IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 18-cv-3245-WJM
Bankruptcy Case Nos. 18-14330-MER, 18-14333-MER, and 18-14334-MER

In re:

WAY TO GROW, INC.
PURE AGROBUSINESS, INC.
GREEN DOOR AGRO, INC.

Debtors.

WAY TO GROW, INC., *et al*.,

Appellants,

v.

COREY INNISS

Appellee.

ORDER AFFIRMING DECISION OF BANKRUPTCY COURT

Way to Grow, Inc. ("Way to Grow"), Pure Agrobusiness, Inc. ("Pure Agro"), and Green Door Agro, Inc. ("Green Door") (together, "Debtors"), appeal the bankruptcy court's decision to dismiss their Chapter 11 petitions "for cause" given that Debtors' business relies on selling equipment and supplies to persons and entities growing marijuana, and Debtors know that the equipment and supplies will be used to grow marijuana. Such conduct is legal under the laws of Colorado and California, where Debtors operate, but remains illegal under federal law.

For the reasons explained below, this Court affirms the bankruptcy court as to Way to Grow and Green Door for the reasons explained by the bankruptcy court. As to

Pure Agro, the Court also affirms, but for a slightly different reason evident in the record.

I. STANDARD OF REVIEW

In reviewing a bankruptcy court's decision, the district court normally functions as an appellate court, reviewing the bankruptcy court's legal conclusions *de novo* and its factual findings for clear error. 28 U.S.C. § 158(a); *In re Warren*, 512 F.3d 1241, 1248 (10th Cir. 2008).

II. BACKGROUND[1]

A. Origins of the Dispute

Appellee Corey Inniss ("Inniss") founded Way to Grow in Fort Collins in 2002 and eventually opened six more retail stores throughout Colorado. *Way to Grow*, 597 B.R. at 115. In Debtors' words, Way to Grow's business model was "to market its stores as garden centers and carry high-end soil, nutrients, lights, and equipment to grow plants in both an indoor and outdoor setting." (ECF No. 27 at 7.)

In 2014, a man named Richard Byrd (not a party here) founded and became CEO of Pure Agro, which operates as a holding company. (*Id*. at 8.) In 2015, Pure Agro "acquired [Green Door], a Los Angeles-based hydroponic and gardening retail store." (*Id*.)

In January 2016, Inniss sold Way to Grow to Pure Agro for $25 million, with $2.5

[1] The record on appeal has been filed in a disorganized fashion. (*See* ECF Nos. 23, 26.) Also, attached to their merits briefs, the parties have filed separate appendices of record excerpts, each with a set of page numbers that differs from the record—while sometimes still citing the record, rather than their appendices, in their briefs. For simplicity when citing to the record in these circumstances, the Court will cite directly to the CM/ECF docket number and page number where the cited material can be found, regardless of whether it is characterized as a part of the record or an appendix. Also, for matters not in dispute, the Court will cite to the parties' briefs where the appropriate record citations may be found. *All* ECF page citations, whether to the record or to a brief, are to the page number in the CM/ECF header, which rarely matches the document's internal pagination.

million paid upfront and the remaining $22.5 million coming by way of a promissory note in Inniss's favor, secured by each Debtor's property (then-existing and after-acquired), accounts receivable, and inventory. *Id*. Inniss also received 12,500 shares of Pure Agro's common stock, amounting to a little more than 21% of Pure Agro's outstanding shares. *Id*.

Way to Grow's "operations . . . remained largely unchanged" after Pure Agro's acquisition, "continu[ing] to market and sell high-end nutrients, soil, and equipment for growing plants in a soil-based or water-based medium." (*Id*. at 10.) Green Door "operated in a similar manner, selling similar products and gardening supplies in a retail setting." (*Id*.)

Sometime in 2017, Debtors defaulted on the promissory note. (*Id*. at 10–11.) Debtors blame Inniss (who continued as a consultant) and his ex-father-in-law (who became CEO of Pure Agro) for this default, accusing them of "inappropriate activities designed to strip the future cash flow away from [Way to Grow] and into their own pockets." (*Id*.) In any event, in April 2018, Inniss filed a lawsuit in Larimer County (Colorado) District Court on his own behalf, and derivatively on behalf of Pure Agro, to appoint a receiver over Debtors. *Way to Grow*, 597 B.R. at 115.

B. Bankruptcy Proceedings

Before the state court could rule on Inniss's request for a receiver, each Debtor filed a Chapter 11 bankruptcy petition, and the three petitions were jointly administered. *See id*. at 114. Debtors soon moved the bankruptcy court for permission to spend cash collateral to meet ongoing business expenses, representing that they "generally sell equipment for indoor hydroponic gardening and related supplies. . . . While the hydroponic gardening equipment may [be] and is used for many types of crops, the

Debtors' future business expansion plan is tied to the growing cannabis industry which is heavily reliant on hydroponic gardening." (ECF No. 23-1 at 53.) But Debtors were quick to add, somewhat inconsistently, that they "do not own or do business with cannabis." (*Id*.)

The bankruptcy court did not rule on this motion before Inniss, appearing as a secured creditor, filed a motion asking the bankruptcy court to abstain in favor of the Larimer County receivership action, or to dismiss the petitions altogether. (ECF No. 27-1 at 32.) Regarding dismissal, Inniss argued, among other things, that the bankruptcy court should dismiss Debtors' petitions "for cause" under 11 U.S.C. § 1112(b) (discussed in detail below in Part III.A) because there was

> no possibility of reorganization within a reasonable time as proceeds from the sale of the Debtors' products come from cannabis companies who violate federal law. . . .
>
> * * *
>
> The Debtors' businesses are not the kind that can meet 11 U.S.C. § 1129(a)(3)'s good faith requirement [also discussed Part III.A] for confirming a plan because their sale of supplies and equipment to cannabis growers taints revenue and places assets at risk of forfeiture and seizure under federal law.

(ECF No. 27-1 at 56, 58.) Through later briefing, it became clear that the criminal prohibition Inniss believed Debtors were violating was the federal aiding and abetting statute, 18 U.S.C. § 2—more specifically, that Debtors were aiding and abetting the growing of marijuana, which is prohibited under the Controlled Substances Act (sometimes referred to in the record as the "CSA"). (ECF No. 27-1 at 287–94.)

The bankruptcy court eventually held a four-day evidentiary hearing on these allegations. *See Way to Grow*, 597 B.R. at 114. It rejected the argument that Debtors

could be found guilty of aiding and abetting a Controlled Substances Act violation. *Id*. at 123–27. The court reasoned that the evidence did not show the proper *mens rea*, namely, "shar[ing] the same intent as their customers to violate the CSA and willfully associat[ing] themselves with their customers' criminal ventures." *Id*. at 126. But the bankruptcy court went on to examine whether Debtors could be found guilty of violating 21 U.S.C. § 843(a)(7). *See id*. at 127–32. As described in more detail below, this statute criminalizes selling goods with knowledge that they will be used to manufacture controlled substances.

No party had raised § 843(a)(7) as a potential basis for criminal liability. Regardless, the bankruptcy court found "ample evidence" that Debtors—referred to collectively—knew they were selling products that their customers would use to grow marijuana, which would be a violation of the statute. *Id*. at 129. Accordingly, the court agreed with Inniss that cause existed to dismiss Debtors' bankruptcy proceedings.

The bankruptcy court then asked whether Debtors could change their business model "to sever all ties to their marijuana customers," and thereby avoid dismissal. *Id*. at 132. The court found that sales to marijuana growers were such an important part of Debtors' business that it was "inconceivable" Debtors could "still operate profitably" without selling to those customers. *Id*. Thus, "[t]o prevent this Court from violating its oath to uphold federal law, under the specific facts of this case, the Court sees no practical alternative to dismissal." *Id*.

Finally, the bankruptcy court concluded by showing its full understanding of the real-world consequences of its ruling:

> The result in this case may be viewed by many as inequitable. The Debtors are insolvent, and their business

> could benefit significantly from reorganization under the Bankruptcy Code. The Debtors likely did not seek bankruptcy relief in bad faith on a subjective standard. But for the marijuana issue, this would be a relatively run-of-the-mill Chapter 11 proceeding. As stated, even following those courts which have crafted alternatives to dismissal when debtors were violating the CSA would produce no practical or efficient alternative to dismissal in this case. At bottom, if the result in this case is unjust, Congress alone has power to legislate a solution.
>
> Ironically, if Inniss, as the party arguing Debtors are violating federal law, wrests control of the Debtors back from Byrd in the [Larimer County lawsuit], he will almost certainly continue, and perhaps expand, the Debtors' ongoing marijuana-related operations. This irony is not lost on the Court but provides no legal basis for an alternate outcome. The Court casts no aspersions upon the Debtors or their businesses. The result in this case is dictated by federal law, which this Court is bound to enforce.

Id. at 133.

C. Motion to Stay Pending Appeal

Debtors immediately appealed to this Court and moved to stay the bankruptcy court's judgment pending appeal. (ECF No. 9.) Among Debtors' arguments was that the bankruptcy court improperly imputed the activities of Way to Grow to the other two Debtors, which was particularly problematic as to Pure Agro because it is a holding company that does not sell anything, so it arguably could not violate § 843(a)(7). (*Id*. ¶¶ 19–21.)

The Court denied the motion to stay pending appeal, for various reasons. (ECF No. 20.) As to Debtors' argument that the bankruptcy court erred by not distinguishing between Debtors for purposes of § 843(a)(7), the Court held that Debtors were not likely to succeed on the merits of this argument because nothing in the record showed that they argued to the bankruptcy court that the evidence was insufficient as to any

particular one of them. (*Id*. at 6–7.) Moreover, Debtors had not argued that the bankruptcy court's alleged error could be reviewed under the plain error doctrine. (*Id*. at 7.)

The parties then proceeded to merits briefing, and the dispute is now ripe for a final disposition.

III. ANALYSIS

As aptly stated by the bankruptcy court, there are many potential disputes here, but "the main event" in this lawsuit is threefold: (i) "Debtors' connections to the marijuana industry," (ii) whether "those connections constitute continuing violations of federal law," and (iii) whether that restricts a bankruptcy court's ability to provide relief to Debtors under the Bankruptcy Code. *Way to Grow*, 597 B.R. at 116. The Court will first address the broader questions about the availability of bankruptcy protection to businesses that depend on the marijuana industry, and then address whether Debtors run such businesses.

A. Bankruptcy Courts' Authority to Dismiss a Chapter 11 Proceeding Where the Debtor's Business Violates Federal Law

1. Federal Crimes Related to Marijuana

The Controlled Substances Act, 21 U.S.C. §§ 101 *et seq*., declares marijuana to be a Schedule I controlled substance. *See* 21 U.S.C. § 812, Schedule I(c)(10). It is a federal crime "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." *Id*. § 841(a)(1). It is also a federal crime "to manufacture, distribute, export, or import . . . any equipment, chemical, product, or material which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to

believe, that it will be used to manufacture a controlled substance." *Id*. § 843(a)(7).

Finally, a party can be liable for aiding and abetting any federal crime. *See* 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."). Aiding and abetting requires proof that (i) someone else committed the underlying crime and (ii) the alleged aider/abettor "willfully associate[d] himself with the criminal venture and [sought] to make the venture succeed through some action of his own." *United States v. Leos-Quijada*, 107 F.3d 786, 794 (10th Cir. 1997); *see also* Tenth Circuit Criminal Pattern Jury Instructions § 2.06 (2011 ed., Feb. 2018 update), *available at* https://www.ca10.uscourts.gov/sites/default/files/clerk/Jury%20Instructions%20Update%202018.pdf (last accessed Sept. 16, 2019).

2. Dismissal for Cause (11 U.S.C. § 1112(b))

Based on the evidence developed through the evidentiary hearing, the bankruptcy court concluded that most of Debtors' business comprised, and would continue to comprise, selling supplies to marijuana growers while knowing that the supplies would be used to grow marijuana. In other words, the bankruptcy court found that the Debtors' primary business was a violation of 21 U.S.C. § 843(a)(7).

In this light, the bankruptcy court held that there was "cause to dismiss this bankruptcy case under 11 U.S.C. § 1112(b)." *Way to Grow*, 597 B.R. at 132. In relevant part, the statute cited by the bankruptcy court reads as follows:

> [O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1).[2]

The first question, then, is whether "cause" exists under this statute when the debtor runs a business dedicated to servicing the marijuana industry. If the answer is "no," the Court need not address Debtors' arguments about the application of this principle to them under the facts of this case. For the reasons explained below, however, the Court finds that the answer is "yes."

Congress provided a list of circumstances that count as "cause" to dismiss a Chapter 11 proceeding. *See id*. § 1112(b)(4). It says nothing about reorganization plans that rely on violations of federal law. However, Congress prefaced this list as follows: "For purposes of [§ 1112(b)], the term 'cause' includes . . . ." *Id*. The words "'includes' and 'including' are not limiting" when used in the Bankruptcy Code. *Id*. § 102(3). Therefore, Congress's list is not exclusive, as further confirmed by legislative history: "The list [in § 1112(b)(4)] is not exhaustive. The court will be able to consider other factors as they arise, and to use its equitable powers to reach an appropriate result in individual cases." H.R. Rep. 95-595, 406, 1978 U.S.C.C.A.N. 5963, 6362.

In an oft-cited decision on bankruptcy law as it relates to marijuana-based businesses, Judge Howard R. Tallman of the United States Bankruptcy Court for the District of Colorado held that a marijuana-based business intending to continue to operate as such cannot propose a Chapter 11 reorganization plan in good faith—and, in turn, the inability to propose a reorganization plan in good faith is "cause" to dismiss a

[2] No party makes any argument about the possibility of converting the jointly administered Chapter 11 cases to a Chapter 7 proceeding, nor the possibility of appointing a trustee or examiner. Accordingly, like the parties, the Court will ignore these portions of § 1112(b)(1). For purposes of this dispute, the only relevant portion of § 1112(b)(1) is its authorization to "dismiss a case . . . for cause."

Chapter 11 proceeding. *See In re Rent-Rite Super Kegs W. Ltd.*, 484 B.R. 799, 809 (Bankr. D. Colo. 2012). This Court agrees.

The relevant statute is 11 U.S.C. § 1129(a)(3), which reads in relevant part, "The court shall confirm a plan only if * * * [t]he plan has been proposed in good faith." "[T]he test of good faith under § 1129(a)(3) focuses on whether a plan is likely to achieve its goals and whether those goals are consistent with the [Bankruptcy] Code's purposes." *In re Paige*, 685 F.3d 1160, 1179 (10th Cir. 2012).

The Bankruptcy Code nowhere explicitly says that one of its purposes is to avoid facilitating commission of a federal crime. One could therefore take a narrow view and conclude that the Bankruptcy Code is blind to the lawfulness of the debtor's activities under a reorganization plan. However, the Tenth Circuit has "not rule[d] out the possibility that a plan could be unconfirmable under § 1129(a)(3) because of the proponent's . . . improper conduct." *Id*. Moreover, the Bankruptcy Code *does* provide that the automatic stay does not extend to "proceeding[s] by a governmental unit . . . to enforce such governmental unit's . . . police and regulatory power," 11 U.S.C. § 362(b)(4), and that a bankruptcy discharge cannot extend to "a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss," *id*. § 523(a)(7). In other words, the Code is not blind to criminal behavior. Finally, it is frankly inconceivable that Congress could have ever intended that federal judicial officials could, in the course of adjudicating disputes under the Bankruptcy Code, approve a reorganization plan that relies on violations of federal criminal law.

For all these reasons, the Court holds that, as long as marijuana remains a

Schedule I controlled substance, a Chapter 11 debtor cannot propose a good-faith reorganization plan that relies on knowingly profiting from the marijuana industry. And, in turn, inability to propose a good-faith reorganization plan is cause for dismissal under 11 U.S.C. § 1112(b)(1).[3]

3. A Clarification Regarding § 1129(a)(3)

For clarity, the Court notes the following about the requirement that a reorganization plan be proposed in good faith. Section 1129(a)(3) states that "[t]he court shall confirm a plan only if * * * [t]he plan has been proposed in good faith," but then goes on to add "and not by any means forbidden by law." Judge Tallman's decision in *Rent-Rite* (*i.e.*, that an inability to satisfy § 1129(a)(3) is cause for dismissal under § 1112(b)(1)) has recently been criticized by the Ninth Circuit in *Garvin v. Cook Investments NW, SPNWY, LLC*, 922 F.3d 1031, 1035 (9th Cir. 2019), based on—as it turns out—a mistaken perception that Judge Tallman was relying on the "means forbidden by law" clause, not the "good faith" clause.

In *Garvin*, the bankruptcy court, over the trustee's objection, confirmed a

[3] Some courts have held that lack of good faith is grounds for dismissal independent from a dismissal for "cause" under § 1112(b)(1). *See* 7 *Collier on Bankruptcy* ¶ 1112.07[1] (Richard Levin & Henry J. Sommer eds., 16th ed.). But, "[i]n general, the requirements of good faith and cause do overlap, and what is sufficient to demonstrate a lack of good faith is also probably sufficient to demonstrate cause." *Id*. ¶ 1112.07[5]. Accordingly, the Court need not explore whether its holding is justified independent of §§ 1112(b)(1) and 1129(a)(3).

Furthermore, bankruptcy decisions throughout the country have explored other potential bases for holding that a bankruptcy court cannot grant relief to a marijuana-based business. *See, e.g.*, *Garvin*, 922 F.3d at 1036 (suggesting that operating a marijuana-based business could be cause for dismissal as "gross mismanagement of the [bankruptcy] estate" under 11 U.S.C. § 1112(b)(4)(B)); *In re Olson*, 2018 WL 989263, at *4–6 (B.A.P. 9th Cir. Feb. 5, 2018) (surveying various approaches); *Way to Grow*, 597 B.R. at 120–23 (same). The Court finds that inability to propose a good-faith reorganization plan provides cause to dismiss under § 1112(b)(1), and so the Court need not express any opinion about alternative bases for dismissal.

reorganization plan that included a continuing lease to an entity growing marijuana. *Id*. at 1033–34. The trustee argued that the reorganization plan contained a "means forbidden by law," as proscribed by § 1129(a)(3), but the Ninth Circuit said that the trustee was misreading the statute because it forbids only a "plan . . . proposed . . . by any means forbidden by law." *Id*. at 1035. In other words, the Ninth Circuit emphasized that the statute focuses on the means of proposing the plan, not on the means of carrying it out.

Having held as much, *Garvin* then characterized *Rent-Rite* as a decision that misreads the "means forbidden by law" clause, *see id*., but *Garvin* itself misunderstood *Rent-Rite*. The entire relevant passage from *Rent-Rite* shows that Judge Tallman was not interpreting on the "means forbidden by law" clause, but only the "good faith" clause:

> Title 11 U.S.C. § 1129(a)(3) provides that a plan may only be confirmed if it is "proposed in good faith and not by any means forbidden by law." Because a significant portion of the Debtor's income is derived from an illegal activity, § 1129(a)(3) forecloses any possibility of this Debtor obtaining confirmation of a plan that relies in any part on income derived from a criminal activity. This Debtor has no reasonable prospect of getting its plan confirmed. *Even if § 1129 contained no such* ***good faith*** *requirement*, under no circumstance can the Court place itself in the position of condoning the Debtor's criminal activity by allowing it to utilize the shelter of the Bankruptcy Code while continuing its unlawful practice of leasing space to those who are engaged in the business of cultivating a Schedule I controlled substance.

484 B.R. at 809 (footnote omitted; emphasis added).

Likewise, this Court grounds its holding in § 1129(a)(3)'s requirement that a Chapter 11 plan is unconfirmable unless "proposed in good faith." This is what Inniss argued below. (ECF No. 27-1 at 58.) The Court need not and does not opine on what it means for a plan to be "proposed . . . not by any means forbidden by law."

4. "Shock[ing to] the General Moral or Common Sense"

Debtors argue that interpreting 21 U.S.C. § 843(a)(7) to be a basis for lack of good faith under 11. U.S.C. § 1129(a)(3) "causes results that are 'so gross as to shock the general moral or common sense.'" (ECF No. 27 at 24 (citing *Crooks v. Harrelson*, 28[2] U.S. 55, 60 (1930)).) Debtors' citation to *Crooks* is instructive but ultimately inapt.

The defendant in *Crooks* sought to avoid the application of a tax statute. 282 U.S. at 57–58. The Supreme Court said that "[t]he meaning of the provision in question, considered by itself, does not seem to us to be doubtful." *Id*. at 58. The defendant nonetheless argued that "the literal meaning of the statute . . . should be rejected as leading to absurd results, and a construction adopted in harmony with what is thought to be the spirit and purpose of the act in order to give effect to the intent of Congress." *Id*. at 59. The defendant cited a case in which the Supreme Court appeared to have taken such an approach, and, in that context, the Supreme Court in *Crooks* said the following:

> [A] consideration of [the prior case] will disclose that the principle is to be applied to override the literal terms of a statute only under rare and exceptional circumstances. The illustrative cases cited in [the prior case] demonstrate that, to justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense. And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail.

Id. at 60 (citation omitted).

Following *Crooks*, then, the question is, first, whether 21 U.S.C. § 843(a)(7), as applied to businesses such as Debtors', leads to an "absurdity . . . so gross as to shock the general moral or common sense"; and second, whether there is "plain" evidence of "the intent of Congress that the letter of the statute is not to prevail." For context, the full text of § 843(a)(7) is as follows:

> It shall be unlawful for any person knowingly or intentionally * * * to manufacture, distribute, export, or import any three-neck round-bottom flask, tableting machine, encapsulating machine, or gelatin capsule, or any equipment, chemical, product, or material which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a controlled substance or listed chemical in violation of this subchapter or subchapter II or, in the case of an exportation, in violation of this subchapter or subchapter II or of the laws of the country to which it is exported[.]

Turning to the first *Crooks* inquiry—shockingly gross absurdity—Debtors note that the bankruptcy court "did not point to any specific transaction in which [they] sold equipment to a customer." (ECF No. 27 at 25.) Debtors seem to be saying § 843(a)(7) must be construed to require proof that the person who bought, *e.g.*, hydroponic equipment, used it to grow marijuana. Without such a requirement, Debtors say,

> section 843(a)(7) could serve to turn any business into a criminal with a single transaction. If an individual walked into a Home Depot and the cashier had reasonable cause to believe the shovel would be used in a marijuana growing operation based on statements by the customer, by virtue of selling that individual a shovel, the Home Depot will have committed a criminal act. The cashier, acting as an agent of the store, knew that he was distributing a shovel to the marijuana grower, and sold the shovel having reasonable cause to believe that it would be used grow marijuana. The Home Depot would not even need to know the customer's name, nor whether the shovel was actually used to grow marijuana.

(*Id*. at 26.)

It would be an absurd use of prosecutorial discretion to charge The Home Depot with a crime based on this fact pattern, but such fact patterns can be imagined under many criminal statutes. The ability to imagine that a prosecutor with poor judgment might institute an absurd prosecution is not a basis to declare that the statute's plain language must be disregarded. The bankruptcy court had before it evidence that

Debtors derive from 65% to 95% of their business from marijuana growers. (*See* Parts III.B & III.C, below.) Notably, Debtors do *not* argue that it would be absurd to prosecute a business if it *knows* that 65% to 95% of its sales will go toward manufacturing a controlled substance.

As for the second *Crooks* inquiry—evidence of Congress's obviously contrary intent—Debtors offer nothing. However, in a separate context that the Court will address below (Part III.A.5), Debtors argue that the statute's specific mention of equipment such as a three-neck round-bottom flask, and its use of verbs such as "distribute" and "manufacture," "denote[] Congress'[s] intent to target persons selling equipment, materials, and listed chemicals to methamphetamine manufacturers." (*Id*. at 28.) Debtors say this is "supported by the legislative history," but they cite none. (*Id*.) In any event, to the extent this can be construed as a *Crooks* argument, the alleged focus on methamphetamine is not "something to make plain the intent of Congress that the letter of the statute is not to prevail." 282 U.S. at 60.

Finally, the *mens rea* of § 843(a)(7) is "knowing, intending, or having reasonable cause to believe, that [the equipment, chemical, product, or material in question] will be used to manufacture a controlled substance." The Tenth Circuit has construed identical language in the statute's immediately preceding paragraph, 21 U.S.C. § 843(a)(6), which makes it a crime

> to possess any three-neck round-bottom flask, tableting machine, encapsulating machine, or gelatin capsule, or any equipment, chemical, product, or material which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a controlled substance or listed chemical in violation of this subchapter or subchapter II.

In that context, the Tenth Circuit held that all three mental states—knowing, intending, or having reasonable cause to believe—are subjective, with "reasonable cause to believe" meaning something "akin to actual knowledge." *United States v. Truong*, 425 F.3d 1282, 1289 (10th Cir. 2005) (internal quotation marks omitted).

As the bankruptcy court recognized, there is no reason to believe that the Tenth Circuit's interpretation of § 843(a)(6) would not also apply to § 843(a)(7). *See Way to Grow*, 597 B.R. at 127 & n.137. In this light, the Court finds nothing "shock[ing to] the general moral or common sense," *Crooks*, 282 U.S. at 60, that an individual or business could be prosecuted for selling an item, knowing it will be used to commit a criminal act—whether or not the criminal act happened.

The lack of "moral shock" is fairly obvious in other contexts. For example, it is

> unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person * * * is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child.

18 U.S.C. § 922(d)(8). The legitimate interest in prohibiting (and therefore dissuading) the mere sale or transfer of firearms in such circumstances is beyond question, without any need to wait and see if the firearm gets used.

The difference in this case, of course, is that a majority of voters in Colorado (and several other states) have decided that one among many Schedule I controlled substances—marijuana—poses no threat worthy of criminal prohibition. Reasonable minds may differ on that question, but the fact that the federal government can enforce the Controlled Substances Act in a manner that many Coloradans would disagree with

does not "shock the general moral or common sense." *Crooks*, 282 U.S. at 60.

5. Vagueness

Debtors further argue that "[s]ection 843(a)(7) is so vague as to fail to put a person of ordinary intelligence on notice that his otherwise lawful conduct, such as selling gardening supplies, is illegal." (ECF No. 27 at 28.) *See also Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015) ("Our cases establish that the Government violates [the Fifth Amendment due process clause] by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes . . . ."). In this context, Debtors note that some of the statute's language appears directed at methamphetamine manufacture. (ECF No. 27 at 28.)[4]

The Court disagrees that § 843(a)(7) is void for vagueness. Its language indeed mentions specific and unique items, but it also encompasses "*any* equipment, chemical, product, or material which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a controlled substance or listed chemical" (emphasis added). This fairly provides notice to the ordinary person. To the extent "reasonable cause to believe" might pose a problem (and the Court expresses no opinion about that), the Tenth Circuit's "akin to actual knowledge" gloss overcomes it. *Truong*, 425 F.3d at 1289. Accordingly, Debtors' vagueness argument fails.

[4] Debtors further note that hydroponic equipment is not on a Drug Enforcement Administration list of products and materials specifically associated with clandestine drug manufacturing. (*Id*.) It is not clear what relevance this has to whether § 843(a)(7) is too vague to be understood by the ordinary person.

6. Proof of Specific Transactions

Finally, Debtors argue that a § 843(a)(7) violation can only be proven through "evidence of specific transactions" in which the defendant knew that the item being sold would be used to manufacture a controlled substance. (ECF No. 27 at 29–36.) The bankruptcy court cited no such evidence, but this Court disagrees with Debtors that such evidence was required under the circumstances.

The question before the bankruptcy court was whether Debtors' business model and profitability relied on actions that could be prosecuted as a violation of § 843(a)(7). In other words, the bankruptcy court's inquiry was ultimately prospective, not retrospective. That is why the bankruptcy court first asked whether Debtors' business model necessarily placed it in a position of violating federal law, *see Way to Grow*, 597 B.R. at 123–32, and then asked whether bankruptcy proceedings could nonetheless be saved by Debtors "sever[ing] all ties to their marijuana customers," *id*. at 132. Unlike a prosecutor, the bankruptcy court needed no evidence of specific criminal transactions to sustain its findings on these matters.

B. Evidence as to Each Debtor

1. Bankruptcy Court's Treatment of "Debtors" as a Group

Debtors argue that, even if the bankruptcy court correctly found that § 843(a)(7) might be a basis for cause to dismiss bankruptcy proceedings, the bankruptcy court erroneously lumped all three Debtors together when the evidence almost exclusively focused on Way to Grow's activities. Thus, say Debtors, at least Pure Agro's and Green Door's bankruptcy petitions should not have been dismissed because the

evidence that they are violating § 843(a)(7) is insufficient. (ECF No. 27 at 18–24.)[5]

As noted above (Part II.C), the Court rejected this argument as a basis to grant a stay pending appeal because nothing in the record showed that Debtors had argued below for separate treatment. In their opening merits brief, Debtors attempt to explain this by arguing that the focus of the evidentiary hearing, as they saw it, was aiding and abetting under 18 U.S.C. § 2, while 21 U.S.C. § 843(a)(7) was raised for the first time by the bankruptcy court in its dismissal order. (ECF No. 27 at 18.)

> Had the Debtors been provided with notice that Inniss intended to argue that section 843(a)(7) applied, each Debtor could have presented additional legal argument regarding how and why section 843(a)(7) does not apply. The Debtors could also have presented evidence including testimony from customers about the use to which the equipment and materials purchased at [Way to Grow] stores was put, the use of hydroponic equipment, and the legal crops grown by customers. The Debtors could also have presented additional evidence to further emphasize the fact that Pure [Agro] is a holding company and does not distribute any equipment.

(*Id*. at 18.)

As presented in the opening brief, this is still not an argument for plain error review, even though the Court previously called Debtors out for failing to argue as much. (*See* ECF No. 20 at 7.) Debtors' first mention of plain error review comes in their reply brief (ECF No. 32 at 12–14), and therefore could be deemed forfeited.

In sum, Debtors are treading on thin ice. Debtors refused to argue for plain error until it was too late for Inniss to respond. Moreover, the Court is not convinced that Debtors would have tailored their evidentiary presentations any differently had they

[5] Save for their argument that there must be evidence of specific transactions, which the Court has rejected immediately above, Debtors do not argue that the evidence against Way to Grow was insufficient.

known that § 843(a)(7) would be at issue, not just aiding and abetting. The aiding and abetting accusation gave Debtors every incentive to present all the same evidence they now say they were precluded from presenting. And, from the Court's review of the hearing transcripts, the parties continually focused on the questions of what Debtors sell and what they know about how their customers use their products. These are the same questions the parties would have explored if § 843(a)(7) had been part of their preparations.

However, viewed generously, the Court can see how looking at the case through an aiding and abetting lens might have caused Pure Agro to think less about its separateness from its subsidiaries than it might have if it had known ahead of time that the bankruptcy court would be considering § 843(a)(7), which requires manufacturing, distributing, exporting, or importing tangible items—activities that a holding company like Pure Agro usually does not perform. From that perspective, there is slightly more merit to Debtors' argument, at least as applied to Pure Agro, although there is still the question of whether Debtors forfeited their opportunity to argue for plain error.

Ultimately, the Court finds that it need not decide whether the bankruptcy court erred by failing to discuss the three Debtors separately, nor whether Debtors forfeited that argument. The Court can affirm on any basis supported by the record. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("[I]n reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason." (internal quotation marks omitted)). There is ample basis in the record that Way to Grow's and Green Door's business models depend on activities that could be prosecuted under § 843(a)(7), and there is likewise ample

evidence that Pure Agro involves itself in Way to Grow's and Green Door's business in a manner that could subject it to prosecution for aiding and abetting their criminal activities.

2. Way to Grow

At least as to Way to Grow, Debtors do not challenge the bankruptcy court's conclusion that there was "ample evidence" that, in the language of § 843(a)(7), Way to Grow at least had "'reasonable cause to believe' the equipment [it] sell[s] to at least some of [its] customers will be used to manufacture marijuana." *Way to Grow*, 597 B.R. at 129. And the evidence before the bankruptcy court was otherwise overwhelming. For example:

- Inniss testified that: (i) he built up Way to Grow to service the marijuana industry; (ii) the "whole thesis" of Pure Agro's acquisition of Way to Grow "was to combine Byrd's California marijuana-related operations with [Way to Grow's] operations in Colorado"; (iii) Way to Grow sells products that "would be cost-prohibitive for use in cultivating any crop except marijuana, because marijuana is the highest yielding cash crop which can be grown"; (iv) Way to Grow "sell[s] so-called 'bubble bags' which are specifically used to make 'water hash,' a concentrated marijuana derivative"; and (v) he knew the real names of customers that used aliases when buying products from Way to Grow, and he further knew that those customers were dispensaries and grow operations. *Id*. at 129–30.
- Since at least 2016, Way to Grow participated in the Cannabis Cup, "a cannabis industry trade show and the world's biggest marijuana grow

competition." *Id*. at 130.

- At the Cannabis Cup and similar events, Way to Grow has distributed self-branded swag such as "lighters and rolling papers," and has contributed prize money to be awarded to the winner of the grow-off competition. *Id*.
- The manager of Way to Grow's Boulder store testified that: (i) "he, and all of his co-workers, were themselves marijuana growers who bought supplies from [Way to Grow] before becoming employees"; (ii) "[mo]st of [his] interactions with customers have been about cannabis"; (iii) Way to Grow "choose[s] products based on favorability of use in marijuana cultivation"; (iv) "the 'trim bags' and 'bubble bags' sold by [Way to Grow] are specifically intended for use with cannabis"; (v) "[a]s recently as August 2018, [Way to Grow] engaged in cross-promotions with dispensaries at local grow-offs"; and (vi) "as much as 95% of customers in his store are using [its] products to grow marijuana." *Id*.
- The manager of Way to Grow's Fort Collins store testified that: (i) "'everybody just assumes' customers talking generally about help with plants are talking about marijuana plants"; (ii) Way to Grow has a reputation for being an expert in cannabis growing; (iii) he has visited customers' cannabis growing facilities; (iv) "[a] list of approved products for use in cannabis cultivation is made available in the store"; (v) "[c]ustomers sometimes bring marijuana plants, or, more commonly, photographs of marijuana grow operations, to [Way to Grow's] stores, and [its] employees 'typically' offer products to those customers based on

those photographs"; and (vi) "the 'vast majority' of [Way to Grow's] customers" grow cannabis. *Id*.

- In an e-mail dated June 28, 2018 (three days after Inniss filed his motion to dismiss), Way to Grow's vice president of operations instructed store managers to remove "anything 'MJ related in your stores'" and "to 'not discuss MJ directly with any customers [or] allow customers to bring anything plant related into your stores.'" *Id*. at 131.

Accordingly, the bankruptcy court did not err, much less clearly err, in finding as a matter of fact that Way to Grow "know[s] . . that it [is selling products that] will be used to manufacture a controlled substance." 21 U.S.C. § 843(a)(7).

3. Green Door

The evidence specifically as to Green Door was not as fully developed. However, the bankruptcy court credited Inniss's testimony that Green Door—described as "Byrd's California marijuana-related operations"—was operating the same type of business as Way to Grow. *Way to Grow*, 597 B.R. at 129. Moreover, Debtors' opening merits brief before this Court admits that Green Door "operated in a similar manner" to Way to Grow. (ECF No. 27 at 10.) Accordingly, given the evidence before the bankruptcy court about Way to Grow and the evidence that Green Door was simply a California-based iteration of the same type of business, the bankruptcy court did not clearly err in finding as a matter of fact that Green Door "know[s] . . that it [is selling products that] will be used to manufacture a controlled substance." 21 U.S.C. § 843(a)(7).

4. Pure Agro

Pure Agro is a holding company that owns Way to Grow, Green Door, and

another (non-debtor) entity called Crop Supply. Although Inniss points to hearing testimony in which Byrd speaks of Pure Agro "sell[ing]" things such as dirt and hydroponic gardening supplies (*see* ECF No. 31 at 26), there appears to be no serious dispute that Byrd was speaking loosely and that Pure Agro, of itself, sells nothing. But that does not mean that Pure Agro is insulated from potential prosecution. Again, "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a). Liability requires an underlying crime (supplied here by the subsidiary Debtors' actions) and "willfully associat[ing] [oneself] with the criminal venture and seek[ing] to make the venture succeed through some action of [one's] own." *Leos-Quijada*, 107 F.3d at 794.

The evidence before the bankruptcy court was enough to support a finding that Pure Agro aids and abets its subsidiaries' violations of federal law. For example:

- Inniss testified that Pure Agro acquired Way to Grow to increase Pure Agro's dominance in the cannabis industry. *Way to Grow*, 597 B.R. at 129.
- Pure Agro's website quotes Byrd as follows: "We are the picks and shovels play for what we're calling the Green Rush."[6] (ECF No. 31-1 at 10.)
- Pure Agro's website approvingly quotes a BusinessWire characterization

[6] As aptly explained by Investopedia, "pick and shovel play" is a metaphor derived from the persons who sold equipment to gold diggers during the California gold rush. It is "an investment strategy that invests in the underlying technology needed to produce a good or service instead of in the final output. It is a way to invest in an industry without having to endure the risks of the market for the final product." Investopedia, "Pick-And-Shovel Play," *at* https://www.investopedia.com/terms/p/pick-and-shovel-play.asp (last accessed Sept. 16, 2019).

of the Way to Grow acquisition as follows: "With the merger of Way to Grow completed in January 2016, PureAgro is now the leading one-stop solution for indoor plant, produce and cannabis growers in Colorado and California." (*Id*. at 9; *see also* ECF No. 23-4 at 372 (Byrd's endorsement of this quote as "a true statement").)

- Pure Agro's website quotes a characterization of itself published in the Cannabis Business Times as a "pioneer[] of the hydroponics and indoor agriculture industry for the past 20 years." (ECF No. 31-1 at 12.)
- Pure Agro issued a press release on November 1, 2016, datelined "Los Angeles & Fort Collins, Colo." The press release describes Way to Grow and Crop Supply—the latter of which was "[s]pun out of Way to Grow's operations" as a "wholesale operating division, selling directly and exclusively to large commercial growers." The press release quotes Byrd as saying, "Our current focus and primary growth initiatives are aligned with serving the fast-growing legal cannabis industry." The press release goes on to describe the business opportunity in light of the many states legalizing cannabis. (*Id*. at 25–27.)
- At the evidentiary hearing, Byrd confirmed his knowledge that certain dispensaries and cannabis growers were customers of Pure Agro's subsidiaries. (ECF No. 23-4 at 418–19.)
- Byrd testified that Crop Supply was losing money but "it's all a rollup so we can have a profit on one sub entity and a loss on another." (*Id*. at 361–62.) Elaborating, John Thompson, Pure Agro's head of finance, testified

that Pure Agro, Crop Supply, and Way to Grow shared a single bank account that allowed for transfers between the companies. (*Id*. at 497.)

Finally, the Court notes that Debtors' failure to argue for distinct treatment in the bankruptcy court is further evidence that they view themselves as distinct on paper but not in purpose.

In sum, Pure Agro "willfully associat[es] [itself] with the criminal venture and seek[s] to make the venture succeed through some action of [its] own." *Leos-Quijada*, 107 F.3d at 794. Indeed, Pure Agro's *purpose* is to support its subsidiaries in their efforts to sell to customers whom the subsidiaries and Pure Agro know to be using the products to grow marijuana. For this reason, the bankruptcy court's decision as to Pure Agro is affirmed.

C. Ability to Reorganize

The bankruptcy court heard testimony from one Way to Grow manager that 95% of his store's customers were using Way to Grow's products to grow marijuana, and from another store manager that the "vast majority" of his customers were doing likewise. *Way to Grow*, 597 B.R. at 130. The bankruptcy court heard testimony from Byrd that "this figure [was] closer to 65%." *Id*. at 130 n.154. Weighing this evidence, the bankruptcy court concluded, "Whether marijuana-related customers account for 65% or 95% of Debtors' revenue, eliminating all such revenue would be devastating to the Debtors. It is inconceivable Debtors could terminate any sales to known marijuana cultivators and still operate profitably." *Id*. at 132.

Debtors challenge this finding. Debtors' first argue that the bankruptcy court relied mostly on evidence from Way to Grow managers (and not witnesses from Pure Agro or Green Door) about the centrality of marijuana to Way to Grow's business. (*Id*.

at 36.) But the evidence as a whole shows that all three Debtors developed their business specifically to service marijuana growers and, tellingly, Debtors failed to introduce any evidence to the contrary during the four-day hearing. The bankruptcy court did not clearly err in applying its finding to all three Debtors.

Debtors next argue that the store managers merely offered "guesses" of how many customers used store products to grow marijuana, and that "the managers acknowledged that this conclusion was speculation, and that they had no personal knowledge of what their customers were growing." (ECF No. 27 at 36–37.) Debtors cite nothing in the record to support these characterizations of the managers' testimony, and they are otherwise inconsistent with the testimony summarized by the bankruptcy court that the managers knew their stores were selling products for use by marijuana growers to grow marijuana. *See Way to Grow*, 597 B.R. at 130. Thus, the bankruptcy court did not clearly err in relying on the managers' estimates.

Debtors further argue that the bankruptcy court inappropriately fixated on Debtors' sales of hydroponic equipment, whereas "soil, containers, and nutrients were and are the principal items sold in terms of product volume and revenue." (ECF No. 27 at 37.) Debtors request that the case be remanded for the bankruptcy court to consider the "actual mix of products" sold. (*Id*.)

It is true that, at one point, the bankruptcy court stated, "Debtors have already acquired a venerable reputation for expertise in hydroponic marijuana growing, and it is difficult to imagine how Debtors could prevent customers from continuing to patronize Debtors' stores because of this reputation." *Way to Grow*, 597 B.R. at 132. But this was part of the bankruptcy court's alternative reason for finding no reasonable prospect

of reorganization, *i.e.*, that it would be difficult to stop marijuana growers from returning to Debtors' stores. The Court need not opine on this alternative reason because the primary reason—the percentage of customers that seek out Debtors for marijuana-growing supplies—is enough by itself to support the bankruptcy court's finding.

Finally, Debtors say that the bankruptcy court "never made any determination as to whether any customer was growing" a cannabis plant for purposes of human consumption, as compared to the now-legal purpose of producing hemp. (ECF No. 27 at 38.) This argument relies on the Agriculture Improvement Act of 2018, Pub. L. No. 115-334, which the President signed into law on December 20, 2018—shortly after Appellants filed this appeal. Among many other changes, this law lifted the federal ban on commercial and industrial hemp production and removed hemp from Schedule I so long as it contains no more than 0.3% of THC (the active ingredient in marijuana) by dry weight. *See id*. §§ 10113, 12619. Debtors say that "[t]he legalization of hemp means that [they] could reorganize based upon the hemp market." (ECF No. 27 at 39.)

Debtors cite nothing in the record to support this contention. Apparently this argument was never advanced to the bankruptcy court. This Court does not opine on whether the timing of the Agriculture Improvement Act's passage excuses Debtors' failure to develop a proper record or to advance the argument. The Court only holds that the bankruptcy court did not err, much less clearly err, by failing to address this argument, which was never presented to it and could not have been a potential basis for relief until after the bankruptcy court issued its decision.

IV. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

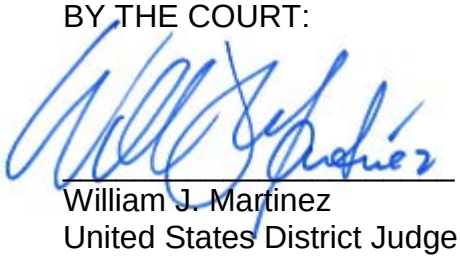
1. The judgment of the bankruptcy court is AFFIRMED;

2. The Clerk shall enter judgment in favor of Appellee and against Appellants, and shall terminate this case; and

3. Appellee shall have his costs incurred in this Court, if any, upon compliance with D.C.COLO.LCivR 54.1.

Dated this 18th day of September, 2019.

BY THE COURT:



William J. Martinez
United States District Judge