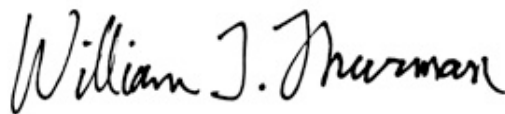


This order is SIGNED.

Dated: June 1, 2022



**WILLIAM T. THURMAN
U.S. Bankruptcy Judge**



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

In re:

SoNev Construction, LLC,

Debtor(s).

Bankruptcy No. 22-21037

Chapter 11

Honorable William T. Thurman

**MEMORANDUM DECISION ON MOTION FOR ADEQUATE PROTECTION, OR IN
THE ALTERNATIVE, MOTION FOR RELIEF FROM THE AUTOMATIC STAY
FILED BY SOLUTIONS FINANCIAL SERVICES**

The matter before the Court is the Movant’s, Solution Financial Services (“SFS” or “Movant”), Motion for Adequate Protection, or in the Alternative, Motion for Relief from the Automatic Stay (the “Motion”). A preliminary hearing on this matter was heard by the Court on May 26, 2022. Appearing for the Movant was Adam Knorr, of Kesler & Rust, and the Debtor, SoNev Construction, LLC (“SoNev” or “Debtor”), was represented by Brian M. Rothschild, of Parsons Behle & Latimer (together, the “Parties”). Appearances were also made by the Peter Kuhn as the United States Trustee, D. Ray Strong as the Subchapter V Trustee, as well as Adam Dunn for Southwest Plumbing Supply. With the consent of the parties, the Court classified the May 26, 2022 hearing as a final hearing on the matter. After the May 26, 2022 final hearing, the

Court took the matter under advisement; and now, after review of the arguments made, briefings submitted, as well as the record as a whole, the Court enters this Ruling.

I. JURISDICTION AND VENUE

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1334. The current Motion, particularly determinations on the automatic stay, represent core proceedings pursuant to 28 U.S.C. § 157(b)(2)(A), and (O), and may be heard and determined by this Court pursuant to 28 U.S.C. § 157(c). The Court has determined venue to be proper pursuant to the provisions of 28 U.S.C. § 1408. The Court finds that pursuant to 11 U.S.C. §§ 105(a) and 524(a)(2), notice was adequate and proper for the Court to enter this ruling.

II. FACTS

The factual record for the matter at hand is brief and has not been a point of contention between the parties. The matter is nearly purely a legal issue. As such, the upcoming recitation of facts is brief, and any finding of fact not contained in this section is similarly adopted as fact by this Court.

The Debtor, a Nevada limited liability company, is in the construction industry. The Movant is a creditor of the Debtor. It is uncontroverted that the Debtor's principal place of business is in Cedar City, Utah. On April 16, 2021, the Debtor executed a promissory note in favor of SFS in the amount of \$1,030,000, accruing interest at the fixed rate of 8% per annum (the "Note").¹ In conjunction with the Note, the Debtor executed a Credit and Security Agreement ("Security Agreement") which pledged certain equipment as collateral under the Note.² The Note and the subsequent Security Agreement, granted SFS a security interest in the following equipment ("Collateral"):

¹ Motion for Relief from Stay, Exhibit 1, ECF No. 50.

² Motion for Relief from Stay, Exhibit 2, ECF No. 50.

2018 Edge Stacker STK 36x80 80' stacker with 40" belt S/N 18TS8040874

2019so ST3.8 track screen S/N 180657

2019 Metso LT1213S impact crusher with screen S/N 180186

SFS, seeking to perfect their security interest, filed its UCC Financing Statement with the Utah Division of Corporations and Commercial Code.³ SFS has not filed a UCC financing statement with the Secretary State of Nevada.

On March 25, 2022, the Debtor filed a petition for relief under Chapter 11, Subchapter V of the Bankruptcy Code. The Debtor remains a Debtor in Possession, including over the property at issue, under the Bankruptcy Code. As of the date of this decision, a plan has not been proposed. On April 13, 2022, SFS filed the current Motion, with the Debtor's Objection filed on May 9, 2022, to which SFS replied on May 16, 2022.

The Court acknowledges there may be some dispute over the amount owed under the Note, the value of the Collateral, and whether the Debtor is in default under the Note and Security Agreement. However, these facts are not truly at issue here, as the Debtor did not dispute that the Creditor would be entitled to adequate protections, or alternatively relief from stay, if the Creditor's interest in the collateral is truly perfected and secured. The Parties stipulated at the May 26, 2022 hearing that in the event the Court finds the Creditor retains a perfected, secured interest, then an additional hearing will be needed to determine adequate protection payments.

As is further discussed herein, the focus of this Court is determining whether SFS is a secured creditor. More specifically, whether SFS properly perfected its secured interest in the

³ Motion for Relief, Exhibit 3, ECF No. 50.

Collateral. As such, the material facts are those which seem to be indisputable nor up to interpretation; rather, the issue is of a purely legal nature.

III. DISCUSSION

The Court now addresses the Movant's Motion, along with the Debtor's objection to the Motion. The overarching issue at hand can be succinctly summarized as whether or not SFS has perfected any secured interest it has by filing its UCC Financing Statement in Utah, while the Debtor is a registered organization of Nevada. As neither party, nor the Court, has found a precedential answer from this District or Circuit, thus the issue appears to be one of first impression here. In addressing this issue, the Court needs to address fundamental aspects of the Motion, and therein, the lead-up to this ruling. To begin, the Court outlines the requirements for a Motion for Adequate Protection and/or Motion for Relief from the Automatic Stay to be successful.

A. Requirements for Adequate Protection or Relief from the Automatic Stay

The Movant moves under either Section 363(e) for adequate protection,⁴ or Section 362(d)(2) for relief from the automatic stay.⁵ Both provisions are properly pled, but whether the Movant has met its burden for either is a different issue.

To begin, a debtor in possession holds the position of a judgment lien creditor as of the petition date.⁶ Both adequate protection and relief from stay are creative measures of the Code, aimed at protecting the investment/capital/asset of secured creditors. Importantly, both of these

⁴ "Notwithstanding any other provisions of this section, at any time on request of any entity that has an interest in property used, sold, or leased...the Court...shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest." 11 U.S.C. § 363(e). *See also* 11 U.S.C. § 361 (defining "adequate protection").

⁵ The Movant correctly points out that 11 U.S.C. § 362(d)(2) "provides that, on request of a party in interest and after notice and a hearing, the Court shall grant relief from the automatic stay and allow a secured creditor to foreclose on its collateral, if the debtor lacks equity in the collateral, and the collateral is not necessary to an effective reorganization of the debtor."

⁶ *Pearson v. Salina Coffee House, Inc.*, 831 F.2d 1531 (10th Cir. 1987); *see* 11 U.S.C. § 544.

provisions are only available to those creditors who have perfected their secured interest in the property at issue. Although a unique area of law, it is hornbook law that a creditor that has not properly perfected its interest is not entitled to either adequate protection nor relief from stay.⁷ This is due to a debtor in possession's position as a judgment lien creditor, allowing the debtor to avoid any lien inferior to its own interest in property of the bankruptcy estate.⁸

B. Governing Law and the UCC

A debtor's location determines which state law governs the perfection of security interests. Section 9-307 of the Uniform Commercial Code (the "UCC"), which has been adopted verbatim by both Nevada and Utah, outlines where a debtor is located.⁹ As Utah and Nevada have adopted the identical sections of the UCC verbatim, for purposes of the pertinent sections to this issue, the issue of governing law is a bit of a nonissue. With that said, the Court still outlines the governing provisions for each. The location of an organization with more than one place of business is "its chief executive office."¹⁰ However, this general rule has exceptions since this subsection begins with "[e]xcept as otherwise provided in this section."¹¹ Subsection (5) of this section identifies that a different rule applies if the organization is a "registered organization" under the law of the state. A debtor that is a registered organization is located in the state where it is registered.¹² Thus, the rule about an organization with multiple places of business does not apply to registered organizations since this type of debtor was "provided in this section."¹³

⁷ See *id.* at 1532; see also 11 U.S.C. § 544(a).

⁸ See *in re Haberman*, 516 F.3d 1207, 1210 (10th Cir. 2008). The above-mentioned powers of the debtor allow a debtor to avoid secured liens that are unperfected as of the time of petition, essentially rendering those unperfected security interests as subordinate to the debtor in possession's interest. See *In re Charles*, 323 F.3d 841, 842 (10th Cir. 2003).

⁹ Utah Code Ann. § 70-A-9a-307(2)(c); Nev. Rev. Stat. 104.9307(2)(c).

¹⁰ Utah Code Ann. § 70-A-9a-307(2)(c); Nev. Rev. Stat. 104.9307(2)(c).

¹¹ Utah Code Ann. § 70-A-9a-307(2)(c); Nev. Rev. Stat. 104.9307(2)(c).

¹² Utah Code Ann. § 70-A-9a-307(5); Nev. Rev. Stat. 104.9307(5).

¹³ Utah Code Ann. § 70-A-9a-307(2); Nev. Rev. Stat. 104.9307(2).

As such, in order to be entitled to the relief sought, being either adequate protection or relief from stay, SFS need establish that it holds a perfected secured interest in the property at issue.

C. Perfecting a Secured Interest Against a Registered Organization Debtor

There is no genuine dispute that SoNev is a registered organization that is registered in the State of Nevada. Thus, SoNev’s location should only be determined as a “registered organization.” As a registered organization, SoNev is thus an exception to the general rule for organizations with multiple places of business being located at “its chief executive office.” Therefore, SoNev being a Nevada limited liability company alone determines that the debtor is located only in Nevada.¹⁴ SFS incorrectly argued that the Debtor is also an “organization” with more than one place of business, so it is also located “at its chief executive office,” or in other words, in Cedar City, Utah. First, as discussed above, a “registered organization” is an exception to the general rule for organizations, so SoNev cannot be both a “registered organization” and an “organization” with two differing locations. Second, *In re Trinity Investment Group*,¹⁵ the case SFS solely relied on to prove this analysis, has been critiqued by commentators,¹⁶ and is

¹⁴ See Stephen L. Sepinuck, Personal Property Secured Transactions, 75 Bus. Law 2705, 2716 (2020). See also U.C.C. § 9-102 cmt. 11 (AM. LAW INST. & UNIF. LAW COMM’N 1977) (highlighting that limited liability companies are registered organizations).

¹⁵ *Trinity Inv. Group, LLC v. Sigma Rests., Inc. (In re Trinity Investment Group)*, 2019 WL 2004760 (Bankr. N.D. Ind. 2019).

¹⁶ See Stephen L. Sepinuck, Personal Property Secured Transactions, 75 Bus. Law 2705, 2716 (2020) (finding the case’s reasoning was faulty because the “rule about an organization with multiple places of business is not applicable to registered organizations”); see also William D. Hawkland, Uniform Commercial Code Series § 9-307:1 (Dec. 2021) (finding the case incorrectly considered subsection (b) of § 9-307 as relevant despite the exception for registered organizations).

distinguishable from the instant.¹⁷ Thus, SFS should have only filed its financing statement in Nevada because the Debtor can only be located in Nevada as a matter of law.¹⁸

Furthermore, in tying into the overarching issue at hand, of whether the failure to perfect in the debtor's state of registration is fatal to being classified as a secured creditor, is a case of first impression in the Utah Bankruptcy Court. However, many of the bankruptcy courts that have addressed this issue have held that creditors who fail to file in the debtor's place of registration have not perfected their security interests and were thus unsecured creditors.¹⁹ Lastly, unperfected security interests are unsecured when the debtor's security interest is superior to that of the creditor.²⁰

Here, the Court aligns with the other bankruptcy courts and finds that SFS did not perfect its security interest in the Collateral when it did not file its UCC financing statement in Nevada. With an unperfected security interest, SFS is an unsecured creditor with a subordinate security interest to that of the Debtor's. Thus, SFS's failure to perfect in the Debtor's state of registration is fatal to it being classified as a secured creditor. As such, the Movant has failed to satisfy its

¹⁷ In *In re Trinity Investments Group*, the actual analysis taken by the court was not actually outcome determinative, nor as full-hearted as SFS has argued. In *Trinity Investments Group*, the debtor's principal place of business, as well as their state of organization, were both located in Indiana, and the creditor at issue mistakenly filed their UCC financing statement in Ohio. See *In re Trinity Investments Group*, 2019 WL 2004760 (Bankr. N.D. Ind. 2019). This is distinguishable from the instant, where the principal place of business and state of registration are not the same, and thus a closer reading of the state's commercial code is necessary.

¹⁸ See *Aura Systems v. Barovich (In re Aura Systems)*, 347 B.R. 720 (Bankr. C.D. Cal. 2006) (“[U]nder both California and Delaware law, there is a single place to perfect a security interest in collateral owned by a Delaware corporation, wherever the collateral may be located. That location is the office of the Delaware Secretary of State. It also follows that there is no place in California to file a financing statement that would accomplish such perfection of a security interest in such collateral, including California collateral, belonging to a Delaware corporation.”).

¹⁹ See *In re Trafford Distrib. Ctr., Inc.*, 414 B.R. 849, 855 (Bankr. S.D. Fla. 2009) (holding creditor's lien is not perfected because it failed to file in debtor's state of incorporation, rendering it unsecured); *In re Qualia Clinical Serv., Inc.*, 441 B.R. 325, 331 (B.A.P. 8th Cir.) (8th Cir. 2011) (holding creditor's interest was unperfected from the Nebraska filing given that the debtor was organized in Nevada—making it unsecured at the relevant time); *In re Semcrude, L.P.*, 407 B.R. 112 (Bankr. D. Del. 2009) (holding since creditor failed to file its financing statement in debtor's place of incorporation, the creditor had not perfected its security interest and was therefore subordinate to perfected security interests).

²⁰ See *Rushton v. Standard Indus., Inc. (In re C.W. Mining Co.)*, 509 B.R. 378, 387 (Bankr. D. Utah 2014) (finding Trustee had a superior interest over the creditor since the creditor failed to perfect its security interest).

burden in establishing that it is entitled to an order lifting the automatic stay, or entitled to adequate protection.

Lastly and although only briefly argued, any statement made by the Debtor (or its representative) portraying the Debtor as an organization registered in Utah is not enough to support any estoppel arguments. In filing the financing statement, the Creditor is charged to have notice of all the facts that could have been learned through reasonable inquiry.²¹ This responsibility includes misrepresented facts as long as the Creditor could have discovered the truth through a reasonable inquiry. Therefore, while there are documents from SoNev that show an address in Utah, a reasonable inquiry into state records about the organizational registration of SoNev would have revealed it is not a Utah registered organization. SFS cannot claim reliance on misrepresentations that were allegedly made by SoNev.

IV. CONCLUSION

For the foregoing reasons, the Court denies the Movant's Motion for Adequate Protection, or in the Alternative, Motion for Relief from the Automatic Stay. The Court concludes that SFS has failed to meet the burden required to prove it is entitled to either forms of relief sought. More specifically, the Court concludes that SFS has failed to establish that it possesses a perfected secured interest in the Collateral. A separate Order accompanies this decision.

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²¹ *WSFS v. Chillibilly's, Inc.*, 2005 WL 730060, at *12 (Del. Super. Ct. Mar. 30, 2005).

SERVICE LIST

Service of the foregoing **RULING ON MOTION FOR ADEQUATE PROTECTION, OR IN THE ALTERNATIVE, MOTION FOR RELIEF FROM THE AUTOMATIC STAY FILED BY SOLUTIONS FINANCIAL SERVICES** shall be made on the following parties through the CM/ECF system:

- **Brian M. Rothschild** penrod.keith@dentons.com ; Kristin.hughes@dentons.com ; ecf@parsonsbehle.com ; docket@parsonsbehle.com
- **Darren B. Neilson** dneilson@parsonsbehle.com
- **Scott S. Bridge** sbridge@keslerrust.com
- **D. Ray Strong, Sub V tr** rstrong@thinkbrg.com ; UT30@ecfcbis.com ; drstrong@ecf.axosfs.com
- **Peter J. Kuhn, tr** Peter.J.Kuhn@usdoj.gov ; James.Gee@usdoj.gov ; Lindsey.Huston@usdoj.gov ; Rinehart.Peshell@usdoj.gov ; Rachelle.D.Armstrong@usdoj.gov ; Brittany.Eichorn@usdoj.gov
- **United States Trustee** USTPRegion19.SK.ECF@usdoj.gov

By U.S. Mail: In addition to the parties of record receiving notice through the CM/ECF system, the following parties should be served notice pursuant to Fed. R. Civ. P. 5(b).

SoNev Construction, LLC
444 S Main St., Suite C7
Cedar City, UT 84720