to the Merrells. Dkt. 62 at 4. Because Truong breached the agreement, the Merrells filed a claim with the Arbitration Service of Portland in accordance with the Contract. Passannante Decl., Ex. 2.

On April 28, 2022, the arbitrator issued an opinion in favor of the Merrells and awarded specific performance, requiring Truong to honor the Contract and convey the home to the Merrells. *Id.* The arbitrator also awarded the Merrells attorney fees incurred in the arbitration. *Id.* But before the Merrells could confirm and enforce the arbitration award, Truong filed for bankruptcy, seemingly as a ruse to avoid the arbitration decision. *See* Dkt. 62 at 5; Dkt. 95

[1] The Passannante Decl. is filed at Dkt 28, pp. 14-57 in the Bankruptcy Court case, Case No: 22-30770. All Dkt. citations in this brief are to the Bankruptcy Court ECF docket in Case No: 22-30770 which is available on PACER.

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(Audio of June 5, 2023 hearing).

Truong filed his initial Chapter 13 plan in this case on May 23, 2022 (the "Plan"), which proposed to reject the Contract. Dkt. 16. The Merrells and Crandall filed objections to the Plan on various grounds, including that (1) the Plan was filed in bad faith to avoid the Contract, (2) the Contract was no longer executory in light of the arbitration decision and thus was not subject to rejection, (3) the Plan was not in the best interests of creditors, and (4) the Plan was not feasible. Dkt. 26, 28. The bankruptcy court held an evidentiary hearing with witness testimony to decide whether to confirm the Plan. Dkt. 61. After overruling some objections at the hearing, the court took other objections under advisement and issued a written decision holding that (1) the Contract was executory and subject to rejection, but (2) Truong had not proven that the Plan was in the best interest of creditors and particularly that Truong "did not articulate a business reason to reject the Contract or supply any evidence that supports the conclusion that he was exercising sound business judgment when he made his decision." Dkt. 61 at 13. The Merrells pointed out during the hearing that the net proceeds from the sale would provide the estate with substantial funds. *Id.*[2] Truong's response was unsatisfactory, as explained by the bankruptcy court:

> When confronted with the potential that the benefit to the estate of assuming the Contract exceeds the cost of rejection, Truong merely stated, "I would like to know what the total number is before I decide what to do with my assets." Truong's statement does nothing to shed light on the basis for his decision to reject the Contract. It is not the court's duty to comb the record to try and ascertain Truong's motivation for seeking rejection. Even if it was appropriate for the court to do so, and it is not, the court is at a complete loss as to what business rationale Truong may have for rejecting the Contract. Truong failed to meet his burden to show that the court should confirm his chapter 13 plan, which requests that the court approve rejection of the Contract under the business judgment rule.

[2] Specifically, Trong testified at the hearing that if he sold the property to the Merrells he would net more than $150,000 over his current valuation of the property. Dkt. No. 59 at 1:36:45.

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Dkt. 61 at 13-14. After the bankruptcy court denied confirmation of the initial Plan, Truong filed an amended plan that again sought to reject the Contract (the "Amended Plan"). Dkt. 66. In support of the Amended Plan, Truong filed a declaration attempting to provide additional explanation as to why it was in the best interest of the estate to reject the Contract. Dkt. 67.[3] The Merrells and Crandall objected to the Amended Plan on multiple grounds, including arguing that Truong should not be allowed a second opportunity to present evidence justifying rejection of the Contract.[4]

The bankruptcy court requested supplemental briefing on the issue of whether Trong was "entitled to put on evidence about his business judgment justifications for seeking to reject" the Contract and explained it intended to rule on that issue first "before setting an evidentiary hearing." Dkt. 75. After supplemental briefing was submitted by all three parties, the bankruptcy court announced its oral ruling on June 5, 2023 (the "Ruling"). The Ruling applied the law of the case doctrine to hold that Truong was not allowed to present new evidence explaining his justification for rejecting the Contract, as such evidence could and should have been presented at the confirmation hearing on the initial Plan. Dkt. 95 (Audio of June 5, 2023 hearing). In particular, the bankruptcy court held that it would not give Truong a "second bite at the apple" just because he failed to carry his burden at the initial confirmation hearing. *Id.* The bankruptcy court also expressed skepticism that it would confirm the Amended Plan even if it did consider Truong's new evidence, suggesting that Truong's concern about an unspecified tax burden

[3] Notably, the declaration only states that the sale would "generate a significant [unspecified] tax burden" and that keeping the property as a short-term rental would allow Truong to use the rental income to pay the claims of creditors. Dkt. 67.

[4] The Merrells and Crandall also raised objections related to feasibility, the non-executory nature of the Contract, and the insufficient interest rate proposed under the Amended Plan. Dkt. 70; Dkt. 71.

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would not be enough to support rejection where, as here, creditors would be paid in full absent rejection.[5] Thus, confirmation of the Amended Plan was denied and Truong was given 21 days to file a further amended plan or face dismissal. Dkt. 94. Truong has not filed a further plan and instead filed a tardy notice of appeal of the Ruling[6] and the Motion. Dkt. 104.

III. ARGUMENT

A. Interlocutory Appeals Should Only be Allowed in Exceptional Circumstances.

Appeals from interlocutory decisions of the bankruptcy court are only allowed "with leave of court." 28 U.S.C. § 158(a)(3). "Leave to appeal should not be granted unless refusal would result in wasted litigation and expense, the appeal involves a controlling question of law as to which there is a substantial ground for difference of opinion, and an immediate appeal would materially advance the ultimate termination of the litigation." *In re NSB Film Corp.*, 167 B.R. 176, 180 (9th Cir. B.A.P. 1994).

"Interlocutory appeals are intended to be rare and used only in 'exceptional circumstances.'" *Greenspan v. Orrick, Herrington & Sutcliffe LLP*, No. C 09-4256 CRB, 2010 WL 3448240, at *1 (N.D. Cal. Sept. 1, 2010) (quoting *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982)). The legislature specifically intended for interlocutory appeals to be employed only in "exceptional situations" when the movant can "justify a departure from the

[5] The court cited the following passage from *In re Hertz*, 536 B.R. 434 (Bankr. C.D. Cal. 2015) on this issue: "'[I]f without regard to rejection of the contract, the estate is solvent and the unsecured creditors would receive 100 percent of their claims, rejection would then accomplish nothing for the general unsecured creditors.' In such a case, the court may decline to permit rejection of a contract, as it would give no benefit to creditors, and may only cause additional delay and administrative expenses." *Id.* at 441 (quoting *In re Chi–Feng Huang*, 23 B.R. 798, 801 (9th Cir. B.A.P. 1982)).

[6] Truong filed a motion seeking to allow the tardy notice of appeal on the grounds of excusable neglect (dkt. 100), which Crandall and the Merrells have opposed. Dkt. 110, 112. That motion is currently pending before the bankruptcy court.

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basic policy of postponing appellate review until after the entry of a final judgment." *In Re Cement Antitrust Litigation*, 673 F.2d at 1026 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978)).

B. Truong Has Failed to Show Exceptional Circumstances in This Case.

The Motion seeks leave to appeal two issues in the Ruling: (1) whether Truong is required to show some business justification to reject the Contract, and (2) whether the bankruptcy court erred in applying the law of the case to prevent Truong from presenting evidence of business justification that he failed to provide at the initial confirmation hearing. But Truong has not shown that "exceptional circumstances" merit immediate review of these issues. Given Truong's ability to appeal from final judgment, he will not be prejudiced if the Motion is denied, and all parties would be saved the expense of piecemeal appeals; further, there is no substantial ground for difference of opinion as to the bankruptcy court's Ruling, which is supported by ample precedent, does not involve pure issues of law, and is not determinative of whether the Amended Plan should be confirmed.

1. The Motion Does Not Present Controlling Questions of Law.

"[A] question of law is 'controlling' if its resolution on appeal could 'materially affect the outcome of the litigation.'" *Ad Hoc Comm. of Holders of Trade Claims.*, 614 B.R. 344 at 351–52 (Bankr. N.D. Ca. 2020) (quoting *In re Cement*, 673 F.2d 1020, 1026 (9th Cir. 1981)). Further, a "controlling question of law must be one of law—not fact" as any review of an interlocutory decision is "confine[d]" to questions of law. *ICTSI Oregon, Inc. v. Int'l Longshore & Warehouse Union*, 22 F.4th 1125, 1130 (9th Cir. 2022) (quoting *Northwestern Ohio Adm'rs v. Walcher & Fox*, 270 F.3d 1018, 1023 (6th Cir. 2001)).

Neither of the issues Truong seeks leave to appeal involve *controlling* questions nor do

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they present pure issues of *law*.

First, whether Truong submitted sufficient evidence to justify rejection of the Contract is a mixed issue of law and fact. The bankruptcy court's decision that Truong did not carry his burden to justify rejection necessarily implicates the bankruptcy court's view of Truong's testimony at the confirmation hearing, which is entitled to deference.[7] *See* Dkt. 61 at 13-14 (explaining that Trong's testimony did "nothing to shed light on the basis for his decision to reject the Contract.").

Similarly, the bankruptcy court's decision to apply the law of the case doctrine to prevent Truong from relitigating an issue is not a pure issue of law. The Ninth Circuit has made clear that a "court's discretionary decision to apply the law of the case doctrine is reviewed for abuse of discretion." *See Stacy v. Colvin*, 825 F.3d 563, 568 (9th Cir. 2016). This is especially true where the law of the case doctrine was applied to prevent a party from relitigating an issue after a full and fair evidentiary hearing, given courts "enjoy an inherent power to manage and control their own dockets." *United States v. Miljus*, No. CIV.06-1832-PK, 2009 WL 2095981, at *2 (D. Or. Feb. 19, 2009), *report and recommendation adopted*, No. CIV. 06-1832-PK, 2009 WL 1211307 (D. Or. May 1, 2009).

Additionally, immediate review of these issues will not materially advance the bankruptcy case, given the many alternative grounds for affirming the bankruptcy court's decision to deny confirmation. Even in the unlikely event that this Court reverses the law of the case ruling, Truong will be unable to show that rejection would benefit his unsecured creditors.

[7] Under Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52, findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and the reviewing court must give due regard to the bankruptcy court's opportunity to judge the witnesses' credibility.

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The Ninth Circuit has explained that rejection is inappropriate if "the debtor's reasoning behind rejection 'is so manifestly unreasonable that it could not be based on sound business judgment, but only bad faith, or whim or caprice.'" Dkt. 62 at 13 (quoting *In re Pomona Valley Med. Grp., Inc.*, 476 F.3d 665, 670 (9th Cir. 2007)). Where, as here, without rejection of the contract, the estate is solvent and unsecured creditors will get full payment, a court "may decline to permit rejection of a contract, as it would give no benefit to creditors, and may only cause additional delay and administrative expenses." *In re Hertz,* 536 B.R. at 441. Whether the law of the case applies, therefore, is not a "controlling" question in determining whether Truong has submitted sufficient evidence to justify rejection of the Contract.

Even if this Court were to determine that the law of the case *and* the business judgment are inapplicable, that does not mean the Amended Plan should be confirmed because the bankruptcy court did not reach other objections to the Amended Plan. Dkt. 95. An evidentiary hearing would be needed to resolve those objections. *See* Dkt. 75. Moreover, the Merrells contend that the bankruptcy court improperly found the Contract was executory despite the binding arbitration decision compelling specific performance; if the Merrells are correct, the Amended Plan is unconfirmable. In the spirit of fairness and efficiency, all parties should be required to wait for final judgment to appeal their various arguments relevant to the bankruptcy court's decision denying confirmation of the Amended Plan. Allowing a piecemeal appeal of the issues presented in the Motion will only delay this case, not materially advance it.

2. Truong Fails to Show Substantial Grounds for Difference of Opinion.

"Courts traditionally will find that a substantial ground for difference of opinion exists where the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult

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questions of first impression are presented." *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (internal quotation omitted). "However, just because a court is the first to rule on a particular question or just because counsel contends that one precedent rather than another is controlling does not mean there is such a substantial difference of opinion as will support an interlocutory appeal." *Id.* (internal quotation omitted). Simply disagreeing, even strongly disagreeing, with a court's ruling, is not sufficient for there to be a substantial ground for difference of opinion. *Id.*

Here, Truong is unable to show substantial grounds for difference of opinion on either of the issues he seeks leave to appeal. As to the first issue, Truong has identified no case law holding that the business judgment rule does not apply to the rejection of a real estate purchase contract in a Chapter 13 plan; instead, Truong's argument appears to be only that this issue is undecided in the Ninth Circuit,[8] but that is not enough, especially where all case law on point is adverse to his position. *Ad Hoc Comm. of Holders of Trade Claims.*, 614 B.R. at 351-52 ("The fact that an issue is novel, or that there is a disagreement about which authority is controlling does not, by itself, constitute a substantial difference of opinion to support an interlocutory appeal."). As explained by the bankruptcy court, all of the cases Truong relies on to argue the business judgment rule does not apply are either no longer good law[9] or they are distinguishable factually and legally as they deal with lease assumption under Chapter 13—not rejection of a sales contract. *See* Dkt. 95 (Audio of June 5, 2023 hearing); *see also* Motion at 6 (citing only lease cases for the proposition that "[o]ther courts have recognized a lower threshold for court

[8] Motion at 5.

[9] Truong cites *In re Alexander*, 670 F.2d 885 (9th Cir. 1982), but acknowledges (as he must) that other courts in this circuit have recognized that decision was abrogated by the 1984 amendments to the Bankruptcy Code. *See e.g.*, *In re Safakish*, No. 18-50769 MEH, 2018 WL 5621783, at *5 (Bankr. N.D. Cal. Oct. 29, 2018).

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approval of section 365 contract assumption/rejection in chapter 13."). In contrast, the bankruptcy court cited multiple cases supporting application of the business judgment rule in precisely this situation; that is, when a Chapter 13 plan seeks rejection of a real property sales agreement. *See* Dkt. 95 (Audio of June 5, 2023 hearing); Dkt 94 at 2 (listing cases cited in oral ruling, including *In re Bellis*, No. 05-41366, 2006 WL 2380997 (Bankr. D.N.J. Aug. 16, 2006); and *In re Meehan*, 59 B.R. 380 (E.D.N.Y. 1986)).

On the second issue, Truong has also failed to point to *any* case law holding that a debtor should be permitted to provide additional evidence of business judgment to support confirmation of a modified plan where he had an opportunity to provide such evidence in a prior confirmation hearing. *See* Motion at 7; *see also* Dkt. 83 (Truong's supplemental brief on law of the case). Tellingly, Truong conceded before the bankruptcy court that the "'law of the case' doctrine certainly applies to preclude relitigating" the court's prior ruling regarding the executory nature of the Contract (an issue Truong won) but Truong argued that the law of the case doctrine did *not* bar him from relitigating whether there was adequate justification for rejecting the Contract (an issue Trong lost). Dkt. 83 at 4. Again, Truong's failure to produce any cases supporting his position is fatal, especially in light of the bankruptcy court's reliance on multiple cases applying the law of the case doctrine under analogous facts; that is, where the doctrine was used to prevent the debtor from having a second bite at the apple in a subsequent plan confirmation hearing. *See* Dkt. 95 (Audio of June 5, 2023 hearing); Dkt 94 at 2 (listing cases cited in oral ruling, including, *In re Budd*, No. 20-21419, 2022 WL 660591 (Bankr. D.N.J. Mar. 4, 2022); and *In re DuFrayne*, 194 B.R. 354 (Bankr. E.D. Pa. 1996)). And given that the law of the case doctrine requires a fact-specific analysis and is highly discretionary, Truong would never be able to find binding case law applying the doctrine under the unique facts and procedural posture of this case.

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In sum, "novelty on its own is insufficient." *Greenspan*, 2010 WL 3448240, at *1. Because Truong has not "go[ne] beyond the issue of novelty and ma[de] a showing that a substantial ground for difference of opinion exists," the Motion should be denied. *Id.; see also Stuart v. Radioshack Corp.*, No. C-07-4499 EMC, 2009 WL 1817007, at *2 (N.D. Cal. June 25, 2009) (defendant failed to show that there was a substantial ground for a difference of opinion where there was no case law on the relevant legal issue).

3. An Immediate Appeal is Not Needed to Materially Advance the Case and Would Only Serve to Waste (Not Save) Litigation and Expense.

An immediate appeal is not needed to advance this case; rather, Truong can and should wait until the bankruptcy court's imminent entry of final judgment to appeal the issues presented in the Motion.

Even if resolution of the issues presented could impact the duration of the litigation, where an interlocutory appeal does not "materially affect the ultimate resolution of the case on the merits," it is inappropriate. *Nike, Inc. v. Interlake Companies, Inc.*, 947 F. Supp. 433, 435 (D. Or. 1996) ("The resolution of the issue certified for interlocutory appeal must materially affect the outcome of the litigation, not only its duration."). Additionally, "[l]eave to appeal should not be granted unless refusal would result in wasted litigation and expense . . . ." *In re NSB Film Corp.*, 167 B.R. at 180.

Here, the bankruptcy court indicated final judgment would be entered 21 days after the Ruling if no further amended plan was filed. Dkt. 94. While an order denying confirmation of a plan is not immediately appealable, both of the issues Truong seeks leave to appeal could be appealed through final judgment, and there is no prejudice in Truong waiting a matter of days for entry of final judgment to pursue them. *In re Giesbrecht*, 429 B.R. 682, 688 (B.A.P. 9th Cir. 2010) (rejecting argument that debtor should have sought leave to appeal order denying plan

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confirmation and explaining that debtor had the right to wait for appellate review until the final confirmation order at which point the denial order "merged into the court's final confirmation order" and was appealable). If Truong is able to show on appeal of the final judgment that the bankruptcy court should have confirmed the Plan or Amended Plan (*i.e.*, that sufficient justification was provided initially to reject the Contract or that the bankruptcy court should have considered the additional evidence offered on that issue with the Amended Plan), then there is nothing preventing the reviewing court from reversing with instructions to confirm the Amended Plan. Alternatively, if the Ruling is confirmed, Truong will either be required to propose a further amended plan that provides for a sale of the home to the Merrells or the arbitration award will be enforced, again with the same result. Put simply, there is no need for an interlocutory appeal on these issues.[10]

The only impact of raising these issues through an interlocutory appeal instead of an appeal of the final judgment is additional expense to all parties and prejudice to Crandall and the Merrells. As argued above, waiting for final judgment would allow for a fuller and more efficient review of all arguments relevant to the bankruptcy court's confirmation decisions. In contrast, allowing a piecemeal appeal now may deprive Crandall and the Merrells of the opportunity to argue an issue important to them that is also relevant to plan confirmation (*i.e.*, the bankruptcy court's ruling that the Contract was executory despite the arbitration decision granting specific performance). Instead of forcing the parties to expend resources litigating multiple appeals

[10] Although dismissal of a bankruptcy case lifts the automatic stay (11 U.S.C. § 362(c)(2)), any concern Truong may have about the impact of the stay terminating upon final judgment could be resolved through proactively filing an expedited motion to stay. *See* 6 Collier Bankruptcy Practice Guide ¶ 117.13 (2023) (explaining that an appealing party may "move for a stay on an emergency basis or on shortened notice so as to bring the motion on for a prompt hearing. Pending a hearing on the motion for a stay itself, the moving party may also ask for a temporary stay when the adversary will not consent to such a stay.").

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regarding plan confirmation, appellate review of all confirmation issues should be postponed until final judgment. *C.f. Sims v. Sunnyside Land, LLC*, 425 B.R. 284, 290 (W.D. La. 2010) ("In most of these cases [addressing the standards governing the granting of interlocutory appeals] the district courts have added '[b]ecause interlocutory appeals interfere with the overriding goal of the bankruptcy system, expeditious resolution of pressing economic difficulties, they are not favored'").

In sum, because a piecemeal appeal of the issues specified in the Motion would not "materially affect the ultimate resolution of the case on the merits," leave to appeal should be denied.

IV. CONCLUSION

For the foregoing reasons, the Court should deny the Motion and require Truong to follow the ordinary procedure of waiting until final judgment to appeal the issues presented in the Motion.

DATED this 21st day of July 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **RESPONSE TO MOTION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL** via ECF Notification to all registered ECF Recipients and on:

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- ☒ **E-mail**, *if e-mail address is indicated above*
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DATED this 21st day of July 2023.

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