Dated: February 04, 2013
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re JAMES V. NEAL CONNIE I. NEAL	Case No. 12-25439-L Chapter 7

NORMAN P. HAGEMEYER,
Chapter 7 Trustee,

Plaintiff,

v. Adv. Proc. No. 12-00654

PEACHY ADVENTURES, LLC,
a Montana Limited Liability Company
JAMES V. NEAL and
CONNIE I. NEAL,

Defendants.

ORDER GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS

BEFORE THE COURT is the Expedited Motion for Judgment on the Pleadings, Injunctive Relief and Turnover, filed by the Plaintiff, Norman Hagemeyer, Chapter 7 Trustee. The Trustee

seeks authority to sell the assets of a single member limited liability company owned by the Debtors. The Debtors have objected that the Trustee must first seek the assistance of the state courts of Montana.

BACKGROUND AND PROCEDURAL FACTS

The Debtors filed a voluntary petition under Chapter 7 of the Bankruptcy Code on May 5, 2012. Among their listed assets is Peachy Adventures, LLC. Mr. Hagemeyer was appointed Chapter 7 trustee by order entered May 24, 2012. The Trustee commenced this adversary proceeding by filing a complaint on October 26, 2012, seeking turnover of the assets of Peachy Adventures and authority to liquidate those assets for the benefit of the bankruptcy estate. Dkt. No. 1. The Defendants filed a joint answer on December 3, 2012, admitting their interest in Peachy Adventure, but denying the Trustee's authority to order the liquidation of its assets. The Defendants maintain that the Trustee may only sell the Debtors' membership interest in the limited liability company. Dkt. No. 9.

The Motion for Judgment on the Pleadings, filed December 4, 2012, recites that the Debtors-Defendants, James V. and Connie I. Neal, hold the sole membership interest in Peachy Adventures as joint tenants with right of survivorship. It further recites that Peachy Adventures holds clear title to two assets, a 2002 Vantare Prevost motorhome and a 2006 Harley Davidson motorcycle. The Trustee seeks to liquidate the Debtors' interest in Peachy Adventures by liquidating its assets. The Trustee asserts that he has sole authority to act for Peachy Adventures. Dkt. No. 10.

As the result of a prior hearing, the Debtors were ordered to turn over the motorhome and motorcycle to the Trustee or his designated representative. Dkt. No. 15. The parties were invited to submit authorities to the court on the question of whether or not the Trustee may sell the property

of Peachy Adventures without first obtaining dissolution of the limited liability company pursuant to Montana Law.

The Debtors maintain that the Trustee must seek dissolution of the limited liability company and sale of its assets through the Montana court system. The Debtors rely upon Montana Code Annotated § 35-8-902. That section provides in pertinent part:

> (2) On application of a transferee of a member's interest, a district court may determine that it is equitable to wind up the company's business:
>
> > (b) at any time, if the company was at will at the time that the applicant became a transferee by member dissociation, transfer, or entry of a charging order that gave rise to the transfer.

The Debtors assert that only a Montana court may order the dissolution and winding up of the company's business.

The Trustee asserts that he succeeded to the membership interests in Peachy Adventures pursuant to 11 U.S.C. § 541(a). He desires to sell the assets of the company for the benefit of creditors of the bankruptcy estate, and has provided the court with a copy of an opinion written by Bankruptcy Judge Scott W. Dales, *In re Hopkins*, No. DG 10-13592 (Bankr. W.D. Mich. January 2, 2013). In that opinion, Judge Dales held that although a trustee in bankruptcy may not sell assets of a non-debtor limited liability company, he may be authorized to act as the sole member of the company and sell its assets if applicable law authorizes the members of a limited liability company to sell property. In *Hopkins* the trustee was authorized to sell the real property belonging to a limited liability company owned by the debtor, and, after paying the costs of sale and the creditors of the limited liability company, before distribute any remaining proceeds to the bankruptcy estate.

The Trustee attached a copy of the Articles of Organization and Operating Agreement for Peachy Adventures to his complaint. The Articles of Organization indicate that existence of the

company is perpetual. Arts. IV. Thus, it is an "at-will" limited liability company for purposes of the Montana Limited Liability Company Act. Mont. Code Ann. § 35-8-102(2). The Operating Agreement provides that the Member may remove and elect a Manager by majority vote. The Manager is to conduct the business of the company only as directed by the Member, and may not sell or transfer the assets of the company without Member authorization. Section 8(a). Other provisions of the Operating Agreement will be referenced as needed.

ANALYSIS

A motion for judgment on the pleadings is brought pursuant to Rule 12(c) of the Federal Rule of Civil Procedure, incorporated at Rule 7012 of the Federal Rules of Bankruptcy Procedure. The motion is made "after the pleadings are closed – but early enough not to delay trial." All well-pleaded material allegations of the pleadings of the opposing party are taken as true. The motion may be granted only if the moving party is nevertheless clearly entitled to judgment. *JPMorgan Chase Bank, N.A. v. Winget*, 513 F.3d 577, 581 (6th Cir. 2007). The parties agree that the facts are as set forth in the complaint. They disagree about the legal consequences of those facts.

This case presents the question of the rights of the trustee in bankruptcy when individual debtors who own the sole membership interest in a limited liability company become debtors in bankruptcy. The parties did not offer for my consideration any decision under Montana law, and after diligent search, I have not been able to locate one either. In addition to the *Hopkins* case provided by the Trustee, I have considered two additional decisions.

The first is *In re Albright*, 291 B.R. 538 (Bankr. D. Colo. 2003) (decided under Colorado law). The debtor in *Albright* was the sole member and manager of a Colorado limited liability company that owned real property in Colorado. The limited liability company was not a debtor in

bankruptcy. The Trustee contended that because the debtor was the sole member and manager when she filed bankruptcy, he succeeded to control of the company, with authority to cause the company to sell its assets and distribute the net sales proceeds to the bankruptcy estate. The debtor argued that at most the trustee was entitled to a charging order against her interest, and that he was not authorised to sell property of the company. Pursuant to Colorado law, however, the interests of members of a limited liability company can be transferred or assigned. Upon consent of the other members, the transferee is entitled to participate in the management of the company. *Id.* at 540 citing Colo. Rev. Stat. §7-80-702. Because there were no other members of the company, the bankruptcy judge held that unanimous written approval of the transfer was unnecessary. The debtor's bankruptcy filing effectively assigned her entire membership interest to the trustee in bankruptcy, including her management rights. *Id.*

The second case that I have considered is *In re Modanlo*, 412 B.R. 715 (Bankr. D. Maryland 2006), *aff'd* 266 Fed. Appx. 272, 2008 WL 481957 (4th Cir. 2008). The question before the bankruptcy court in *Modanlo* was whether a trustee in bankruptcy might resuscitate a single member Delaware limited liability company that was dissolved upon the filing of the debtor/member's bankruptcy petition. Underlying this was the question of whether the trustee in bankruptcy succeeded to the debtor's management rights or only his economic interests in the limited liability company. The trustee in bankruptcy sought to resuscitate the company in order to call a meeting of shareholders of a corporation in which the company was the controlling shareholder. The debtor argued, based on the Delaware Limited Liability Company Act, that upon the filing of his bankruptcy petition, his ability to act on behalf the company terminated, and thus neither he nor the trustee could act on behalf of the company. The court found that the trustee in bankruptcy, acting

as the "personal representative" or legal representative of the debtor/member, effectively revoked dissolution and appointed himself manager as provided in the Delaware Act. The Delaware Act defined "personal representative" with respect to a natural person as "the executor, administrator, guardian, conservator, or other legal representative thereof." Del. Code Ann. Tit.6, § 18-101. Despite the debtor's argument that this definition does not include the trustee in bankruptcy, the court held that "a bankruptcy trustee is the successor to property of the debtor's estate and is the legal representative of the estate." *Modanlo*, 266 Fed. Appx. at 724, citing 11 U.S.C §§ 541(a)(1), 704(1), and *In re Baer Group, Inc.*, No. 91-5-6020-JS, 1997 WL 912291, at *10 (D. Md. Dec. 01, 1997). The court noted that the trustee in bankruptcy is "'the proper party in interest, and the only party with standing to prosecute causes of action belonging to the estate.'" *Modanlo*, 266 Fed. Appx. at 724, citing *In re Eisen*, 31 F.3d 1447, 1451 n.2 (9th Cir. 1994). As a result, the court concluded that "personal representative" and "legal representative" should be read to include the trustee in bankruptcy. *Modanlo*, 266 Fed. Appx at 724-25. The court further found, to the extent that there was a distinction, that the trustee in bankruptcy is also the personal/legal representative of the debtor with respect to assets and causes of action belonging to the estate. *Id.* With respect to the governance or management authority of the limited liability company, the court focused on the distinction between multi-member companies and single member companies. "By definition," it said, 'there can be no remaining members of a single member LLC ... whose personal relationships (among members) could be compromised by being forced to accept substitute performance from a stranger (bankruptcy trustee)." *Id.* at 727. The court relied heavily upon *Albright*, even though the Delaware and Colorado statues are different in material ways, in deciding that the trustee in bankruptcy for a single member limited liability company may exercise the governance rights of a

member.

The three cases taken together articulate a practical approach to the unique circumstance of a single member limited liability company whose sole member is a debtor in bankruptcy. These cases cannot be read to require that the trustee in bankruptcy succeed to the governance rights of a member in all cases. In other words, this result does not flow from the mere fact that the membership interest becomes property of the bankruptcy estate pursuant to section 541(a) of the Bankruptcy Code. When a debtor holds a membership interest in a multi-member company, the remaining members will ordinarily continue the management of the company, while the bankruptcy estate will enjoy the economic benefits of the membership interest. Where the debtor holds the only membership interest, however, the trustee in bankruptcy is the only person who can assure that management rights are exercised for the benefit of the estate and its creditors.

The Montana Limited Liability Company Act is similar to the Delaware Act in providing that a person is dissociated from a limited liability company when he becomes a debtor in bankruptcy (Mont. Code Ann. § 35-8-803(7)(a)), and upon dissociation loses his right to participate in the management and conduct of the company's business (Mont. Code Ann. § 35-8-805(2)(a)). Upon a member's dissociation in an at-will company (like Peachy Adventures), the company is to cause the dissociated members distributional share to be purchased. Mont. Code Ann. § 35-8-805(1)(a). There is no requirement that a company be dissolved upon dissociation of a member, however. Pursuant to the Montana Act, a limited liability company is dissolved and its affairs must be wound up when an event specified in the operating agreement occurs. Mont. Code Ann. § 35-8-901. After dissolution, the company continues for the purpose of winding up its business. Mont. Code Ann. § 35-8-901(2). The winding up of a limited liability company is accomplished "by the members or

managers who have authority under 35-8-304, or for wrongful conduct or other cause, by the district court." Mont. Code Ann. 35-8-903(1). The persons winding up the affairs of a limited liability company may, among other things, pay the debts of the company and distribute its assets. Mont. Code Ann. 35-8-903(2)(e).

A careful reading of the Montana Act indicates that it, like the Colorado and Delaware Acts, does not make specific provision for the winding up of the affairs of a single member limited liability company upon the filing of a bankruptcy petition. The Montana Act contains a number of safeguards for *other* members of a company when one of the members is dissociated by bankruptcy. There are, of course, no other members to be protected in a single member company. The Act also includes a provision for judicial dissolution when there has been wrongful conduct or other cause. Judicial dissolution may be necessary when the members, or members and a dissociated member, of a limited liability cannot agree or when there has been evidence of wrongdoing. The intent of this provision is to safeguard the creditors and other members of the company.

The particular Operating Agreement for Peachy Adventures, unlike the Montana Act itself, does provide that the company is dissolved upon a dissociation. Section 22(b). The Operating Agreement further provides that upon dissolution, the assets be sold and the proceeds distributed to the creditors of the company and then to the member. Section 23.

When the Operating Agreement and the Montana Act are read together, it is clear that an event of dissociation occurred when the Debtors filed their bankruptcy petition; that this resulted in the dissolution of the company pursuant to the Operating Agreement; and that the process of winding up the affairs of the company should proceed. In the context of the pending bankruptcy case, the Trustee, as the legal representative of the bankruptcy estate and of the Debtors with respect

to assets of the bankruptcy estate, is the only person who can now act with respect to the membership interest in Peachy Adventures. The Debtors ceased to have that right when they filed their bankruptcy petition. There is no other person with authority to undertake the winding up of the limited liability company. A judicial dissolution is not necessary and would be unduly burdensome and expensive because dissolution has already occurred according to the Operating Agreement; there are no other members to be protected; provision may be made to protect any creditors of the company; and there is already a court with jurisdiction to supervise this process.

CONCLUSION

Accordingly and for the foregoing reasons, the Motion for Judgment on the Pleadings is **GRANTED.** The Trustee is authorized to take steps to wind up the affairs of Peachy Adventures. This includes the identification of the creditors of Peachy Adventures, if any; the sale of its assets; the payment of the costs of sale and creditors of the company; and the distribution of the net proceeds to the bankruptcy estate.

cc: Norman P. Hagemeyer, Trustee
Russell W. Savory, Attorney for the Trustee
All Defendants
Eugene G. Douglass, Attorney for the Defendants
United States Trustee