

NOT FOR PUBLICATION

FEB 05 2018

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	NV-17-1168-LTiF
)		
PATRICIA G. OLSON,)	Bk. No.	3:17-bk-50081-BTB
)		
Debtor.)		
_____)		
)		
PATRICIA G. OLSON,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
WILLIAM ALBERT VAN METER,)		
Chapter 13 Trustee;)		
CODY BASS; CITY OF SOUTH)		
LAKE TAHOE; UNITED STATES OF)		
AMERICA; U.S. BANK, N.A.,)		
)		
Appellees.)		
_____)		

Argued and Submitted on December 1, 2017
at Reno, Nevada

Filed - February 5, 2018

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Bruce T. Beesley, Bankruptcy Judge, Presiding

Appearances: Anne J. Williams of the Law Offices of J. Craig Demetras argued for Appellant Patricia G. Olson; Seth Joseph Adams of Woodburn & Wedge argued for Appellee Cody Bass.

*This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8024-1.

1 Before: LAFFERTY, TIGHE,** and FARIS, Bankruptcy Judges.

2 Memorandum by Judge Lafferty
3 Concurrence by Judge Tighe

4 The Debtor is 92 years old, legally blind, and resides in an
5 assisted living facility. She sought chapter 13¹ relief to stop
6 foreclosure of her commercial real property. One of the tenants
7 at that property operated a marijuana dispensary on the premises
8 and continued to pay rent to Debtor postpetition. Debtor's plan
9 called for her to sell the commercial real property to pay off
10 all creditors. At the hearing on the motion to sell and reject
11 the lease with the tenant, the bankruptcy court dismissed the
12 case sua sponte on the ground that Debtor's postpetition
13 acceptance of rents from the dispensary business was an ongoing
14 criminal violation that disqualified her from bankruptcy relief.

15 Because the bankruptcy court did not make adequate findings
16 for us to discern the standard under which it concluded that
17 dismissal was mandatory, we VACATE and REMAND.

18 **FACTS²**

19 Prepetition, Debtor Patricia G. Olson was the general
20

21 **Hon. Maureen A. Tighe, U.S. Bankruptcy Judge for the
22 Central District of California, sitting by designation.

23 ¹Unless specified otherwise, all chapter and section
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

25 ²The parties did not include all relevant documents in their
26 excerpts of record. We have thus exercised our discretion to
27 review relevant imaged documents from the bankruptcy court's
28 electronic docket. See O'Rourke v. Seaboard Sur. Co. (In re E.R.
Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989); Atwood v.
Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9
(9th Cir. BAP 2003).

1 partner of Olson Bijou Center, L.P., a California limited
2 partnership ("OBC"). OBC owned real property on Lake Tahoe
3 Boulevard in South Lake Tahoe, California, known as the Olson
4 Bijou Shopping Center (the "Shopping Center Property").

5 Beginning in January 2013, Appellee Cody Bass began leasing
6 space in the Shopping Center Property from OBC; although the
7 record includes only an unsigned copy of the lease, the signature
8 block on the lease indicates that it was to be signed by Debtor's
9 son, Patrick Olson, as manager of OBC.³ The lease expressly
10 authorized Mr. Bass to operate a "dispensary."⁴ Pursuant to that
11 authority, Mr. Bass operated at the leased premises Tahoe
12 Wellness Cooperative ("TWC"), a marijuana dispensary authorized
13 under California law. Both the operation of the dispensary
14 business and the leasing of the premises for such a business,
15 however, potentially violated the federal Controlled Substances
16 Act, 21 U.S.C. §§ 801-904 ("CSA"). The CSA classifies marijuana
17 as a controlled substance, 21 U.S.C. § 812, and makes it unlawful
18 to

19 (1) knowingly open, lease, rent, use, or maintain any
20 place, whether permanently or temporarily, for the
21 purpose of manufacturing, distributing, or using any
22 controlled substance;

23 ³In Debtor's declaration in support of the motion to reject
24 lease, she stated that she believed the lease "agreements" were
25 taken from her residence by government law enforcement
26 authorities in May 2015. In Debtor's second declaration in
27 support of the motions to sell and to reject, she stated,
28 "[t]here is no signed lease agreement between Mr. Bass and me."

29 ⁴The lease also required Mr. Bass to "comply with all
30 statutes, codes, ordinances, orders, rules and regulations of any
31 Federal, California, municipal or other governmental or quasi-
32 governmental entity"

1 (2) manage or control any place, whether permanently or
2 temporarily, either as an owner, lessee, agent,
3 employee, occupant, or mortgagee, and knowingly and
4 intentionally rent, lease, profit from, or make
available for use, with or without compensation, the
place for the purpose of unlawfully manufacturing,
storing, distributing, or using a controlled substance.

5 21 U.S.C. § 856(a).

6 In early 2016, Mr. Bass and OBC entered into a letter of
7 intent for Mr. Bass to purchase the Shopping Center Property for
8 \$4.2 million; Mr. Bass made a \$25,000 payment to Debtor's
9 attorney pursuant to the letter of intent. Shortly thereafter,
10 Mr. Bass, OBC, and Debtor entered into an option agreement, which
11 expired on March 3, 2016. Mr. Bass tendered an additional
12 \$50,000 to be applied to the purchase price if the option were
13 exercised. According to Mr. Bass' declaration in support of his
14 opposition to the motion to sell, he gave notice on April 1,
15 2016, that he was exercising the option agreement. He asserted
16 that this notice was timely based on a First Amendment to Option
17 Agreement attached to his declaration, which extended the
18 deadline for exercising the option to April 4, 2016 and appears
19 to be signed by Debtor. But in Debtor's second declaration in
20 support of pending motions, she stated that Mr. Bass came to her
21 assisted living facility on March 3, 2016, the day the option
22 agreement expired, and asked her to sign papers, but she did not
23 understand what she may have signed, and she believed Mr. Bass
24 misled her into "signing something."⁵

25
26 ⁵We include these "facts" merely to provide some context for
27 the proceedings before the bankruptcy court, and for no other
28 purpose. And we should be particularly circumspect in this
instance, in which we remand after determining that the

(continued...)

1 OBC and Debtor did not perform under the option agreement,
2 and, in May 2016, Mr. Bass sued OBC, Debtor, and Mr. Olson in El
3 Dorado County Superior Court for damages and specific
4 performance.

5 The Shopping Center Property was encumbered by a deed of
6 trust in favor of U.S. Bank, N.A. In August 2016 U.S. Bank
7 recorded a notice of default, and in December 2016 it recorded a
8 notice of sale. The foreclosure sale was set for February 1,
9 2017.

10 On January 30, 2017, Debtor filed a chapter 13 petition,
11 which stayed both the foreclosure and the Bass litigation. That
12 same day, she filed a quitclaim deed transferring OBC's interest
13 in the Shopping Center Property to herself individually.
14 Mr. Bass continued to pay rent postpetition to Debtor or her
15 counsel.

16 About a month after the bankruptcy filing, the bankruptcy
17 court approved a stipulation between Debtor and U.S. Bank for the
18 use of cash collateral for Debtor's ordinary operating expenses
19 and maintenance of the Shopping Center Property as well as
20 assisted living expenses and health insurance, through April
21

22 ⁵(...continued)
23 bankruptcy court neither articulated the legal basis for its
24 decision sua sponte to dismiss this case, nor identified with
25 precision the facts which it must have determined, or upon which
26 it might have relied, under any cognizable theory, in dismissing
27 the case. Accordingly, we neither make any determination
28 concerning what appear to be disputed facts, nor "weigh" any such
facts, nor determine credibility, nor even, indeed, opine
regarding what facts might be relevant under the
as-yet-undetermined legal standard to be applied by the
bankruptcy court on remand.

1 2017. In exchange, Debtor granted U.S. Bank a postpetition
2 replacement lien on all rents generated from the Shopping Center
3 Property and agreed to make adequate protection payments of
4 \$4,000 per month. According to the stipulation, at that time
5 expected rental income was \$16,220 per month, including TWC's
6 monthly rental payment of \$10,200. In early May 2017, the court
7 approved another cash collateral stipulation extending the
8 agreement to use cash collateral through July 31, 2017 and
9 modifying the budget to exclude the rent from TWC. There is no
10 evidence in the record to indicate whether the postpetition rents
11 paid by Mr. Bass were used to make payments pursuant to the
12 initial cash collateral stipulation; other than Debtor's
13 counsel's oral representation that the May 2017 rent payment was
14 being held in a safe in his office, the record does not show what
15 happened to those funds at all.

16 Debtor's proposed chapter 13 plan called for monthly
17 payments of \$150 for 12 months and \$2,100 for 48 months. The
18 plan also provided that Debtor would sell the Shopping Center
19 Property within six months of plan confirmation and use the net
20 proceeds to pay all administrative, priority, and unsecured
21 claims.

22 In April 2017, Debtor filed a motion to sell free and clear
23 under § 363(f) the Shopping Center Property and the adjacent
24 property, which she also owned, for \$3 million. Among the
25 conditions of the sale of the Shopping Center Property were
26 (i) court approval of the rejection or termination of Mr. Bass'
27 lease and the commencement of eviction proceedings by Debtor; and
28 (ii) court-ordered rejection, termination, or voiding of the

1 option agreement with Mr. Bass. Debtor also filed a motion to
2 reject the lease and the option agreement with Mr. Bass.⁶ In her
3 declaration in support of the motion to reject, Debtor stated
4 that she had entered into the lease with Mr. Bass in January 2013
5 and that Mr. Bass "currently operates a medical marijuana
6 dispensary at 3443 Lake Tahoe Blvd[.]" In a subsequent
7 declaration filed May 11, 2017, Debtor further testified:

8 1. I am 92-years [sic] old and legally blind. I
9 live in an assisted living facility in Sparks, Nevada.

10

11 9. At times prior to the filing of this case, my
12 son, Patrick Olson, acted and served as my
13 attorney-in-fact. In doing so, Patrick managed most of
14 my financial affairs, which included the management of
15 949 Bal Bijou Road and 3443 Lake Tahoe Blvd. Patrick's
16 duties included obtaining leases for the properties,
17 collecting rents and paying all expenses, such as the
18 secured mortgage payment to U.S. Bank, real property
19 taxes and insurance premiums.

20 10. In 2012, Patrick Olson, through Olson Bijou
21 Center L.P., leased space at 3443 Lake Tahoe Blvd. to
22 Cody Bass.

23

24 15. I wish to end any involvement with Mr. Bass
25 and his illegal business. I do not want to use money
26 from Mr. Bass to fund my Chapter 13 Plan. I don't want
27 to sell my property to Mr. Bass and do not want to
28 finance his purchase of 3343 Lake Tahoe Blvd. I wish
only to terminate any dealings with Mr. Bass and to
sell my property and pay my creditors in full.

Mr. Bass opposed both motions. In his declaration in
support of his opposition to the motion to sell, Mr. Bass

⁶The City of South Lake Tahoe (the "City") filed a joinder
in the motion to reject on the ground that Mr. Bass' permit to
operate the dispensary had expired and had not been renewed
because the Debtor had not provided her written consent.

1 confirmed that he had been operating a marijuana dispensary on
2 the premises pursuant to the terms of his lease with OBC and that
3 he had paid rent to the Debtor postpetition.

4 Shortly thereafter, the chapter 13 trustee filed a motion to
5 dismiss for failure to make plan payments and for failure to file
6 an amended plan. Mr. Bass also filed a motion to dismiss the
7 case on grounds that Debtor's acceptance of rents from his
8 marijuana dispensary violated the CSA. Neither of those motions
9 were heard because they were mooted by the bankruptcy court's sua
10 sponte dismissal of Debtor's case.

11 At the initial hearing on the motion to sell and motion to
12 reject, the bankruptcy court questioned whether it could
13 authorize the sale, given that the Debtor had been accepting
14 rents from leasing a marijuana dispensary; the parties argued the
15 issue, and the court continued the matter for a few days to study
16 the relevant authorities. At the continued hearing, the court
17 heard additional argument but concluded, based on its
18 interpretation of relevant case law, that because Debtor had
19 continued to receive rent postpetition, the case had to be
20 dismissed:

21 I think it's a crime for Ms. Olson to be accepting
22 rents from an illegal operation, so I am dismissing
23 this case. . . . My finding is this debtor is leasing
24 property for an unlawful purpose under federal law,
although lawful under state law . . . and has continued
to accept rents during the course of her bankruptcy.

25 Hr'g Tr. (May 22, 2017) at 6:4-5; 22-25. In response to a
26 request for clarification from Debtor's counsel, the court
27 explained:

28 [I]f the debtor has committed a crime during the course

1 of the bankruptcy and continued for several months to
2 commit a crime during the course of the bankruptcy, I
3 think that is a basis for not providing relief to the
4 debtor. Had the debtor, prior to filing bankruptcy or
5 not during the bankruptcy had not committed the crime
6 of taking money from a marijuana operation, I would
7 feel differently. But that's not what happened here.
8 Because you don't, in my opinion, get to go through
9 five or six months of a bankruptcy knowingly receiving
10 illegal proceeds and then say, oh, I'm not going to
11 take those anymore, I want to sell the property now, so
12 I get to play here. I don't think that's correct.

13 Id. at 7:17-8:3. The bankruptcy court entered its sua sponte
14 order dismissing the case on May 31, 2017; the court also granted
15 a stay pending appeal. Debtor timely appealed.

16 **JURISDICTION**

17 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
18 §§ 1334 and 157(b) (2) (A). We have jurisdiction under 28 U.S.C.
19 § 158.

20 **ISSUE**

21 Whether the bankruptcy court abused its discretion in
22 dismissing Debtor's chapter 13 case.

23 **STANDARD OF REVIEW**

24 We review a bankruptcy court's dismissal of a chapter 13
25 case for abuse of discretion. Ellsworth v. Lifescape Med.
26 Assoc., P.C. (In re Ellsworth), 455 B.R. 904, 914 (9th Cir. BAP
27 2011). A bankruptcy court abuses its discretion if it applies
28 the wrong legal standard, misapplies the correct legal standard,
or if its factual findings are clearly erroneous.
TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th
Cir. 2011).

DISCUSSION

Ordinarily, a bankruptcy court grants or denies relief based

1 on a specific provision in the Code. Here, the bankruptcy court
2 did not specify what Code section or other authority it relied
3 upon in dismissing Debtor's case. The court concluded,
4 apparently based on case law from other jurisdictions, that
5 Debtor's postpetition receipt of rental payments from a tenant
6 that operated a marijuana dispensary on property she owned was
7 (i) a violation of the CSA that (ii) constituted grounds for
8 dismissal of the case. The legal basis for dismissal could have
9 been bad faith under § 1307(c), but the bankruptcy court made no
10 bad faith finding and did not engage in the totality of the
11 circumstances analysis required for dismissal under that Code
12 section.

13 Alternatively, the bankruptcy court may have been acting
14 pursuant to its inherent power to "issue any order, process, or
15 judgment that is necessary or appropriate to carry out the
16 provisions of this title." § 105(a). But, if acting pursuant to
17 its inherent powers, the court could act only "within the
18 confines of the Bankruptcy Code." Law v. Seigel, 134 S. Ct.
19 1188, 1194-95 (2014) (citations omitted). And where a statute
20 adequately addresses the conduct at issue, the court's inherent
21 powers should be invoked only when that statute does not fully
22 address the situation at hand. See Chambers v. NASCO, Inc., 501
23 U.S. 32, 50 (1991) ("[I]f in the informed discretion of the
24 court, neither the statute nor the Rules are up to the task, the
25 court may safely rely on its inherent power [in imposing a
26 sanction for bad faith litigation conduct].").

27 But the bankruptcy court did not articulate the legal basis
28 for its ruling or make findings to support its conclusions that

1 the CSA was being violated and that that violation was grounds
2 for dismissal. When a court imposes the harsh penalty of
3 dismissal in circumstances such as those presented here, it is
4 imperative that it state with clarity and precision its factual
5 and legal bases for doing so.

6 The standard for dismissal of a chapter 13 case is set forth
7 in § 1307(c). That section provides that on request of a party
8 in interest and after notice and a hearing, the bankruptcy court
9 may convert a chapter 13 case to chapter 7, or may dismiss a
10 case, whichever is in the best interests of creditors and the
11 estate, for "cause." § 1307(c).⁷ Section 1307(c) sets forth a
12 non-exclusive list of factors that constitute "cause" for
13 conversion or dismissal.⁸ In dealing with questions of
14 conversion and dismissal, the bankruptcy court engages in a two-
15 step process: "First, it must be determined that there is 'cause'
16 to act. Second, once a determination of 'cause' has been made, a
17 choice must be made between conversion and dismissal based on the

18
19 ⁷Although that statute requires a request by a party in
20 interest or the United States trustee, the bankruptcy court may
21 dismiss or convert a case sua sponte under § 105(a). Tennant v.
22 Rojas (In re Tennant), 318 B.R. 860, 868-70 (9th Cir. BAP 2004).
23 Additionally, despite § 1307's requirement of notice and a
24 hearing, due process is satisfied if the impacted party has had
25 an opportunity to be heard. See id. at 870 (noting that the
26 concept of notice and a hearing is flexible and depends on what
27 is appropriate in the circumstances). Debtor does not argue that
28 her due process rights were violated, nor does she dispute that
the court had the authority to sua sponte dismiss the case.

⁸Those enumerated factors include: unreasonable delay by the
debtor that is prejudicial to creditors; failure to commence
making timely payments; denial of confirmation of a plan; and
material default by the debtor with respect to a term of a
confirmed plan.

1 'best interests of the creditors and the estate.'" Nelson v.
2 Meyer (In re Nelson), 343 B.R. 671, 675 (9th Cir. BAP 2006).

3 Although not listed, bad faith is cause for dismissal.
4 Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir.
5 1999). In determining bad faith, the bankruptcy court is to
6 apply a totality of the circumstances analysis, considering
7 (1) whether the debtor misrepresented facts in her petition or
8 plan, unfairly manipulated the Bankruptcy Code, or otherwise
9 filed her chapter 13 petition or plan in an inequitable manner;
10 (2) the debtor's history of filings and dismissals; (3) whether
11 the debtor only intended to defeat state court litigation; and
12 (4) whether egregious behavior is present. Id.

13 On appeal, Debtor assumes the bankruptcy court dismissed her
14 case on grounds of bad faith by arguing that the bankruptcy court
15 abused its discretion in not considering the totality of the
16 circumstances, especially the fact that Debtor was using the
17 bankruptcy to sever her ties with Mr. Bass' business. But the
18 bankruptcy court did not invoke § 1307(c), nor did it explicitly
19 find bad faith.

20 The bankruptcy court stated that it had "looked at the
21 cases," but did not articulate any rules drawn from those cases
22 that applied to the facts before it. The case law addressing
23 facts such as those presented here is sparse, and there is no
24 controlling authority in the Ninth Circuit.

25 Some courts have held that, to the extent estate assets are
26 used for or generated by the operation of a federally prohibited
27 marijuana business, a trustee or debtor in possession may not
28 administer those assets without violating federal law. Arenas v.

1 U.S. Tr. (In re Arenas), 535 B.R. 845, 852 (10th Cir. BAP 2015);
2 In re Medpoint Mgmt., LLC, 528 B.R. 178, 184-85 (Bankr. D. Ariz.
3 2015), vacated in part, Medpoint Mgmt., LLC v. Jensen (In re
4 Medpoint Mgmt., LLC), BAP No. AZ-15-1130-KuJaJu, 2016 WL 3251581
5 (9th Cir. BAP Jun. 3, 2016); In re Johnson, 532 B.R. 53, 56-57
6 (Bankr. W.D. Mich. 2015);⁹ In re Rent-Rite Super Kegs W., Ltd.,
7 484 B.R. 799, 810 (Bankr. D. Colo. 2012). The bankruptcy court
8 here made no finding, however, that the trustee would be
9 administering the proceeds of an illegal business, and there is
10 no evidence in the record that the rents were to be used to fund
11 the plan.

12 Some courts have held that a bankruptcy filing or a plan of
13 reorganization proposed by a debtor who is involved in an illegal
14 enterprise is not in good faith, even where the debtor does not
15 have a subjective bad motive, is in legitimate need of bankruptcy
16 relief, and there is otherwise no indicia of an attempt to abuse
17 the bankruptcy process. In re Arenas, 535 B.R. at 852-53; In re
18 Rent-Rite Super Kegs W., Ltd., 484 B.R. at 809. Related to the
19 good faith analysis, some courts have concluded that a debtor
20 engaged in an illegal business who seeks bankruptcy relief comes
21 into court with unclean hands and is not eligible for relief. In

22 _____
23 ⁹In In re Johnson, the bankruptcy court acknowledged the
24 problems created when a debtor who operates a marijuana business
25 that is legal under state law seeks bankruptcy relief, noting
26 that continued operation of the marijuana business would result
27 in the court and the trustee tacitly supporting the debtor's
28 criminal enterprise. 532 B.R. at 56-57. Nevertheless, the court
ruled that it would permit the debtor to remain in chapter 13 on
the condition that he stop engaging in the marijuana business.
Id. at 58. The bankruptcy court here explicitly disagreed with
this approach.

1 re Rent-Rite Super Kegs W., Ltd., 484 B.R. at 807; cf. In re
2 Medpoint Mgmt., LLC, 528 B.R. at 186-87 (petitioning creditors
3 who knew the putative debtor was engaged in a federally
4 prohibited medical marijuana business had unclean hands and could
5 not seek relief from the bankruptcy court).

6 The bankruptcy court here made no finding of bad faith or
7 unclean hands. Further, it concluded that it was a crime for
8 Debtor to be accepting rents from Mr. Bass' business without
9 making any findings showing that all the elements of a CSA
10 violation had been established (such as the requirement that the
11 conduct be "knowing").

12 The foregoing cases suggest possible reasons for the court's
13 decision, but without specific findings and conclusions, we
14 cannot determine whether or how the court found those cases
15 applicable to the facts of this case, nor can we adequately
16 evaluate the propriety of the bankruptcy court's ruling.

17 Accordingly, on remand, the bankruptcy court should
18 articulate the findings that led it to determine that Debtor was
19 violating the CSA and what legal standard it relied upon in
20 dismissing the case.

21 **CONCLUSION**

22 For the reasons set forth above, we VACATE and REMAND.
23

24 Concurrence begins on next page.
25
26
27
28

1 TIGHE, Bankruptcy Judge, CONCURRING.

2 I concur in the memorandum and write separately to emphasize
3 (1) the importance of evaluating whether the Debtor is actually
4 violating the Controlled Substances Act and (2) the need for the
5 bankruptcy court to explain its conclusion that dismissal was
6 mandatory under these circumstances. With over twenty-five
7 states allowing the medical or recreational use of marijuana,
8 courts increasingly need to address the needs of litigants who
9 are in compliance with state law while not excusing activity that
10 violates federal law. A finding explaining how a debtor violates
11 federal law or otherwise provides cause for dismissal is
12 important to avoid incorrectly deeming a debtor a criminal and
13 denying both debtor and creditors the benefit of the bankruptcy
14 laws.

15 As the memorandum details, there are a number of situations
16 where the federal prohibition on marijuana distribution prevented
17 debtors from reorganizing or liquidating under federal bankruptcy
18 laws. Typically, these were cases where the debtor sought to
19 continue to distribute marijuana postpetition or where a trustee
20 would be asked to accept proceeds of a drug-related business,
21 situations where federal law would clearly be violated. See,
22 e.g., In re Arenas, 535 B.R. 845 (debtors themselves grew and
23 sold marijuana); In re Rent-Rite Super Kegs W., Ltd., 484 B.R.
24 799 (debtor's ongoing postpetition leases with marijuana-growing
25 tenant exposed debtor to criminal liability and primary asset to
26 forfeiture).

27 This Debtor's plan did not necessarily require the rental
28 income from the dispensary to fund the proposed payments. It

1 provided for minimal plan payments until a sale motion could be
2 filed and the Debtor's real property sold. The sale of Debtor's
3 real property would have been simply a liquidation of legal
4 estate assets. In fact, but for the marijuana-related proceeds,
5 the sale of real property to fund a plan is a common scenario
6 because of the ability in bankruptcy to sell property subject to
7 a bona fide dispute free and clear of a lien. See § 363(f)(4).

8 If, on remand, the basis for dismissal is the court's
9 concern that Debtor committed a crime by receiving postpetition
10 rent derived from a marijuana business, an explicit finding of
11 the facts required for criminal liability is needed. Section
12 856(a)(2) of Title 21 prohibits a person with a premises from
13 knowingly and intentionally allowing its use for the purpose of
14 distributing drugs. United States v. Tamez, 941 F.2d 770, 774
15 (9th Cir. 1991). A violation of section 856(a) also requires a
16 showing that a primary or principal use of the premises is for
17 drug distribution or manufacture. See United States v. Mancuso,
18 718 F.3d 780, 794-96 (9th Cir. 2013). Any prosecution of this
19 crime would require a showing that Debtor knew that Mr. Bass
20 leased the property to operate a marijuana dispensary, and that
21 she intended to allow that use.

22 The Debtor's personal knowledge is an especially critical
23 inquiry for an elderly, blind woman residing in assisted living
24 with an attorney-in-fact in charge of the lease. Although Debtor
25 stated in her second declaration in support of the motion to
26 reject the lease that Bass was operating a medical marijuana
27 dispensary, the record does not indicate when Debtor became aware
28 of this. She stated in that declaration that she did not want to

1 be involved in leasing to a marijuana business.

2 Any prosecution of 21 U.S.C. § 856(a)(2) would need to prove
3 beyond a reasonable doubt that Debtor herself “knowingly and
4 intentionally” leased the property where the marijuana is
5 distributed. See *Elonis v. United States*, 135 S. Ct. 2001, 2009
6 (2015) (general rule is that a guilty mind is a necessary element
7 in the proof of every crime); *Morrisette v. United States*, 342
8 U.S. 246, 252 (1952) (“wrongdoing must be conscious to be
9 criminal”). Debtor’s son’s knowledge in acting for her cannot be
10 imputed to Debtor for purposes of showing criminal knowledge and
11 intent. Nor can Mr. Bass’ intent and knowledge be imputed to the
12 Debtor.

13 Bankruptcy courts have historically played a role in
14 providing for orderly liquidation of assets, equal payment to
15 creditors, and resolution of disputes that otherwise would take
16 many years to resolve. Although debtors connected to marijuana
17 distribution cannot expect to violate federal law in their
18 bankruptcy case, the presence of marijuana near the case should
19 not cause mandatory dismissal.¹ I believe this focus on specific
20 federal violations along with the further analysis required by
21 the lead memorandum properly address the challenge of a marijuana
22 related case.

25 ¹Cf. *Northbay Wellness Grp., Inc. v. Beyries*, 789 F.3d 956,
26 960-61 (9th Cir. 2015) (bankruptcy court abused its discretion by
27 failing to conduct the balancing test required by doctrine of
28 unclean hands, and instead determining that unclean hands applied
solely because the creditor had engaged in marijuana
distribution).