UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

In re:	:	
	:	CHAPTER 13
DOUGLAS J. HEIDT,	:	
Debtor.	:	
	:	CASE NO.: 19-32789 (RG)
	:	
	:	
DOUGLAS J. HEIDT,	:	
	:	ADV. NO.: 19-2294 (RG)
Plaintiff,	:	
v.	:	
BV001 REO BLOCKER LLC, and	:	
U.S. BANK, AS CUSTODIAN	:	
FOR BV TRUST 2015-1,	:	
Defendants.	:	
	:	

OPINION

APPEARANCES:

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GREGORY CORVELYN, ESQ.
Appeared for the November 22, 2022
Oral Argument for Brian W. Hofmeister, Esq., on
Behalf of BV001 Reo Blocker LLC
& U.S. Bank, as the Custodian for BV Trust 2015-1

[1] On June 6, 2023, a Substitution of Attorney was filed terminating Brian W. Hofmeister, Esq. and adding Adam Greenberg, Esq. as counsel for BV001 Reo Blocker LLC and US Bank as the Custodian for BV Trust 2015-1. Previously, upon the filing of the case, Defendants were formerly represented by Susan B. Fagan-Rodriquez, Esq. until her passing during the pendency of this case. The Court acknowledges Ms. Fagan-Rodriquez's fine work before the Court over the years.

ROSEMARY GAMBARDELLA, UNITED STATES BANKRUPTCY JUDGE

MATTER BEFORE THE COURT

Before the Court is Defendants' BV001 REO Blocker, LLC, and U.S. Bank, as the Custodian for BV Trust 2015-1 ("BV001" or the "Defendants") Motion to Dismiss the Amended Complaint for Failure to Meaningfully Respond to Discovery or Compel Same (ECF 43)[2]. Debtor, Douglas J. Heidt ("Plaintiff" or "Debtor") filed an Opposition to the Motion to Dismiss (ECF 44).

Also, before the Court is Plaintiff's Motion for Summary Judgment (ECF 45). Defendants filed a Brief in Opposition to Plaintiff's Motion for Summary Judgment and in Reply to Plaintiff's Opposition to the Defendants' Motion to Dismiss (ECF 46). Debtor filed a Reply Brief in Support of Plaintiff's Motion for Summary Judgment (ECF 48), and Defendants filed a Sur Reply to the Debtor's Motion for Summary Judgment (ECF 51).

Also, before the Court is Defendants' Cross-Motion for Payment of Real Estate Taxes and Use and Occupancy During the Post Petition Period (ECF 47). Debtor filed a Brief in Opposition to Defendants' Cross-Motion (ECF 49) and Defendants filed a Brief in Reply to the Debtor's Opposition (ECF 50).

This Court held hearings on November 22, 2021 and November 30, 2022, at which time the court reserved decision. During the time this matter was under Court advisement, on several occasions, the parties or the Court requested additional briefing and oral arguments to be considered by the Court relating to recent factual developments in the case and emerging case law

[2] Also pending before the Court is the Defendant BV001's Motion for an Order Expunging the Proof of Claim of BV001 Reo Blocker LLC. Debtor filed Opposition to the Motion Expunging Proof of Claim. A Reply Certification of Counsel in Support of Motion to Expunge Proof of Claim was filed. This Motion was carried without decision based on the Court's finding that it was premature to decide the Motion prior to the adjudication of the Cross-Motion.

in the District of New Jersey, the United States Circuit Courts of Appeals, and the United States Supreme Court.[3] The following constitutes this Court's findings of fact and conclusions of law.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (H) and the Standing Order of Reference from the United States District Court for the District of New Jersey dated July 23, 1984, as amended September 18, 2012, referring all bankruptcy cases to the bankruptcy court. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) and (H). Venue is proper in this Court pursuant to 28 U.S.C. § 1408.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Debtor Douglas J. Heidt occupies a property located at 3 Barber Street, Little Falls, New Jersey 07424 also identified as Block 83, Lots 6 and 7 of the tax map of Little Falls, New Jersey (the "Property") as a primary residence. Debtor asserts that the Property is valued at approximately $220,000 as of the date of the final judgment in the New Jersey State Court Tax Foreclosure (Adv. No. 19-2294-RG, ECF 6) ("ECF 6") whereas the Defendants assert the Property is valued between $150,000 to $200,000 (ECF 10).

On December 9, 2015, Defendants or Defendants' predecessor-in-interest, BV001 Trust & Creditors, purchased a Tax Sale Certificate (No. 11-2015) for real estate taxes owed in 2015 on the Property from the town of Little Falls, New Jersey. Debtor asserts this was in the amount of $5,156.68 at 0.00% interest per annum. Defendants assert that the Tax Sale Certificate was purchased in competitive bidding and acquired at 0% interest for which BV001 Trust & Creditors paid an additional $12,800 premium to obtain. By assessment recorded on April 11, 2016, the Tax

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[3] *Tyler v. Hennepin County, Minnesota,* 598 U.S. 631 (2023).

Sale Certificate was assigned by BV001 Trust & Creditors to Defendant, U.S. Bank as Custodian for BV Trust 2015-1.

On February 28, 2019, Defendants filed a Tax Foreclosure Complaint against Debtor in the Superior Court of New Jersey, Passaic County, Docket Number F-004093-19 ("Tax Foreclosure"). Debtor alleges in his Complaint that, on June 20, 2019, an Order setting the amount, time, and place of redemption was set by the Superior Court for August 19, 2019 in the amount of $30,540.53[4], with costs of suit to be taxed in the sum of $1,240. On September 5, 2019, Defendants filed a Motion for Final Judgment in the Superior Court of New Jersey. On September 9, 2019, the Debtor entered into a contract of sale with regard to the Property with F&G Grand Property, LLC for $220,000, which Cynthia Rivera, Real Estate Broker-Associate at Keller Williams, certified was the fair market value of the Property. On September 18, 2019 (the "Transfer Date"), an uncontested order for Final Judgment was entered against the Debtor in the New Jersey Superior Court, Chancery Division, Passaic County (Docket No. F-004093-19) with a lien redemption amount then owing of $35,746.99.[5] The Debtor asserts that pursuant to the September 18, 2019 Default Final Judgment, the Defendants received the involuntary transfer of title of the Debtor's interest in the Property.

Debtor filed a Notice of Motion to Vacate the Foreclosure Judgment in the New Jersey Superior Court, which was stayed by the Debtor's December 6, 2019 bankruptcy petition ("Petition") filing for relief under chapter 13 of the United States Bankruptcy Code ("Bankruptcy Code"). (19-32789 ECF 1). That same day, Debtor filed his chapter 13 plan ("Plan") which

[4] Defendants did not dispute this amount in their January 23, 2020 Answer to the Complaint. However, later in this proceeding, Defendants disputed the amount in their Answer to the Amended Complaint alleging that as of September 18, 2019 the amount due was $35,746.99 (ECF 32).

[5] This is the amount Defendants stated was necessary to redeem the Property from tax sale foreclosure and Debtor accepts this figure as an undisputed fact, ECF 45-1, ¶ 8.

provides that Debtor will make payments of $105.00/month for 36 months from future earnings and from the sale of the Property. (ECF 3). The Plan proposes that the property will be sold within four (4) months of the resolution of the Adversary Proceeding. The Plan also provides that the Debtor shall bring a Cross-Motion against Defendants to recover the Property. Also, on December 6, 2019, Debtor through counsel, Northeast New Jersey Legal Services, filed such Adversary Complaint seeking to avoid the transfer of the Property to Defendants as a preferential transfer under 11 U.S.C. § 547(b) of the Bankruptcy Code, Adv. No. 19-2294-RG ("Cross-Motion").

Thereafter, on February 7, 2020, Debtor filed a Motion for Summary Judgment in that Adversary Proceeding. (ECF 6).

On June 4, 2020, Defendants filed a Cross-Motion for Summary Judgment. (ECF 13).

Responsive pleadings were filed thereafter.

On July 16, 2020, the Court held a hearing on the Debtor's Motion for Summary Judgment and the Defendants' Cross-Motion for Summary Judgment.

On July 28, 2020, Debtor filed a Motion for Leave to Amend the Complaint in the Adversary Proceeding, seeking to add a second cause of action under 11 U.S.C. § 548. (ECF 15).

On November 5, 2020, Defendants filed an Opposition to the Motion for Leave to Amend the Complaint. (ECF 20).

On January 19, 2021, this Court entered an Order Denying Debtor's Motion for Summary Judgment as to the First Count of the Complaint seeking recovery of a § 547 avoidable preference and granting Defendants' Motion for Summary Judgment as to the First Count of Debtor's Complaint. (ECF 28). In so ruling, this Court held that the Debtor, at the time of the alleged preferential transfer, was not "insolvent" as that term is defined under 11 U.S.C. § 101(32)(A) so

that as a matter of law, the Debtor could not set aside the transfer as preferential under 11 U.S.C. § 547(b).[6]

On March 9, 2021, this Court issued an Opinion granting Debtor's Motion for Leave to File an Amended Complaint and directed Debtor to do so within 15 days of the opinion. (ECF 31); *Heidt v. BV001 Reo Blocker, LLC (In re Heidt),* 626 B.R. 777 (Bankr. D.N.J. 2021).

On March 11, 2021, Debtor filed the Amended Complaint. (ECF 32).

On March 18, 2021, this Court entered an Order granting Debtor Leave to File an Amended Complaint. (ECF 36).

On March 19, 2021, Defendants answered the Amended Complaint. (ECF 37).

On May 20, 2021, a Scheduling Order was entered setting forth deadlines for discovery and dispositive motions and set a trial date for October 27, 2021. (ECF 40).

Defendants' Motion to Dismiss (ECF 43)

On June 4, 2021, Defendants filed the Motion to Dismiss the Cross-Motion for Debtor's failure to meaningfully respond to discovery or compel same (the "Motion to Dismiss").

In support of the Motion to Dismiss, Defendants submit the certification of Brent Cunningham as Defendants' authorized representative ("Mr. Cunningham"). Defendants explain that in its defense of the current Adversary Complaint, Defendants call into question Debtor's assets and debts at the time of filing. It is Defendants' position that Debtor "fraudulently fabricated" his debts to qualify to file bankruptcy and seek to recover the Property. Defendants assert this scheme is apparent in looking at the Debtor's response to Defendants' discovery

[6] On December 8, 2020, this Court entered an Order selecting Nancy Isaacson Esq., 75 Livingston Avenue, Suite 301, Roseland, N.J. 07068, to serve as mediator in the Cross-Motion. Ms. Isaacson accepted the appointment on December 23, 2020. On February 1, 2021, Ms. Isaacson filed a Mediation Report indicating that after a mediation conference on January 22, 2021, a settlement of the matter was not reached.

requests. Specifically, on November 5, 2020, Debtor was served with the first discovery demand ("First Demand").[7] The First Demand included requests for proof of amounts due as claimed and identified on the Debtor's schedules, timing of the arising of the debt, all bank account statements, and proof of valuation of assets identified on Schedule B.

Defendants assert that in response, Debtor directed Defendants to the Claims Register.[8] Defendants contend that not one creditor submitted a claim in Debtor's case and that this is because Debtor's counsel filed all the claims and that the debts were written off a long time ago, including some debts that are asserted to be over a decade old. Defendants assert that they have received information that at least two of the claims were written off years ago and were not current at the time of Debtor's Petition filing.

After Defendants received Debtor's response to the First Demand, Mr. Cunningham contacted the creditors on the claims register. He asserts that he spoke to directly to creditor Hackensack UMC ("HUMC"), who explained that the debt of $1,315.91 had been fully paid and that HUMC was not able to provide proof of payment of a debt which apparently does not exist. Defendants assert that the filing of a proof of claim for a debt not owed violates the Bankruptcy Code and provides evidence of Debtor's unclean hands.

Thereafter, Defendants served subpoenas on all creditors demanding supporting documentation. One creditor, Baldi & Marotta, provided information that the debts (on a balance of $150.00) were written off.[9] Another creditor asserted that their debt in the amount of $23.40 was from a 2017 medical bill and no effort had been made to collect same by United

[7] ECF 43, Exhibit A.
[8] ECF 43, Exhibit B.
[9] ECF 43, Exhibit C.

Telemanagement Corporation.[10] Furthermore, while the $709.00 amount claimed by the Little Falls Municipal Court appeared to be correct, it represented over 21.5% of the entire creditor body.[11] Mr. Cunningham noted five of the eleven claims were for under $200.00 each in amount, and four claims were for less than $500.00 each in amount. Because the debt owed to HUMC was paid, Debtor's total debt now equals $1,977.49. Defendants asserted that given Debtor's claimed income, it did not appear that Debtor was unable to pay these debts as they came due, given his expenses were minimal in that he did not have a mortgage nor was he paying the taxes on the Property. Also, in response to the First Demand, Defendants assert that Debtor provided eighteen (18) pages of bank statements from a Valley Bank account disclosed on his schedules which show that in the six (6) months prior to the filing of the Petition, Debtor withdrew in cash nearly his entire income each month which makes it impossible for Defendants to determine whether or not Debtor was able to pay his debts as they came due. While Debtor claimed expenses on his Schedule J, he cannot provide proof of those expenses.

On March 16, 2021, Defendants served upon Plaintiff a supplemental demand for documents ("Second Demand").[12] The Second Demand requested the turnover of documents that show proof of payments with withdrawn cash from the Debtor's Valley Bank account. The Second Demand also requested production of all documents that show proof of all monthly expenses and liabilities on Schedule J therein.

Defendants assert that in response to the Second Demand, Debtor identified one PSE&G invoice[13] claiming he does not track his purchases nor the bills he pays. Defendants explain the

[10] ECF 43, Exhibit D.
[11] ECF 43, Exhibit E.
[12] ECF 43, Exhibit F.
[13] ECF 43, Exhibit G.

stark lack of documents leaves them to question whether or not Debtor should be entitled to a discharge under 11 U.S.C. § 727.

Defendants seek to dismiss Debtor's complaint on the basis that he has failed to fulfill his disclosure and discovery obligations in this Adversary Proceeding. In the alterative, Defendants seek an order compelling Debtor to cooperate and supply documents which meaningfully respond to the First and Second Demands.

Also, Defendants argue that Debtor withdrew nearly $10,000.00 of his income in cash from his bank account prior to filing bankruptcy, then claimed to be insolvent based on unsecured debt of just over $3,000.00, if not less. Debtor has failed to show why those funds were not used to pay his debts. Therefore, Defendants argue it appears Debtor comes to this Court with unclean hands.

Finally, Debtor provided Defendants with the outstanding real estate tax bills for 2020 and 2021[14] showing Debtor is not current with his tax obligations for the Property, which violates the Bankruptcy Code and Debtor's chapter 13 Plan.

Debtor's Opposition to the Motion to Dismiss (ECF 44)

On June 18, 2021, Debtor filed an Opposition to the Motion to Dismiss. Debtor explains that in response to Defendants' discovery requests, he provided all the documents that were in his possession, including all bank statements for the period 2019-2020, and that Debtor did not keep his receipts for certain incidental living expenses in 2019.

Debtor explains that his Schedule J (Expenses) indicates his estimated budget based on his best recollection, not based on particular documents. Debtor explains this court uses the Internal Revenue Service (IRS) "Means Test" for necessary living expenses. Debtor explains that Exhibit

[14] ECF 43, Exhibit H.

1 identifies the Means Test value for 2019 in Passaic County, N.J. which was $1,563.00/month. Mr. Heidt's Schedule I indicates his income in September and December 2019 was $1,270.00/month in social security and $15 in food stamps. Debtor had less monthly income than the IRS states as necessary for living expenses and he was using all his income on these expenses and even spending more due to short term borrowing. Each month, Debtor would withdraw $1,000 from his social security benefits to spend such on expenses, usually paying in cash. Debtor explains he was never able to accumulate savings from his social security income. At the time the Property was transferred, Debtor had $23.84 in his Valley Bank account.[15] Debtor argues that the issue here is whether his debts exceeded his non-exempt assets. Debtor explains that all his personal property is exempt, as provided for in his Amended Schedules. As such, Debtor argues it must follow that if Debtor has just one debt on September 18, 2019, he is rendered insolvent. As of that date, Debtor explains he had twelve (12) debts including the debt held by Defendants in the amount of $35,746.99, and the following debts:

1. Anthony Campagna judgment $233.85
2. Baldi & Marotta $150.00
3. Emergency Associates Montclair $48.58
4. Public Defender judgment/FAMS $250.00
5. HUMC At Mountainside $1,315.91
6. Highland Physician Service $49.39
7. James P. Morgan, LLC $20.45
8. Little Falls Municipal Court $709.00

[15] ECF 44, Exhibit 2.

9. New Jersey American Water $218.49

10. Ramapo Valley Anesthesia Associates $41.62

11. United Telemanagement Corp. $23.40

Debtor disputes Defendants' assertion that these debts are manufactured and contends that the Court can consider actual bill statements as well as two outstanding judgments. Debtor notes that the Little Falls Municipal Court statement submitted by Debtor confirmed that the $709.00 was still owing in 2021. Even if these defendants are not pursuing their debts, this does not mean that Debtor did not owe these debts on the date of the transfer of the Property. Additionally, while Exhibit 5 evinces that one judgment of N.J. Public Defender was paid May 4, 2021, this does not mean that such was not owing on the relevant transfer date. Debtor notes that all the creditors were notified in March 2020 by the Clerk of the Bankruptcy Court that a proof of claim was filed for their debt and none except for Defendants in this Adversary Proceeding objected to the claim. Debtor notes that when Defendants subpoenaed Debtor's creditors, it did not include a copy of their bill to confirm or deny, which made it more difficult for the creditor to find Debtor's debt.

In sum, Debtor argues: (1) Defendants use the wrong test of insolvency; (2) a litigant cannot be compelled to produce documents which are not in his possession; and (3) Debtor had $38,807.68 of debts as of September 18, 2019, the date of the Transfer of the Property.

Defendants argue that a debtor must prove an inability to pay his debts as they become due to file a bankruptcy petition or to prove a claim under 11 U.S.C. § 548. However, Debtor argues there is no requirement in the Bankruptcy Code that a debtor be insolvent to file a petition. *In re SGL Carbon Corp.*, 200 F.3d 154, 163 (3d Cir. 1999). Debtor notes that there would not be any feasible chapter 13 plans if it were only open to debtors with an inability to pay debts. Here, Debtor's non-exempt property value is zero dollars, and he became insolvent because of the

transfer of Property. Therefore, Defendants' inquiries as to Debtor's Schedule J Expenses are irrelevant because the test is not income versus expenses; rather it is debts as compared to non-exempt assets.

Debtor's second argument is that a debtor who certifies under penalty of perjury that he does not possess certain documents cannot be compelled to produce documents not in his "possession, custody, or control" under Fed. R. Civ. P. 34, and once a responding party has produced all documents in their possession, the rules do not permit anything further. *Davis v. Rossell*, No. 13-4616 (PGS) (DEA), 2015 WL 5921043, at *1 (D.N.J. 2015). Debtor also explains that he produced all of his bank statements and he does not possess 2019 receipts for cash purchases for necessities. Debtor explains that he withdraws $1,000 from his $1,270.00 monthly social security benefits and he uses it to pay his living expenses. The IRS estimates $1,563.00 are needed for necessary living expenses for a person living in Passaic County New Jersey in 2019, so $1,270 plus $15 in food stamps is insufficient.

Debtor asserts that he will not need a discharge in bankruptcy as it is his intention to pay his debts in full by the sale of the Property. Debtor cites *In re Hackler and Stelzle-Hackler*, 938 F.3d 473 (3d Cir. 2019) and *In re Kopec*, 621 B.R. 621 (Bankr. D.N.J. 2020) for the proposition that the bankruptcy avoidance powers have been used to recover real property from a New Jersey tax-foreclosure judgment under 11 U.S.C. § 547 and § 548, and this Court permitted Debtor to amend his complaint to seek avoidance of the transfer of the Property under § 548 of the Bankruptcy Code.

Debtor's third point, Debtor argues he had $38,807.68 of debt on September 18, 2019. Debtor explains Defendants' certification fails to include the $35,746.99 debt which Defendants agree was the amount needed to redeem the tax sale foreclosure. Debtor cites the definition of

"debt" under 11 U.S.C. § 101(12) and explains an *in rem* debt is a "claim" which can be paid in a chapter 13 plan intended to save a house from foreclosure. *Johnson v. Home State Bank*, 501 U.S. 78, 85 (1991). Debtor then cites the definition of a "claim" under § 101(5), and that Congress intended "the broadest possible definition of 'claim.'" H. R. Rep. No., at 95-595, at 309-314 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977). Since Debtor had possession of the Property, which was a property interest protected by the Bankruptcy Code under *In re Atl. Bus. & Comm. Corp*., 901 F.2d 325, 328 (3d Cir. 1990), the redemption amount of the tax lien constituted a "claim" and "debt" which can be paid through the plan under *Johnson*. Debtor can redeem by paying the redemption amount when his home is sold. Additionally, Debtor has eleven (11) smaller debts adding up to $3,060.69 which have actual statements and judgments. Specifically, two creditors hold judgments: Anthony Campagna DJ 154595-12 (2012) and New Jersey Public Defender PD118113-17 (2017). Debtor provides judgments are enforceable for twenty years under N.J.S.A. § 2A:14-5. Additionally, the parties both agreed that a $709.00 debt was due and owing to the Little Falls Municipal Court, which remains unpaid since 2021. The Baldi & Marotta receipt shows that on September 3, 2019, a balance of $150 was due, which is fifteen (15) days before the date of the transfer of the Property (September 18, 2019). Likewise, the United Telemanagement Company admits that their debt was owing but decided not to pursue such on February 23, 2021 because Debtor had filed for bankruptcy. Debtor disputes Defendants' assertion that the Mountainside/HUMC debt was "fully paid."

In sum, Debtor argues that all of his property was exempt and if the Debtor only had one debt at the time of the transfer, he was insolvent under § 101(32) and § 548 of the Bankruptcy Code. As to the debts accruing after the Petition date, Defendants paid several of the 2020 real estate tax bills. However, not all have been paid. Debtor explains this would be remedied by his

sale of the Property once it is brought back into the estate, all liens would be paid, and Defendants would be reimbursed.

Plaintiff's Motion for Summary Judgment (ECF 45)

On June 18, 2021, Debtor filed the Motion for Summary Judgment ("Motion for Summary Judgement") seeking to avoid the transfer of the Property under § 548 of the Bankruptcy Code as a constructively fraudulent transfer.

In sum, Debtor argues (1) that the transfer of the property was for "less than equivalent value," and that he became insolvent as a result of the transfer of the Property; and (2) this Court may avoid a New Jersey tax-sale judgment under § 548 of the Bankruptcy Code.

Debtor argues the following facts are not in dispute. Debtor explains as of the date of his Petition, his assets included furniture, clothing, etc. worth $845, cash on hand $50, and the balance of his Valley National Bank account $23.84. Debtor's assets on September 18, 2019, were $918.84. Debtor did not have any other assets.

As for Debtor's liabilities as of the date of the transfer of the Property, Debtor explains this included the $35,746.99 tax-lien redemption amount owing to either the Tax Collector of Little Falls or to Defendants in this Adversary Proceeding, a secured claim attached to the Property, along with eleven (11) debts unpaid on the Transfer Date. These unsecured debts total $3,060.69 and include two unpaid judgments and a municipal court fine, unpaid since 2018. A statement from the Little Falls Municipal Court includes a fine of $709.00 remaining unpaid by the Debtor as of 2021. The Debtor asserts that his total debts owing on the Transfer Date were $38,807.68.

Debtor explains that the debt to New Jersey Public Defender was paid by a State offset from Debtor's homestead benefit on May 4, 2021.

United Telemanagement Corp. acknowledged Debtor owed them funds but suspended collection in 2021 due to Debtor's bankruptcy filing.

Other smaller debts were waived.

Proofs of claim for all said creditors, except the Little Falls Tax Collector, were filed by Debtor's attorney, Mr. Fogarty. The Tax Collector of Little Falls was added to the list of creditors by amendment, notified of the bankruptcy, but has not filed a claim. Debtor's attorney filed proofs of claim for twelve (12) creditors, and such creditors were notified by the bankruptcy court. Only Defendants filed an objection to these proofs of claim.

Debtor cites the standard for summary judgment under Fed. R. Civ. P. 56 that a movant is entitled to such relief if they demonstrate there is no genuine dispute as to any material fact and movant is entitled to relief as a matter of law. To proceed to trial, the nonmoving party must present sufficient evidence supporting the claimed factual dispute such that the differing versions of the truth must be resolved at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

Debtor argues by this standard, there is no need for a trial because it cannot be denied Debtor received less than reasonably equivalent value in exchange for the transfer of the Property when the $220,000 home was transferred to Defendants for a $35,746.99 debt owed. Debtor argues Defendants cannot present evidence to contradict every one of Debtor's debts which were owing as of the Transfer Date. If even one debt was owing, Debtor argues he can satisfy the insolvency requirement as all his property was exempted.

Debtor first argues that he became insolvent as a result of the transfer of his house in a strict tax-foreclosure. Debtor cites the definition of insolvency under 11 U.S.C. § 101(32) and explains therefore the test of insolvency under 11 U.S.C. § 548 is to compare the Debtor's debts,

here $38,807.68, with his non-exempt property, here zero dollars. Therefore, Debtor argues he became insolvent as a result of the transfer of the Property to Defendants.

Debtor also argues that under § 548 of the Bankruptcy Code, the time for determining insolvency is the date of the transfer. Debtor cites *In re R.M.L., Inc.*, 92 F.3d 139, 154 (3rd Cir. 1996) and *Mellon Bank, N.A. v. Metro Commc'ns, Inc.*, 945 F.2d 635, 648 (3rd Cir. 1991), as amended (Oct. 28, 1991). Debtor argues that implicit in the statute is the idea that insolvency is to be determined after the transfer was completed and that consequently, after his property was transferred, his debts exceeded his nonexempt assets, and he was insolvent. Under § 548(a)(1)(A)(ii), exempt property is not counted as an asset in the insolvency determination. On September 18, 2019, Debtor's assets totaled $918.84. As of the Transfer date, title to the Property was in the hands of Defendants, and Debtor could not then sell it, such that the valuation of his possessory interest in the property was zero dollars. (19-32789 ECF 57).

Debtor explains there is no genuine dispute that he had debts on the Transfer Date. Debtor argues Defendants are estopped from denying the two judgment debts because Defendants sued these judgment-lien creditors Anthony Campagna and New Jersey Public Defender in the tax foreclosure lawsuit and received a final judgment debarring and foreclosing their judgment lien interests. Such were owing on the Transfer Date. Since the date for determining insolvency is the Transfer Date, Debtor argues it is irrelevant that certain debts, United Telemanagement and Baldi & Marotta, were suspended in 2021 since the relevant date is the date of the Transfer, September 18, 2019. The fact that the debt to New Jersey Public Defender was paid on May 4, 2021, by State offset proves it was due and owing in 2019.

Debtor contends that his largest debt is for the redemption of the tax sale certificate on the Property. The parties agreed $35,746.99 was the amount to be paid to redeem the Property on the

Transfer Date. Debtor argues this debt is counted toward the insolvency calculation because a debt is defined as a liability on a claim under § 101(12). Additionally, an *in rem* debt is a "claim" in the bankruptcy which can be paid in a chapter 13 plan intended to save a house from foreclosure under *Johnson v. Home State Bank*, 501 U.S. at 85. In that case, the U.S. Supreme Court explained a claim is allowed if it is enforceable against either a debtor or his property. *Id.* Furthermore, the definition of claim in § 101(5) of the Bankruptcy Code includes a "right to payment" and Congress intended the broadest definition of claim. H. R. Rep. No. 95-595 at 309-314 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977). Debtor argues because he had possession of the Property and the redemption amount of the tax lien was a "claim" and a "debt" which can be paid in his plan under *Johnson*, therefore this redemption claim is payable in the case, it is a debt under 11 U.S.C. § 101(32), and Debtor can redeem when the Property is sold. Since the redemption amount continues to increase, Debtor seeks to resolve this as soon as possible. Debtor argues Defendants have not produced admissible evidence to show all twelve (12) debts were not owing on September 18, 2019, which would be necessary because this Court observed that the insolvency requirement under § 548 of the Bankruptcy Code is satisfied so long as there is one facially valid claim of a debt. *In re Heidt*, 626 B.R. at 793.

Debtor next argued that this Court may avoid a New Jersey tax sale judgment under 11 U.S.C. § 548. The chapter 13 Trustee has not attempted to recover the Property nor objected to the Debtor's suit such that the elements of § 548 of the Bankruptcy Code have been proven. Debtor posits that the Third Circuit in *In re Hackler*, 938 F.3d at 479 held that the bankruptcy court has the power to avoid a New Jersey judgment of tax foreclosure when the elements of § 547 of the Bankruptcy Code dealing with preferential transfers are met and that *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994) does not apply to a New Jersey tax-sale foreclosure because "the

relationship between the winning bid and the value of the underlying property is not merely attenuated but nonexistent." *See In re Hackler*, 938 F.3d at 479. In a New Jersey tax foreclosure, there is no sheriff sale auction nor bidding as to the value of the property and only the lienholder may foreclose and become the owner. *Id.* at 475. Therefore, Debtor argues given this precedent, the Third Circuit would hold that *BFP* does not apply in a tax-sale foreclosure and that § 548 can be used to avoid a New Jersey tax-sale foreclosure judgment. Debtor also relies on *In re Kopec*, which holds that in a tax foreclosure "bidding is in no way related to the actual value of the property, but rather to the amounts owed in taxes and the interest to be paid thereon." *In re Kopec*, 621 B.R. at 625. In that case, the court found the debtor to be insolvent after the home was transferred since the debtor had debts and her property was exempt such that the debtor proved her insolvency in the same manner this Debtor seeks to here. In that case, the home was returned to the bankruptcy estate under § 548 of the Bankruptcy Code. Debtor also cites *In re Berley Assocs., Ltd*., 492 B.R. 433, 440 (Bankr. D.N.J. 2013), *Matter of Varquez*, 502 B.R. 186, 192 (Bankr. D.N.J. 2013), and *In re GGI Props., LLC*, 568 B.R. 231 (Bankr. D.N.J. 2017) as other examples of cases which support the proposition that § 548 of the Bankruptcy Code may be utilized to avoid New Jersey tax foreclosure judgments.

In conclusion, Debtor explains the law of the case is Debtor stated a cause of action under § 548 of the Bankruptcy Code to avoid the tax sale foreclosure judgment, and now Debtor, through his Certification and Exhibits, has proven his case and therefore he asks that the Property be transferred back to the estate so that he may carry out his chapter 13 Plan and pay his creditors in full.

Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment and in Reply to the Plaintiff's Opposition to the Defendants' Motion to Dismiss (ECF 46)

On October 20, 2021, Defendants filed a Brief in Opposition to the Motion for Summary Judgment and in Reply to the Plaintiff's Opposition to the Defendants' Motion to Dismiss. Defendants argue that in addition to the parties' briefing and Debtor's lack of discovery production, the June 28, 2021 deposition of the Debtor reveals that the Debtor (and potentially his counsel) committed fraud on the bankruptcy system. Specifically, the Defendants highlight that the debts that Debtor raises in his argument are more than five years old and of miniscule amounts, and that the Debtor withdrew $10,000 in cash in the months leading up to the Petition date with no explanation as to its disposition.

Defendants urge that when the Debtor's deposition testimony is considered in tandem with the record here, the Court should deny the Debtor's motion for Summary Judgment and grant the Defendants' Motion to Dismiss, or in the alternative, grant Defendants' expanding monetary claim.

Defendants by their pending Cross-Motion for Payment of Real Estate Taxes and Use and Occupancy Payments, argue that after the deposition, there are many material facts that are genuinely disputed in this matter, which leads to the conclusion that Debtor's Summary Judgment motion should be denied. Defendants assert that the material facts in dispute are: 1) the veracity of the Debtor's schedules; and 2) whether his debt load is being accurately represented. Specifically, the Debtor admitted at his deposition that his schedules do not include references to personal loans both received and paid as of the Petition date. Also, Debtor represented that he owned the Property listed on Schedule A but he testified that as of September 2019 he knew he was divested of his interest in the Property due to the tax sale certificate foreclosure. Additionally, Defendants' representative certified to having spoken to Debtor's creditors who have provided that

the debts claimed are not owed (i.e. HUMC) and the Debtor admitted to knowing that some of the debts were no longer owed (i.e. Baldi & Marotta) and has not withdrawn the claims, because it will have a direct impact on the Court's analysis in this action.

Defendants argue that: 1) the Debtor failed to keep accurate financial records; 2) the Debtor purposefully did not schedule personal loans which provide a significant source of income and that also made a plan proposal nearly impossible and, is evidence of the Debtor's intent to take advantage of the bankruptcy process. The deposition transcripts are quoted in relevant part at pages 3-5 of ECF 46, where the Debtor testified that he borrows from friends when he needs extra money but did not specify an amount.

Also, Defendants point to deposition testimony that the Debtor acknowledged he received notice on September 18, 2019, that he no longer owned the Property, but as of June 28, 2021, the property was still being placed for sale by the Debtor and his broker. ECF 46. Defendants also state that the "Debtor also claimed an exemption in the property on Schedule C of his initial bankruptcy filing, further attempting to indicate his ownership interest in the Property." *Id.*

Defendants argue that the Debtor's alleged debts are merely manufactured. Defendants take issue with the fact that the Debtor's counsel prepared, signed, and filed all of the claims in this case and that the Debtor nor the creditors filed any of the claims. The Defendants herein did not file a proof of claim on their own behalf (and, in fact, have moved to expunge the proof of claim) because they assert that Defendants are the title owner of the Property. The Defendants ask the Court to address the fact that the Debtor did not sign these documents. The Defendants claim that the Debtor's testimony shows that the Debtor knew certain debts had been written off ("I knew they weren't going to come after me," Debtor Dep. Tr. 72:1-13), and were no longer owed, or were not being collected. The Defendants state that the Debtor knew that the debts were old and

represented a very small amount in the aggregate. The Defendants request that the Debtor's counsel now offer some explanation for his failure to ascertain his own independent knowledge of those claims prior to signing and filing them before the Court (or his failure to similarly withdraw them when he discovered they were not owed). The Defendants state that this should also disqualify counsel because at trial he will be a witness to the disputed facts of the claims filing, which, the Defendants highlight, is an important reason why attorneys do not sign their clients' proofs of claim.

Also, the Defendants argue that the Debtor allowed debts to be scheduled (or to remain on the claims register) when they were not owed or had been written off. The Debtor and his counsel had acquired information indicating that at least two of the smaller debts, Baldi & Marotta, and FAMS, had been cancelled and/or paid in full. The Defendants argue that the Debtor did not remove these claims from the claims register because it would have further reduced the overall total of debt which was already miniscule. The Defendants state that the Debtor must remove creditor claims from the claims register once they have been waived or are no longer viable. The Defendants again state that they have provided a certification that the Debtor's major debts are not owed by the Debtor.

The Defendants also argue that the Debtor's failure to maintain books and records for his personal living expenses are cause for concern. The Defendants' final argument is that the Debtor's chapter 13 Plan is not feasible due to the Debtor limited income.

The Defendants also argue that the Debtor is seeking a windfall to the extent that the Debtor seeks in this Adversary Proceeding to claw back a one hundred percent (100%) interest in the Property, and that his remedy here should be limited to protecting his claimed exemption under § 522(a). *See In re Nealy*, 623 B.R. 278, 280 (Bankr. D.N.J. 2021); *Majestic Star Casino, LLC v.*

Barden Dev., Inc. (In re Majestic Star Casino, LLC), 716 F.3d 736, 761 (3d Cir. 2013) ("A debtor is not entitled to benefit from any avoidance."); *In re Allonhill, LLC*, No. 14-10663 (KG), 2019 WL 1868610, at *52 (Bankr. D. Del. Apr. 25, 2019), *aff'd in part, remanded in part,* No. 13-11482 (KG), 2020 WL 1542376 (D. Del. Mar. 31, 2020), *reh'g denied,* No. 14-10663-KG, 2020 WL 6822985 (D. Del. Nov. 20, 2020).

The Defendants argue here that the Debtor is dragging out the Adversary Proceeding for the sole purpose of living in the Property. Defendants argue that because the Debtor is not the owner but does still physically possess the Property, the Defendants are not able to rent the Property due to the automatic stay. The Debtor has not paid adequate protection to the Defendants (because, again, he asserts that the Property belongs to him) but he has not paid the real estate taxes. Delinquent taxes are due as of the date of the filing of the Adversary Proceeding in the amount of $4,432.33 and $7,484.69 respectively (total $11,917.02). (Cunningham Cert., Ex. A). The Defendants paid the property insurance in the amount of $621.47. *Id.* Additionally, given that the Property belongs to the Defendants, the Debtor has not paid the Defendants for his continued use and occupancy thereof. The Defendants urge that the projected rental amount for the Property is approximately $1,900.00 per month, based on comparable rents in the area. *Id.* at Ex. B. The bankruptcy case (as of the filing date of the Adversary Proceeding) has been pending for nearly two years and so, too, the Adversary Proceeding. The Debtor has already placed the Defendants in a very difficult position whereby the Defendants cannot act on its ownership of the Property but do not have the grounds to move for stay relief (because it is the record owner) and cannot (until now) force the Debtor to pay for what he has received. In essence, the Debtor has lived in the Property for free for nearly two years, has not paid the now-outstanding post-petition taxes and has paid no rent or living expenses. Defendants state that even after living in the Property without

paying these expenses it still seems unlikely that Debtor has saved up any money to pay the Defendants. The Defendants state that this is further evidence of the Debtor's scheme: to file the bankruptcy to avoid the tax sale certificate foreclosure and then draw out the Adversary Proceeding for as long as possible pending this Court's decision and continue to live in the Property for free when it actually belongs to the Defendants. At the very least, the Defendants state, the Defendants' claim should be expanded to include interest on the amount owed, reimbursement for the taxes paid during the post-petition period, and reasonable rent for occupancy for the two years the Debtor has lived there since the filing. The Defendants set forth a proposed calculation:

Amount of Original Claim: $30,540.00 (not including running interest from date of filing); Post Petition Taxes (Paid and Unpaid): $11,917.02; Insurance Premium: $621.47; Post Petition Use and Occupancy: $43,700.00 ($1,900.00 x 23 months). In total (not including the interest calculation on the original amount), the Defendants claim could be worth $86,688.49. The Debtor cannot be permitted to continue to take inconsistent positions about the Property which continue to monetarily harm the Defendants.

Defendants' Cross-Motion for Payment of Real Estate Taxes and Use and Occupancy During the Post-Petition Period (ECF 47)

On October 20, 2021, Defendants filed their Notice of Cross-Motion for Payment of Real Estate Taxes and Use and Occupancy During the Post-Petition Period "Cross-Motion"). The Defendants seek reimbursement for the following: a. Real Estate Taxes Paid: $3,509.37 (including interest); b. Real Estate Taxes Due for 2020 and 2021: $7,484.69 (including interest); c. Insurance Premium: $621.47 (Total: $11,615.53). Defendants assert that the Debtor should be required to reimburse the Defendants for the total of $11,615.53, as well as 23 months of rent post-petition as of October 20, 2021, in the amount of $1,900.00 per month (a total of $43,700.00).

Defendants assert since the date of the filing of the Petition, the Defendants have paid real estate taxes due and owing on the Property in protection of its equitable and possessory rights to same. Specifically, the Defendants assert that they have paid approximately $3,509.37 (including interest) for real estate taxes due and owing since December 6, 2019.

Defendants allege approximately $7,484.69 are delinquent real estate taxes owed for 2020 and 2021. Exhibit A shows this amount is comprised of $1,127.35 in an unpaid real estate tax lien, $2,965.41 is for delinquent taxes for year 2020 ($2,240.64 is the principal and $724.77 is interest and penalties, and $3,391.93 is for delinquent taxes for year 2021). This exhibit indicates these amounts were calculated as of October 19, 2021.

Additionally, the Defendants assert, since December 6, 2019, that the Defendants have paid the homeowner's insurance premiums of approximately $621.47 on the Property.

Defendants assert the Debtor has not paid the delinquent real estate taxes or homeowner's insurance nor has the Debtor reimbursed the Defendants for these expenses.

Defendants argue there is no dispute that as of December 6, 2019, the Property belonged to the Defendants.

Defendants assert the Debtor has not paid the Defendants rent or otherwise compensated the Defendants to live in the Property during the pendency of the Debtor's chapter 13 case which is approximately two years. Therefore, the Defendants argue the Debtor has lived at the Property without paying any carrying costs for two years.

Defendants argue that comparable rent for the Property is approximately $1,900.00 per month. To support their position, Defendants provide a list of comparable rental properties as Exhibit B to the Cross-Motion. A total of seven properties were listed ranging in monthly rents of $1,500.00 to $2,500.00.

Defendants assert the Debtor should be required to reimburse the Defendants for these expenses and twenty (23) months of post-petition rent totaling $43,700.00 ($1,900 x 23 months).

Debtor's Reply Brief in Support of Plaintiff's Motion for Summary Judgment (ECF 48)

On October 22, 2021 the Debtor filed a Reply in Support of Plaintiff's Motion for Summary Judgment. The Debtor requests that (1) the Court grant Debtor's motion for summary judgment and transfer the Property back into his bankruptcy estate pursuant to § 548 and § 550; (2) the chapter 13 case, No. 19-32789, proceed to confirmation; and (3) the Debtor will then move to sell the Property with a closing to the waiting buyer.

Debtor disputes the Defendants' claim that the Debtor's "alleged debts are manufactured." (ECF 46). Debtor asserts that the municipal debt of $709.00 from case S 2018-000185 (ECF 45-7 and Appendix A) is enough to grant summary judgment. The Debtor relies on *Johnson v. Home State Bank,* 501 U.S. 78, which holds that *in rem* debts are claims in bankruptcy. The Debtor asserts the parties must concede that as of September 18, 2019, $35,746.99 was due and owing on the tax sale certificate and that the Debtor was rendered insolvent because of the transfer.

As for proof of debt, the Debtor refers to his deposition testimony at pages 81-87, whereas Debtor testified that as of September 18, 2019, he owed several debts. Debtor asserts these debts have been substantiated and provided as exhibits to the Debtor's Certification (ECF 45-2 through 45-11).

Debt to be Written Off or Charged Off

The Debtor asserts that to "write off" a debt or "charge off" under the principles of accrual accounting means that a creditor must remove a Debtor from performing status and stop counting income. The Debtor concludes that "charge off" is the beginning of the collection process, not the end and therefore charged off debts are still due and owing until they are paid.

To support their position, the Debtor states "…charging off an account does not equate to debt forgiveness …." *See In re McGarvey*, 613 B.R. 285, 307 n.14 (E.D. Cal. 2020) ("The creditor may continue to try and collect (or sell it to someone else to try and collect) the debt. The 'charge-off' does not change the legal enforceability of the debt."); *Dye v. TransUnion, LLC*, No. 2:13-CV-1094-RCJ-VCF, 2013 WL 5663094, at *3 (D. Nev. Oct. 15, 2013) ("[Charged off] debt is still enforceable."). Creditors, for example, could attempt to collect the debt themselves – either by utilizing internal collections staff or by contracting with a third-party agent willing to collect the debt on their behalf. Alternatively, they could sell the debt to a third-party purchaser at a discounted price based on the reduced likelihood of collection. *See Hinkle v. Midland Credit Management, Inc.*, 827 F.3d 1295, 1287-98 (11th Cir. 2016); *Lieberman v. Am. Express Co.,* No. 19-CV-6989 (BMC), 2020 WL 5517271, at *3 (E.D.N.Y. Sept. 14, 2020).

Factual Disputes of the Debtor's Debts

The Debtor asserts that the Defendants have not created any factual disputes regarding the Debtor's debts. The Debtor asserts that pursuant to Fed. R. Civ. P. 56(a), the Defendants have the burden to produce admissible evidence disproving all of Debtor's twelve debts. With respect to the Debtor's debt with Mountainside Hospital, the Debtor asserts the Defendants rely on inadmissible hearsay to try to prove the Debtor paid this debt. The Debtor asserts he has placed in evidence a bill, statement, or judgment and the Debtor argues the Defendants have not presented any evidence to disprove these debts, so therefore, summary judgment should be granted in the Debtor's favor.

Debtor Alleges He Has Proven He Is Insolvent

The Debtor asserts that he has proven he is insolvent. The Debtor alleges that the Defendants have not produced any actual evidence showing that the Debtor has any savings. The

Debtor testified at his deposition that he receives $1,270 per month in Social Security benefits and that he spends same. The Debtor asserts that there is no evidence to indicate otherwise. The Debtor asserts that his personal property was exempt and when the Debtor lost his Property, the Debtor became insolvent as a result of the transfer.

Bad Faith Filing

The Debtor asserts the Defendants' allegation that the Debtor's chapter 13 bankruptcy filing is in bad faith is surprising considering the fact that this Court issued a written opinion in this matter granting Debtor's motion to file an Amended Complaint asserting a cause of action under 11 U.S.C. § 548 (*In re Heidt*, 626 B.R. 777 (Bankr. D.N.J. 2020)). Additionally, the Debtor cites to *Johnson v. Home State Bank,* 501 U.S. 78, 85 (1991) which held that "Chapter 13 of the Bankruptcy Code provides a reorganization remedy for consumer debtors and proprietors with relatively small debts." 501 U.S. at 82. The Debtor also cites to *In re Hackler*, 938 F.3d 473. The Third Circuit there held that under the Bankruptcy Code's avoidance statutes (there, § 547 dealing with preferential transfer), the Bankruptcy Court has the power to avoid a transfer of property by way of a New Jersey judgment of strict tax-lien foreclosure. Therefore, the Debtor asserts taking advantage of one's rights under the Bankruptcy Code and Third Circuit precedent is proper and thus is not in bad faith.

Debtor's Brief in Opposition to Defendants' Cross-Motion (ECF 49)

On October 22, 2021, the Debtor filed a Brief in Opposition to Defendants' Cross-Motion seeking payment for payment of real estate taxes and use and occupancy during the post-petition period. By way of this filing, the Debtor requests this Court (1) deny Defendants' Motion; (2) deny the proof of claim set forth in this Motion; and (3) the Defendants' tax sale certificate should be forfeited to the Debtor. In its Opposition, the Debtor asserted the following:

(1) ***De facto late proof of claim*** – The Debtor asserts the Defendants' Cross-Motion seeking said payments is a de facto late proof of claim and argues such claim has been asserted without any explanation as to why this claim was not filed in 2020 before the claim filing deadline of February 14, 2020. Therefore, Debtor argues, pursuant to Fed. R. Bankr. P. 3002(c), *In re Vertientes, Ltd.*, 845 F.2d 57 (3d Cir. 1988), *Chrysler Motors Corp. v. Schneiderman*, 940 F.2d 911 (3d Cir. 1991), this claim should be denied.

(2) ***Violation of N.J.S.A. § 54:5-63.1*** – The Debtor asserts charging a homeowner for "use and occupancy" is unlawful as the Defendants are the holder of a tax sale certificate. The Debtor asserts that under N.J.S.A. § 54:5-63.1 the charging of an excessive or unlawful fee by Defendants would result in the tax sale certificate held by the Defendants being forfeited to the Debtor. The Debtor emphasizes "use and occupancy fee" is not listed as a permissible fee or charge in Chapter five of Title 54 of the N.J. Rev. Statutes and therefore, the Debtor alleges the Defendants have knowingly charged an illegal fee by filing said Motion demanding payment of $43,700.00.

In support of Debtor's position, Debtor relies on *In re Princeton Office Park, L.P.*, 504 B.R. 382 (Bankr. D.N.J. 2014), *aff'd* 2015 WL 420171 (D.N.J. 2015), *aff'd* 649 Fed. Appx. 137 (3d Cir. 2016) where the court held that the holder of a tax sale certificate who files a proof of claim in a bankruptcy reorganization proposing to redeem the certificate, which includes an illegal charge, must suffer the penalty of N.J.S.A. § 54:5-63.1, which is that the claim is disallowed in its entirety, the lien is void and that the Certificate is forfeited to the person who was charged the illegal charge. 504 B.R. at 403.

(3) ***Real Property could become property of the bankruptcy estate*** – The Debtor argues, if his Motion for Summary Judgment is granted, then the Property would be retroactively restored to the bankruptcy estate as of December 6, 2019, which is the date the Debtor filed this Adversary Proceeding. Therefore, the Debtor asserts that an order avoiding the transfer to BV001 would cause the Debtor to be restored to the position as a debtor in possession of the Property, and consequently, the Debtor argues, the Defendants would not have any rights to charge the Debtor rent as the Defendants would no longer hold legal title.

Defendants' Brief in Reply to the Debtor/Plaintiff Opposition to the Defendants' Cross-Motion for Rent and Compensation (ECF 50)

In a Reply Brief, the Defendants assert that the Defendants' Cross-Motion to compel the Debtor to pay post-petition real estate taxes and rent use and occupancy should be granted and the Plaintiff's motion for summary judgment denied. The Defendants chiefly argue that it is duplicitous for the Debtor to continue to seek to be the owner of the property and not have the obligations of ownership including paying taxes and use and occupancy costs.

The Defendants challenge the Debtor's contention that the Defendants are tax sale certificate holders and that under N.J.S.A. § 54:5-63.1, the Defendants are prohibited from charging the Debtor rent. The Defendants do not dispute the applicable law, but rather Debtor's assertions that the Defendants are tax sale certificate holders. The Defendants state that under the New Jersey tax sale law, the entry of a final judgment of foreclosure creates an "an absolute and indefeasible estate of inheritance in fee simple" that may be vested in the purchaser. N.J.S.A. § 54:5-87; *Matter of Varquez*, 502 B.R. 186, 189 (Bankr. D.N.J. 2013). The Defendants do not disagree that a tax sale certificate holder should not be permitted to charge rent. However, the

Defendants contend that they hold title to the Property pursuant to N.J.S.A. § 54:5-87. According to the Defendants, on the Petition Date, the Debtor admitted that he no longer owned the Property and he testified in his deposition that he *knew* he did not own the property. (Debtor Dep. Tr. 18:7-20). The Defendants stated in their Reply Brief that "[T]he Debtor's counsel also recognized that concept when he says "[t]herefore BV001 would have no right to charge Mr. Heidt rent, since BV would no longer hold legal title should the Court grant Mr. Heidt's motion for summary judgment." (emphasis added)." Even in the event the Court were to grant the Debtor's motion for summary judgment on the § 548 claim (which the Defendants oppose in a separate filing), the Debtor would still have occupied the property when it was the Defendants' property since September 18, 2019 and continuing without compensation to date. The Debtor has not paid rent. The Debtor has not paid the real estate taxes. The Defendants have paid the real estate taxes and insurance for the Property because it is the owner. The Debtor has contributed *nothing* in the post-petition period and continues to live at the Property without cost.

Defendants' Brief in Sur Reply to the Debtor/Plaintiff Motion for Summary Judgment (ECF 51)

On November 15, 2021, the Defendants filed a Sur Reply to the Debtor's Motion for Summary Judgment and state that they have not filed a proof of claim in this case because the Defendants are the owners of the Property. In this Sur Reply, the Defendants reassert all of their prior positions to the matters before this Court and the Defendants' position they are incorporated by reference. Additionally, the Defendants raise the following:

1. The Debtor fails to address the continued accrual of interest for the past two (2) years as well as the Cross-Motion for payment of post-petition real estate taxes and use and occupancy. This is an attempt by the Debtor to demonstrate undisputed facts

relevant to the Motion for Summary Judgment where there are many facts in dispute. The Debtor also seeks to have the Court take evidentiary note of his inconsistent statements in his own deposition, first telling Counsel to the Defendants one thing and then his own counsel another. How that equates to undisputed facts is unclear. It is the position of the Defendants that the Court must hear from this Debtor at trial and judge his veracity for itself.

2. The Defendants urge the Court to apply *In re Nealy*, 623 B.R. 278, 280 (Bankr. D.N.J. 2021), asserting that it is directly applicable to the instant case. Defendants contend that the fact that the debtor in *Nealy* held a partial interest in the property was not central to that decision. In addition, Defendants argue that the *Nealy* court was reluctant to provide the relief the instant Debtor seeks of the avoidance of transfer of the Property back to the Debtor. The Defendants argue that the relief Debtor seeks is inequitable.
3. The Debtor's reference to the Court's Opinion as precedent for the concept that "one debt on the date of the transfer" proves insolvency is incorrect. That statement is clearly *dicta* in the opinion and was not supported or cited for that concept by any other authority. This position flies in the face of already existing precedent from the Fifth Circuit. "[Debtor's] failure to pay one debt is not sufficient to show that [debtor] was not paying his debts, in general, and thus is not sufficient to raise a presumption of insolvency." *United States v. Washington, No. H-09-3996*, 2011 WL 3902737, at *16, (S.D. Tex. Sep. 6, 2011).
4. The Debtor's reply and its reference to facts in dispute make it clear that the Court must try this case to conclusion to fully assess the legal and factual issues and the Debtor's veracity, his intent in filing and his bad faith, all of which point to the Debtor's attempt

to manufacture a last-ditch effort to save the Property through bankruptcy where no other remedy existed.

November 22, 2021 Hearing on the Defendants' Motion to Dismiss, Plaintiff's Motion for Summary Judgment, and Defendants' Cross-Motion for Debtor to Pay Real Estate Taxes

This Court held a hearing on November 22, 2021 and considered oral argument on the Defendants' Motion to Dismiss, Plaintiff's Motion for Summary Judgment, and Defendants' Cross-Motion for Debtor to Pay Real Estate Taxes and Use and Occupancy During Post Petition Period. In essence, the arguments put forth by the parties mirror their briefing submitted in support of the motions.

1. **Defendants' Motion to Dismiss**

In support of their Motion to Dismiss, the Defendants chiefly argue two points: 1) that they are the title and record owner of the Property as a result of the September 18, 2019 foreclosure of their tax sale certificate; and 2) that there is a lack of information provided by the Debtor with regard to the Petition and schedules and proofs of claim that were filed. With regard to the latter point, the Defendants assert that neither the Debtor nor any actual creditors filed any of the twelve proofs of claim that were filed in this chapter 13 case, but instead point out that all claims were filed by Debtor's counsel. This Court observed and Defendants conceded in oral argument that this action does not violate any applicable rule and in fact the rules allow for it. However, the Defendants extend this argument to urge that it is highly unusual that not a single creditor independently filed a proof of claim, and that every single claim was filed by the Debtor's attorney in the case. Counsel for Defendants also advised the Court that they have tried to get more information directly from creditors about these claims and have been told by some creditors that they are not seeking repayment from the Debtor. The Defendants imply that these facts may be

indicative and draw into question the validity of these claims and consequently the Debtor's qualification and the legitimacy of his chapter 13 case.

In connection with their factual concerns as to the Debtor's claims, the Defendants highlight certain claims including HUMC at Mountainside, specifically that Defendants' representative certified to have spoken to identified creditors of the Debtor who have provided that the debts claimed are not owed. Defendants point to other areas of insufficient, incomplete, and/or failure to disclose enough information about the Debtor's small monthly loans with friends that was not disclosed on Debtor's Schedules I and J. Defendants contend that this lack of disclosure and information is suggestive of a potential bad faith filing and at the very least cause to deny the Debtor's request for summary judgment.

In addition, the Defendants assert that the Debtor removed $10,000 cash from his bank account and has not accounted for it in response to Defendants' discovery. They assert this fact weighs heavily against the Debtor in his request for the "extraordinary relief" of the avoidance of the transfer of the Property to the Defendants and that the Debtor should be compelled to provide additional information in discovery before the Court can rule on such relief under 11 U.S.C. § 548.

The Court asked the Defendants to give specific examples of the information that they are seeking. In response, the Defendants explained that the Debtor is taking out loans and paying them off every month, this is not in the bankruptcy Petition and schedules, and it was only revealed in the Debtor's deposition. The Defendants asked that the Debtor be compelled to demonstrate where his money goes every month.

The Court asked the Debtor's counsel to respond to the issue of records and documentation that has been provided in the context of the discovery and in response to the Motion to Dismiss. Debtor's counsel reiterated his position on Debtor's monthly social security income, its value

being less than the IRS means test amount for Passaic County, New Jersey, and that the entirety of Debtor's income is used for living expenses. The Debtor's counsel also stated that when the Defendants' attorney states that the Debtor takes out $10,000 out of his account, he is referring to the Debtor taking out his money over a ten (10) month period and he pays things in cash. He does not have receipts from 2019 for these living expenses. Debtor asserted that it is impossible to give more information about these living expenses.

As to the Debts

Debtor's counsel stated that as of the date of the foreclosure of the tax sale certificate and the transfer of the Property on September 18, 2019, the amount of debt was $38,807.68 of which $35,746.99 was real estate taxes which the Debtor had not paid. Debtor's counsel relied on the case of *Johnson v. Home State Bank,* 501 U.S. 78, for the proposition that *in rem* debts can be payable in chapter 13 and should be countable in an insolvency analysis. Debtor's counsel disputes as untrue the Defendants' allegation and insinuation that the Debtor has manufactured his debts. Debtor's counsel points to the Defendants' identification of the 2021 Little Falls Municipal Court receipt owed since 2018 for $709.00 as a valid claim that is not disputable by the parties. Debtor's counsel also points to the fact that in the state court foreclosure, the Defendants added the State of New Jersey and Anthony Campagna to the litigation as defendants as they both had judgments against the Debtor before September 18, 2019.

Debtor's counsel asserted that the Debtor provided bills, statements, and judgments for all twelve (12) debts listed in the Debtor's schedules. Debtor's counsel also argued that as for the HUMC debt, and the Defendants' charge that the debt was no longer owing, that the Defendants' allegations are not evidence. At the deposition, the Debtor reaffirmed that all of the debts were unpaid in September 2019. As to the other example by the Defendants of an alleged "non-debt,"

the Debtor's counsel argues that the Baldi & Marotta debt is valid, and just because the creditor did not want to seek payments does not mean that the claim is not owing. As to the United Telemarketing debt, the Debtor's attorney also stated that just because a creditor stops collecting a debt as it is required to do at notice of a bankruptcy filing, this does not invalidate a debt.

Additionally, the Debtor's attorney cites to *Johnson v. Home State Bank* which held that "Chapter 13 of the Bankruptcy Code provides a reorganization remedy for consumer debtors and proprietors with relatively small debts." 501 U.S. at 85. The Debtor also cites to *In re Hackler*, 938 F.3d at 473. The Third Circuit held that under the Bankruptcy Code's avoidance statutes (there, § 547), the Bankruptcy Court has the power to avoid a transfer of a house by a New Jersey judgment of strict tax-lien foreclosure.

Assertions of Debtor's Bad Faith

In response to the Defendants' assertions of the Debtor's possible bad faith filing, the Debtor's counsel asserts that taking advantage of one's rights under the Bankruptcy Code and Third Circuit precedent is proper and thus is not bad faith. The Debtor's counsel noted that there is nothing unusual about a person who receives $1,270 a month and takes it out of the bank to pay his living expenses in cash and engages in small, short-term borrowing from friends and payment of those loans. Counsel also noted that Anthony Campagna, a former friend and judgment holder, is such an example of a loan from a former friend. Debtor's counsel argued that the Defendants' entire Motion to Dismiss must be denied as Debtor has done nothing in violation of the Bankruptcy Code and Rules, that there is no other further documentation to provide by the Debtor, and that this is a one hundred percent (100%) plan that is feasible as a corporate buyer is under contract and waiting to purchase the property for $220,000.

Personal loans/short term loans

The Debtor's counsel provided the following explanation regarding the Debtor's short-term loans. Debtor's counsel responded that the Debtor's monthly social security disability funds of $1,270 is not enough to live on as evidenced by IRS guidelines that provide that a minimum of $1,570 is needed to pay basic monthly living expenses for residents of Passaic County, New Jersey. Debtor's counsel explained that the Debtor would for instance borrow $100 from a friend and when he received his monthly social security funds, he would pay his friend back. Debtor's counsel pointed to the fact that the Defendants have not disputed there is no proof that the Debtor, with his limited income and assets, has any hidden assets or proof of the potential for same. Debtor's counsel stated, and the Defendants have not refuted, that it is the Defendants' burden to prove the existence of such disputed facts to meet their burden to withstand summary judgment.

Debtor's counsel argued that a person does not have to be insolvent to file a bankruptcy case. The Debtor's Motion of Summary Judgment is warranted as Defendant BV001 has not shown any hidden assets and all of the Debtor's assets are exempt. Counsel for the Debtor argued that Defendants never filed an objection to exemption, no hidden assets have been uncovered to the date of the transfer, and that the Defendants must show that assets existed on September 18, 2019 greater than the debts owed of at least $38,807.68.

Counsel for the Debtor stated that the small personal loans were not brought to the attention of the Chapter 13 Standing Trustee outside of the Debtor's deposition and that it is unclear whether at the date of the Petition the Debtor had such personal loans and that the loans were always quite minimal.

Issue of Standing

Debtor's counsel argues that the Debtor has standing to seek relief under the avoidance powers granted in 11 U.S.C. § 548 and § 550, and that the function of this avoidance power is for

the benefit of creditors as well as the Debtor. Debtor's counsel argued that there are twelve (12) documented creditors, including the Defendants, that will benefit from the avoidance of the transfer under § 548 and the confirmation of the Debtor's Plan to sell the Property which will provide funds for a one hundred percent (100%) plan payments to creditors. Debtor's counsel sought to distinguish the holding by Chief Bankruptcy Judge of the District of New Jersey Michael B. Kaplan in *In re Nealy*, 623 B.R. at 278, that found that the Debtor in that case did not have standing as the avoidance power would only benefit the Debtor as a ten percent (10%) interest owner in the property. Counsel for the Debtor argues that the facts in the case before this Court were distinguishable from *Nealy* because the Debtor is a one hundred percent (100%) interest holder in the Property, and that as in the *Hackler* case, the property transfer can be avoided in full.

11 U.S.C. § 522(h) and its Application in This Matter

The Debtor's counsel argued that the Bankruptcy Code allows the Debtor to prosecute avoidance actions when the Chapter 13 Standing Trustee does not, and that the Chapter 13 Standing Trustee, Marie-Ann Greenberg, is aware of the Adversary Proceeding here and has chosen not to intervene in the action such that the Debtor should be allowed to proceed.

On September 16, 2020, the Chapter 13 Standing Trustee filed a Certification of Chapter 13 Standing Trustee as to the Status of the Underlying Case. *See* Main Bankruptcy Case No. 19-32789, ECF 49. In the Certification, the Chapter 13 Standing Trustee certified that she was aware of the Debtor's contested Adversary Proceeding seeking avoidance of the transfer of the Property under the Bankruptcy Code[16] as well as the Debtor's Motion for Summary Judgment and

[16] In the instant case, Debtor's Adversary Complaint initially sought avoidance as a preferential transfer under 11 U.S.C. § 547. The Complaint was later amended on March 11, 2021 to seek relief under the avoidance power of 11 U.S.C. § 548 as a constructive fraudulent transfer. (ECF 32).

Defendants' Cross-Motion. The Chapter 13 Standing Trustee stated there in that, "[t]here is no implication of Sec. 522(h) to date and no consent to use trustee strongarm powers at this juncture." To date, the Chapter 13 Standing Trustee has not objected to the Debtor's standing to bring this Adversary Proceeding.

As to summary judgment, counsel for Defendants argues that this is a debtor surplus case, and that Defendants had no obligation to object to an exemption when Defendants owned the Property at the date of the bankruptcy filing. Defendants argue that given issues undisclosed including these small loans, and the Debtor's attempt to sell an asset he does not own, *Hackler* and the other cases granting avoidance powers are distinguishable**.** As well, the Debtor has not paid taxes or other expenses of the Property since the bankruptcy filing, which taxes, insurance, and expenses have been borne by the Defendants such that the granting of summary judgment would be inequitable. For these same reasons, the Defendants' Cross-Motion to Compel the Debtor to Pay Real Estate Taxes and Use and Occupancy Post-Petition should be granted. Defendants also urge that if the § 548 relief is granted it will only benefit the Debtor not creditors.

Oral Arguments as to the Cross-Motion to Compel the Debtor to Pay Real Estate Taxes and Post-Petition Use and Occupancy (ECF 47)

As to Defendants' Cross-Motion filed on October 20, 2020 (ECF 47), Defendants dispute the Debtor's assertions, specifically, that they are a tax sale certificate holder and contend that as of September 18, 2019, they became the title and record holder of the Property.

On the other hand, as to the Defendants' Cross-Motion, Debtor argued that this tax sale certificate has not been redeemed such that Defendants are certificate holders and as tax sale certificate holders, they may not seek any payments except what is permitted by statute and that the Defendants' request for the payment of taxes and use and occupancy payments or rent is not

permitted by statute (here, N.J.S.A. § 54:5-63.1), and are illegal under New Jersey law, and thus Defendants' Cross-Motion should be denied. Debtor's counsel also asserted that the Defendants' Cross-Motion may also subject the Defendants to the risk of loss of their tax sale certificate for having brought an action to obtain from the Debtor the payment of additional sums not authorized by the statute citing *In re Princeton Office Park , L.P.,* 504 B.R. 382 (Bankr. D.N.J. 2014), *aff'd* 2015 WL 420171 (D.N.J. 2015), *aff'd* 649 Fed. Appx. 137 (3rd Cir. 2016), in which the Third Circuit affirmed the lower courts and held that a tax-lien creditor who demanded prohibited charges forfeited its claim in bankruptcy.

The Defendants calculated the use and occupancy as of date of the bankruptcy filing. Attorney for the Debtor stated that if summary judgment is granted it will moot the Defendants' Cross-Motion for Real Estate Taxes and Post Petition Use and Occupancy.

Lastly, the Debtor's attorney noted that the Defendants' paid real estate taxes only for one year and they have not paid any further real estate taxes. All real estate taxes will be paid at closing if the Debtor is granted relief of summary judgment in this action and permitted to proceed with confirmation of his proposed chapter 13 Plan.

The Court closed the record at the November 22, 2021 hearing and reserved decision. Before this Court issued an opinion, the parties filed the following supplemental pleadings:

On June 9, 2022, Defendant BV001 filed a Supplemental Brief in Further Support of the Motion of the Defendant to Dismiss and in Further Opposition to the Plaintiff's Motion for Summary Judgment (ECF 52).

On June 23, 2022, Plaintiff filed a Reply Brief in Response to the Defendants' Supplemental Brief (ECF 53).

On July 5, 2022, Plaintiff filed a Supplemental Response (ECF 54).

By way of these supplemental pleadings, counsel for the parties seek this Court's consideration of additional case law both within and outside of the District of New Jersey and to add factual information and allegations for the Court in rendering its decision. The Defendants assert that the purpose of their supplements is to inform the Court on the presence of new case law in the District that directly address the present facts. Defendants assert that the case of *In re Morawski v. Effect Lake, LLC (In re Morawski)*, 2022 WL 1085739, at *1 (Bankr. D.N.J. 2022), decided in April 2022 by Judge John K. Sherwood, at least initially, assumes the standard that "the Debtor only has standing to avoid transfers under 11 U.S.C. § 548 to the extent of a homestead exemption and for the benefit of creditors. Debtors do not have standing to avoid transfers under § 548 for their own benefit." Defendant further asserts that the *Morawski* decision, like the decision in *In re Nealy*, 623 B.R. 278, demonstrates further that the bankruptcy courts in the District of New Jersey are moving away from the Debtor's ability to fully recover the entirety of their property lost pre-petition to Tax Sale foreclosures. The Defendant contends that there is further indication that this movement is occurring in this District as set forth in a case before Judge Christine M. Gravelle, captioned as *Christine Washington v. JEM Group, LLC (In re: Washington, Christine)*, Case No. 20-21306 (CMG), Adv. Pro. 20-1580 (CMG). (ECF 60, *Washington* Transcript.) (The "*Washington* case" or "*Washington* opinion.")

On the contrary, the Debtor, by his supplemental pleadings, ECF 53 and 54, respectively, assert a factual development that the Defendants have transferred their interest in the property to Virgo Management LLC on November 18, 2021, without notice at that time to the Debtor or to this Court. The Plaintiff also argues that the *Morawski* case is not controlling in this matter and instead the Court should consider and find dispositive, the Second Circuit case of *Gunsalus v. County of Ontario*, 37 F.4th 859 (2d Cir. 2022) that holds that a chapter 13 debtor has standing to

bring a § 548 avoidance proceeding. *Gunsalus* holds that the New York tax-sale judgment of strict foreclosure, transferring the entire interest of the homeowners to the tax creditor without bidding, did not result in a reasonably equivalent value. *Id. Gunsalus* holds that the tax-sale foreclosure was properly avoided under § 548, since *BFP*, 511 U.S. 531, does not apply to strict foreclosures. *Gunsalus*, 37 F.4th 859. Accordingly, the supplemental pleadings filed by the parties seek this Court's consideration of additional case law and factual developments.

A summary of the supplemental pleadings are as follows:

Supplemental Brief in Further Support of the Motion of the Defendants' Motion to Dismiss and in Further Opposition to the Plaintiff's Motion for Summary Judgment (ECF 52)

On June 9, 2022, the Defendant BV001 filed a Supplemental Brief (ECF 52). The Defendants seek to rely upon *In re Morawski*, 2022 WL 1085739, at *1, and contend that it directly addresses the present facts.

Defendants again bring the decision in *Morawksi* to this Court's attention. In *Morawski*, the debtor filed a Cross-Motion to avoid the alleged transfer of her real property by the foreclosure of a tax sale certificate in an identical way to the Debtor in the present matter. The Court granted the debtor derivative standing to bring the action pursuant to 11 U.S.C. § 522(h), but only to recover the amount of the debtor's exemption under 11 U.S.C. § 522(d)(1). "Unfortunately, the Debtor cannot recover the equity lost in the tax foreclosure." *Id.* at 3. Defendants assert that in *Morawski,* as in the present case, the claims body had extremely low value, evidencing further that the sole reason for the filing of the Petition was the attempt to use the Bankruptcy Code for relief that would not have otherwise been available outside of bankruptcy and that the *Morawski* decision, like the decision in *Nealy*, demonstrates that the Courts in this District are moving away

from the debtor's ability to fully recover the entirety of their property lost pre-petition to tax sale certificate foreclosure.

Defendants also cite to *Washington* opinion (ECF 60). The debtor in *Washington* is engaged in a similar effort, to attempt to avoid a tax sale certificate foreclosed upon by the holder under § 548 (which also began as an unsuccessful attempt to reverse the alleged transfer under § 547).

In that matter, the debtor continued to occupy the property in question post-petition rent free. The tax sale certificate holder, JEM Group, LLC, sought from the court an order for reasonable use and occupancy payment (i.e. rent) (the "Use and Occupancy Order"), which was granted but remained entirely unpaid even following the debtor's vacation of the property nearly ten months later.

The question regarding whether the court will permit the tax sale certificate holder to deduct the use and occupancy rent from the debtor's claimed exemption remains pending. The tax sale certificate holder also incurred substantial cost to contractors to avoid further municipal ordinance violations, fines and penalties, calling into question whether the costs associated with the avoidance of those fines and penalties are the responsibility of the debtor (and thus charged back against the debtor's exemption under § 522(d)(1)) or is charged to the tax sale certificate holder.

Defendants argue that the basic premise that the full avoidance of a property transfer to a tax sale certificate holder is a windfall to the Debtor is apparent given the recent opinions in this District, and that in the present matter, the Debtor should only be able to protect his interest in the homestead exemption. The *Washington* opinion adds the proposition that should be followed in the present matter as well: even in the event there is a finding that the fraudulent transfer can be

avoided by the debtor, the debtor may still only protect his exemption, and the debtor is responsible for the property, its costs, and occupancy. Thus, the Debtor here should be subject to use and occupancy for the nearly two years that the tax sale certificate holder has paid the taxes, insurance, and other maintenance. Any other resolution, Defendants urge, represents too steep a penalty to potential purchasers of tax sale certificates and leaves a loophole in the Bankruptcy Code not intended by Congress or the State of New Jersey.

Plaintiff Reply Brief in Response to BV001's Supplemental Brief (ECF 53)

On June 23, 2022, Plaintiff filed a Reply Brief in Response to the Defendants' June 9, 2022 Supplemental Brief and requested the Court's permission to file this Reply Brief.

A. Post-Argument Factual Development

Debtor states here that the motions in this Cross-Motion were argued on November 22, 2021 and that not disclosed at the time of oral argument was the fact that BV001 had four days earlier, on November 18, 2021, transferred its interest in the Property to Virgo Management LLC ("Virgo") for a $1 consideration. After oral argument, on November 30, 2021, Virgo filed a Transfer of Claim, (Exhibit A) in Case 19-32789, ECF 58, the main Douglas Heidt chapter 13 case. Ownership of the $30,540.53 proof of claim filed on behalf of BV001 was transferred to Virgo. The Debtor argues that the significance is that by accepting ownership of the $30,540.53 claim for the tax-sale arrears, succeeding creditor Virgo has accepted and ratified that claim.

Debtor asserts that the first consequence is that the Defendant should withdraw its motion to expunge that tax-sale claim (ECF 40 in Case 19-32789) since Virgo has accepted that claim. The second consequence is that the Court should disregard the numerous false assertions by BV001 that Debtor has no debts and that no creditors would benefit from his chapter 13 Plan. BV001 transferred the $30,540.53 claim to Virgo. There were twelve proofs of claim filed,

including the $30,540.53 BV001 claim, all with documentation, including judgments and invoices. The third consequence is that assignee Virgo stands in the shoes of assignor BV001 holding the same rights and liabilities, citing *James Talcott, Inc. v. H. Corenzwit & Co.*, 76 N.J. 305, 309-310 (1978). The Debtor also notes that Virgo was on notice that the Debtor had filed a Cross-Motion to recover his Property, because the Debtor had filed a *lis pendens* with the Passaic County Clerk on May 5, 2020 (Exhibit B). Virgo shares the same current address with BV001, and the same attorney, Robert A. Del Vecchio, who represents BV001 in the Superior Court suit, No. F-004093-19, Passaic County Chancery Court. Mr. Del Vecchio was also on the list of creditors who were notified when the Debtor filed his chapter 13 Petition.

The Debtor's proposed chapter 13 Plan proposes to pay all approved creditors 100%. The Plan is funded by the sale of the Property. There is a contract to sell it for $220,000 to F&G Grand LLC, a buyer still ready, willing, and able to purchase the house. Any sale would necessarily have to satisfy the Tax Collector of Little Falls at closing by payment of taxes. At closing the Debtor would pay the past-due taxes, $8,417.69, for 2021 and 2022, which BV001 has failed to pay. (Exhibit C).

B. Post-Argument Legal Citations

Debtor notes the content of BV001's June 9, 2022 filing.

The Debtor urges that this Court should not follow *Morawski*, but instead look to the Third Circuit's leading case on tax sale foreclosures, to *In re Hackler*, 938 F.3d 473.

The Third Circuit in *Hackler* held that:

> …at New Jersey tax sales the public bids only on the rate of interest on the unpaid taxes. The main conclusion of *BFP*—that the price reached via a foreclosure conducted according to state law should be considered to be the "reasonably equivalent value" of the property—is not pertinent here, because in New Jersey, the relationship between the winning bid and the value of the underlying property is

> not merely attenuated but nonexistent. Given that the term "reasonably equivalent value" does not appear in § 547(b), and in light of the divergent procedures and attendant considerations in tax foreclosure proceedings in New Jersey, we find *BFP* inapplicable to this case.

938 F.3d at 479.

Hackler thus holds that a New Jersey tax sale foreclosure does not bring "reasonably equivalent value." *See* Debtor's Reply Brief at 3.

The Debtor asserts that *Morawski* is at odds with this Court's own prior opinion in this case, *Heidt v. BV001 Reo Blocker LLC (In re Heidt)*, 626 B.R. 777 (Bankr. D.N.J. 2021), where this Court permitted the Debtor to file an Amended Complaint to state a cause of action under 11 U.S.C. § 548. This Court in that opinion held that the Debtor was not insolvent for purposes of the preference action under 11 U.S.C. § 547, measured just before the time of that transfer, because he still owned the Property before the transfer. *In re Heidt*, 626 B.R. at 781.

However, Debtor asserts that under 11 U.S.C. § 548, the Court must determine that the debtor "…became insolvent as a result of such transfer" which can only be measured after the actual transfer. Since the Debtor lost title to the Property on September 18, 2019, it would defy the plain language of § 548 of the Bankruptcy Code to hold that any date other than September 18, 2019 could be used to determine the date when the Debtor "became insolvent as a result of such transfer."

Debtor argues that the *Morawski* opinion is inconsistent with *In re Hackler*, *Heidt*, and *In re Kopec*, 621 B.R. 621 (Bankr. D.N.J. 2020), insofar as it holds that the debtor is limited to recovering only the amount of his homestead exemption. None of those cases are so limited. *In re Nealy*, 623 B.R. 278, had such a limitation because Mr. Nealy held only a one-tenth interest in the property, hence his recovery was properly limited.

The Debtor asserts that BV001 conceded that the Debtor has standing to bring this Adversary Proceeding. *In re Heidt*, 626 B.R. at 786.

As to BV001's initial citation to the *Washington* opinion, ECF 60, the Debtor asserts that Defendant had not provided any written opinion in this case nor is there an indication as to whether the Court considered whether rent charged by a tax-lien holder is a prohibited charge violating N.J.S.A. § 54:5-63.1, or whether that debtor or the Court cited Chief Bankruptcy Judge of the District of New Jersey Michael B. Kaplan's opinion *In re Princeton Office Park, L.P.,* 504 B.R. 382, (Bankr. D.N.J. 2014), *aff'd* 2015 WL 420171 (D.N.J. 2015), *aff'd* 649 Fed. Appx. 137 (3rd Cir. 2016), in which three Courts held that a tax-lien creditor which demanded prohibited charges forfeited its claim in bankruptcy.

The Debtor urges that if the Court rules that the September 18, 2019 transfer is avoided, then the Debtor becomes the owner again of the Property as of December 6, 2019 (date of bankruptcy filing and the filing of the Adversary Proceeding), and surely owes no rent to himself. Virgo, successor to BV001, accepting the proof of claim, would retain the tax-sale lien which BV001 possessed.

The Debtor argues that the tax-sale law of New Jersey imposed a harsh forfeiture upon him, and a large windfall for the creditor, when the Debtor lost a house worth $220,000 for less than reasonable equivalent value—the $30,540.53 tax-lien debt. The Debtor became insolvent as a result. "A court of equity abhors forfeitures and will not lend its aid to enforce them." *Jones v. Guaranty and Indemnity Co.,* 101 U.S. 622, 628 (1879), cited by *In re Robertson*, 147 B.R. 358, 368 (Bankr. D.N.J. 1992). Debtor argues 11 U.S.C. § 548 restores ownership to the Debtor, his chapter 13 Plan pays the creditors in full, and the interests of the Debtor and creditors are balanced by the relief requested.

Debtor's Supplemental Response (ECF 54)

On July 5, 2022, the Debtor filed a Supplemental Response (ECF 54) requesting that the Court consider a recent decision of the United States Court of Appeals for the Second Circuit, in support of his Motion for Summary Judgment.

The Second Circuit case of *Gunsalus*, 37 F.4th 859, holds that a chapter 13 debtor has standing to bring a § 548 avoidance proceeding. *Gunsalus* holds that the New York tax-sale judgment of strict foreclosure, transferring the entire interest of the homeowners to the tax creditor without bidding, did not result in a reasonably equivalent value. *Id. Gunsalus* holds that the tax-sale foreclosure was properly avoided under § 548, since *BFP,* 511 U.S. 531, does not apply to strict foreclosures. *Gunsalus*, 37 F.4th 859.

The Second Circuit in *Gunsalus* affirmed the Bankruptcy Court judgment where title to the property was restored to the homeowners pursuant to § 548. *In re Gunsalus*, 613 B.R. 1 (Bankr. W.D.N.Y. 2020), *cert. granted* 2020 WL 3469692 (W.D.N.Y. 2020), *aff'd Gunsalus v. County of Ontario*, 37 F.4th 859 (2d Cir. 2022).

The Second Circuit held that the strict tax foreclosure "…would give the County a windfall at the expense of the estate, the other creditors and the debtor—which is precisely what the Code's fraudulent conveyance provisions are intended to prevent." *Gunsalus*, 37 F.4th at 866. *Gunsalus* held that "there is a strong presumption of not allowing a secured creditor to take more than its interest…" in a "…Bankruptcy Code fashioned by Congress to afford relief to debtors. By its very nature, the Code upsets common and state law property interests and recalibrates the relationship between debtors and creditors." *Id.*

The Debtor urges that the *Gunsalus* decision reaches results similar to this Court's decision in *In re Heidt*, 626 B.R. 777 (Bankr. D.N.J. 2021) and the Third Circuit's decision to *In re Hackler*, 938 F.3d 473.

On August 25, 2022, this Court entered a Scheduling Order that directed Counsel for BV001 file a brief by September 12, 2022 and Counsel for the Debtor file a brief by September 21, 2022.

Additional Supplemental Responses

Supplemental Brief in Further Support of the Motion of the Defendants to Dismiss and in Further Opposition to the Motion of the Plaintiff for Summary Judgment (ECF 57)

On September 12, 2022, BV001 replied to the Debtor's supplemental pleadings of June 23, 2022 and July 5, 2022. (ECF 57). In further response, BV001 urged that the decision by this Court in *In re Heidt,* 626 B.R. 777 (Bankr. D.N.J. 2021) merely granted the Debtor the right to amend the complaint to assert a claim of a fraudulent transfer under § 548.

The Debtor's argument that BV001 has, by its assignment of the proof of claim (which BV001 did not file), conceded the fact that it has a proof of claim here is inaccurate. BV001 urges that no creditors filed proofs of claim in this bankruptcy at all. BV001 filed a motion in the main case to expunge the proof of claim filed by Debtor's counsel on its behalf. That motion, ECF 40, on the main case docket is pending. Thus, BV001 has appropriately called the proof of claim's validity into question such that the mere assignment of the undecided claim for notice purposes only should not be deemed a concession.

Defendants argue the Debtor's supplemental submission also ignores the payments which BV001 made on behalf of the Debtor in order to enable him to continue to live in the Property rent-free. Instead, the Debtor argues that the amount of the proof of claim is all that BV001 should

recover. The Debtor's continued reliance and reference to *In re Hackler*, 938 F.3d 473, is not controlling. While there is no debate regarding the holding of *Hackler* there can be little argument that the law applied in that case is completely different than the case here, and those in *Morawski,* the *Washington* opinion, and *Kopec* as highlighted in the prior pleadings. *Hackler* was decided under § 547 of the Bankruptcy Code and this Court has already ruled that § 547 is inapplicable here. Anything referenced by the Third Circuit beyond the holding is dicta. The analysis in *Morawski* is clear and similar to the present facts (with the exception of this Debtor's alleged bad faith). The *Morawski* court stated, "[a]voidance actions can only be brought for the benefit of creditors. Debtors are not entitled to benefit from avoidance actions. Accordingly, courts have limited recovery under § 548 to allowed claims to prevent a windfall to the Debtor. The Court finds that the Debtor only has standing to avoid the value of the Property to the extent of her exemption and the amount necessary to satisfy her creditors." *Morawski*, 2022 WL 1085739, at *3. Defendant argues that while there is disagreement with *Morawski*, the lack of a pending appeal in that case deems the matter settled in law, at least in the District of New Jersey. The Defendant also relies on the *Washington* opinion (ECF 60). Defendant again notes that all of the proofs of claim were signed and filed by his counsel and not the Debtor while the Debtor continues to assert the validity of the proofs of claim where deposition testimony of the Debtor has proven them false. Finally, the Debtor asserts that his bankruptcy schedules are complete and accurate, and were on the date of filing, while deposition testimony from the Debtor has also proven this false and the Debtor has filed no amended schedules.

BV001 urges that the court in the *Washington* case clearly limited the debtor's recovery under § 548, holding that the debtor "is entitled to recover the value of her statutory exemption in the transferred property." *See* August 4, 2022 Order. BV001 urges that courts in this District

disfavor a windfall to the debtor, and particularly so, in the present case, where the Debtor sat on his rights pre-petition, knew well the implications of the entry of judgment and filed his bankruptcy with the sole intent of forum shopping to obtain relief under the Bankruptcy Code not available at State Court. BV001 argues here that the Debtor has taken the facts of *Hampton v. Cty. of Ontario, New York*, No. 20-3868-bk, 2022 WL 2443007, at *1 (2d Cir. July 5, 2022) out of context and cited law outside of this district and circuit. BV001 also notes that *Hampton* does not cite to *Hackler*.

Debtor's Reply to Defendants' Supplemental Responses (ECF 58)

On September 21, 2022, the Debtor filed a Reply to Defendants' Supplemental Responses and the Debtor asserts as follows:

BV001 cannot deny that in 2022 it transferred its rights in the Proof of Claim to sister corporation Virgo Management LLC. By acknowledging the proof of claim, BV001 admitted that a tax-sale claim exists. This *in rem* debt, which would reimburse BV001 for paying Debtor's taxes, may be paid in bankruptcy chapter 13. *Johnson v. Home State Bank*, 501 U.S. at 85. This tax-sale claim, along with the other documented claims, proves Debtor "became insolvent as a result of such transfer…," 11 U.S.C. § 548, because after he lost the house, his debts exceeded his non-exempt assets. 11 U.S.C. § 101(32). The Court previously decided in an oral decision of November 24, 2020 that the date of the transfer was September 18, 2019, the date of the Superior Court order of strict foreclosure and that insolvency was not to be calculated on the date that the chapter 13 Petition was filed. This Court previously decided that at the time of the transfer, the Debtor owned the Property, a valuable asset, and was not insolvent, so therefore a preferential transfer under 11 U.S.C. § 547 did not occur.

11 U.S.C. § 548 avoids "any transfer …of an interest of the debtor in property… ." The Debtor argues that the New Jersey Superior Court transferred his title and entire interest in the Property to BV001. The Superior Court Order of September 18, 2019 did not transfer any bankruptcy exemption interest to BV001. The Debtor did not have any bankruptcy exemption until December 6, 2019, when he filed his chapter 13 Petition. Therefore, to apply the plain language of § 548, to avoid the transfer "of an interest of the debtor in property," the Court should return the "interest of the debtor" which had been transferred, that is, the Debtor's title and entire ownership of the Property. The Debtor notes that the Second Circuit in *Gunsalus*, 37 F.4th 859, affirmed the Bankruptcy and District Courts which avoided the strict tax-sale foreclosure by transferring the house back to the debtors. Returning the title to real estate to the Debtor was also the relief ordered by Judge Gravelle in her summary judgment order in *Hackler v. Arriana Holding Company*, Adv. Pro. 16-01881-CMG. The Third Circuit affirmed Judge Gravelle's order transferring the title to real estate back to the debtors. *In re Hackler*, 938 F.3d at 475. Indeed, the Third Circuit framed the issue as "whether a transfer of real estate title conducted via New Jersey's tax foreclosure procedures may be voided as 'preferential' under § 547(b)" *Hackler*, 938 F.3d at 475. Judge Gravelle ordered similar relief in *In re Kopec,* 621 B.R. 621. To the extent the debtor in the *Washington* case only requested the return of her bankruptcy exemption, *see* Amended Complaint, Adv. Pro. 20-1580, Doc 27, Brief Doc 44-2, the Debtor urges that the case is inapposite. The Debtor asserts that to return to the Debtor only the amount of his bankruptcy exemption does not follow the plain language of 11 U.S.C. § 548 and that this Court should instead follow the Circuit Court decisions in *Hackler* and *Gunsalus*, which result in the return of the debtor's entire "interest" – title to the Property. The Debtor also argues that the Defendants misconstrue the concept of windfall. It is BV001 which aims to obtain property worth

approximately $220,000 for a $30,540.53 tax debt. That is the windfall here. The Second Circuit held that enforcing the strict foreclosure of a tax-sale lien "…would give the [creditor] a windfall at the expense of the estate, the other creditors and the debtor- which is precisely what the Code's fraudulent conveyance provisions are intended to prevent." *Gunsalus*, 37 F.4th at 866. Debtor's chapter 13 Plan benefits all creditors, paying all creditors one hundred percent by selling the Property to a waiting buyer.

Debtor's Reply Regarding Transcript in Christine Washington Case (ECF 59)

On October 28, 2022, Counsel for the Debtor filed a Reply regarding the transcript in the *Christine Washington* case, Adv. Pro. 20-01580, dated June 22, 2022 before Judge Gravelle. *See* Debtor's Reply, ECF 59, and Transcript of *Washington* opinion, ECF 60.

In the Reply, the Debtor asserts that the *Washington* case is distinguishable from the case before this Court as the debtor was only seeking to be paid for her homestead exemption and Judge Gravelle did grant the debtor an exemption. In the *Washington* case, the Court granted the debtor's request under 11 U.S.C. § 548 and found that § 548 may be used to avoid a New Jersey tax-sale judgment as a transfer for less than a reasonably equivalent value where the debtor becomes insolvent because of the transfer. The Court entered judgment for $25,150 in favor of the debtor. ECF 48.

The Debtor asserts that, in contrast, in the matter before this Court, the Debtor seeks to avoid the entire transfer of the Property to Defendant BV001 and a return of the Property to the bankruptcy estate. Counsel for the Debtor asserts that this is the same relief which the Second Circuit recently affirmed in *Gunsalus v. County of Ontario*, 37 F.4th 859, under § 548 of the Bankruptcy Code and the same relief that the Third Circuit granted under § 547. *In re Hackler*, 938 F.3d at 475. In both *Gunsalus* and *Hackler*, after the successful avoidance of a state-court tax

judgment, the entire house was returned to the bankruptcy estate, and the debtors paid all debts in their chapter 13 plans. In *Hackler*, the debtors paid the tax lien by selling the property, and in *Gunsalus*, the debtors are to pay the tax lien in monthly installments.

The Debtor argues that to the extent that the *Washington* opinion allows the debtor only her bankruptcy exemption, then it does not follow 11 U.S.C. § 548. Debtor further argues that § 548(a)(1) may be used to "avoid any transfer … of an interest of the debtor in property." Debtor's counsel posits as to what is the "interest of the debtor in property." Before the September 18, 2019 judgment, the Debtor owned his house at 3 Barber Street, Little Falls, New Jersey. On September 18, 2019, no bankruptcy exemption existed, hence no bankruptcy exemption could be transferred. The September 18, 2019 pre-petition judgment transferred the Property to BV001. To avoid that transfer "of an interest of the debtor in Property," the Court should return what was transferred, namely the Property.

The Debtor distinguishes the case before this Court from the *Washington* case and points to the following distinguishable facts in the *Washington* case:

- The debtor, in the *Washington* case, converted her case from chapter 13 to a chapter 7.
- No creditors received any payment in the *Washington* chapter 7 case.
- The Chapter 7 Trustee in the *Washington* case abandoned the Property, demonstrating that the trustee believed there was no equity worth pursuing.
- Municipal citations required home repairs.
- The tax-lien creditor paid real estate taxes, unlike BV001 which has not paid 2021 and 2022 real estate taxes.
- The Debtor moved out of her property.

Additionally, Debtor urges the Court to consider another difference from the facts in this case and the *Washington* case, and that is that the *Washington* opinion did not cite to N.J.S.A. § 54:5-63.1, which prohibits tax-lien creditors from charging homeowners for any charge not

specifically authorized by that statute. Debtor continues to argue that BV001's purported "use and occupancy" charges are illegal and should be disallowed.

Debtor further observes that in the present case, the Property has sufficient equity to pay all creditors 100% of valid claims and the $220,000 valuation of the house is supported by a buyer who is ready, willing, and able to buy the house.

Lastly, Debtor notes that an important issue in the present case is who will receive the surplus funds after the Property is sold and that 11 U.S.C. § 1306(a) provides that property which the debtor acquires during the chapter 13 case becomes property of the estate. Debtor argues that pursuant to § 548, the Property would be restored to the estate and that 11 U.S.C. § 1306(b) provides "except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate," so that once the chapter 13 debtor pays all creditors one hundred (100%), any surplus property of the estate would belong to the Debtor.

June 22, 2022 Transcript of Hearing Before Judge Christine M. Gravelle, U.S.B.C. in the matter of *Christine Washington v. JEM Group, LLC*, Adv. Pro. 20-01580 (the "Washington case" or "Washington opinion") (ECF 60)

On November 2, 2022, Counsel for Defendants filed the transcript of the *Washington* case hearing and opinion. In the *Washington* case (*Christine Washington v. JEM Group, LLC*, Adv. Pro. No. 20-1580 (CMG)), the debtor filed an Adversary Proceeding seeking to avoid the tax-sale foreclosure transfer of a real to JEM Group, LLC and the Adversary Proceeding was brought pursuant to 11 U.S.C. § 547 and § 548 of the Bankruptcy Code, and/or to recover a setoff of the debtor's exemption in the property pursuant to § 522(h). JEM moved for summary judgment in its favor. The debtor filed a Cross-Motion for summary judgment in her favor. ECF 60, *Washington* Transcript at 9.

Judge Gravelle observed:

> There has been a substantial amount of emerging case law in this District as to the avoidance of tax sale foreclosures. The unique question presented here is the treatment of the post-petition use and occupancy by [the debtor] along with other post-petition fees incurred against the property as it relates to the [debtor's] exemption. The Court finds that these amounts, which do not arise through any contractual arrangement, cannot impair the exemption to which the [debtor] is entitled. Through her Cross-Motion, Washington represents that she is no longer pursuing Count 1 of the complaint, seeking avoidance of the transfer a preferential transfer [under 11 U.S.C. § 547]. Because she concedes that the cause of action is time barred, judgment will be entered in favor of [creditor] as to that count.

ECF 60, *Washington* Transcript at 9-10.

> As to the facts of that case, the debtor purchased the property in March 2016. On or about August 8, 2017, the creditor's predecessor in interest purchased a tax sale certificate in the amount of $539.90. A *lis pendens* was recorded on the property on September 30, 2019, shortly after the filing of a foreclosure proceeding. As of February 20, 2020, the redemption amount was $20,945.92, plus $1,094.45 in tax costs. The debtor was unable to redeem the certificate and on July 6, 2020, a foreclosure judgment was entered. By New Jersey law, the judgment transferred ownership of the property to the creditor certificate holder. *Id.*

ECF 60, *Washington* Transcript at 11.

Judge Gravelle noted in the *Washington* opinion that case law in this District has allowed for the avoidance of tax sale foreclosure transfers citing *In re Kopec*, *In re GGI Properties,* and *In re Berley Assos.* (Citations omitted). *Id.* at 16. The *Washington* court observed that the creditor did not challenge this general notion or any element of § 548 which were satisfied, so § 522(h) was held to be applicable.

The *Washington* court rejected the creditor's claim that the cost incurred during the bankruptcy took priority over the debtor's exemption, but rather the court found that there was no statutory authority allowing for the payment of a claim at the expense of the debtor's exemption. ECF 60, *Washington* Transcript at 17.

November 30, 2022 Hearing on Recent Factual Developments and Case Law

At the previous November 22, 2021 hearing, this Court reserved decision and the matter was under advisement. However, Counsel for both Debtor and BV001 filed documents with the Court raising recent factual developments and case law that they asserted were pertinent for the Court to consider before issuing a decision.

On November 30, 2022, this Court held a hearing to consider the parties' arguments regarding the asserted recent factual developments and case law submitted by counsel for the Debtor and BV001.

Arguments by Counsel for the Debtor

The Debtor's counsel asserted that a few days prior to the November 21, 2021 hearing, BV001 transferred its interest in the Property and on November 30, 2021, BV001's transfer of its tax lien claim to a sister corporation, Virgo Management, LLC, was an important factual development in the case that demonstrated BV001's acknowledgement and the existence of a claim in Debtor's estate. *See* ECF 58 and 59. In addition, counsel for the Debtor asserted that BV001's failure to disclose to the Court and the Debtor the transfer of the claim at the previous hearing was a relevant omission related to BV001's assertion that there were no legitimate debts in the case to qualify the Debtor in seeking relief under chapter 13 of the Bankruptcy Code.

As to recent case law that is relevant for the Court's consideration, Debtor's counsel identified the *Gunsalus* case and argued that its facts were virtually identical to the case before this Court. Debtor's Counsel asserted that the Third Circuit Court of Appeals in *Hackler*, faced with similar facts to those in this case, reversed the tax sale foreclosure, transferred title back to the

debtors, and did not limit recovery to the debtors' exemption pursuant to 11 U.S.C. § 522(h). Counsel for the Debtor urged the Court to follow *Gunsalus* and *Hackler* instead of other decisions of the bankruptcy courts in the District of New Jersey which have recently been decided and limited the debtor's recovery to an exemption value of the real property pursuant to 11 U.S.C. § 522(h). (Citing *Cohen v. de la Cruz*, 523 U.S. 213, 218-223 (1998) (broad purpose was to make fraud losses and triple damages excepted from bankruptcy discharge, not just debts "to the extent" of the fraud loss. Interpreting the phase "to the extent obtained … in Section 523(a)(2)), *aff'g* 106 F.3d 52 (3d. Cir. 1997), *aff'g* 191 B.R. 599 (D.N.J. 1996), *aff'g* 185 B.R. 180 (Bankr. D.N.J. 1995).

Debtor's counsel noted that it has always been the intention of the Debtor to satisfy all outstanding taxes as part of his proposed one hundred percent (100%) Plan which contemplated the sale of the real estate, the payment of all taxes and all debts, and with any surplus funds going to the Debtor. Counsel for the Debtor argued that under 11 U.S.C. § 548, the interest of the Debtor in the property to be avoided is the title, which would revert back to the Debtor and become property of the estate and the proceeds used to make plan payments. Debtor's counsel also asserted that pursuant to 11 U.S.C. § 1306(a) and (b)[17], that all debts would be satisfied upon the return of the Property, and the surplus funds would then be paid to the Debtor.

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[17] **§ 1306. Property of the estate**

(a) Property of the estate includes, in addition to the property specified in section 541 of this title [11 USCS § 541]—
(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, or 11, or 12 of this title [11 USCS §§ 701 et seq., 1101 et seq., or 1201 et seq.], whichever occurs first; and

As to the issue of standing to avoid the transfer, Debtor's counsel urged the Court not to follow the line of cases that would limit standing to pursue avoidance under 11 U.S.C. § 548. *See In re Nealy*, 623 B.R. 278; *In re Morawski*, 2022 WL 1085739, *1.

Arguments by Counsel for BV001

Counsel for BV001 argued before the Court that BV001 has never acknowledged the claim filed by the Debtor on behalf of BV001, and as proof of this, Counsel refers to the pending Motion to Expunge the Claim which was filed on April 3, 2020 in the main bankruptcy case, No. 19-32789. *See* ECF 40. Also, BV001's counsel points to the fact that all of the claims in the Debtor's case were filed by Debtor's counsel and not by any of the asserted creditors in the case. Further, BV001's counsel argues that the Debtor has failed to provide meaningful discovery about these claims, many over six years old, and also about the withdrawal by the Debtor of $10,000 immediately before the filing of the Debtor's bankruptcy case. Counsel further argues that the Debtor's case is a bad faith filing and an attempt at forum shopping to seek relief that is not available in State Court.

As to the transfer of claims from BV001 to Virgo, Counsel asserts that the transfer was a purely administrative "name change" as no value was exchanged, the transfer was essentially for proper notice, and that Defendants are still challenging the claim.

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(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title [11 USCS §§ 701 et seq., or 1101 et seq., or 1201 et seq.], whichever occurs first.
(b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

BV001's counsel argued that BV001 is the title owner of the Property as the Debtor sat on his right to redeem the tax sale certificate during the designated time period afforded under New Jersey law, and thus upon the foreclosure of the tax sale certificate, title was transferred from the Debtor to BV001, who since that point is the titled property owner.

As to 11 U.S.C. § 522(h), Counsel for BV001, urges this Court to follow the holding in the following cases decided in this District: *In re Nealy*, 623 B.R. 278; *In re Morawski*, 2022 2022 WL 1085739, at*1; ECF 60, Washington Transcript. These cases held that pursuant to 11 U.S.C. § 522(h), a debtor's recovery under 11 U.S.C. §548(a)(1) is limited to any exemption amount in the real estate if equity remains, and further that the holdings in *Majestic* and *Messina* support such a limitation. *See Majestic Star Casino, LLC v. Barden Dev., Inc. (In re Majestic Star Casino, LLC)*, 716 F.3d 736, 761 n.26 (3d Cir. 2013) ("A debtor is not entitled to benefit from any avoidance."); *In re Messina,* 687 F.3d 74, 82-83 (3d Cir. 2012) ("We have it previously held that a debtor is not entitled to benefit from any avoidance. *Cybergenics Corp*., 226 F.3d 237, 244-47 (3d Cir. 2000) (noting that Courts have limited debtor's exercise of avoidance powers to circumstances in which such actions would in fact benefit the creditors, not the debtors themselves) … However, a debtor may benefit from an avoidance if he files an exemption, pursuant to 11 U.S.C. § 522(g). 'The basic purpose of section 522(i)(2) is to make such property available to the debtor as well as the estate, but only as expressly provided; that is, "to the extent that the debtor may exempt such property under subsection (g) [of § 522] or paragraph 1 of [§ 522(i)]."' *See In re Simonson,* 758 f.2d 103, 106 (3d Cir. 1985)"); *see also Cybergenics Corp.*, 226 F.3d 237, 244 (3d Cir. 2000).

This Court identified several recent Circuit Court of Appeals cases, including *Lowry v. Southfield Neighborhood Revitalization Initiative, LLC*, No. 20-1712, 2021 WL 6112972, at *1

(6th Cir. Dec 27, 2021), *In re Tracht Gut, LLC*, 836 F.3d 1146 (9th Cir. 2016), and *Hall v. Meisner,* 51 F.4th 185 (6th Cir. 2022), and provided the parties with the opportunity to file additional briefs on these cases for the Court's consideration.

Debtor's Comment to Recent Cases in the Courts of Appeals (ECF 61)

On December 5, 2022, Debtor's counsel filed a letter brief urging this Court to follow the Third and Second Circuit Courts of Appeal's decisions in *Hackler*, *Gunsalus*, and *Hampton*, which counsel for the Debtor urged supports the avoidance of the transfer of title to the Property and then a return of title to the Property to the chapter 13 Debtor. (Citations omitted.) Debtor's counsel continues to argue that for the Court to grant any lesser relief would not avoid any transfer of an interest of the Debtor in property under 11 U.S.C. § 548(a)(1). Debtor's counsel contends that pursuant to 11 U.S.C. § 548(a)(1), the Property which was transferred must be returned to the Debtor's bankruptcy estate otherwise there is no avoidance of the transfer. (Citations omitted).

Debtor's counsel argues that in the *Hampton* case the Second Circuit held that chapter 13 debtors have standing to bring § 548 avoidance actions to reverse a tax-sale foreclosure, and that the decision in *BFP*, 511 U.S. 531, does not apply to tax-sale foreclosures. Also, the Court in *In re Lowry*, 2021 WL 6112972 at *1 held that the *BFP* decision does not apply to suits seeking avoidance of tax-sale foreclosures.

Debtor's counsel also argues that the Third Circuit, in *In re Hackler*, 938 F.3d at 423 n.27, declined to follow the case of *In re Tracht Gut, LLC*, 836 F.3d 1146, a chapter 11 case in which a commercial debtor had purchased two real estate properties, and where the Ninth Circuit held that the *BFP* decision applied to a California tax-sale foreclosure. In *Hackler,* the issue was "whether a transfer of real estate title conducted via New Jersey's tax foreclosure procedures may be voided

as 'preferential' under § 547(b) of the United States Bankruptcy Code." *Id.* at 475. The Debtor argues that the Third Circuit upheld the bankruptcy court's decision which transferred title back to the homeowners. The Debtor also relies upon *Hall v. Meisner*, 51 F.4th 185, where the Court held that homeowners, who lost their homes under the Michigan tax-sale laws to the government, stated a claim under the U.S. Constitution, Takings Clause, that the government had taken their property without just compensation. While the Debtor has not made such a claim in his original Complaint[18], the Debtor's counsel contends that the Debtor is faced with a similar injustice of losing his home worth $220,000 for a $30,540.53 tax lien. Debtor's counsel argues that "[e]quity abhors a forfeiture" and that BV001's position throughout these proceedings "would give it a windfall at the expense of the estate, the other creditors, and the debtor—which is precisely what the Bankruptcy Code's fraudulent conveyance provisions are intended to prevent." Citing *Gunsalus*, 37 F.4th at 866.

Supplemental Brief in Further Support of the Motion to Dismiss and in Further Opposition to the Motion of the Plaintiff for Summary Judgment (ECF 62)

On December 14, 2022, counsel for BV001 filed a Supplemental Brief on the pending motions. Counsel for BV001 asserts that the Debtor in the present case has failed to show actual insolvency, manufactured his claims, and the Debtor's recovery is limited to his exemption by § 522(h) of the Bankruptcy Code.

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[18] *See infra* section entitled "Two New Motions --- Recent Court Filings (19-32789 ECF 65 and19-02294 ECF 71)."

On July 12, 2023, in the lead bankruptcy case No. 19-32789, Defendants filed a Motion for Relief from the Automatic Stay (ECF 65). On August 8, 2023, in this Cross-Motion, Debtor filed a Motion for Leave to File Second Amended and Supplemental Complaint asserting three new counts to include adding new causes of action based upon the United States Constitution, Fifth Amendment, Takings Clause, 42 U.S.C. § 1983, the New Jersey Constitution, Article 1, § 20, and upon N.J.S.A. § 54:5-63.1. The Complaint would add two additional defendants, Virgo Management and the Township of Little Falls N.J. (ECF 69).

Counsel for BV001 urges the Court to follow *In re Tracht Gut, LLC*, 836 F.3d 1146, asserting that in *Tracht*, "[t]he central issue [was] whether the BAP properly extended the rule in *BFP* […] to California tax sales and that the Supreme Court held that the price received at a mortgage foreclosure sale 'conclusively satisfies' the Bankruptcy Code's requirement that transfers of an insolvent debtor's property be in exchange for a 'reasonably equivalent value,' so long as the mortgagee complied with the relevant foreclosure laws of the state in question, which in that case was also California." *Id.* at 1149.

BV001's Counsel argues that in *Tracht*, 836 F.3d at 1149, "because California tax sales have the same procedural safeguards as the California mortgage foreclosure sale at issue in *BFP*, [the court] agree[d] with the BAP and [held] that the price received at a California tax sale conducted in accordance with state law conclusively establishe[d] 'reasonably equivalent value' for purposes of 11 U.S.C. § 548(a).'" BV001 argues that New Jersey law offers the same protection to debtors by providing them a redemption period to satisfy the outstanding tax liability within two years of the sale of the tax sale certificate. BV001 also contends that the Third Circuit holding in *Hackler* is limited to 11 U.S.C. § 547 actions and not 11 U.S.C. § 548 actions.

Counsel for BV001 also argues that the analysis in *In re Lowry*, No, 20-1712, 2021 WL 6112972, at *1 (6th Cir. Dec. 27, 2021) is more likely limited to the denial of the claim under the Rooker Feldman doctrine than any actual determination under § 548 and that in *Lowry* the Sixth Circuit remanded the case for the purposes of litigation related to the § 548 claim, thus any determination beyond the Rooker Feldman analysis is dicta. Further, the *Lowry* decision held that "[t]he portion of § 548 at issue here only applies if the debtor 'was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer

or obligation.' 11 U.S.C. § 548(a)(1)(B)(ii). The district court briefly referred to the insolvency issue but did not decide it. The briefs before us do not address the issue at all." *Id.* at *4. It is also argued by BV001 that the same applies to the cases of *Hampton* and *Hall*. BV001's counsel notes that Plaintiff cites to the ruling under *Hampton* that a chapter 13 debtor has standing to assert a claim under § 548, but this law in the Sixth Circuit has not been adopted in the Third Circuit.

Instead, the Defendants point to the *Nealy* case where the Court held "[a]s to the issue of standing, it does not appear that the Debtor has authority to bring these avoidance actions to achieve all of the relief sought in the summary judgment motion." *Nealy*, 623 B.R. 278. "A debtor must, however, tailor the relief sought in an action brought under 11 U.S.C. § 522(h) to comport with the limitations prescribed by statute — meaning that a debtor can only recover to the extent of any valid exemptions. That is not the relief requested in the summary judgment motion presently before the Court, so it must be denied." *Id.*

BV001's counsel claims that the Debtor's analysis of the holding in *In re Morawski*, 2022 WL 1085739, at *1, is unavailing and that *Morawski* clearly provides that "[a]voidance actions can only be brought for the benefit of creditors. [Citations omitted]. Debtors are not entitled to benefit from avoidance actions. Accordingly, courts have limited recovery under § 548 to allowed claims [and recovery of the debtor's exemption] to prevent a windfall to the Debtor." *Id.* at *7.

The Defendants do not dispute that there is disagreement with *Morawski* but the lack of pending appeal in that case deems the matter settled in law in the District of New Jersey. Defendants also rely on the *Washington* case, noting the order in *Washington* clearly limits the Debtor's recovery under § 548, providing that the debtor "is entitled to recover the value of her statutory exemption in the transferred property." *See* Order, August 4, 2022, ECF 48. The

Defendants assert that the outside-circuit decisions cited by the Debtor's counsel fail to undertake any analysis under 11 U.S.C. § 522.

Defendant's Supplemental Submission (ECF 63)

In its supplemental submission, Counsel for BV001 directs the Court's attention to a recently decided matter before Judge Andrew B. Altenburg, U.S.B.J., in *Wright v. Trystone Cap. Assets*, LLC (*In re Wright*), 649 B.R. 625 (Bankr. D.N.J. 2023).

In *Wright*, the debtor filed an action against Trystone Capital Assets, LLC, alleging preferential and fraudulent transfers in connection with the tax sale certificate foreclosure of the debtor's residence. Both parties filed motions for summary judgment. The court granted Trystone's motion for summary judgment dismissing the preference count but denied both motions on the fraudulent transfer count without prejudice.

The court held that the debtor's recovery of the fraudulent transfer was limited under 11 U.S.C. § 522 to $25,150.00, the amount of the debtor's claimed exemption, and ordered Trystone, while retaining title to the property, to pay the debtor the exemption amount. The court reasoned:

> In sum, to recover either the entire value of the real property or the real property itself in this case, the Chapter 13 trustee had to avoid the transfer. *In re Young,* 390 B.R. at 489 (stating that the Chapter 13 trustee's failure to avoid a lien for the benefit of the estate, "allows the debtors to avoid Camelot's lien to the extent of their allowed exemptions under § 522(h)."). Had the Chapter 13 trustee done so here, then her recovery would be for the benefit of creditors, with the debtor still only entitled to his exemption. 11 U.S.C. § 522(g); *Matter of Varquez*, 502 B.R. 186, 190 (Bankr. D.N.J. 2013) (noting that, had the Chapter 13 trustee avoided the transfer, the debtor could have asserted their exemptions against the proceeds of the property); *see In re Ryker*, 315 B.R. at 670 (stating that "the exercise of avoidance powers by a Chapter 13 trustee can be a means to fulfill the duty to 'assist the debtor in performance under the plan,' set forth in § 1302(b)(4).")

649 B.R. at 631-632. In *Wright*, like in the case at bar, the Chapter 13 Trustee determined not to pursue the avoidance claim, such that the Debtor was left to attempt to accomplish same. The *Wright* court observed:

> While the result here may feel unfair, it is a greater outcome for the debtor than would occur outside of bankruptcy. New Jersey state law bars a property owner from avoiding a tax sale foreclosure. Citing N.J.S.A. 54:5-104.32; *In re GGI Properties, LLC*, 568 B.R. 231, 247 (Bankr. D.N.J. 2017). Within bankruptcy, the debtor at least may recoup their federal exemption.

In re Wright, 649 B.R. at 622.

Debtor's Reply to BV001's March 31, 2023 Supplemental Response (ECF 64)

Debtor, in his Reply Brief, disagrees with the holding in *Wright* that a debtor who is successful under 11 U.S.C. § 548 in 'avoiding' a tax-sale foreclosure judgment, is limited to receiving a $25,150 homestead exemption, in a direct payment by the tax-lien creditor. The Debtor urges here that in that case the § 548 avoidance action did not accomplish an actual avoidance—there was no transfer of title to property back to the bankruptcy estate.

Debtor's counsel asserts that the Second and Third Circuits held otherwise. Debtor's counsel argues that the Third Circuit upheld the Bankruptcy Court decision which transferred real estate title back to the homeowners and further that in the chapter 13 proceeding, the debtors subsequently sold the real estate and paid their tax lien.

Debtor's counsel cites also to *Gunsalus*, 37 F.4th 859, where after the Court avoided the foreclosure judgment, the debtors were allowed to pay their tax debt through installments in a chapter 13 plan. The Second Circuit there held that "[t]he Code provides that debtors who are eligible for the federal homestead exemption have standing to bring avoidance actions." *See id.* at 863; 11 U.S.C. §522(h).

Debtor's counsel also notes that in *Hampton*, the Second Circuit upheld the decision of the bankruptcy court that chapter 13 debtors had standing to bring a § 548 avoidance action to reverse a tax-sale foreclosure and restored title to the property to the debtors. *Hampton*, 2022 WL 2443007, at *1.

Debtor notes the reasoning in *Gunsalus*, that the "[tax-sale creditor's] position would produce results that are fundamentally at odds with the goals of bankruptcy law. Here it would give the [creditor] a windfall at the expense of the estate, the other creditors, and the debtor—which is precisely what the Code's fraudulent conveyance provisions are intended to prevent." 37 F.4th at 866.

Debtor argues that § 548 avoids "any transfer...of an interest of the debtor in property...." Since the "interest of the debtor in property" here is title to the Property, there can be no actual avoidance unless title is returned to the Debtor, as was done in *Hackler* and *Gunsalus*. Avoided transfers become property of the bankruptcy estate, 11 U.S.C. § 1306(a)(6), and the debtor remains in possession of such property except as provided in the confirmed plan. 11 U.S.C. § 1306(b). Here the Debtor's plan would sell the Property and pay all approved creditor claims.

The Debtor urges that the *Wright* court bases its limitation on a narrow interpretation of the words "to the extent" in § 522(h). However, the Supreme Court has held that the language "to the extent" was not narrowly limited if such a construction would defeat the purpose of the statute. *Cohen v. de la Cruz*, 523 U.S. 213, 218-223 (1998) (broad purpose was to make fraud losses and triple damages excepted from bankruptcy discharge, not just debts "to the extent" of the fraud loss). The Debtor urges that as in *Gunsalus*, this Court should adopt an interpretation of § 522(h) which requires that the debtor have an exemption interest, but once such standing is established, §

548(a)(1) requires the actual avoidance of "any transfer...of an interest of the debtor in property" by reversing that transfer, and bringing the property back into the bankruptcy estate.

Previously, this Court noted that, "[d]efendants do not contest the issue of whether or not Debtor has standing to bring the Cross-Motion." *Heidt v. BV001 Reo Blocker LLC (In re Heidt)*, 626 B.R. 777, 786 (Bankr. D.N.J. 2021). "To date, the Chapter 13 Standing Trustee has not objected to the Debtor's standing to bring this Cross-Motion." *Id.* at n.4.

***Tyler v. Hennepin County, Minnesota*, 598 U.S. 631 (2023)**

On May 25, 2023, the United States Supreme Court decided the case of *Tyler v. Hennepin County, Minnesota,* 598 U.S. 631 (2023). In the *Tyler* case, Chief Justice Roberts stated in summary of the case before the Court, "Hennepin County, Minnesota, sold Geraldine Tyler's home for $40,000 to satisfy a $15,000 tax bill. Instead of returning the remaining $25,000, the County kept it for itself. The question presented is whether this constituted a taking of property without just compensation, in violation of the Fifth Amendment." *Id.* 598 U.S. at 634.

The unanimous Court held that Tyler "plausibly alleged a taking under the Fifth Amendment" by Hennepin County for its retention of the excess value of her home above her tax debt, reversing the judgment of the Court of Appeals for the Eighth Circuit. *Id.* at 647-648. In so ruling, the Supreme Court stated:

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>
> The County had the power to sell Tyler's home to recover the unpaid property taxes. But it could not use the toehold of the tax debt to confiscate more property than was due. By doing so, it effected a 'classic taking in which the government directly appropriates private property for its own use.' *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U. S. 302, 324 (2002) (internal quotation marks and alteration omitted). Tyler has stated a claim under the Takings Clause and is entitled to just compensation.

Id. at 639.

On or about May 26, 2023, this Court requested that counsel submit letter memoranda to the court addressing the *Tyler* decision and its implications, if any, to the matter before the Court.

Supplemental Submission by the Defendants in Response to the *Tyler* Decision (ECF 65)

On June 5, 2023, the Defendants filed a Supplemental Response addressing the applicability of the *Tyler* decision. Defendants argue that facts in the *Tyler* case and the facts in the instant case do not match, so therefore *Tyler* is not applicable. ECF 65.

Defendants argue that in the present matter and in the State of New Jersey, the only responsibility of the municipality is the packaging and sale of the real estate tax debt under the terms of the already existing New Jersey statutes and regulations. Defendants also contend that unlike *Tyler*, the counties in New Jersey do not foreclose, seize, or sell real property themselves. In New Jersey, the counties sell tax debt on the open market and through auction, thus transferring and assigning the rights to foreclose, seize, or sell real property to those third-party holders. Those municipalities receive compensation only based on the outstanding tax debt due at the time. Defendants further assert that if the third-party tax sale certificate holder properly obtains judgment through foreclosure and subsequently sells the property, any windfall inures to the benefit of the tax sale certificate holder, not the municipality or to the government. The question of whether such a windfall to an independent third-party, not a government entity, violates the Takings Clause was not decided by the *Tyler* decision. Lastly, Defendants argue that any attempt to broaden the *Tyler*

decision would have a terrible impact on the secondary market for real estate tax debt not just in the State of New Jersey but in all states similarly situated. ECF 65.

Honig & Greenberg, LLC Supplemental Response on behalf of Defendants (ECF 66) and Substitution of Attorney (ECF 67)

On June 6, 2023, Adam D. Greenberg, Esq, of Honig and Greenberg, LCC filed a substitution of attorney replacing Brian Hofmeister, Esq. as counsel for the Defendants in this matter (ECF 67) and also filed a Supplemental Response on behalf of the Defendants in regard to the applicability of the *Tyler* decision to the matter before this Court (ECF 66).

Counsel asserts that *Tyler* did not change the existing United States Supreme Court precedent concerning private tax foreclosures, does not apply to private foreclosure sales of tax certificates, nor does it apply to the instant case. Instead, counsel for the Defendants cite *Balhazar v. Mari, LTD.,* 396 U.S. 114 (1969), which affirmed a lower court decision, *Balhazar v. Mari, LTD.,* 301 F. Supp. 103, 105 (N.D. Ill. 1969), citing *Nelson v. New York City*, 352 U.S. 103, 110 (1956) for the proposition that where a tax sale takes place with a redemption period following, "[s]o long as owners have this opportunity [to redeem], state legislation meets the due process requirements of the Fourteenth Amendment." ECF 66.

Debtor's Supplemental Authority and Response (ECF 68)

On June 6, 2023, the Debtor filed a Supplemental Authority and asserted that the *Tyler* decision supports the Debtor's motion for summary judgment. Debtor's counsel asserts that the Debtor here, and the property owner in *Tyler*, lost their home equity when their properties were transferred by state systems for collecting real estate taxes. Debtor

argues that "[i]n both Minnesota and New Jersey, failure to pay real estate taxes on time will lead to the complete loss of the homeowner's equity, even when the value of the home greatly exceeds the amount of the tax owed." ECF 68.

Debtor further argues that *Tyler* is a compelling authority that is applicable to the instant case as evidenced by the following:

1. In *Tyler*, the Supreme Court held that a property owner is entitled to the surplus in excess of the debt owned, otherwise the loss is a taking, quoting the *Tyler* Court that "a government may not take more from a taxpayer than she owes." *Tyler,* 598 U.S. at 639.

2. The *Tyler* Court held that Geraldine Tyler had standing to bring her federal suit because she suffered "financial harm" when she did not recover the surplus from the tax sale. *Id.* Accordingly, the Debtor here has constitutional standing to sue for his lost surplus equity and for return of title to the entire property under § 548 of the Bankruptcy Code.

3. The constitutional principle of *Tyler* would have the consequence of invalidating New Jersey's laws re tax-lien sales as 'takings' prohibited by the Fifth Amendment. State action caused the loss of the Debtor's equity, citing N.J.S.A. §§ 54:5-1 to 54:5-137. The Superior Court of New Jersey entered a strict foreclosure judgment transferring the Debtor's Property to the tax-lien holder, with no sheriff sale. The town's tax collector must also calculate the amount needed to redeem the property from the tax sale, and then reimburses the purchaser of the tax-sale certificate. N.J.S.A. § 54:5-54.1; 54:5-57. The municipality may also profit by keeping the premium which the tax-sale purchaser paid in addition to the taxes, when the tax lien is not redeemed within five years, plus additional time if bankruptcy filing precludes foreclosure. N.J.S.A. § 54:5-33. In the case of the Debtor, the tax-lien purchaser paid a $12,800 premium in addition to $5,156.68 taxes to acquire the right to foreclose Mr. Height's equity of redemption. The township got its taxes paid sooner under the New Jersey procedure, and a $12,800 premium, but at the cost of 'taking' the Debtor's equity by selling its rights to foreclose the Debtor's constitutionally protected home equity. Therefore New Jersey state action directly caused a $184,253 loss to the Debtor (an amount which is more than the equity lost by Geraldine Tyler).

4. The New Jersey tax-lien laws, while procedurally not the same as those of Minnesota, cause and result in exactly the same constitutional violation, loss of the homeowner's surplus equity, the amount not needed to pay the taxes.

5. Justice Gorsuch and Justice Jackson in a concurring opinion in *Tyler* found that the Minnesota tax forfeiture scheme may be an 'excessive fine' violating the Eighth Amendment: "Economic penalties imposed to deter willful noncompliance with the law are fines by any other name. And the Constitution has something to say about them: They cannot be excessive." *Tyler,* 598 U.S. at 649-650 (Gorsuch, N., Concurring). Counsel for Debtor argues that the Debtor's loss was excessive.

6. Like New Jersey, Nebraska's laws allow the sale of tax deeds to private parties, which gain the windfall of taking a homeowner's surplus equity, after the redemption deadline passes. The Nebraska Supreme Court had ruled that when government sells a tax deed to a private party, that is not a 'taking.' *Continental Resources v. Fair*, 971 N.W.2d 313 (2022). However, on June 5, 2023 the United States Supreme Court in *Fair v. Continental Resources,* et al, 598 U.S., 2023 WL 3798629 (2023), vacated the judgment of the Supreme Court of Nebraska, and remanded, instructing the Supreme Court of Nebraska to reconsider in light of *Tyler v. Hennepin County, MN.* Thus, *Fair v. Continental Resources*, et al, signals that a government which transfers its rights to a private party may also be found to have 'taken' the homeowner's surplus equity. That is the case in New Jersey. In other words, the important factor in a 'taking' is that the homeowner has lost his or her surplus equity, the amount not needed to pay the taxes. *Tyler*, *supra* at 9. *Fair v. Continental Resources*, et al, signals that the method by which the homeowner's equity is taken (directly by the government, or indirectly when the government partners with a private investor), does not alter the result that the equity was 'taken' in violation of the United States Constitution.

7. At least one suit has been filed challenging the New Jersey tax-sale laws as unconstitutional.[19] *Lynette Johnson v. City of East Orange,* et al, Superior Court, Chancery Div., Essex County, Docket ESX-C-000016-23. Here, a suit to declare New Jersey's tax-lien laws unconstitutional would need an amendment to the Adversary Complaint, and additional defendants, such as the New Jersey Attorney General and the Township of Little Falls. Fed. R. Civ. P. 5.1.

8. *Tyler* demonstrates that the United States Constitution, Takings Clause, has a public policy protecting a homeowner from needless loss of home equity in tax sales. This

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[19] Letter from the state of New Jersey

> constitutional public policy should be carried forward, as it is congruent with the Bankruptcy Code's parallel chapter 13 policies, which allow a homeowner to either save his/her home from foreclosure, or as here, recover the home, sell the home, pay all just debts, and keep his home equity. As the Second Circuit held, the "Bankruptcy Code [was] fashioned by Congress to afford relief to debtors." *Gunsalus v. Cnty. of Ontario, New York,* 37 F.4th 859, 866 (2d Cir. 2022).

The Debtor asserts that the Court need not reach the constitutional question at this time but can grant the Debtor's Motion for Summary Judgment to avoid the transfer of title to the Property by strict foreclosure, return legal title to the Debtor and his bankruptcy estate, and allow the Debtor to sell the Property under his proposed chapter 13 Plan, paying all creditors and protecting the Debtor's surplus.

Two New Motions --- Recent Court Filings (Case No. 19-32789 (ECF 65), Adv. No. 19-2294 (ECF 69))

1. Defendants Motion for Relief from the Automatic Stay in the Lead Case

On July 12, 2023, in the lead bankruptcy case No. 19-32789, Defendants filed a Motion for Relief from the Automatic Stay (ECF 65) that Debtor filed Opposition to (ECF 66) and for which Defendants Replied (ECF 68). Debtor the filed a Sur Reply (ECF 71).

2. Debtor's Motion to Leave to File Second Amended and Supplemental Complaint

On August 8, 2023, in this Adversary Proceeding, Debtor filed a Motion for Leave to File Second Amended and Supplemental Complaint asserting three new counts with new causes of action based upon the United States Constitution, Fifth Amendment, Takings Clause, 42 U.S.C. § 1983, the New Jersey Constitution, Article 1, § 20, and upon N.J.S.A. § 54:5-63.1. The Complaint would add two additional defendants, Virgo Management and the Township of Little Falls N.J. (ECF 69). Pursuant to the Certification of Counsel for the Debtor attached to the Motion:

The Debtor brings this complaint:

a. to avoid the transfer, via tax-foreclosure judgment, of the Property as a constructively fraudulent transfer pursuant to § 548 of the Bankruptcy Code,

b. to assert claims under the United States Constitution, 42 U.S.C. § 1983, and the New Jersey Constitution, to compensate him for the unlawful 'taking' by the operation of New Jersey's Tax Lien Law, of his constitutionally protected equity interest in the Property

c. to obtain a declaration that BV001 violated N.J.S.A. § 54:5-63.1, and that the penalty of that statute should be imposed.

Defendants filed a Brief in Opposition to the Motion to Amend (ECF 70) and Debtor filed a Response to the Defendants' Opposition (ECF 71).

On September 19, 2023, the Office of the Attorney General of the State of New Jersey filed a letter to the Court advising that it received two "Notice of Constitutional Questions re New Jersey Statute," both dated August 9, 2023, filed by the Debtor, Adv. No. 19-2294-RG, ECF 69-5, Bankruptcy Docket 19-32789, ECF 66-3, and that in connection with these notices and the Debtor's Motion to Amend, and the Defendant's Motion for Relief from Stay pending on October 26, 2023, the State of New Jersey has declined to intervene. The Attorney General's letter also stated that the New Jersey Legislature is currently considering options for amending state law after T*yler v. Hennepin County*, 598 U.S. 631 (2023), in the fall, and also indicated that, "the Legislature may enact changes that would render moot any related questions in this case." ECF 72.

These Motions are pending hearings before the Court.

Debtor's Supplemental Authority (ECF 74)

On October 10, 2023, Debtor filed a Supplemental Authority, citing a recent decision of the Second Circuit, *DuVall v. Cnty of Ontario*, 83 F.4th 147 (2d Cir. 2023), for the proposition that a homeowner's remedy under 11 U.S.C. § 548 is not limited to a homestead exemption under 11

U.S.C. § 522(h). They noted that the Second Circuit opined that "[b]ut that defense is now unavailable in light of *Tyler v. Hennepin County*, 598 U.S. 631 (2023), which held that there is an unconstitutional taking in violation of the Takings Clause when a county keeps surplus funds accrued from a tax foreclosure." *DuVall*, 83 F.4th at 155.

Debtor also urges this Court to follow the holdings in *Duval, Hackler, Gunsalus*, *supra*, to avoid the tax sale foreclosures by transferring the title of the Property back to the Debtor. The Debtor also asserts that the New Jersey Attorney General had declined to intervene in this Cross-Motion and that is an indication that it is passing on the opportunity to defend the constitutionality of New Jersey's tax lien law after the Supreme Court's holding in *Tyler*.

Defendants' Response to Supplemental Authority (ECF 75)

On October 17, 2023, the Defendants filed a Supplemental Response in which they asserted that *DuVall* does not affect this case. Defendants distinguish *DuVall* from the instant case by asserting that *DuVall* was an *in rem* foreclosure filed by a governmental entity, not an *in personam* case filed by a private party. *DuVall*, 83 F.4th 147. Defendants argue for the distinction, that the Defendants are not state actors, and the property was not taken for public purpose, thus *DuVall* is not applicable.

LEGAL STANDARDS

I. Motion to Dismiss for Failure to Respond to Discovery or to Compel Discovery in the Alternative: Legal Standard for Sanctions Pursuant to Fed. R. Civ. P. 37

Fed. R. Civ. P. 37(b)(2)(A) and (C), made applicable by Fed. R. Bankr. P. 7037, provides in relevant part:

> **(A) Sanctions Sought in the District Where the Action Is Pending.**
> **(A) For Not Obeying a Discovery Order**. If a party or a party's officer, director, or managing agent--or a witness designated under Rule 30(b)(6) or 31(a)(4)--

> fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:
>
> **(i)** directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
>
> **(ii)** prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
>
> **(iii)** striking pleadings in whole or in part;
>
> **(iv)** staying further proceedings until the order is obeyed;
>
> **(v) dismissing the action or proceeding in whole or in part;**
>
> **(vi)** rendering a default judgment against the disobedient party; or
>
> **(vii)** treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

* * *

> (**C) Payment of Expenses.** Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust. **(emphasis added).**

The express language of Fed. R. Civ. P. 37 lists several sanctions which a court may impose for a party's failure to comply with a discovery order. *In re Lands End Leasing, Inc.*, 220 B.R. 226, 229-30 (Bankr. D.N.J. 1998); *Clientron Corp. v. Devon IT, Inc.*, 894 F.3d 568, 577 (3d Cir. 2018).

As recognized by the Supreme Court in *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982), the sanction "must be just," and it "must be specifically related to the particular claim which was at issue in order to provide discovery."; *see In re Lands End Leasing*, 220 B.R. at 229 ("If a party fails to obey an order to provide discovery, Fed. R. Civ. P. 37(b)(2) allows the trial court to 'make such orders in regard to the failure that are just.'"). In addition, the sanction "must be specifically related to the claim at issue in the previous order to provide discovery. The court must also make factual findings sufficient to support its

decision to impose sanctions." *Access 4 All, Inc. v. ANI Assocs., Inc.,* No. 04-6297 RBK, 2007 WL 178239, at *3 (D.N.J. Jan.12, 2007), *citing Naviant Mktg Sols., Inc. v. Larry Tucker, Inc.,* 339 F.3d 180, 185 (3d Cir. 2003).

In *Victor International*, the Judge Morris Stern of United States Bankruptcy Court for the District of New Jersey entered an order striking the pleadings of the defendant in a fraudulent transfer action and entered default judgment in favor of the Trustee in light of the defendant's repeated refusal to submit tax returns to the Trustee. 278 B.R. 67, 76 (Bankr. D.N.J. 2002), *aff'd* 97 F. App'x. 365 (3d Cir. 2004). The *Victor International* Court noted,

> The required tax returns would, if produced have in the courts view been probative in evaluating debtor-defendant's transfers. Yet, notwithstanding the foregoing and the imposition of a protective order, several warnings and monetary sanctions (as well as an offer to reduce monetary sanctions), [defendant] stubbornly refused to comply with courts orders. The trustee was thus stymied in her discovery efforts and the court has been likewise stymied in bringing this matter to trial. And, most fundamentally, the court cannot permit its order to be flouted without, however reluctantly imposing this ultimate sanction.

Id.

In support of its findings, the *Victor International* Court explored the factors set forth in *Poulis v. State Farm,* 747 F.2d 863 (3d Cir. 1984) that should be considered when imposing the sanction of dismissal with prejudice or a default judgment. *Id.* at 76 n.6. The *Victor International* Court however, concluded that it was not necessary to demonstrate all six factors for an entry of default. *Id.* at 76 n.6. The six factors include:

> (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Id. (citing *Poulis*, 747 F.2d at 863; *see Curtis T. Bedwell and Sons, Inc. v. Int'l Fid. Ins. Co.*, 843 F.2d 683 (3d Cir. 1988) (Court applied the *Poulis* factors to determine whether Fed. R. Civ. P. 37 sanctions were warranted)).

II. Summary Judgment

Federal Rule of Civil Procedure 56(a), made applicable to these proceedings by Federal Rule of Bankruptcy Procedure 7056, provides that a court shall "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion." Fed. R. Civ. P. 56(a); Fed. R. Civ. P. 7056. [20]

The United States Supreme Court has defined an "issue of material fact" as a question which must be answered in order to determine the rights of the parties under substantive law, and which can only properly be resolved "by a finder of fact because [it] may reasonably be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986); s*ee also Justofin v. Metropolitan Life Ins. Co.*, 372 F.3d 517, 521 (3d Cir. 2004) ("A fact is material when its resolution 'might affect the outcome of the suit under the governing law,' and a dispute about a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" (citing *Anderson*, 477 U.S. at 248).)

The moving party bears the initial burden of demonstrating that there are no genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, (1986); *Knauss v. Dwek*, 289 F.

[20] The quoted language is taken from the 2010 revision of Rule 56(a), which replaces the previous Rule 56(c). Notably, it replaces "genuine issue of material fact" with "genuine dispute as to any material fact." The cited cases all predate this new Code change and therefore use the older terminology.

Supp. 2d 546, 549 (D.N.J. 2003). The burden then shifts to the nonmoving party, who must present evidence establishing that a genuine issue of material fact exists, making it necessary to resolve the difference at trial. *Id.* The nonmoving party must "make a showing sufficient to establish the existence of every element essential to the party's case, and on which that party will bear the burden of proof at trial." *Cardenas v. Massey*, 269 F.3d 251, 254-55 (3d Cir. 2001).

Inferences and facts should be construed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986); *Sempier v. Johnson & Higgins*, 45 F.3d 724, 727 (3d Cir. 1995). However, parties opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita,* 475 U.S. at 586. The nonmovant may not rely on mere allegations but must present actual evidence raising a genuine issue of material fact. *Anderson, supra*, 477 U.S. at 249. In addition, a motion for summary judgment will not be defeated by "the mere existence" of some disputed facts. *American Eagle Outfitters v. Lyle & Scott, Ltd.,* 584 F.3d 575, 581 (3d Cir. 2009). "If the evidence (offered by the nonmoving party) is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50. Only disputes over those facts "that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Dehart v. Horn,* 390 F.3d 262, 267 (3d Cir. 2004).

Summary judgment may be proper even though some material facts remain disputed if, after all inferences are drawn in favor of the non-moving party, the moving party is entitled to judgment as a matter of law. *Cleveland v. Policy Mgmt. Sys. Corp*., 526 U.S. 795 (1999). "[T]he inquiry involved in a ruling on a motion for summary judgment…necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Anderson*, 477 U.S. at 252.

The Third Circuit has held that the purpose of summary judgment is to avoid an unnecessary trial which results in delay and expense, by promptly disposing of any actions in which there is no genuine issue of material fact. *Tomalewski v. State Farm Life Ins. Co*., 494 F.2d 882, 884 (3d Cir. 1974). However, summary judgment is defined as a "drastic remedy" which is not to be granted liberally. *Tomalewski*, 494 F.2d at 884. The Third Circuit has stated that "where there is the slightest doubt as to the facts," summary judgment may not be granted. *Id.*; *see also Ness v. Marshall*, 660 F.2d 517, 519 (3d Cir. 1981). At the summary judgment stage, therefore, the role of the court "is not to weigh evidence, but to determine whether there is a genuine issue for trial." *Knauss*, 289 F. Supp. 2d at 549 (citing *Anderson,* 477 U.S. at 249).

III. 11 U.S.C. § 548 Fraudulent Transfers (Trustee's Avoidance Power)

11 U.S.C. § 548 provides in relevant part as to constructively fraudulent transfers:

> (a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
> (B)
> (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
> (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.
> (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
> (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or
> (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

11 U.S.C. § 548(a).

11 U.S.C. § 101(54) defines "transfer" as: "(A) the creation of a lien; (B) the retention of title as a security interest; (C) the foreclosure of a debtor's equity of redemption; or (D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with (i) property; or (ii) an interest in property." "The word 'transfer' therefore has a very broad meaning under the Bankruptcy Code." *In re Decalcomania Mfg. Corp.*, 142 B.R. 670, 675 (Bankr. D.N.J. 1990). Courts must look to New Jersey state law to determine whether, and when, a transfer of the debtor's interest in the property occurred. *Id.* at 676 (citing *Butner v. United States*, 440 U.S. 48, 54-57, (1979)).

Although "reasonably equivalent value" is undefined in the Bankruptcy Code, the Supreme Court established the standard in the context of mortgage foreclosure sales in *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994). In *BFP*, the Supreme Court declined to read the phrase "reasonably equivalent value" in § 548(a)(1) to mean, in its application to mortgage foreclosure sales, either "fair market value" or "fair foreclosure price" (whether calculated as a percentage of fair market value or otherwise). *BFP*, 511 U.S. at 545. Instead, the Supreme Court held, in accordance with pre-existing interpretations of the law, that "a fair and proper price, or a 'reasonably equivalent value,' for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with." *Id*.

In *Polanco v. City of Camden (In re Polanco)*, 622 B.R. 631, 640 (Bankr. D.N.J. 2020), Judge Gerrold N. Poslusny, Jr. explained as to a determination of "reasonably equivalent value" under 11 U.S.C. § 548(a)(1)(b)(i):

> Moreover, section 548 requires the Court to consider whether there was 'reasonably equivalent value' exchanged for a given transfer. 11 U.S.C. § 548(b)(1). '[T]o determine 'reasonably equivalent value' requires the court to determine the value of what was transferred and compare that value to the value the debtor received.' *In re Phillips*, 379 B.R. 765, 779 (Bankr. N.D. Ill. 2007) (citing *Barber v. Golden Seed Co.*, 129 F.3d 382, 387 (7th Cir. 1997)); see also *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 548, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994).

Additionally, in an avoidance action under 11 U.S.C. § 548, there is no presumption of insolvency of the debtor on and during the 90 days immediately preceding the filing of the petition as there is in an avoidance action under 11 U.S.C. § 547. *In re Schultz*, 250 B.R. 22, 28 n.3 (Bankr. E.D.N.Y. 2000). A trustee or debtor standing in the trustee's shoes must present at least some evidence that the debtor was insolvent on the date that such transfer was made or became insolvent as a result of such transfer. *See* § 548(a)(1)(B)(ii)(I); *Mellon Bank, N.A. v. Metro Commc'ns, Inc*., 945 F.2d 635, 649 (3rd Cir. 1991) ("In the absence of any evidence as to the value of the accounts receivable and the sum owing on the accounts payable, and no proof of the value of Metro's rights to contribution, one cannot determine on this record whether the guaranty of the $1.85 million dollar loan and the accompanying security interest rendered the corporation insolvent."). The Bankruptcy Code states that "the term 'insolvent' means with reference to an entity other than a partnership and a municipality, [a] financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of— (i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and (ii) property that may be exempted from property of the estate under section 522 of this title." 11 U.S.C. § 101(32)(A).

IV. 11 U.S.C. § 550

§ 550. Liability of transferee of avoided transfer

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title [11 USCS § 544, 545, 547, 548, 549, 553(b), or 724(a)], the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section [subsection] (a)(2) of this section from—

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) If a transfer made between 90 days and one year before the filing of the petition—

(1) is avoided under section 547(b) of this title [11 USCS § 547(b)]; and

(2) was made for the benefit of a creditor that at the time of such transfer was an insider;

the trustee may not recover under subsection (a) from a transferee that is not an insider.

(d) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(e)

(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of—

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes—

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

(f) An action or proceeding under this section may not be commenced after the earlier of—

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.

11 U.S.C. § 550.

V. Tax Foreclosure Sales as Fraudulent Transfers

In *BFP v. Resolution Trust Corp.*, the Supreme Court held that the price received at a mortgage foreclosure sale conclusively established "reasonably equivalent value" of the mortgaged property for purposes of the requirement under § 548 of the Bankruptcy Code so long

as the state's procedures for that sale were followed. In reaching this conclusion, the Court reflected on the history of foreclosure law explaining that:

> [f]oreclosure laws typically require notice to the defaulting borrower, a substantial lead time before the commencement of foreclosure proceedings, publication of a notice of sale, and strict adherence to prescribed bidding rules and auction procedures. Many States require that the auction be conducted by a government official, and some forbid the property to be sold for less than a specified fraction of a mandatory presale fair-market-value appraisal.

BFP, 511 U.S. at 542.

In dicta, the Third Circuit in *In re Hackle and Stelzle-Hackler*, 938 F.3d 473, 479 (3d Cir. 2019) addressed the scope of *BFP* explaining: "[t]he Court's decision in *BFP* is thus closely tied to both the language of § 548 and the mechanics of mortgage foreclosures. The Court even emphasized, in a footnote, that its 'opinion . . . cover[ed] only mortgage foreclosures of real estate,' because '[t]he considerations bearing upon other foreclosures and forced sales (*to satisfy tax liens, for example*) may be different.'"

Recent decisions of the Second Circuit, *Gunsalus*, *Hampton*, *DuVall,* have granted relief to chapter 13 debtors upholding judgments avoiding tax sale foreclosures in New York State as constructively fraudulent transfers of property under 11 U.S.C. § 548(a)(1). *See Gunsalus v. Cnty of Ontario*, 37 F.4th 839 (2d Cir. 2022); *Hampton v. County of Ontario, New York*, No. 20-3868-BK, 2022 WL 2443007 (2d Cir. July 5, 2022); *DuVall v. County of Ontario*, 83 F.4th 147 (2d Cir. 2023).

While the Third Circuit has not squarely addressed the issue of whether a tax foreclosure sale conclusively establishes reasonably equivalent value under § 548, the emerging case law in this District and Circuit is that a tax foreclosure sale can constitute a fraudulent conveyance under

§ 548 because the price received at a tax foreclosure sale does not conclusively establish "reasonably equivalent value." In *In re Berley Assocs., Ltd*., 492 B.R. 433, 440 (Bankr. D.N.J. 2013), the court held that a prepetition tax foreclosure sale that was conducted in accordance with New Jersey law and that did not provide for advertising or competitive bidding did not conclusively establish reasonably equivalent value, with the lack of bidding and appropriate advertising creating a "significant bar to adjudicating 'reasonably equivalent value'" in a tax foreclosure sale scenario. The court also relied on the fact that a "tax sale certificate foreclosure is a 'strict foreclosure' that does not result in a public sale, but merely a straight transfer of title." *Id.* at 441; *see Polanco v. City of Camden*, 622 B.R. 631, 640 (Bankr. D.N.J. 2020) ("[Section] 548 requires the Court to consider whether there was reasonably equivalent value exchanged for a given transfer. 11 U.S.C.S. § 548(b)(1). To determine reasonably equivalent value requires the court to determine the value of what was transferred and compare that value to the value the debtor received.").

In *Matter of Varquez*, 502 B.R. 186, 192 (Bankr. D.N.J. 2013), the court held it was not required to draw the same conclusion in the context of a transfer of title to property from a debtor to a tax sale certificate holder that was drawn in *BFP* in the context of a mortgage foreclosure. The court relied on the fact that the procedures under New Jersey Tax Sale Law are distinguishable from those in a mortgage foreclosure. *Id.* at 192. Mainly, "[u]nlike the acquisition of title to property by a purchaser through a mortgage foreclosure sheriff's sale . . . the acquisition of free and clear title to property by a tax sale certificate holder through the foreclosure of a debtor's equity of redemption involves no sale, no notice requirements to third parties, no auction procedures, and no other exposure to the marketplace in any way." *Id.* at 192. Similarly, in *In re GGI Props., LLC*, 568 B.R. 231 (Bankr. D.N.J. 2017), the court held that a tax foreclosure sale did not conclusively

establish reasonably equivalent value under § 548. The court found "there simply is no correlation between the value received at the foreclosure of the equity of redemption and the value of the related property." *Id.* at 243. The fact that "there were not even any interested bidders and therefore the City acquired the tax sale certificate without any bidding" only made the conclusion that the sale did not constitute reasonably equivalent value more evident. *Id.* at 243.

The court held in *In re Kopec*, 621 B.R. 621 (Bankr. D.N.J. 2020), that a tax foreclosure sale in which the Defendants received the property worth approximately $130,000 on account of a $21,000 obligation was avoidable as a constructively fraudulent transfer, even when there was bidding on the tax sale certificate itself. The court explained that "[i]n New Jersey, parties bid on the tax sale certificate, not the property itself, which precludes a finding of 'reasonably equivalent value.'" *Id.* Because of this, the bidding "is in no way related to the actual value of the property, but rather to the amounts owed in taxes and the interest to be paid thereon." *Id.* Most recently, in a prior decision in this Adversary Proceeding, this Court explained that:

> While the Third Circuit has not squarely addressed the issue of whether a tax foreclosure sale conclusively establishes reasonably equivalent value under § 548, the emerging case law in this District and Circuit is that a tax foreclosure sale can constitute a fraudulent conveyance under § 548 because the price received at a tax foreclosure sale does not conclusively establish 'reasonably equivalent value.'

Heidt v. BV001 Reo Blocker LLC (In re Heidt), 626 B.R. 777, 790 (Bankr. D.N.J. 2021).

This Court acknowledges that there are other, less recent, lower Third Circuit cases that instead hold that a tax foreclosure sale constitutes reasonably equivalent value for purposes of a fraudulent conveyance under § 548 so long as all the requirements of the state tax foreclosure law were met. In *In re McGrath*, the court recognized that there are differences in procedures between a mortgage foreclosure and a tax sale certificate foreclosure. *In re McGrath*, 170 B.R. 78, 81

(Bankr. D.N.J. 1994). However, relying on *BFP*'s holding that "reasonably equivalent value" does not mean "fair market value" and the fact that in New Jersey, the legislature amended N.J.S.A. § 54:5-87 to clarify that a tax foreclosure sale is not a fraudulent transfer under the Uniform Fraudulent Transfer Act, the court drew the conclusion that *BFP* applies with as much force to New Jersey tax foreclosures as it does to mortgage foreclosures. *Id.* at 80-83. Therefore, the price paid for the tax sale certificate established "reasonably equivalent value" under § 548 of the Bankruptcy Code. *Id.* at 83. Similarly, in *In re Lord*, 179 B.R. 429, 436 (Bankr. E.D. Pa. 1995), the court concluded "that the reasoning of *BFP* applies to tax sales conducted in accordance with the [Pennsylvania] Tax Law." The *Lord* court relied on factors such as that the "[Pennsylvania] Tax Law provides ample notice to the taxpayer, a substantial opportunity to cure, and requires strict adherence to statutory requirements." *Id.*

This Court also acknowledges that courts in other Circuits have held that tax foreclosure sales establish "reasonably equivalent value" for purposes of § 548. *See In re Trach Gut,* 836 F.3d 1146 (9th Cir. 2016) (Chapter 11 case where a commercial debtor purchased properties and the Ninth Circuit held that the *BFP* decision applied to a California tax-sale foreclosure); *In re Grandote Country Club Co., Ltd.*, 252 F.3d 1146, 1152 (10th Cir. 2001) (The court concluded "that the tax sale at issue constitutes transfer for 'reasonably equivalent value' under CUFTA [Colorado Uniform Fraudulent Transfer Act]"; *see also In re Washington*, 232 B.R. 340, 344 (Bankr. E.D. Va. 1999) ("[T]he court concludes as a general matter that the standards for reasonably equivalent value developed by the Supreme Court in *BFP* apply with equal force in the context of a judicial tax sale conducted in accordance with Virginia law").

VI. 11 U.S.C. § 522(g), (h), and (i) (Debtor's Derivative Avoidance Power)

11 U.S.C. § 522(g), (h), and (i) of the Bankruptcy Code provides:

§ 522. Exemptions

***

(g) Notwithstanding sections 550 and 551 of this title [11 USCS §§ 550 and 551], the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if—

(1)

(A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property; or

(2) The debtor could have avoided such transfer under subsection (f)(1)(B) of this section.

(h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if—

(1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title or recoverable by the trustee under section 553 of this title [11 USCS § 553]; and
(2) the trustee does not attempt to avoid such transfer.

(i)

(1) If the debtor avoids a transfer or recovers a setoff under subsection (f) or (h) of this section, the debtor may recover in the manner prescribed by, and subject to the limitations of, section 550 of this title [11 USCS § 550], the same as if the trustee had avoided such transfer, and may exempt any property so recovered under subsection (b) of this section.
(2) Notwithstanding section 551 of this title [11 USCS § 551], a transfer avoided under section 544, 545, 547, 548, 549, or 724(a) of this title [11 USCS § 544, 545, 547, 548, 549, or 724(a)], under subsection (f) or (h) of this section, or property recovered under section 553 of this title [11 USCS § 553], may be preserved for the benefit of the debtor to the extent that the debtor may exempt

> such property under subsection (g) of this section or paragraph (1) of this subsection.

11 U.S.C. § 522.

Bankruptcy courts in this District have considered the issues of a debtor's standing to avoid a tax sale foreclosure of real property under 11 U.S.C. § 548 and other sections of the Bankruptcy Code including 11 U.S.C. § 522(h) with varying results reliant on the individual facts of each case. *See Berley Assocs,* 492 B.R. 433; Matter of *Varquez*, 502 B.R. 186; *In re Morawski v. Effect Lake, LLC (In re Morawski)*, No. 20-12079, 2022 WL 1085739 (Bankr. D.N.J. Apr. 11, 2022); *In re McGrath*, 170 B.R. 78, 81 (Bankr. D.N.J. 1994); the *Washington* opinion, Adv. Pro. 20-1580(CMG), ECF 60; *In re Heidt*, 626 B.R. 777; *In re Nealy*, 623 B.R. 278, 280 (Bankr. D.N.J. 2021 *In re Princeton Office Park, L.P.,* 504 B.R. 382, (Bankr. D.N.J. 2014), *aff'd* 2015 WL 420171 (D.N.J. 2015), *aff'd* 649 Fed. Appx. 137 (3rd Cir. 2016); In re *Kopec,* 621 B.R. 621; *Wright v. Trystone Cap. Assets, LLC (In re Wright)*, 649 B.R. 625 (Bankr. D.N.J. 2023).

Some bankruptcy court decisions in the District of New Jersey have held that a debtor's standing to avoidance a fraudulent transfer under 11 U.S.C. § 548 is derived solely from 11 U.S.C. § 522(h) and recovery is limited to the exemption amount in the real estate only if equity remains in the real property. *In re Nealy*, 623 B.R. 278; *In re Morawski,* 2022 WL 1085739, at *1; *In re Wright*, 649 B.R. 625; *In re Steck,* 298 B.R. 244, 248 (Bankr. D.N.J. 2003) (holding that chapter 13 debtor does not have standing to exercise trustee's avoiding powers); *In re Hayles*, 200 B.R. 26, 27-28 (Bankr. D.N.J. 1996) (stating that the debtor's standing to avoid a lien would be limited to the circumstances set forth in § 522(h)) (citing *In re Tash*, 80 B.R. 304, 305-06 (Bankr. D.N.J. 1987).

The *Nealy* Court observed:

> Recently, the concept that a transfer may only be avoided if it benefits the estate was reinforced in a decision out of a bankruptcy court in Delaware. In *In re Allonhill, LLC*, the bankruptcy court stated that:
>
> Section 550(a) of the Bankruptcy Code provides that transfers avoided under Sections 544 and 548 may be recovered only "for the benefit of the estate." . . . For this reason, "courts have limited a debtor's exercise of avoidance powers to circumstances in which such actions would in fact benefit the creditors, not the debtors themselves." *Id.* at 244; *See also In re Messina,* 687 F.3d 74, 82-83 (3d Cir. 2012); *In re Majestic Star Casino, LLC*, 716 F.3d 736, 761 n.26 (3d Cir. 2013) ("A debtor is not entitled to benefit from any avoidance.") (citation omitted). To the extent *Allonhill* prevails on its avoidance claims, it cannot recover in excess of outstanding creditor claims. To hold otherwise would result in a windfall to equity (primarily the Allons) that Section 550 and Third Circuit law precludes. *See In re Majestic Star*, 716 F.3d at 761 n.26.
>
> *In re Allonhill, LLC*, No. 14-10663 (KG), 2019 Bankr. LEXIS 1304, 2019 WL 1868610, at *52 (Bankr. D. Del. Apr. 25, 2019), *aff'd in part, remanded in part*, No. 13-11482 (KG), 2020 U.S. Dist. LEXIS 55862, 2020 WL 1542376 (D. Del. Mar. 31, 2020), *reh'g denied*, No. 14-10663-KG, 2020 WL 6822985 (D. Del. Nov. 20, 2020).
>
> In the Debtor's response to the Defendant's Supplement (ECF No. 15), she claims that she "is not seeking to avoid a transfer of property greater than the extent exempted under (g)(1)." However, the Debtor's motion for summary judgment clearly seeks an "un-doing" of the foreclosure sale and a restoration of title in the Debtor's name. The motion makes no mention of recovering an exemption amount under § 522(g)(1) and, if the Debtor were to prevail as sought in her avoidance claims, she would receive a recovery in excess of creditor claims—a result which is contrary to the purposes and objectives of § 548 and § 550.
>
> This Court does not interpret the line of cases requiring a benefit to creditors to mean that a debtor can never bring an avoidance action where a trustee has opted not to do so for the benefit of creditors. Indeed, the ability of a debtor to avoid a transfer reflects the entire purpose of the rights provided to a debtor under 11 U.S.C. § 522(h). A debtor must, however, tailor the relief sought in an action brought under 11 U.S.C. § 522(h) to comport with the limitations prescribed by statute—meaning that a Debtor can only recover to the extent of any valid exemptions. That is not the relief requested in the summary judgment motion presently before the Court, so it must be denied.

***

> Indeed, the *Funches* court [381 B.R. 471, 478 (Bankr. E.D. Pa. 2008)] concluded that "Where all of the statutory prerequisites under § 522(g)(1) and (h) have been satisfied, a debtor may use the trustee's avoiding powers for his or her own benefit." *In re Funches*, 381 B.R. at 492. What *Funches* and its progeny, including *In re Majestic*, make clear is that a debtor does not have an independent right of action to exercise the trustee's avoidance powers. Rather, an avoidance action can only be maintained by a chapter 13 debtor within the confines of the Code and if the requirements of § 522(g)(1) and § 522(h) are satisfied. The Court finds this line of authority persuasive because to hold otherwise—and deem that an independent right of action exists—would afford a chapter 13 debtor additional rights and relief which are not provided for in the Bankruptcy Code.

623 B.R. at 283-284; *see also In re Wright*, 649 B.R. 625 (holding that chapter 13 debtor does not have standing to exercise trustee's avoiding powers); *In re Morawski,* 2022 WL 1085739, at *1; *In re Hayles*, 200 B.R. 26, 27-28 (Bankr. D.N.J. 1996) (stating that the debtor's standing to avoid a lien would be limited to the circumstances set forth in § 522(h)) (citing *In re Tash*, 80 B.R. 304, 305-06 (Bankr. D.N.J. 1987)).

Other decisions have not limited the debtor's standing in the context of avoidance action. In the case of *Gunsalus*, 37 F.4th 859, the Second Circuit held that the setting aside of a tax sale foreclosure was justifiable because the chapter 13 debtors had derivative standing under 11 U.S.C. § 522(h) to bring an avoidance action under 11 U.S.C. § 548(a) where the County's *in rem* foreclosure and sale of the debtor's property failed to yield a "reasonably equivalent value." The County foreclosed on a $1,290 tax debt and sold their home to a third party for $22,000 and kept the difference of $20,710, which meant that the Gunsaluses were required to forfeit to the County all of their accumulated equity. *Id.* at 862.

The *Gunsalus* Court observed that,

> Section 522 of the Code authorizes debtors to exempt certain transfers of property. *See* 11 U.S.C. § 522. In Bankruptcy Court, the *Gunsalus* claimed the federal homestead exemption, which allows a debtor to exempt a home from the bankruptcy estate. *See id*. § 522(d)(1). The Code provides that debtors who are eligible for the federal homestead exemption have standing to bring avoidance actions. *See* id. § 522(h); *Deel Rent-A-Car, Inc. v. Levine*, 721 F.2d 750, 754 (11th Cir. 1983).

Id. at 863.

In *Gunsalus*, the Second Circuit observed that, "[a]s we have previously admonished, 'there is a strong presumption of not allowing a secured creditor to take more than its interest.' *In re Harris*, 464 F.3d 263, 273 (2d Cir. 2006); *see* also *In re Smith,* 811 F.3d at 238 (noting that one goal of fraudulent conveyance law is to avoid a 'windfall to one creditor at the expense of others'." *Gunsalus*, 37 F.4th at 866. The Second Circuit affirmed the debtor had derivative power under 11 U.S.C. § 522(h) to avoid the transfer of their real property, their home under 11 U.S.C. § 548.

The Second Circuit in *Hampton*, 2022 WL 2443007, at *1, reiterated its previous ruling in *Gunsalus* that "the '[Bankruptcy] Code provides that debtors who are eligible for the federal homestead exemption have standing to bring avoidance actions.' *Gunsalus v. Cnty. of Ontario, New York*. (citation omitted)." The Second Circuit also rejected the County's contention that the Supreme Court's ruling in *BFP*, 511 U.S. 531, entitles the transfer of the debtor's home to be for "reasonably equivalent value" under 11 U.S.C. § 548(a)(1)(B). Referring to its ruling in *Gunsalus*, the Second circuit stated:

> As Justice Scalia noted, *BFP* 'covers only mortgage foreclosures of real estate. The considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different. That admonition is dispositive because . . . the strict foreclosure procedures [at issue here] offer far fewer debtor protections than the mortgage foreclosure procedures at issue in *BFP*. *See In re Smith,* 811 F.3d 228, 239 (7th Cir. 2016) (finding that a state's tax foreclosure protections must compare favorably to the mortgage foreclosure protections in *BFP* in order to receive a

> presumption of "reasonably equivalent value"); *In re Hackler & Stelzel,* 938 F.3d 473, 479 (3d Cir. 2019).

2022 WL 2443007, at *2.

In *Hackler*, the Third Circuit observed in a preference action under 11 U.S.C. § 547 of the Bankruptcy Code,

> [the Supreme] Court's decision in *BFP* is thus closely tied to both the language of § 548 and the mechanics of mortgage foreclosures. The Court even emphasized, in a footnote, that its "opinion . . . cover[ed] only mortgage foreclosures of real estate," because "[t]he considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different." This is such a case. As explained above, at New Jersey tax sales the public bids only on the rate of interest on the unpaid taxes. The main conclusion of *BFP* —that the price reached via a foreclosure conducted according to state law should be considered to be the "reasonably equivalent value" of the property—is not pertinent here, because in New Jersey, the relationship between the winning bid and the value of the underlying property is not merely attenuated but nonexistent. Given that the term "reasonably equivalent value" does not appear in § 547(b), and in light of the divergent procedures and attendant considerations in tax foreclosure proceedings in New Jersey, we find *BFP* inapplicable to this case.

938 F.3d at 479.

In *In re Kopec*, 621 B.R. at 625, the Court held that a tax foreclosure sale in which the Defendants received the property worth approximately $130,000 on account of a $21,000 obligation was avoidable as a constructively fraudulent transfer, even when there was bidding on the tax sale certificate itself. *Id.* at 625. The court explained that "[i]n New Jersey, parties bid on the tax sale certificate, not the property itself, which precludes a finding of 'reasonably equivalent value.'" *Id.* at 625. Because of this, the bidding "is in no way related to the actual value of the property, but rather to the amounts owed in taxes and the interest to be paid thereon." *Id.* at 625.

In *In re Heidt*, a prior decision in this Adversary Proceeding, this Court explained that:

> While the Third Circuit has not squarely addressed the issue of whether a tax foreclosure sale conclusively establishes reasonably equivalent value under § 548, the emerging case law in this District and Circuit is that a tax foreclosure sale can constitute a fraudulent conveyance under § 548 because the price received at a tax foreclosure sale does not conclusively establish 'reasonably equivalent value.'

626 B.R. at 790.

In *Hall v. Meisner*, 51 F.4th 185 (6th Cir. 2022), the Sixth Circuit Court of Appeals held that the homeowners, who lost their homes under the Michigan tax-sale laws to the government, stated a claim under the U.S. Constitution, Takings Clause, that the government had taken their property without just compensation. The Sixth Circuit reversed and remanded the District Court's dismissal of the plaintiffs' takings claim under the U.S. Constitution (Count I) against Oakland County. *Id.* at 197.

More recently in *DuVall*, 83 F.4th 147, a debtor claimed an annuity was exempt from the bankruptcy estate. The county did not timely object to the exemption under Fed. R. Bankr. P. 4003(b). When the debtor sought to avoid the county's prior tax foreclosure of her property as a constructively fraudulent conveyance under 11 U.S.C.S. § 548(a)(1)(B), the bankruptcy court found the annuity was exempt under Rule 4003(b) and as debtor was insolvent at the time of foreclosure, the bankruptcy court avoided transfer.

The Second Circuit affirmed, holding:

> For the third time in recent years, Ontario County, New York (the "County") asks us to overturn a Bankruptcy Court's decision in a proceeding connected to a tax foreclosure of real property. *See Gunsalus v. County of Ontario*, 37 F.4th 859 (2d Cir. 2022), *cert. denied*, 143 S. Ct. 447, 214 L. Ed. 2d 254 (2022); *Hampton v. Cnty. of Ontario*, No. 20-3868, 2022 U.S. App. LEXIS 18424, 2022 WL 2443007 (2d Cir. July 5, 2022). As in those prior cases, the United States Bankruptcy Court for the Western District of New York (Warren, B.J.) in this case issued a judgment and order avoiding the tax foreclosure as a constructively fraudulent transfer of property, *see* 11 U.S.C. § 548(a)(1), and the District Court

> (Larimer, J.) affirmed. The County argues that the Bankruptcy Court misinterpreted the relevant sections of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 4003. By avoiding the foreclosure rather than awarding *DuVall* damages, the County claims, the Bankruptcy Court also improperly awarded *DuVall* a windfall. We disagree with the County's arguments and affirm.

2023 WL 6323123, at *1.

VII. *Tyler v. Hennepin Cnty.*, 598 U.S. 631 (2023)

In the *Tyler case,* the unanimous Supreme Court held that Tyler "plausibly alleged a taking under the Fifth Amendment" by Hennepin County for its retention of the excess value of her home above her tax debt reversing the judgment of the Court of Appeals for the Eighth Circuit. *Tyler v. Hennepin Cnty.*, 598 U.S. at 647-48. In so ruling, the Supreme Court opined on Standing and the Taking Clause:

Standing to Bring a Takings Claim

As to standing to bring a claim under the Takings clause, the Supreme Court held,

> To bring suit, a plaintiff must plead an injury in fact attributable to the defendant's conduct and redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). This case comes to us on a motion to dismiss for failure to state a claim. At this initial stage, we take the facts in the complaint as true. *Warth v. Seldin*, 422 U. S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). **Tyler claims that the County has illegally appropriated the $25,000 surplus beyond her $15,000 tax debt. App. 5. This is a classic pocketbook injury sufficient to give her standing. *TransUnion LLC v. Ramirez*, 594 U. S. ___, ___, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021) (slip op., at 9). (Emphasis added)**

Id. at 636.

The Taking Clause

As to the Taking Clause, applicable to the States through the 14th Amendment, the Supreme Court opined,

> The Takings Clause, applicable to the States through the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." U. S. Const., Amdt. 5. States have long imposed taxes on property. Such taxes are not themselves a taking, but are a mandated "contribution from individuals . . . for the support of the government . . . for which they receive compensation in the protection which government affords." *County of Mobile v. Kimball,* 102 U. S. 691, 703, 26 L. Ed. 238 (1881). In collecting these taxes, the State may impose interest and late fees. It may also seize and sell property, including land, to recover the amount owed. *See Jones v. Flowers*, 547 U. S. 220, 234, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006). Here there was money remaining after Tyler's home was seized and sold by the County to satisfy her past due taxes, along with the costs of collecting them. **The question is whether that remaining value is property under the Takings Clause, protected from uncompensated appropriation by the State. (Emphasis Added)**

Id. at 637-38.

***

> The County had the power to sell Tyler's home to recover the unpaid property taxes. But it could not use the toehold of the tax debt to confiscate more property than was due. By doing so, it effected a 'classic taking in which the government directly appropriates private property for its own use.' *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U. S. 302, 324 (2002) (internal quotation marks and alteration omitted). Tyler has stated a claim under the Takings Clause and is entitled to just compensation.

Id. at 639.

The Supreme Court also reiterated the long-standing precedents regarding the ownership and entitlement to surplus in excess of a debt owed and, in that regard, the Supreme Court observed:

> Our precedents have also recognized the principle that a taxpayer is entitled to the surplus in excess of the debt owed. In *United States v. Taylor*, 104 U. S. 216, 26 L. Ed. 721, 17 Ct. Cl. 427 (1881), an Arkansas taxpayer whose property had been sold to satisfy a tax debt sought to recover the surplus from the sale. A

> nationwide tax had been imposed by Congress in 1861 to raise funds for the Civil War. Under that statute, if a taxpayer did not pay, his property would be sold and "the surplus of the proceeds of the sale [would] be paid to the owner." Act of Aug. 5, 1861, §36, 12 Stat. 304. The next year, Congress added a 50 percent penalty in the rebelling States, but made no mention of the owner's right to surplus after a tax sale. *See* Act of June 7, 1862, §1, 12 Stat. 422. Taylor's property had been sold for failure to pay taxes under the 1862 Act, but he sought to recover the surplus under the 1861 Act. Though the 1862 Act "ma[de] no mention of the right of the owner of the lands to receive the surplus proceeds of their sale," we held that the taxpayer was entitled to the surplus because nothing in the 1862 Act took "from the owner the right accorded him by the act of 1861, of applying for and receiving from the treasury the surplus proceeds of the sale of his lands." Taylor, 104 U. S., at 218-219, 26 L. Ed. 721, 17 Ct. Cl. 427.

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> **Unlike in *Nelson*, Minnesota's scheme provides no opportunity for the taxpayer to recover the excess value; once absolute title has transferred to the State, any excess value always remains with the State. The County argues that the delinquent taxpayer could sell her house to pay her tax debt before the County itself seizes and sells the house. But requiring a taxpayer to sell her house to avoid a taking is not the same as providing her an opportunity to recover the excess value of her house once the State has sold it. (Emphasis added.)**

Id. at 642-45.

VIII. Bankruptcy Rule 3002(c)

With respect to the Defendants' Cross-Motion for Payment of Real Estate Taxes and Use and Occupancy During the Post-Petition Period, the Debtor asserts this Motion violates Bankruptcy Rule 3002(c). This rule provides:

> (c) Time for filing. In a voluntary chapter 7 case, chapter 12 case, or chapter 13 case, a proof of claim is timely filed if it is filed not later than 70 days after the order for relief under that chapter or the date of the order of conversion to a case under chapter 12 or chapter 13. In an involuntary chapter 7 case, a proof of claim is timely filed if it is filed not later than 90 days after the order for relief under that chapter is entered.

***

(6) On motion filed by a creditor before or after the expiration of the time to file a proof of claim, the court may extend the time by not more than 60 days from the date of the order granting the motion. The motion may be granted if the court finds that:

(A) the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim because the debtor failed to timely file the list of creditors' names and addresses required by Rule 1007(a); or

(B) the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim, and the notice was mailed to the creditor at a foreign address.

(7) A proof of claim filed by the holder of a claim that is secured by a security interest in the debtor's principal residence is timely filed if:

(A) the proof of claim, together with the attachments required by Rule 3001(c)(2)(C), is filed not later than 70 days after the order for relief is entered; and

(B) any attachments required by Rule 3001(c)(1) and (d) are filed as a supplement to the holder's claim not later than 120 days after the order for relief is entered.

Fed. R. Bankr. P. 3002.

IX. N.J.S.A. § 54:5-63.1

The Debtor alleges Defendants' Cross-Motion for Payment of Real Estate Taxes and Use and Occupancy During the Post-Petition Period violates N.J.S.A. § 54:5-63.1 which provides:

> Any holder of a tax sale certificate, excepting any municipal corporation, his agent, servant, employee or representative, who knowingly charges or exacts any fee or charge in connection with the redemption of any tax sale certificate owned by him, in excess of the amounts permitted by chapter five of Title 54 of the Revised Statutes, shall forfeit such tax sale certificate to the person who was charged such excessive or unlawful fee and the person paying such unlawful charge shall become vested with all the right, title and interest of such tax sale certificate holder in and to such tax lien. In addition, thereto the person aggrieved shall have a right of action to recover back the full amount paid by him to such tax lien holder, by an action at law in any court of competent jurisdiction.
>
> The collection of any excessive charge or fee in connection with the redemption or assignment of a tax sale certificate shall be deemed prima facie evidence of the fact that such tax sale certificate holder did knowingly charge and exact such excessive fee or charge within the intent of this act.

In *In re Princeton Office Park, L.P.,* 504 B.R. 382, 403 (Bankr. D.N.J. 2014), *aff'd* 2015 WL 420171 (D.N.J. 2015), *aff'd* 649 Fed. Appx 137 (3d Cir. 2018), the bankruptcy court disallowed a creditor's claim and avoided its lien on the debtor's property pursuant to 11 U.S.C. § 506(d), because the creditor violated N.J.S.A. § 54:5-63.1 when it claimed in its original proof of claim that it was entitled to recover a $600,100 premium it paid for a tax lien it purchased on property the partnership owned even though it knew that the partnership was not obligated to pay the premium, procedures he established for filing claims against debtors' bankruptcy estates directed that proofs of claim include premiums the LLC paid to acquire a tax lien on a debtor's property. As a result, the bankruptcy court:

> … (i) grant[ed] the Reorganized Debtor's request for reconsideration of the allowance of Plymouths Proofs of Claim; and (ii) [found] that Plymouth violated N.J.S.A. § 54:5-63.1, subjecting Plymouth's Certificate to forfeiture to the Reorganized Debtor. Plymouth's claim [was] thus disallowed in its entirety and, as a result, the underlying lien is void pursuant to the operation of 11 U.S.C. § 506(d).

504 B.R. at 403.

LEGAL ANALYSIS

I. Motion to Dismiss

In the Motion to Dismiss, the Defendants do not specify a legal rule, provision, or authority for which this Court should specifically rely upon to grant Defendants' request to dismiss Plaintiff's complaint for allegedly "failing to meaningfully respond to discovery or to compel same." (ECF 43). Defendants' representative, Brent Cunningham, submitted a certification to challenge the Debtor's assets and debts at the time of filing. The Defendants claim that the Debtor fraudulently manufactured his debts to qualify for bankruptcy relief and to recover the Property. Defendants argue that since Counsel for the Debtor filed all the proofs of claims for creditors here

this is an indication of the lack of validity and legitimacy of these claims. Defendants argue that these claims are old, were written off a long time ago, and were not current on the chapter 13 Petition date. This assertion was addressed in the related proceeding of *Heidt v. BV001 Reo Blocker LLC (In re Heidt)*, 626 B.R. 777, 787 (Bankr. D.N.J 2021), and this Court at the time determined there was nothing facially invalid about the claimed debts set forth in the filed proofs of claims. *In re Heidt,* 626 B.R. at 792.

In *Heidt*, this Court previously held:

> As to the issue of the insolvency, Defendants dispute Debtor's insolvency and the legitimacy of the debts on Debtor's Claims Register. Considering dismissal under Fed. R. Civ. P. 12(b)(6), the Court is to take all factual allegations as true. Upon the transfer of the subject Property, Debtor alleges his assets (less exemptions) were less than the amount of his debts. Therefore, the insolvency requirement under § 548 is satisfied so long as there is one facially valid claim of a debt. In Debtor's bankruptcy proceeding, there are a total of 12 claims filed for a total amount of $33,833.93. All of these proofs of claims were filed by the Debtor's attorney. Under Fed. R. Bankr. P. 3004, "[i]f a creditor does not timely file a proof of claim under Rule 3002(c) or 3003(c), the debtor or trustee may file a proof of the claim within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c)." Therefore, there is nothing facially invalid about these claimed debts.

In re Heidt, 626 B.R. at 793.

On the contrary, the Debtor explains that in response to Defendants' discovery requests, he provided all the documents that were in his possession and that he did not keep his receipts for certain incidental living expenses in 2019. (ECF 44) The Debtor disputes Defendants' assertion that his debts are manufactured and in support points to the statements, and two outstanding judgments that are attached to the pleadings. The Debtor also notes that the Little Falls Municipal Court statement submitted by Debtor confirmed that a $709.00 debt was still owing in 2021. The Debtor contends that even if these Creditors are not pursuing their debts, this does not mean that Debtor did not owe these debts on the date of the transfer of the Property. Debtor also points to

ECF 44, Exhibit 5 to evidence that one judgment was paid May 4, 2021, to indicate that this does not mean that such was not owing on the relevant transfer date of September 18, 2019. Debtor noted that all the creditors were notified of their proofs of claim in March 2020 and none except for Defendants in this Adversary Proceeding objected to the claim. Debtor notes when Defendants subpoenaed Debtor's Creditors, Defendants did not include a copy of their bill to confirm or deny which may have made it more difficult for Creditors to find and identify the Debtor's debt.

In sum, Debtor argues: (1) Defendants use the wrong test of insolvency; (2) a party cannot be compelled to produce documents which are not in his possession; and (3) Debtor had $38,807.68 in debts as of September 18, 2019, the date of the transfer of the Property.

Debtor explains that a debtor who certifies under penalty of perjury that he does not possess certain documents cannot be compelled to produce documents not in his "possession, custody, or control" under Fed. R. Civ. P. 34, and once a responding party has produced all documents in their possession, the rules do not permit anything further. *Davis v. Rossell*, No. 13-4616 (PGS) (DEA), 2015 WL 5921043, at *1 (D.N.J. 2015). This Court agrees. Debtor explained he produced all his bank statements and that he does not possess 2019 receipts for cash purchases of incidentals and living necessities like groceries. Debtor explains it is "no mystery" what he does with the $1,000 he withdraws out of his $1,270.00 monthly social security benefits; he uses such to pay his living expenses. Debtor points to the IRS estimate that $1,563 is needed for necessary living expenses for a person living in Passaic County New Jersey in 2019, so $1,270 plus $15 in food stamps is clearly insufficient.

Debtor also explains that he will not need a discharge in bankruptcy after full payments of his debt as it is his intention to pay his debts by a sale of the property. Debtor cites *In re Hackle and Stelzle-Hackler*, 938 F.3d 473 (3d Cir. 2019) and *In re Kopec*, 621 B.R. 621 (Bankr. D.N.J.

2020) for the proposition that the bankruptcy avoidance powers have been used to recover the Property from a New Jersey tax-foreclosure judgment under § 547 and § 548 respectively and that this Court permitted Debtor to amend his complaint to seek avoidance under § 548.

As to Debtor's third point, he asserts that he had $38,807.68 of debts on September 18, 2019. Debtor explains Defendants' certification fails to include the $35,746.99 debt which Debtor urges was the amount needed to redeem the tax sale certificate. Debtor cites the definition of debt under § 101(12) and notes that an *in rem* debt is a "claim" which can be paid in a chapter 13 Plan intended to save a house from foreclosure. *Johnson v. Home State Bank,* 501 U.S. 78, 85 (1991). Then Debtor cited the definition of a claim under § 101(5) and that Congress intended "the broadest possible definition of 'claim.'" H. R. Rep. No., at 95-595, at 309-314 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977). Since Debtor had possession of the Property, which was a property interest protected by the Code under *In re Atl. Bus. & Comm. Corp.,* 901 F.2d 325, 328 (3d Cir. 1990), the redemption amount of the tax lien constituted a "claim" and "debt" which can be paid through the plan under *Johnson*. Debtor can redeem by paying the redemption amount when his home is sold. Additionally, Debtor has 11 smaller debts adding up to $3,060.69 which have actual statements and judgments. Specifically, two of the creditors hold judgments: DJ 154595-12 (2012) and N.J. Public Defender PD118113-17 (2017). Debtor provides judgments are enforceable for twenty years under N.J.S.A. § 2A:14-5. Additionally, a $709.00 debt was due and owing to the Little Falls Municipal Court, which remained unpaid in 2021. Furthermore, the Baldi and Marotta receipt show that on September 3, 2019 a balance of $150 was due, which is fifteen days before the date of the transfer of the Property (September 18, 2019). Likewise, the United Telemanagement Company admits that its debt was owing but decided not to pursue such on February 23, 2021 because Debtor had filed for bankruptcy. Debtor disputes Defendants' assertion

that the Mountainside/HUMC debt was "fully paid" as hearsay to contradict Debtor's certification that he did not pay that $1,315.91 bill. In sum, Debtor argues because all of his property was exempt such that even if Debtor only had one debt at the date of the transfer, he was insolvent under §§ 101(32) and 548 of the Bankruptcy Code. Therefore, Defendants cannot deny that Debtor had unpaid debts on the transfer date. As to the debts accruing after the Petition date, Defendants paid several of the 2020 real estate tax bills, however not all have been paid. Debtor offers this will be remedied by the sale of the Property once it is brought back into the estate and all liens will be paid and Defendants will be reimbursed.

Additionally, in *In re Heidt*, 626 B.R. 777, this Court, in permitting the Plaintiff to amend his Complaint to assert a cause of action pursuant to 11 U.S.C. § 548, has determined that this claim may withstand a challenge pursuant to Federal Rule of Civil Procedure 12(b)(6), which is made applicable in bankruptcy court by Federal Rule of Bankruptcy Procedure 7012. Fed. R. Civ. P. 12(b)(6) and Fed. R. Bankr. P. 7012 require a showing that the complaint contains sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). Nothing in this current record changes that determination. Accordingly, the Defendants' Motion to Dismiss the Amended Complaint cannot be granted under Fed. R. Civ. P. 12(b)(6) and Fed. R. Bankr. P. 7012.

Defendants' Motion to Dismiss the Amended Complaint for Failure to Meaningfully Respond to Discovery or Compel Same will be denied as the Defendants have not demonstrated entitlement to the relief. Debtor has responded to all discovery demands and submitted all documents within his possession and control. Notwithstanding the Defendants' supporting pleadings, they have failed to substantiate their allegations that the Debtor's discovery

submissions, schedules, and testimony lack veracity and are incomplete. On the contrary, the Debtor has provided responses and filings as required under the applicable law and rules such that the sanctions of dismissal of the Amended Compliant under Fed. R. Civ. P. 37(b)(2)(A) and Fed. R. Bankr. P. 7037 will be denied.

II. Plaintiff's Motion for Summary Judgment Seeking to Avoid the Transfer of the Property Under 11 U.S.C. § 548 and 11 U.S.C. § 522 (g), (h), and (i)

Plaintiff argues that he is entitled to summary judgment under on the basis that he became insolvent as a result of the transfer of the Property and this Court may avoid a New Jersey tax sale judgment under the provisions of § 548 of the Bankruptcy Code.

In order to set aside the transfer of the property under § 548, Plaintiff-Debtor is required to show that the transfer was (1) within two years of filing the bankruptcy petition; (2) the Debtor received less than a reasonably equivalent value in exchange for such transfer or obligation; and (3) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

As to the first requirement that the transfer was within two years of the filing of the Petition, the transfer occurred on September 18, 2019, the Transfer Date, and the Debtor filed his chapter 13 Petition on December 6, 2019, within the two-year period, so clearly this requirement is satisfied.

As to the second requirement, that the Debtor received less than a reasonably equivalent value in exchange for such transfer or obligation, this Court finds this element is satisfied. As the Court previously decided in *In re Heidt*, 626 B.R. at 790, "a tax foreclosure sale can constitute a fraudulent conveyance under 11 U.S.C. § 548 because the price received at a tax foreclosure sale

does not conclusively establish 'reasonably equivalent value.'" Here, the value of the property ranges from $150,000 to $220,000. The lien redemption amount on the tax sale certificate held by Defendants was $35,746.99.[21] Furthermore, this was a straight and involuntary transfer of title, there is no evidence there was any bidding. *See generally, In re Heidt*, 626 B.R. at 790-792. While the Third Circuit has not squarely addressed the issue of whether a tax foreclosure sale conclusively establishes reasonably equivalent value under § 548, the emerging case law in this District and Circuit is that a tax foreclosure sale can constitute a fraudulent conveyance under § 548 because the price received at a tax foreclosure sale does not conclusively establish "reasonably equivalent value." In *In re Berley Assocs*., *supra*, the court held that a prepetition tax foreclosure sale that was conducted in accordance with New Jersey law that did not provide for advertising or competitive bidding did not conclusively establish reasonably equivalent value, with the lack of bidding and appropriate advertising creating a "significant bar to adjudicating 'reasonably equivalent value' in a tax foreclosure sale scenario." *In re Berley Assocs., Ltd*., 492 B.R. 433, 440 (Bankr. D.N.J. 2013). The court also relied on the fact that a "tax sale certificate foreclosure is a 'strict foreclosure' that does not result in a public sale, but merely a straight transfer of title." *Id.* at 441.

In *Matter of Varquez*, 502 B.R. 186, 192 (Bankr. D.N.J. 2013) the court held it was not required to draw the same conclusion in the context of a transfer of title to property from a debtor to a tax sale certificate holder that was drawn in *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994) in the context of a mortgage foreclosure. The court relied on the fact that the procedures under New Jersey Tax Sale Law are distinguishable from those in a mortgage foreclosure. *Id.* at

[21] This is the amount Defendants stated was necessary to redeem the Property from tax sale foreclosure and Debtor accepts this figure as an undisputed fact, ECF 45-1, ¶ 8.

192. Mainly, "[u]nlike the acquisition of title to property by a purchaser through a mortgage foreclosure sheriff's sale . . . the acquisition of free and clear title to property by a tax sale certificate holder through the foreclosure of a debtor's equity of redemption involves no sale, no notice requirements to third parties, no auction procedures, and no other exposure to the marketplace in any way." *Id.* at 192.

Similarly, in *In re GGI Props., LLC*, 568 B.R. 231, the court held that a tax foreclosure sale did not conclusively establish reasonably equivalent value under § 548. The court found "there simply is no correlation between the value received at the foreclosure of the equity of redemption and the value of the related property." *Id.* at 243. The fact that "there were not even any interested bidders and therefore the City acquired the tax sale certificate without any bidding" only made the conclusion that the sale did not constitute reasonably equivalent value more evident. *Id.* at 243.

In *In re Kopec,* 621 B.R. at 625, a tax foreclosure sale in which the defendant received the property worth approximately $130,000 on account of a $21,000 obligation was avoidable as a constructively fraudulent transfer, even when there was bidding on the tax sale certificate itself. The court explained that "in New Jersey parties bid on the tax sale certificate, not the property itself, which precludes a finding of 'reasonably equivalent value.'" *Id.* at 625. Because of this, the bidding "is in no way related to the actual value of the property, but rather to the amounts owed in taxes and the interest to be paid thereon." *Id.* at 625.

This Court acknowledges that there are other, less recent, bankruptcy court decisions in the Third Circuit that instead hold that a tax foreclosure sale constitutes reasonably equivalent value for purposes of a fraudulent conveyance under § 548 so long as all the requirements of the state tax foreclosure law were met. In *In re McGrath*, 170 B.R. 78, 81 (Bankr. D.N.J. 1994), the court recognized that there are differences in procedures between a mortgage foreclosure and a tax sale

certificate foreclosure. However, relying on *BFP*'s holding that "reasonably equivalent value" does not mean "fair market value" and the fact that in New Jersey, the legislature amended N.J.S.A. § 54:5-87 to clarify that a tax foreclosure sale is not a fraudulent transfer under the Uniform Fraudulent Transfer Act, the court drew the conclusion that *BFP* applies with as much force to New Jersey tax foreclosures as it does to mortgage foreclosures. *Id.* at 80-83. Therefore, the price paid for the tax sale certificate established "reasonably equivalent value" under § 548 of the Bankruptcy Code. *Id.* at 83. Similarly, in *In re Lord*, 179 B.R. 429, 436 (Bankr. E.D. Pa. 1995), the court concluded "that the reasoning of *BFP* applies to tax sales conducted in accordance with the [Pennsylvania] Tax Law." The court relied on factors such as that the "[Pennsylvania] Tax Law provides ample notice to the taxpayer, a substantial opportunity to cure, and requires strict adherence to statutory requirements." *Id.* at 436.

This Court also acknowledges that courts in other Circuits have held that tax foreclosure sales establish "reasonably equivalent value" for purposes of § 548. *See In re Grandote Country Club Co., Ltd.*, 252 F.3d 1146, 1152 (10th Cir. 2001) where the court concluded "that the tax sale at issue constitutes transfer for 'reasonably equivalent value' under CUFTA [Colorado Uniform Fraudulent Transfer Act]"; *see also Tracht Gut, LLC v. L.A. Cnty. Treasurer & Tax Collector,* 836 F.3d 1146, 1149 (9th Cir. 2016) (“Because California tax sales have the same procedural safeguards as the California mortgage foreclosure sale at issue in *BFP*, we agree with the BAP and hold that the price received at a California tax sale conducted in accordance with state law conclusively establishes ‘reasonably equivalent value’ for purposes of 11 U.S.C. § 548(a). We affirm.”).

However, in this District, Circuit and other Circuits, courts have held that a tax foreclosure sale did not conclusively establish "reasonably equivalent value" under § 548 of the Bankruptcy

Code and a tax foreclosure sale can be avoided as a fraudulent transfer under § 548 of the Bankruptcy Code. *See DuVall v. Cnty of Ontario*, 83 F.4th 147 (2d Cir. 2023) ("The parties do not dispute that [debtor]…did not receive 'reasonably equivalent value' in exchange for the Property because the entire Property was seized to pay for a tax deficiency that was much smaller than its assessed value."); *Gunsalus v. County of Ontario*, 37 F.4th 859, 865-66 (2d. Cir. 2022); *Hampton v. County of Ontario, New York*, No. 20-3868-BK, 2022 WL 2443007, at *3 (2d Cir. July 5, 2022); *Lowry v. Southfield Neighborhood Revitalization Initiative, LLC*, No. 20-1712, 2021 WL 6112972, at *10-12 (6th Cir. Dec. 27, 2021); *In re GGI Props., LLC*, 568 B.R. 231, 242 (Bankr. D.N.J. 2017); *In re Kopec*, 621 B.R. 621, 625 (Bankr. D.N.J. 2020); *In re Morawski v. Effect Lake, LLC*, No. 20-12079, 2022 WL 1085739, at *4-5 (Bankr. D.N.J. Apr. 11, 2022); and *Wright v. Trystone Cap. Assets, LLC (In re Wright)*, 649 B.R. 625, 632 (Bankr. D.N.J. 2023).

As the court explained in *Kopec*,

> Recent bankruptcy court decisions from this district have distinguished *BFP* as it relates to New Jersey tax foreclosure law, on the basis that in New Jersey parties bid on the tax sale certificate, not the property itself, which precludes a finding of "reasonably equivalent value." *See In re GGI Properties, LLC*, 568 B.R. 231, 2017 WL 2473278 (Bankr. D.N.J. 2017) (prepetition tax foreclosure sale conducted in accordance with New Jersey law did not establish "reasonably equivalent value" for debtor's property so as to prevent avoidance of tax sale as constructively fraudulent transfer); *In re Berley Associates, Ltd.*, 492 B.R. 433 (Bankr. D.N.J. 2013) (distinguishing between procedures for mortgage and tax foreclosures in New Jersey; absence of competitive bidding a bar to finding reasonably equivalent value). The Third Circuit has not expressly ruled on whether a tax sale foreclosure can constitute a fraudulent transfer under § 548.

Kopec, 621 B.R. at 625.

The Court also looks to the Third Circuit decision in *Hackler which* examined New Jersey tax foreclosure law in the context of a § 547 preference action:

> The Court's decision in *BFP* is thus closely tied to both the language of § 548 and the mechanics of mortgage foreclosures. The Court even emphasized, in a footnote, that its "opinion . . . cover[ed] only mortgage foreclosures of real estate," because "[t]he considerations bearing upon other foreclosures and forced sales (*to satisfy tax liens, for example*) may be different." This is such a case. As explained above, at New Jersey tax sales the public bids only on the rate of interest on the unpaid taxes. The main conclusion of *BFP* —that the price reached via a foreclosure conducted according to state law should be considered to be the "reasonably equivalent value" of the property—is not pertinent here, because in New Jersey, the relationship between the winning bid and the value of the underlying property is not merely attenuated but nonexistent. Given that the term "reasonably equivalent value" does not appear in § 547(b), and in light of the divergent procedures and attendant considerations in tax foreclosure proceedings in New Jersey, we find *BFP* inapplicable to this case.

Hackler, 938 F.3d at 479.

Accordingly, this Court finds that the Debtor here did not obtain reasonably equivalent value in exchange for the transfer of the Property as set forth in 11 U.S.C. §548(a)(1)(B).

As to the final requirement, that the Debtor was insolvent on the date that such transfer was made or such obligation was incurred or became insolvent as a result of such transfer or obligation, this Court previously explained in *In re Heidt*, 626 B.R. 777, that so long as the Debtor can provide evidence that other valid debts existed separate from the Property, Debtor can satisfy the insolvency requirement of § 548. In an avoidance action under 11 U.S.C. §548, there is no presumption of insolvency of the debtor on and during the ninety days immediately preceding the filing of a petition as there is in an avoidance action under 11 U.S.C. § 547. *In re Schultz*, 250 B.R. 22, 28 n.3 (Bankr. E.D.N.Y. 2000). A trustee or debtor standing in the trustee's shoes most present evidence that the debtor was insolvent on the date of the transfer or became insolvent as a result of the transfer. *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 649 (3d Cir. 1991). Furthermore, "[f]or purposes of 11 U.S.C. § 548, solvency is measured at the time the debtor transferred value, not at some later or earlier time." *In re R.M.L., Inc.*, 92 F.3d 139, 154

(3rd Cir. 1996). The fact that certain of these debts were written-off debts or were not being pursued at some point after the transfer date, or on or after the Debtor filed his chapter 13 Petition is not relevant to this determination. As Debtor provides for in the summary judgment motion, there was a $709.00 debt owing to the Little Falls Municipal Court as of the Petition date.[22] Debtor explains that the fact that the debt owed to N.J Public Defender was discharged on May 4, 2021 proves it was due and owing as of the Petition date.[23] Debtor also urges that the fact United Telemanagement Corporation debt was waived evinces it was due and owing as of the Petition date.[24] Lastly, it also appears Debtor had a $150.00 debt owed to Baldi and Marotta as of the Petition date.[25]

Under 11 U.S.C. § 548(a)(1)(B)(II), Debtor must demonstrate that he "was insolvent on the date that such transfer "was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation." Therefore, in accordance with §548(a), the Property is not required to be included on the asset side for the calculation of insolvency. *See In re Heidt,* 626 B.R. 777, 792 (Bankr. D.N.J.) If other valid debts exist, Debtor can demonstrate he became insolvent as a result of the transfer of the Property. *Id.*

Measuring insolvency under 11 U.S.C. § 101(32)(a) ("the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of- (i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and (ii) property that may be exempted from property of the estate under § 522 of this title"), the Debtor

[22] Exhibit 4.3, ECF 45.
[23] Exhibit 8, ECF 45.
[24] Exhibit 8, ECF 45.
[25] Exhibit 8, ECF 45.

had bona fide debts as of the Petition date and on the asset side no non-exempt assets and has satisfied insolvency requirement of § 548 of the Bankruptcy Code.

Therefore, there is no genuine dispute as to any material fact as to whether Debtor satisfies the requirements under 11 U.S.C. § 548(1)(a)(B) and the Debtor's Motion for Summary Judgement is granted.

III. 11 U.S.C. § 522 (g), (h), and (i) (Debtor's Derivative Avoidance Powers)

11 U.S.C. § 522 (g), (h), and (i) of the United States Bankruptcy Code provides:

§ 522. Exemptions

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(g) Notwithstanding sections 550 and 551 of this title [11 USCS §§ 550 and 551], the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553 of this title [11 USCS § 510(c)(2), 542, 543, 550, 551, or 553], to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if—
(1)
(A) such transfer was not a voluntary transfer of such property by the debtor; and
(B) the debtor did not conceal such property; or
(2) The debtor could have avoided such transfer under subsection (f)(1)(B) of this section.

(h) The debtor may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if—
(1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title [11 USCS § 544, 545, 547, 548, 549, or 724(a)] or recoverable by the trustee under section 553 of this title [11 USCS § 553]; and
(2) the trustee does not attempt to avoid such transfer.

(i)

> (1) If the debtor avoids a transfer or recovers a setoff under subsection (f) or (h) of this section, the debtor may recover in the manner prescribed by, and subject to the limitations of, section 550 of this title [11 USCS § 550], the same as if the trustee had avoided such transfer, and may exempt any property so recovered under subsection (b) of this section.
> (2) Notwithstanding section 551 of this title [11 USCS § 551], a transfer avoided under section 544, 545, 547, 548, 549, or 724(a) of this title [11 USCS § 544, 545, 547, 548, 549, or 724(a)], under subsection (f) or (h) of this section, or property recovered under section 553 of this title [11 USCS § 553], may be preserved for the benefit of the debtor to the extent that the debtor may exempt such property under subsection (g) of this section or paragraph (1) of this subsection.

In several cases before the Bankruptcy Court for the District of New Jersey, including *In re Nealy*, 623 B.R. at 280, *In re Morawski*, 2022 WL 1085739, at *1; and *In re Wright*, 649 B.R. 625 courts have held that a debtor's standing to avoid a fraudulent transfer under 11 U.S.C. § 548 is limited under 11 U.S.C. § 522(h) to recovery of the debtor's exemption amount in the real estate if equity remains in the property. *See also In re Allonhill, LLC*, No. 14-10663 (KG), 2019 WL 1868610, at *52 (Bankr. D.Del. Apr. 25, 2019), *aff'd in part, remanded in part,* No. 13-11482 (KG), 2020 WL 1542376 (D.Del. Mar. 31, 2020), *reh'g denied,* No. 14-10663-KG, 2020 WL 6822985 (D.Del. Nov. 20, 2020). These cases rely on the Third Circuit Court of Appeals cases of *Majestic, Messina,* and *Cybrgenics'* reasoning as to avoidance for the benefit of creditors not as a windfall to the debtor. *See In re Majestic Star Casino, LLC*, 716 F.3d at 761 n.26 (A debtor may avoid transfers and recover transferee's property or its value only if the recovery is for the benefit of the estate); *In re Messina*, 687 F.3d 74, 82 (3d Cir. 2012) ("We have previously held that a debtor is not entitled to benefit from any avoidance"); *Cybergenics Corp.*, 226 F.3d 237, 244 (3d Cir. 2000) ("…we note that courts have limited a debtor's exercise of avoidance powers to

circumstances in which such actions would in fact benefit the creditors not the debtors themselves").

IV. Application of *Tyler v. Hennepin Cnty.*, 598 U.S. 631 (2023)

As to the application of the U.S. Supreme Court's recent decision in *Tyler* to the case at hand, this Court, while not reaching the constitutional issues set forth therein, is guided by the principles set forth in that decision as to a property owner's standing to assert a claim (there under the Taking Clause of the Fifth Amendment) as well as a property owner's entitlement to surplus funds in excess of a debt owed. *Tyler*, 598 U.S. at 636.

As to Standing, the Supreme Court opined that "Tyler claims that the County has illegally appropriated the $25,000 surplus beyond her $15,000 tax debt. App. 5. This is a classic pocketbook injury sufficient to give her standing. *TransUnion LLC v. Ramirez*, 594 U. S. ___, ___, 141 S. Ct. 2190, 210 L. Ed. 2d 568 (2021) (slip op., at 9)." *Id.* at 642.

In regard to a property owner's right to surplus funds after the sale of its property, the Supreme Court opined in *Tyler* that the historical and precedential rights of property owners are such that, "Our precedents have also recognized the principle that a taxpayer is entitled to the surplus in excess of the debt owed…" *Id*. at 642. The *Tyler* decision provided support for the Debtor's assertion of standing and entitlement to surplus funds after the sale of the Property.

A reading of 11 U.S.C. § 548 together with § 522(g), (h), and (i) to limit the Debtor's recovery to an exemption amount cannot be reconciled with the plain language of § 548(a)(1) which grants the trustee the power to "avoid any transfer… of an interest of the debtor in property…" The Debtor is entitled to relief under § 548 (a)(1) to avoid the transfer of the Property and pursuant to § 550(a) recover for the benefit of the estate the property transferred.

Accordingly, the involuntary transfer of title of the Debtor's interest in the Property is avoided as a constructively fraudulent transfer under 11 U.S.C. § 522(h) and § 548(a)(1)(B)(i).

As the transfer of Property has been avoided under § 548(a)(1)(B), § 550 of the Bankruptcy Code provides that the trustee, or the debtor acting under § 522(h), "may recover for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property," from "the initial transferee of said transfer."

Here the court finds persuasive the reasoning in *DuVall*,

> The County alternatively argues that the proper remedy for a constructively fraudulent transfer of the Property in this case would have been to award DuVall damages limited to either the amount of creditor claims or the [*15] amount of the claimed exemption.
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> ***
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> To start, the County's proposal to limit DuVall's damages to the amount of creditor claims lacks support in the text of Section 522(h), under which DuVall was entitled to bring this Section 548 proceeding. Section 522(h) provides that a debtor "may avoid a transfer of property of the debtor or recover a setoff to the extent that the debtor could have exempted such property." 11 U.S.C. § 522(h). Section 522(i)(1) in turn provides that if a debtor avoids a transfer of property under Section 522(h), the debtor may recover "in the manner prescribed by" Section 550(a). *See* 11 U.S.C. § 522(i)(1).6 Section 550(a) further provides that the "trustee may recover, for the benefit of the estate, the property transferred, or...the value of such property." Nothing in these provisions of the Bankruptcy Code appears to limit the award of damages to the amount of creditor claims. *Cf. Brennan-Centrella v. Ritz-Craft Corp. of Pennsylvania,* 942 F.3d 106, 111 (2d Cir. 2019) (noting that "it would be strange for [a] statute to mention specifically several remedies . . . while leaving [the remedy at issue] to implication" (quotation marks omitted)).
>
> We therefore turn to the Bankruptcy Court's decision to avoid the transfer of the Property rather than award DuVall damages in the amount of the claimed exemption. The parties appear to agree that the Bankruptcy Court had discretion to choose between the two remedies listed in Section 522(h), and so we take the same approach.

DuVall, 83 F.4th at 154-155.

The Property here shall be recovered by the Debtor from the Defendants, the initial transferees for the benefit of the estate. Return of title and possession of the Property to the Debtor will benefit the estate and increase the probability of a successful reorganization under the chapter 13 Plan. The tax lien of the Defendants against the Property will remain in place until the debt secured by the lien is repaid through the chapter 13 Plan.

V. Defendants' Cross-Motion for Payment of Real Estate Taxes and Use and Occupancy During the Post Petition Period

On October 20, 2021, Defendants filed their Notice of Cross-Motion for Payment of Real Estate Taxes and Use and Occupancy During the Post-Petition Period since December 6, 2019, the Petition Date. The Defendants seek reimbursement for the following: a. Real Estate Taxes Paid: $3,509.37 (including interest); b. Real Estate Taxes Due: $7,484.69 (including interest); c. Insurance Premium: $621.47 (total: $11,615.53). Defendants assert the Debtor should be required to reimburse the Defendants for the total of $11,615.53 as well as for 23 months of rent in the amount of $1,900.00 per month (a total of $43,700.00). The Debtor has been in constant possession of the Property.

Defendants assert since the date of the filing of the chapter 13 Petition, December 6, 2019, the Defendants has paid certain real estate taxes due and owing on the Property to protect their equitable and possessory rights. Specifically, the Defendants assert that they have paid approximately $3,509.37 (including interest) for real estate taxes due and owing since December 6, 2019.

Defendants assert that approximately $7,484.69 are delinquent real estate taxes owed for 2020 and 2021. According to the Cross-Motion, this amount is comprised of $1,127.35 for an outside real estate tax lien, $2,965.41 for delinquent taxes for year 2020, $2,240.64 is the principal

and $724.77 interest and penalties, and $3,391.93 for delinquent taxes for year 2021. These amounts were calculated as of October 19, 2021.

Additionally, the Defendants assert, since the bankruptcy filing date of December 6, 2019, that the Defendants have paid the homeowner's insurance premiums of approximately $621.47 on the Property.

Defendants assert the Debtor has not paid the delinquent real estate taxes or homeowner's insurance nor has the Debtor reimbursed the Defendants for these expenses.

Defendants argue there is no dispute that as of December 6, 2019, the Defendants were the owners of the Property.

Defendants assert the Debtor has not paid the Defendants rent or otherwise compensated the Defendants to live in said property during the pendency of the Debtor's chapter 13 case which is approximately two years. Therefore, the Defendants argue the Debtor has lived in said property without paying any carrying costs for two years.

Defendants argue that comparable rent for this property is approximately $1,900.00 per month. To support their position, Defendants provided a list of what they assert are comparable rental properties. A total of seven properties were listed with monthly rents ranging from $1,500.00 to $2,500.00.

Therefore, Defendants assert they have incurred a total of approximately $11,615.53 in expenses in connection with said property. These expenses are $3,509.37 in real estate taxes paid (including interest), $7,484.69 (including interest) for real estate taxes due and owing, $621.47 for the homeowner's insurance premium. Defendants assert that the Debtor should also be required to reimburse the Defendants for these expenses and as of the date of their motion, the twenty (23)

months of post-petition use and occupancy payments or rent totaling $43,700.00 ($1,900 x 23 months).

The Debtor filed a Brief in Opposition to Defendants' Cross-Motion. By way of this filing, the Debtor requests this Court to: (1) deny Defendants' Motion; (2) deny the proof of claim set forth in this Motion; and (3) the Defendants' possession of the tax sale certificate should be forfeited. To support the Debtor's position, the Debtor asserts the following:

(1) ***De facto late proof of claim*** – The Debtor asserts the Defendants' Cross-Motion seeking said payments are a de facto late proof of claim and argues such claim has been asserted without any explanation as to why this claim was not filed in 2020 before the claims deadline. Therefore, Debtor argues, pursuant to Bankruptcy Rule 3002(c), *In re Vertientes, Ltd*., 845 F.2d 57 (3d Cir. 1988), *Chrysler Motors Corp. v. Schneiderman*, 940 F.2d 911 (3d Cir. 1991), this claim should be denied.

(2) ***Violates N.J.S.A. § 54:5-63.1***– The Debtor asserts charging a homeowner for "use and occupancy is illegal as the Defendants is the holder of a tax lien certificate. The Debtor also asserts that under N.J.S.A. § 54:5-63.1 means the tax sale certificate held by the Defendants would be forfeited to the Debtor. The Debtor emphasizes "use and occupancy fee" is not listed as a permissible fee or charge in chapter five of Title 54 of the N.J. Revised Statutes and therefore, the Debtor alleges the Defendants has knowingly charged an illegal fee by filing said Motion demanding payment of $43, 700.00.

In support of Debtor's position, Debtor relies on *In re Princeton Office Park, L.P.,* 504 B.R. 382, (Bankr. D.N.J. 2014), *aff'd* 2015 WL 420171 (D.N.J. 2015), *aff'd* 649 Fed. Appx. 137 (3rd Cir. 2016) where the court held that the holder of a tax sale

certificate who files a proof of claim, in a bankruptcy reorganization proposing to redeem the certificate, which includes an illegal charge, must suffer the penalty of N.J.S.A. § 54:5-63.1, which is that the claim is disallowed in its entirety, the lien is void and that the Certificate is forfeited to the person who was charged the illegal charge. 504 B.R. at 403. This decision of the bankruptcy court was affirmed by the U.S. District Court and the Third Circuit Court of Appeals.

(3) ***Real Property could become property of the bankruptcy estate*** – The Debtor argues, if the Debtor's Motion for Summary Judgment is granted, then the Property would be retroactively restored to the bankruptcy estate as of December 6, 2019, which is the date the Debtor filed his chapter 13 case and this Adversary Proceeding. Therefore, the Debtor assets an order avoiding the filed transfer to BV001 would cause the Debtor to be restored to the position as debtor in possession of the Property and consequently, the Debtor argues, the Defendants would not have any rights to charge the Debtor rent as the Defendants would no longer hold legal title.

In their Reply Brief, the Defendants asserted that the Defendants' Cross-Motion to compel the Debtor to pay post-petition real estate taxes and rent use and occupancy should be granted and the Plaintiff's motion for summary judgment denied. The Defendants chiefly argued that it is duplicitous for the Debtor to continue to seek to be the owner of the property and not have the obligations of ownership including paying taxes and use and occupancy costs.

The Defendants challenge the Debtor's contention that the Defendants are tax sale certificate holders and that under New Jersey law, N.J.S.A. § 54:5-63.1[26], the Defendants are

[26] N.J.S.A. 54:5-63.1 provides as follows:

prohibited from charging the Debtor rent. The Defendants do not dispute the applicable law, but rather Debtor's assertions that the Defendants are tax sale certificate holders. The Defendants state that under the New Jersey tax sale law, the entry of a final judgment of foreclosure creates an "an absolute and indefeasible estate of inheritance in fee simple" that may be vested in the purchaser. N.J.S.A. § 54:5-87; *Matter of Varquez*, 502 B.R. at 189. The Defendants do not disagree that a tax sale certificate holder should not be permitted to charge rent. However, the Defendants contend that they *hold title to the Property itself* pursuant to N.J.S.A. §54:5-87. According to the Defendants, on the Petition Date, the Debtor admitted that he no longer owns the Property and he testified in his deposition that he *knew* he did not own the property. Debtor Dep. Tr. 18:7-20. The Defendants stated in their Reply Brief that "[t]he Debtor's counsel also recognized that concept when he says '[t]herefore BV001 would have no right to charge Mr. Heidt rent, since *BV would no longer hold legal title* should the Court grant Mr. Heidt's motion for summary judgment.' (emphasis added)." Defendants assert that the Debtor cannot allege that the Defendants are the property owner as of this date. Even in the event the Court were to grant the Debtor's motion for

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§ 54:5-63.1. Excessive charges or fees charged by tax sale certificate holder on redemption; forfeiture

Any holder of a tax sale certificate, excepting any municipal corporation, his agent, servant, employee or representative, who knowingly charges or exacts any fee or charge in connection with the redemption of any tax sale certificate owned by him, in excess of the amounts permitted by chapter five of Title 54 of the Revised Statutes, shall forfeit such tax sale certificate to the person who was charged such excessive or unlawful fee and the person paying such unlawful charge shall become vested with all the right, title and interest of such tax sale certificate holder in and to such tax lien. In addition, thereto the person aggrieved shall have a right of action to recover back the full amount paid by him to such tax lien holder, by an action at law in any court of competent jurisdiction. The collection of any excessive charge or fee in connection with the redemption or assignment of a tax sale certificate shall be deemed prima facie evidence of the fact that such tax sale certificate holder did knowingly charge and exact such excessive fee or charge within the intent of this act.

N.J. Stat. § 54:5-63.1

summary judgment on the § 548 claim the Debtor would still have occupied the property when it was the Defendants' property since September 2019 and continuing without compensation to date. The Debtor has not paid rent. The Debtor has not paid the real estate taxes. The Defendants have paid the real estate taxes and insurance for the Property because it is the owner. The Debtor has contributed *nothing* in the post-petition period and continues to live at the Property without cost.

The Defendants argue that the Debtor's position in reference to the Defendants' Cross-Motion for compensation is yet another example of the Debtor's bad faith in his attempt here to not only undo the Defendants' pre-petition efforts in obtaining title to the property by foreclosure (without compensation) but also to keep the Defendants from its equitable position as a property owner during the pendency of this case. The Defendants contend that they are the owner of the Property and that the Debtor should pay compensation for its use and occupancy.

In the Defendants' Sur Reply to the Debtor's Motion for Summary Judgment, the Defendants continue to urge this Court to deny the Debtor's Motion arguing that the Defendants are the title owner of the Property not the Debtor and that the Debtor does not hold a recoverable interest in the Property. Additionally, Defendants argue that the Debtor does not qualify for relief under chapter 13 of the Bankruptcy Code claiming that the Debtor was not insolvent at the time of the filing of the chapter 13 Petition and because his debt are either unsubstantiated, fabricated, or no longer exist.

Defendants' Cross-Motion for Payment of Real Estate Taxes and Use and Occupancy During the Post Petition Period (ECF 47) will be addressed in conjunction with the Debtor's Motion to File a Second Amended Complaint which is pending a hearing before this Court ("Motion to File a Second Amended Complaint"). ECF 69. The Motion to File a Second Amended Complaint proposes in the Third Count, a cause of action against Defendant BV001 for

violation of the New Jersey Tax Lien Law, Prohibition against charging additional fees under N.J.S.A.§ 54:5-63.1 ("Third Count").

In Debtor's proposed Third Count, the Debtor asserts that Defendant BV001 violated N.J.S.A. § 54:5-63.1, which prohibits the holder of a tax sale certificate from charging any fee which is not listed in the New Jersey Tax Lien Law. Debtor alleges in this proposed new count that Defendant BV001 charged and demanded that the Debtor pay an illegal use and occupancy fee in the Cross-Motion filed on October 20, 2021 in this Adversary Proceeding.

Debtor further alleges that pursuant to N.J.S.A. § 54:5-63.1, if a holder of a tax lien certificate charges an illegal fee, then the certificate is forfeited to the homeowner. Debtor demands judgment against the defendants including declaring that the application of N.J.S.A.§ 54:5-1 et seq., resulted in an unconstitutional taking of the equity in the Debtor's Property in violation of United States Constitution and New Jersey Constitution. Debtor also seeks a judgment declaring that the proposed defendant Township of Little Falls as well as the Defendants, U.S. Bank as Custodian for BV Trust 2015-1 and BV001, violated 42 U.S.C. § 1983, because under color of the New Jersey Tax Lien Law, N.J.S.A. § 54:5-1 et seq., they deprived the Debtor of his rights and privileges secured by the United States Constitution, Fifth Amendment, Takings Clause, by taking his Property which exceeded the real estate tax he owed, without just compensation.

Under this new proposed count, the Debtor seeks a judgment for damages and a declaration that pursuant to N.J.S.A. § 54:5-63.1, the use and occupancy fee charged by the defendant BV001was illegal and unenforceable; and also that pursuant to N.J.S.A. § 54:5-63.1, since Defendant BV001, the holders of a tax lien certificate charged an illegal fee, then the tax lien certificate on the Property would be forfeited by the Defendants to the Debtor.

Accordingly, since Defendants' Cross-Motion is intricately related to the Debtor's Motion to File a Second Amended Complaint, the Cross-Motion will be addressed during the pending hearing on the Debtor's Motion to File a Second Amended Complaint.

CONCLUSION

For the foregoing reasons, the Defendants' Motion to Dismiss the Amended Adversary Complaint is DENIED. Plaintiff's Motion for Summary Judgement under 11 U.S.C. § 548(a)(1)(B) is GRANTED. Defendants' Cross-Motion for Payment of Real Estate Taxes and Use and Occupancy During the Post Petition Period will be addressed in conjunction with the Debtor's Motion to File a Second Amended Complaint which is pending a hearing before this Court.

An order shall be submitted in accordance with this Opinion.

Dated: November 3, 2023

Rosemary Gambardella

ROSEMARY GAMBARDELLA
United States Bankruptcy Judge