

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

FULCRUM BIOENERGY, INC.,

Debtor.

Chapter 11

Case No.: 24-12008 (TMH)

Confirmation Date: April 14, 2025

Confirmation Time: 10:00 a.m. (ET)

**STATE OF NEVADA, EX REL. ITS DEPARTMENT OF TAXATION’S MOTION
FOR ORDER LIFTING STAY AND ALLOWING ADMINISTRATIVE
TAX MATTER TO PROCEED ON ORDER SHORTENING TIME**

COMES NOW, the State of Nevada, ex rel. its Department of Taxation (“Department”), by and through counsel Aaron D. Ford, Attorney General, and Kayla D. Dorame, Deputy Attorney General, hereby moves this Court for an order lifting the stay to permit Fulcrum Bioenergy, Inc.’s (“Fulcrum” or “Debtor”) pending administrative tax case challenging the audit deficiency – in relation to Debtor’s identification of the Department’s claims as “undetermined” – to proceed through the administrative, and potentially judicial, processes available under Nevada law.¹

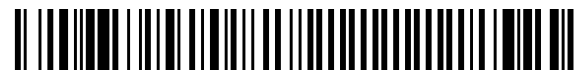
This Motion is made pursuant to Debtor’s statement in its Memorandum of Law in Support of Confirmation of its Amended Chapter 11 Plan of Liquidation that it intends to file an Objection to the Department’s claims.² This Motion is further based on all pleadings and paper filed herein, the following memorandum of points and authorities, as well as any oral argument this Court may entertain at the time of hearing regarding this motion.

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¹ See Debtor’s Amended Schedules of Assets and Liabilities, Doc. 304.

² See Doc. 528, par. 105 at p.38.



MEMORANDUM OF POINTS AND AUTHORITIES

I. PROCEDURAL AND FACTUAL BACKGROUND

When this bankruptcy case was filed, the Department's audit process had already commenced. When the Department received notice of the bankruptcy, the Debtor was aware of the audit deficiency and requested redetermination of the deficiency amount.

The Department sent Debtor a Notice of Audit Determination on August 30, 2024.³ Thereafter, Debtor had forty-five (45) days to file a Petition for Redetermination challenging the audit results.⁴ However, the Department was also assessing a Jeopardy Deficiency and therefore, Debtors only had ten (10) days to petition the department for a redetermination.⁵ Debtor submitted a Petition for Redetermination dated September 9, 2024.⁶ That same day, Debtors also filed for bankruptcy, and therefore, the administrative process was stayed pending the outcome of the bankruptcy.⁷

If the Department and the Debtor are unable to resolve the petition, the matter will be referred to an administrative law judge ("ALJ").⁸ Should the Debtor not be satisfied with the ALJ's decision, Debtor can appeal the decision to the Nevada Tax Commission ("NTC").⁹ Thereafter, the final decision can be the subject of a petition for judicial review pursuant to NRS 233B.130.

The Department and its ALJs are the specialized tribunal that hears state tax matters including cases involving Chapter 360 of the NRS and NAC. Debtors have attached additional information to their petition, however, due to the stay, the Department cannot issue its Order

³ Exhibit A, containing only the first page of the Notice of Audit Determination.

⁴ Nevada Revised Statutes ("NRS") 360.360.

⁵ See Exhibit A and NRS 360.414.

⁶ Exhibit B, containing only the first page of the petition for redetermination.

⁷ See Doc. 1.

⁸ Nevada Administrative Code ("NAC") 360.706(4).

⁹ NRS 360.245 and NAC 360.172.

Regarding Petition for Redetermination. Should Debtor continue to challenge the deficiency, the case will be referred to an ALJ for the purposes of holding an administrative hearing.¹⁰ Although Section 362(b)(9) of the Code allows the Department to issue the revised billing and explanation regarding whether any changes will be made to the deficiency, the stay needs to be lifted to allow the matter to proceed to hearing.¹¹

II. ARGUMENT

a. This Court Should Permit the State Tax Administrative Proceeding to Proceed Under the Doctrine of Permissive Abstention Pursuant to 28 U.S.C. § 1334.

Pursuant to 28 U.S.C. § 1334(c)(1), a bankruptcy court may, in its discretion, abstain from hearing matters over which it otherwise has jurisdiction “in the interest of justice, or in the interest of comity with State courts or respect to State law.”¹² Discretionary abstention is appropriate in both core and noncore cases.¹³

Pursuant to Ninth Circuit law, courts consider twelve nonexclusive factors in determining whether discretionary, or permissive, abstention is appropriate. These factors are:

1. The effect or lack thereof of efficient administration of the estate;
2. The extent to which state law issues predominate over bankruptcy issued;
3. The difficulty or unsettled nature of applicable state law;
4. The presence of a related proceeding commenced in state court

¹⁰ NAC 360.706(4).

¹¹ See *In re Delpit*, 18 F.3d 768, 770-71 (9th Cir. 1994) (explaining that a taxing authority commences an audit against a taxpayer/debtor and therefore the stay needs to be lifted to allow the parties to continue with the administrative proceedings).

¹² 28 U.S.C. § 1334(c)(1); see also *In re Colarusso*, 295 B.R. 166, 178 (B.A.P. 1st Cir. 2003), *aff'd*, 382 F.3d 51 (1st Cir. 2004) (“Courts have broad discretion to abstain from hearing state law claims whenever appropriate ‘in the interest of justice, or in the interest of comity with State courts or respect for State law.’” (citation omitted)); see *Massey Energy Co. v. West Virginia Consumers for Justice*, 351 B.R. 348, 353-354 (Bankr. E.D. Va. 2006) (stating that the court would voluntarily abstain if mandatory abstention did not apply).

¹³ See *In re Telluride Income Growth, L.P.*, 364 B.R. 390, 398 (B.A.P. 10th Cir. 2007) (“Section 1334(c)(1) permits abstention from core matters and non-core matters when it is in the ‘interest of justice,’ judicial economy, or respect for state law.”); See *In re Dees*, 369 B.R. 676 (Bankr. N.D. Fla. 2007) (explaining that, when the dispositive question is determined by tax law, non-bankruptcy issues predominate and that the complexity (e.g. law that is well-settled) of the dispositive tax question weighs in favor of abstention).

- or other non-bankruptcy court;
- 5. The jurisdictional basis, if any, other than 28 U.S.C. § 1334;
- 6. The degree of relatedness or remoteness of the proceeding to the main bankruptcy case;
- 7. The substance rather than form of an asserted “core” proceeding;
- 8. The feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court;
- 9. The burden of [the bankruptcy’s court] docket;
- 10. The likelihood that commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties;
- 11. The existence of a right to a jury trial; and
- 12. The presence in the proceeding of nondebtor parties.¹⁴

Other identified factors include “the asset and liability structure of the debtor”, “the length of time required for trial and decision”, and potential prejudice to the taxing authority responsible for collection from inconsistent assessments.”¹⁵ There is also a “general proposition that a bankruptcy court should defer a complicated, technical dispute to a specialized forum.”¹⁶ No one factor is dispositive and the decision to abstain is not dictated merely by more of the listed factors weighing on one side.¹⁷

The factors weigh in favor of abstention.

i. Efficient Administration of the Estate

This inquiry centers on whether adjudicating the matter will negatively impact the efficient administration of the estate.¹⁸ Exhausting the administrative remedies will allow an

¹⁴ *In re Lazar*, 200 B.R. 358, 372-373 (Bankr. C.D. California 1996).

¹⁵ *In re Hunt*, 95 B.R. 442, 445 (Bank. N.D. Texas 1989).

¹⁶ *Id.* at 445 (citation omitted).

¹⁷ See *In re Chicago, Milwaukee, St. Paul Pacific R. Co.*, 6 F.3d 1184, 1189 (7th Cir. 1993) (“Courts should apply these factors flexibly, for their relevance and importance will vary with the particular circumstances of each case, and no one factor is necessarily determinative. At the same time, because section 1334(c)(1) is concerned with comity and respect for state law, whether a case involves unsettled issues of state law is always significant.”); *In re Lazar*, 200 B.R. 358, 373 (Bankr. C.D. Cal. 1996) (“No single factor is dispositive, and the decision does not turn on counting the number of factors on each side. Rather, a court must consider each of the factors and . . . weigh its importance in the decision on discretionary remand.”); See *In re World Financial Svcs. Ctr., Inc.*, 64 B.R. 980, 989 (Bankr. S.D. Cal. 1986) (abstaining and stating, “this entire adversary proceeding is founded upon the application and interpretation of California state law” which was found to be “unsettled and require[ing] state law interpretation.”).

¹⁸ See *Hopkins v. Plant Insulation Co.*, 342 B.R. 703, 711 (Bankr. D. Del. 2006).

ALJ and then the NTC to determine whether the deficiency should be upheld or adjusted and then this court will not have to use its own valuable resources. This particular matter is a Nevada issue and should proceed next to an ALJ, the specialized tribunal to hear such matters. In the event that the Debtor does not agree with the decision of the ALJ, the Debtor would then appeal the decision to the NTC as provided in NRS 360.245. Therefore, this factor weighs in favor of abstention.

ii. State Law Issues Predominate over Bankruptcy Issues

The issues are limited to the application of Nevada tax statutes and stem from an audit conducted by the Department, an Executive Branch agency of the State of Nevada.¹⁹ The issues in this case, primarily regarding the abatement issue, should be decided by the tribunals in Nevada. Nevada State law is very particular regarding its tax statutes and abatement statutes. Therefore, this factor weighs in favor of abstention.

iii. Difficulty or Unsettled Nature of Applicable State Law

The issue involved in this matter is a difficult question on whether the equipment purchased during the audit timeframe is subject to the tax abatement or if the tax is owed to the Department. State tax abatements are state issues. Therefore, the statutory interpretation and all the related facts are difficult in nature because this is a state issue rather than a federal one. Therefore, this factor weighs in favor of abstention.

iv. Presence of Related Non-bankruptcy Proceeding

When the Department commenced the audit procedures, it commenced an action or proceeding against Fulcrum.²⁰ When Fulcrum filed its petition for redetermination, it availed

¹⁹ See *In re Kessler*, 430 B.R. 155, 167 (Bankr. M.D. Penn. 2010) (“I agree with Builder. Although the issues affect property of the estate, the mere impact on the estate is not enough to change this issue from one of purely state law to a mix of state and federal bankruptcy law. I find that this factor weighs heavily in favor of abstention.”).

²⁰ See *In re Delpit*, 18 F.3d 768, 770-71 (9th Cir. 1994) (finding that when the IRS initiates a proceeding against a taxpayer with an audit, subsequent hearings and appeals are “continuation[s]” of an administrative proceeding “to recover a claim against the debtor” and are stayed by Section 362(a)(1)).

itself of the available administrative remedy challenging the deficiency.²¹ The administrative proceeding, if allowed to go forward, will resolve the Debtor's dispute on the Department's claim as stated in its Schedules.

The related non-bankruptcy proceeding simply must be pending in "another forum."²² When courts abstain, "it is because of a determination that important policy grounds such as federalism or respect for state processes make it appropriate or necessary that the matter be resolved in a state tribunal."²³ In addition, "under proper circumstances, it is more appropriate to have a state court hear certain matters of state law."²⁴ In this case, it is more appropriate for the state tribunals to hear these matters of state law. Therefore, this factor weighs in favor of abstention.

v. Jurisdictional Basis, Other Than 11 U.S.C. § 1334

There is no jurisdictional basis other than 11 U.S.C. § 1334 and Section 505. Indeed, the Tax Injunction Act deprives Federal Courts of jurisdiction over state tax matters.²⁵ Therefore, this factor weighs in favor of abstention.

vi. Degree of Relatedness or Remoteness of the Proceeding to the Main Bankruptcy Case

Although the confirmation of the plan appears to qualify as a core proceeding, the tax issue is present merely because the bankruptcy case was filed.²⁶ "As noted in the discussion of factor one, the bankruptcy estate will not be negatively impacted if this dispute is decided in state court and the plan is later modified to reflect the outcome of the proceeding. While this proceeding is, therefore, related to the main bankruptcy case, the mere determination of priority

²¹ NRS 360.370; NRS 360.390; NAC 360.706.

²² *In re Hospitality Ventures/Lavista*, 314 B.R. 843, 850 (Bankr. N.D. Ga. 2004).

²³ *Id.*

²⁴ *Id.*

²⁵ 28 U.S.C. §1341.

²⁶ 28 U.S.C. §157(b)(2)(L).

itself is relatively remote and creates no great urgency for these issues to be decided by this Court.”²⁷ Therefore, it is understood that confirmation of the plan to be decided in April 2025, proceeding with the administrative process will not impact the plan as it could be later modified. Therefore, this factor weighs in favor of abstention.

vii. The Substance Rather than the Form of an Asserted Core Proceeding

The form of the proceeding is the confirmation of the plan and in this form, appears to be a core proceeding. The substance of the proceeding is to have the plan confirmed as is, however, there is a dispute over the Department’s claim as identified in Debtor’s schedules. This is essentially a challenge to the Department’s audit findings challenging the interpretation and application of Chapter 360 of the NRS (state law). Therefore, this factor weighs in favor of abstention.

viii. The Feasibility of Severing State Law Claims from Core Bankruptcy Matters

Respecting state law and lifting the stay will allow the pending administrative matter to proceed in the specialized Nevada administrative forum. The tax law issues in this dispute involve questions of interpretation and application of Chapter 360 of the NRS to Fulcrum, a Nevada business, by the Department, a Nevada state agency.²⁸ Therefore, this factor weighs in favor of abstention.

ix. The Burden of the Bankruptcy Court’s Docket

Allowing the administrative proceedings to proceed in the specialized forum that hears such matters will undoubtedly lessen the burden on this Court’s docket by having the

²⁷ *In re Kessler*, 430 B.R. 155, 168 (Bankr. M.D. Penn. 2010).

²⁸ *See In re Enron Corp.*, 296 B.R. 505, 509 (Bankr. C.D. Cal. 2003) (concluding, “[w]hen a state court proceeding sounds in state law and bears a limited connection to a debtor’s bankruptcy case, abstention is particularly compelling”).

administrative tribunals hold the evidentiary hearing, create a record and issue a final decision. Therefore, this factor weighs in favor of abstention.

x. Likelihood that Commencement of the Proceeding in Bankruptcy Court Involves Forum Shopping

Fulcrum attempted to dodge the remaining process of the audit (the redetermination phase) by commencing this bankruptcy on the same day the petitioned the Department for redetermination. The Department has records to prove that the tax is owed by the Debtors. However, it is apparent that Debtors do not want to develop the record that would be created during the redetermination and an administrative evidentiary hearing. It is also apparent that Fulcrum is attempting to evade its tax liability by filing for bankruptcy the same day it submitted to the Department its petition for redetermination. Fulcrum clearly wants this Court to determine the tax liability. All of this tends to show that Fulcrum was forum shopping. Therefore, this factor weighs in favor of abstention.

xi. The Existence of a Right to a Jury Trial

The administrative proceedings do not offer a jury trial. The hearing presided over by an ALJ is akin to a bench trial, followed by an appeal to the NTC which can reverse, affirm or modify the administrative law judge's decision.²⁹ The NTC's decision is thereafter reviewable by the courts with an appellate standard of review.³⁰ Therefore, this factor weighs in favor of abstention.

xii. Presence in the Proceedings of Non-debtor Parties

The only parties to the administrative tax proceedings are the Department (a non-debtor) and Fulcrum. Therefore, this factor weighs in favor of abstention.

²⁹ NRS 360.245(4).

³⁰ NRS 233B.135.

b. The Factors Weigh in Favor of Abstention

Considering all of the above factors, and weighing them appropriately, this Court should abstain from hearing this tax matter. At this time, the plan is unsure how much each class will get as each class is impaired except for Class 1 identified as Other Priority Claims.³¹ Further, based on the amount owed to all of its creditors, compared to how much money was acquired during the sale, it is unrealistic to think each creditor will get paid anything more than a nominal amount. Moreover, by allowing the Department and Debtor to proceed with the administrative process, this will give all creditors and this Court a better understanding of how much money is actually owed.

c. Debtor has Administrative Remedies Available That Can Be Pursued Without Having to First Pay the Audit Deficiency

In *Peter D. Fyfe v. United States of America*, 186 B.R. 290 (Bankr. N.D. Ga. 1995), the debtor sought determination of the amount of his tax liability. The court decided, in part, “this court abstains . . . until such time as the Debtor shows that he has exhausted all administrative and legal remedies to resolve the disputed claim that are available to him without having to first pay the claim.” *Id.* at 293.

In this case at hand, Fulcrum has submitted a petition for redetermination challenging the audit deficiency issued by the Department. Therefore, Fulcrum has availed itself of the available administrative remedies—remedies that do not require payment of the deficiency or claim before that can be pursued. Such remedies include a hearing before an ALJ and an appeal to the NTC. It is not until Fulcrum pursues a petition for judicial review, pursuant to NRS 233B.130, that it will have to pay any portion of the deficiency. Pursuant to NRS 360.395, Fulcrum would be required to at least enter into a payment plan with the Department before

³¹ See Doc 415-1 at 19.

pursuing a petition for judicial review.³² Fulcrum should be required to exhaust its administrative remedies in accordance with the reasoning in the *Peter D. Fyfe* case, as well as to respect the Department's original jurisdiction of such tax matters.

III. CONCLUSION

For all the reasons above, this Court should abstain and lift the stay allowing the administrative tax matter to proceed.

DATED this 11th day of April, 2025.

AARON D. FORD
Attorney General

By: /s/ /s/ Marcianelle C. Villanueva-Escoli
MARCIANELLE C. VILLANUEVA-ESCOLIN
Nevada Bar No. 15108
Deputy Attorney General
MARY M. HUCK
Nevada Bar No. 12031
Senior Deputy Attorney General
State of Nevada
Office of the Attorney General
1 State of Nevada Way, Suite 100
Las Vegas, NV 89119
(702) 486-3125 (phone)

*Attorneys for the State of Nevada,
Ex rel. its Department of Taxation*

³² *C.f. Peter d. Fyfe*, 186 B.R. 293 (referencing a requirement to pay the deficiency or claim in full in order to continue to contest it).