FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
April 2, 2014
Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE AARON GRANT BUERGE, doing business as Trolley's, LLC, doing business as Trolley's Overland Park, LLC, doing business as Trolley's Real Estate Holdings, Debtor.	BAP No. KS-12-074
PRIME LENDING II, LLC, Appellant, v. AARON GRANT BUERGE, LIBERTY BANK, FINANCIAL ENTERPRISES, INC., BUERGE BANCSHARES, INC., and ALDEN BUERGE, Appellees.	Bankr. No. 11-20325 Chapter 7 OPINION*
IN RE AARON GRANT BUERGE, doing business as Trolley's, LLC, doing business as Trolley's Overland Park, LLC, doing business as Trolley's Real Estate Holdings, Debtor.	BAP No. KS-12-077
ERIC C. RAJALA, Chapter 7 Trustee, Appellant,	Bankr. No. 11-20325 Chapter 7

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

v.

AARON GRANT BUERGE, LIBERTY BANK, FINANCIAL ENTERPRISES, INC., BUERGE BANCSHARES, INC., and ALDEN BUERGE,

Appellees.

IN RE AARON GRANT BUERGE, doing business as Trolley's, LLC, doing business as Trolley's Overland Park, LLC, doing business as Trolley's Real Estate Holdings,

Debtor.

BAP No. KS-12-078

DAVID L. JOHNSON, MONTE G. MCDOWELL, JOSE L. EVANS, MELVIN L. DUNSWORTH, Jr., STEVEN B. CHASE, BRADLEY L. NICHOLSON, and KEVAN D. ACORD,

Appellants,

v.

AARON GRANT BUERGE, LIBERTY BANK, FINANCIAL ENTERPRISES, INC., BUERGE BANCSHARES, INC., and ALDEN BUERGE,

Appellees.

Bankr. No. 11-20325
Chapter 7

IN RE AARON GRANT BUERGE, doing business as Trolley's, LLC, doing business as Trolley's Overland Park, LLC, doing business as Trolley's Real Estate Holdings,

Debtor.

BAP No. KS-13-022

PRIME LENDING II, LLC, Appellant, v. AARON GRANT BUERGE, ALDEN BUERGE, BUERGE BANCSHARES, INC., and FINANCIAL ENTERPRISES, INC., Appellees.	Bankr. No. 11-20325 Chapter 7 OPINION
IN RE AARON GRANT BUERGE, doing business as Trolley's, LLC, doing business as Trolley's Overland Park, LLC, doing business as Trolley's Real Estate Holdings, Debtor.	BAP No. KS-13-023
PRIME LENDING II, LLC, Appellant, v. AARON GRANT BUERGE, ALDEN BUERGE, BUERGE BANCSHARES, INC., and FINANCIAL ENTERPRISES, INC, Appellees.	Bankr. No. 11-20325 Chapter 7
IN RE AARON GRANT BUERGE, doing business as Trolley's, LLC, doing business as Trolley's Overland Park, LLC, doing business as Trolley's Real Estate Holdings, Debtor.	BAP No. KS-13-024
ERIC C. RAJALA, Chapter 7 Trustee, Appellant,	Bankr. No. 11-20325 Chapter 7

v.

AARON GRANT BUERGE, ALDEN BUERGE, BUERGE BANCSHARES, INC., and FINANCIAL ENTERPRISES, INC.,

Appellees.

IN RE AARON GRANT BUERGE, doing business as Trolley's, LLC, doing business as Trolley's Overland Park, LLC, doing business as Trolley's Real Estate Holdings,

Debtor.

BAP No. KS-13-025

ERIC C. RAJALA, Chapter 7 Trustee,

Appellant,

v.

AARON GRANT BUERGE, ALDEN BUERGE, BUERGE BANCSHARES, INC., and FINANCIAL ENTERPRISES, INC.,

Appellees.

Bankr. No. 11-20325
Chapter 7

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

Before THURMAN, Chief Judge, CORNISH, and ROMERO, Bankruptcy Judges.

ROMERO, Bankruptcy Judge.

Among many duties, a Chapter 7 trustee's first-listed duty under 11 U.S.C. § 704(a)(1) is to "collect and reduce to money the property of the estate for which [he] serves, and close such estate as expeditiously as is compatible with the best

interests of parties in interest."[1] Once property is surrendered to the trustee, he must determine how to administer estate property – whether to sell the property pursuant to § 363 or § 522(f), abandon it pursuant to § 554, or otherwise dispose of it pursuant to § 724 or § 725. A party in interest, however, may compel a trustee to abandon the property if it is burdensome or of inconsequential value and benefit to the estate.[2]

In this case, Eric C. Rajala, the Chapter 7 Trustee assigned to the bankruptcy case (the "Trustee"), sought to sell shares of stock in two closely-held bank holding companies to Prime Lending II, LLC ("Prime"), the debtor's largest unsecured creditor, while the debtor sought to compel the Trustee to abandon them to him. At issue is whether the Bankruptcy Court erred in denying the proposed sale to Prime and compelling the Trustee to abandon the stock. The Bankruptcy Court was faced with a multitude of very difficult issues. While we agree with many of that Court's determinations, we simply disagree with others as will be discussed hereafter. After careful review of the record and arguments in this matter, we AFFIRM in part and REVERSE in part.

Factual Background

Aaron Buerge (the "Debtor") and his family are bankers. The Buerge family has been in the banking business since 1965, when the Debtor's grandfather purchased a bank in Butler, Missouri.[3] The family eventually acquired two banking entities, First National Bank of Clinton, Missouri and First

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[1] All future references to "Code," "Section," and "§" are to title 11, United States Code, unless otherwise specified.

[2] 11 U.S.C. § 554(b).

[3] Testimony of Alden Buerge, July 13, 2012 Trial Tr. at 51-52, *in* Joint Appendix of Appellants Eric C. Rajala, Chapter 7 Trustee, Prime Lending, II, LLC, David L. Johnson, Monte G. McDowell, Jose L. Evans, Melvin L. Dunsworth, Jr., Steven B. Chase, Bradley L. Nicholson, and Kevan D. Acord filed in BAP Appeal Nos. KS-12-074, -077, & -078 ("App.") at 1575-76.

State Bank of Joplin, Missouri. Each entity has several branch locations in Missouri, and each entity represents the principal asset of a bank holding company. Buerge Bancshares, Inc. ("BBI") holds all shares of First State Bank of Joplin, while Financial Enterprises, Inc. ("FEI") holds all of the shares of First National Bank of Clinton. The Debtor's father, Alden Buerge ("Alden"), the Debtor's brother, and the Debtor own approximately ninety percent of BBI and FEI's shares, and non-family shareholders own the remaining shares.

From 2003 through 2007, the Debtor invested in a restaurant business, obtaining an ownership interest in Trolley's, LLC, Trolley's Overland Park, LLC, and Trolley's Real Estate Holdings, LLC (collectively "Trolley's").[4] Columbian Bank and Trust Company financed Trolley's operations, and the Debtor personally guaranteed the loans, which totaled approximately $3.7 million and were secured by Trolley's real estate and assets. Columbian Bank failed in 2008, and although the Debtor made a bid for the loans, the FDIC sold the loans to Prime's predecessor, which immediately assigned the loans to Prime. Upon obtaining the loans, Prime declared the loans in default and filed suit in state court against Trolley's and their members, including the Debtor, on February 6, 2009. Trolley's filed for bankruptcy on May 11, 2009. That bankruptcy concluded with the liquidation of Trolley's assets after extensive litigation with Prime.

The Debtor filed for Chapter 7 relief on February 11, 2011. He received his discharge on October 5, 2011. Unsecured claims filed against the estate were approximately $3 million. Prime's claim of $2,545,668.66 represented eighty-five percent of the unsecured class.[5]

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[4] Statement of Financial Affairs at 7-8, *in* App. at 32-33.

[5] Prime initially filed a proof of claim for $4,707,937.90, but later amended its claim to reflect recovery from the liquidation of Trolley's assets.

A. The Stock

The Debtor's stock in BBI and FEI (collectively the "Stock") constituted his primary nonexempt asset. On the petition date, he owned 306.47 shares of BBI stock and 132.64225 shares of FEI stock, which represent approximately 11.5% ownership of each company. The Debtor's schedules valued the BBI shares at $1,102,930.30, and the FEI shares at $566,255.07.[6]

FEI was a C corporation and did not pay dividends.[7] BBI is a Subchapter S corporation and generally pays quarterly distributions to cover the income tax associated with profit passed through to the shareholders.[8] BBI has historically generated a profit, resulting in estimated quarterly state and federal taxes of about $34,385. If BBI does not distribute dividends to cover these tax liabilities, the bankruptcy estate does not have assets to pay the tax liability.

The Stock was subject to liens held by Alden and Liberty Bank in the total amount of $1.73 million as of April 2011.[9] Alden holds a lien on 100 of the Debtor's BBI shares, as security for a loan he made to the Debtor to purchase those shares. Liberty Bank's claim arose from two loans it made to the Debtor that were cross-collateralized by the other 206.47 shares of the Debtor's BBI

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[6] Amendment to Schedule B Personal Property, *in* App. at 170. The Debtor initially valued the BBI shares at $1,165,210 and the FEI shares at $ 579,219. Schedule B at 1, *in* App. at 39.

[7] FEI has recently converted to a S corporation. Testimony of the Trustee, July 11, 2012 Trial Tr. at 75, *in* App. at 1247.

[8] The dividends usually do not provide shareholders with cash in excess of their tax liability except in the fourth quarter of 2011. Alden, who determines the BBI dividends, miscalculated the 2011 fourth quarter dividend because he was distracted by a recent cancer diagnosis and the effects of the Joplin tornado, resulting in a larger than usual distribution that quarter.

[9] The Debtor reported Alden's claim was $398,669.14, and Liberty Bank's claim was $1,331,334.53 on April 7, 2011. Notice of Corrected Scheduled D Creditors Holding Secured Claims, *in* App. at 168.

stock, as well as by all of his FEI stock.[10] Quarterly debt service payments on the loans secured by the Stock total about $27,249. The Debtor reaffirmed these secured loans.[11]

The Stock is also subject to stock purchase agreements ("SPAs") that restrict the Debtor's ability to transfer the stock.[12] Most significantly, any transfer that renders BBI or FEI ineligible for Subchapter S tax treatment is prohibited. Further, under the SPAs, BBI and FEI have an option to purchase their respective stock at book value.

B. Various Offers for the Stock

1. The $10,000 offer

On September 8, 2011, the Trustee moved to abandon the Stock (and to sell some other assets) to the Debtor in exchange for $10,000 and the Debtor's payment of the estate's 2010 priority tax claim (approximately $15,000).[13] In that motion, the Trustee stated the Stock:

> (i) [] are shares [] of closely held banking corporations with shareholder restriction agreements in place which prevented [him] from selling the stock to a third party;
>
> (ii) even if [he] could sell the stock to a third party, the stock is encumbered by perfected security interests which secure debts that could equal or exceed the net liquidation value of the stock;
>
> (iii) the income and the estimated net sale proceeds attributed to the stock appear to be sufficient to only pay the income taxes generated by its sale, leaving nothing for distribution to creditors;

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10 *Id.*

11 *See* Reaffirmation Agreements, *in* App. at 142-67.

12 Stock Purchase Agreement [Between FEI and the Debtor], *in* App. at 1736-45; Stock Purchase Agreement [Between BBI and the Debtor], *in* App. at 1755-68.

13 Trustee's Motion for Approval of Sale of Personal Property #S-1, Abandonment of Property of the Estate, and Compromise and Settlement, Pursuant to 11 U.S.C. §§ 363(b), 363(f), and 554(a), and Bankruptcy Rules 2002, 6004, 6007 and 9019 (the "Trustee's Motion to Abandon"), *in* App. at 241-46.

> (iv) it would costs thousands of dollars' worth of research and analysis to determine the basis and income tax consequence to the estate if the estate sold the stock, according to the Debtor's accountant;
>
> (v) no other shareholder is apparently willing to purchase [the Stock] from the Trustee; and
>
> (vi) even if these obstacles could be overcome, the shares appear to be unmarketable at this time, because they represent minority interests in small community banks that have been damaged by the ongoing financial and economic recession [and the Joplin tornado].[14]

Prime objected to the proposed abandonment of the Stock, disagreeing with the Trustee's assessment and advising that it was "prepared to do the necessary discovery at no cost to the estate or Debtor" to complete its analysis as to the Stock's value, liens, and the tax consequences to determine whether to make an offer forthwith or withdraw its objection.[15] Prime believed the Debtor's equity in the Stock was approximately $1.8 million after deducting the secured debt.[16] The Debtor replied the purpose of Prime's discovery was delay and harassment, arguing the Stock's value had been an issue for the past three years, should be discounted for lack of control and marketability, and any offer would have to exceed $1.7 million to cover the liens, trustee fees, accountant fees, and taxes. The Debtor questioned why Prime waited some eight months after the petition date to conduct discovery.

At the hearing on the Trustee's Motion to Abandon, Prime offered to pay the Trustee a nonrefundable fee of $15,000 to give Prime sufficient time to complete its analysis and decide whether to make an offer.[17] The Trustee agreed

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[14] *Id.* at 2-3, ¶ 5(B), *in* App. at 242-43.

[15] Prime's Objection to the Trustee's Motion to Abandon at 2-3, *in* App. at 263-64.

[16] *Id.* at 4-5, *in* App. at 265-66.

[17] If an offer was made, a $15,000 credit would apply to the purchase price. If no offer was made, the Trustee would keep the $15,000 scot-free. Oct. 12,

(continued...)

to allow Prime additional time, while acknowledging the Debtor's concerns.[18] In the end, the Bankruptcy Court allowed Prime shortened discovery on the issues discussed at the hearing and set the matter for an evidentiary hearing on November 9, 2011.[19] The Trustee, however, withdrew his motion to abandon on November 3, 2011.[20]

A month later, the Debtor filed a motion to compel the Trustee to abandon the Stock (the "Motion to Compel Abandonment") as the Trustee had yet to present an offer from Prime. The Debtor reported Liberty Bank's loans had matured, he had allowed his time to rescind the reaffirmation agreement to lapse so Liberty Bank would not refuse to renew the loan, he paid the estate's priority tax claims in the approximate of $15,000 in reliance on his agreement with the Trustee, and he had filed an administrative claim for the tax payment.[21] The Debtor argued Prime was not a good faith bidder because a $1.83 million bid, after paying the secured claims, trustee fees, and other expenses, would result in little to no return to unsecured creditors.

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[17] (...continued)
2011 Hearing Tr. at 12, *ll.* 4-8, *in* App. at 319.

[18] *Id.* at 5, *ll.* 4-11, *in* App. at 312 ("As far as the trustee is concerned, I think it is in the estate's best interest to allow this process to come to its natural conclusion, let the creditor make its evaluation and then decide, do they want to bid or not. But having said that, I understand the debtor's concerns. It seems to be dragging on and they have got some issues they have got to deal with and this is not helping."). The Trustee explained that he filed the motion with the specific intention of motivating Prime to "put up or shut up" as it had indicated it may make an offer for several months. *Id.* at 4, *ll.* 12-18, *in* App. at 311.

[19] *Id.* at 33, *ll.* 5-9, *in* App. at 340 ("Well, with regard to the [Trustee's Motion to Abandon] before the Court this morning, the Court is not going to rule on that motion and will provide Prime Bank with very shortened discovery as to the issues that were discussed this morning.").

[20] Notice of Withdrawal of Trustee's Motion to Abandon, *in* App. at 374-75.

[21] Motion to Compel Abandonment, *in* App. at 459-67.

2. The Stalking Horse Offer

Two days later, the Trustee filed a motion seeking: 1) approval of procedures for an auction with a stalking horse bid and with an expense reimbursement provision, and 2) authority to sell the Stock, free and clear of liens, claims, and interests pursuant to 11 U.S.C. §§ 363(f)(1), (3), (4) and (5) (the "§ 363 Motion").[22] The Trustee also sought an expedited date for a sale hearing, stating that he and Prime would "forego a two-step process for the approval of bid procedures before the sale hearing," and was prepared to have all matters heard on the same day.[23]

An Asset Purchase Agreement between Prime and the Trustee (the "APA") and Auction and Bid Procedures ("Procedures") accompanied the § 363 Motion.[24] The APA and Procedures denominated Prime as the "Purchaser/Stalking Horse Bidder," and described Prime as "an acquisition group acting together but made up of [certain named individuals], which shall, in no event, individually own more than five percent [] of the [Stock] for either FEI or BBI."[25] In sum, the APA and the Procedures provided for a stalking horse offer of $1.83 million from Prime, a $15,000 escrow deposit from Prime, an opportunity for other potential purchasers to submit qualifying bids,[26] and reimbursement of $10,000 to Prime in

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22 § 363 Motion, *in* App. at 471-76.

23 *Id.* at 4, ¶ 8, *in* App. at 474.

24 APA, *in* App. at 477-88; Procedures, *in* App. at 489-92.

25 APA at 3, *in* App. at 479. Those individuals are David L. Johnson, Monte G. McDowell, Jose L. Evans, Melvin L. Dunsworth, Jr., Steven B. Chase, Bradley W. Nicholson, and Kevan D. Acord.

26 The Procedures defined a "Qualifying Bid" as

> a written offer that: (a) states that the bidder offers to purchase part or all of the Purchased Shares for cash plus the Expense Reimbursement plus $10,000.00 (each such bid amount being a "Qualifying Bid Amount"); (b) does not request or entitle the bidder to any transaction or break up fee,

(continued...)

the event it was outbid[27] (the "Stalking Horse Offer"). The Procedures required a Qualifying Bidder to submit bids 24 hours in advance of the hearing set for the auction. Bids were to be in cash, and were to be accompanied by the $10,000 expense reimbursement, and a cash deposit of $15,000.

Both Prime and the Trustee objected to the Debtor's Motion to Compel Abandonment. Prime argued the Debtor lacked standing to object to the § 363 Motion, his math "[did] not add up," and he prematurely assumed there were no other bidders.[28] Prime claimed a $100,000 benefit to the estate would be meaningful. The Trustee argued the Stalking Horse Offer was structured to comply with SEC regulations, would stimulate other bids, and would result in a sufficient return.

On January 18, 2012, the Bankruptcy Court held a status conference regarding whether to hold multiple hearings or a single hearing on the pending motions. The Debtor and Alden urged the Bankruptcy Court to bifurcate the matter:

> It is the debtor's [and Alden's] position [] that there are some legal issues inherent to the procedures motion which might make sense to

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[26] (...continued)
> expense reimbursement, termination, or similar type of fee or payment; (c) is accompanied by a cash deposit in the amount equal to $15,000 (each such amount being a "Deposit"), which Deposit shall be deposited with the Trustee; (d) is accompanied by a clean and duly executed APA; (e) is accompanied by a modified APA, if applicable, reflecting the variations from the Stalking Horse APA; (f) does not contain any due diligence or financing contingencies and, upon request of the Trustee, provides to the Trustee evidence of financial ability to close a sale; (g) fully disclose the identity of each entity that will be bidding for the Purchased Shares or otherwise participating in connection with such bid, and the complete terms of any such participation; and (h) states that the offering party consents to the core jurisdiction of the Bankruptcy Court.

Procedures at 1-2, *in* App. at 489-90.

[27] This is commonly known as a break-up fee.

[28] Prime's Objection to Motion of Debtor to Compel Abandonment of Stock at 5, ¶ 6, *in* App. at 508-14, 512.

be heard first.

> The motion seeks to basically sell the stock free and clear of the shareholder restriction agreement. We don't think it can be sold free and clear of the shareholder restriction agreement. And we would assume that if this Court were to say it is a binding and valid restriction agreement and the winning bidder cannot be recognize[d] as a shareholder, the bidder probably wouldn't pay the 1.8 million they have offered[.]
>
> The second issue is that . . . the ownership of the stock, which is the bank holding company, is governed by regulations and a federal bank holding act, and only certain parties can be qualified to bid, and we believe that Prime is not a qualified bidder under the act.
>
> [I]f Prime is not a qualified bidder, there are no other potential bidders at this point, it would make sense to us to have the Court determine that before we spend the time and resources on an all day hearing on a 363 sale.[29]

The Trustee and Prime preferred one hearing, stating "[w]e think it should be one hearing and we just want to go forward and see if we can get it done."[30] The Bankruptcy Court agreed, ruled that all of these issues could be decided at one hearing, and set the matter for a two-day evidentiary hearing.[31]

Subsequently, Liberty Bank, Alden, FEI, BBI, and the Debtor (collectively "Appellees") all filed Objections to the § 363 Motion. No one consented to the sale or agreed to the $10,000 break-up fee. Liberty Bank and Alden argued, *inter alia*, that the Stalking Horse Offer failed to provide them adequate protection as it: 1) lacked an equity cushion to accommodate continuing accrued interest and attorney's fees; 2) did not provide specific price and distribution allocations for each company's stock or for immediate payments of their claims; and 3) left the validity of their liens open to challenge, which might require them to incur additional costs and attorney's fees to defend their liens. Appellees claimed the

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[29] Jan. 18, 2012 Status Conference Tr. at 4-5, *ll.* 4-25, 1-9, *in* App. at 563-64.

[30] *Id.* at 7, ll. 5-6, *in* App. at 566.

[31] The initial trial setting was for February 28 and 29, 2012. The trial date was continued numerous times, once pursuant to an agreement by the parties and four times by the Bankruptcy Court.

Stalking Horse Offer violated the SPAs because the sale to Prime would destroy the holding companies' Subchapter S eligibility. Further, they all questioned whether the proposed sale complied with SEC regulations and demanded the Trustee obtain a legal opinion from a qualified securities attorney indicating the series of share transfers were exempt from securities registration requirements under both federal and applicable state law prior to deciding whether to proceed with sale of the Stock. The Debtor argued, *inter alia*: 1) he had standing to object to the § 363 Motion; 2) the Procedures were designed to chill bidding because the parties' objections to the sale would not even be heard until after the auction was purportedly conducted and because it did not authorize non- or partial-cash bids; 3) Prime was not a good faith purchaser; and 4) the proposed sale would not provide benefit to the estate. Finally, to preserve the issue for appeal, the Debtor again objected to the § 363 Motion to the extent it sought approval of the Procedures and the sale at the same hearing.[32]

On February 27, 2012, the Trustee filed an amended APA to address some of the objections.[33] The amended APA substituted Prime's seven individual members (the "Individual Purchasers") as the "Purchaser" in place of Prime, the limited liability company, to overcome the Subchapter S objection. It added the following provisions to satisfy the SPAs- and SEC-related objections: 1) any sale was subject to BBI and FEI's SPAs; 2) the Trustee and Purchaser agreed to give BBI and FEI a certain period to exercise their respective option rights to purchase the Stock at "book value" pursuant to the SPAs; and 3) Purchaser agreed to comply with all banking regulations and obtain a legal opinion stating that the transfer of the Stock complied with all applicable federal and state securities law, at the Purchaser's own cost. As a result of these amendments, the Bankruptcy

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[32] Debtor's Objection to § 363 Motion at 3,5, *in* App. at 603, 605.

[33] Amendment to APA, *in* App. at 689-98.

Court, after a phone conference with counsel, continued the trial to March 26 and 27, 2012.

On March 20, 2012, the Trustee filed a second amended APA,[34] this time increasing the Stalking Horse Offer to include: 1) an amount equal to the unpaid interest accrued *per diem* on the secured claims as of the closing date, and 2) a $50,000 escrow deposit to apply toward the secured creditors' attorney's fees.[35] Further, bidders were now allowed to use the assumption of the secured creditors' debt as part of their bid price (bids were previously limited to cash only).[36]

3. The Debtor's $150,000 Offer

The Debtor took advantage of this "assumption credit" provision. Sometime in March 2012, he offered to pay the Trustee $150,000 to abandon the Stock (the "$150,000 Offer").[37] Because he had reaffirmed the secured debts, the Debtor claimed his offer constituted a total bid of approximately $1.9 million (secured liens of $1.75 million plus $ 150,000).[38] The Trustee rejected that offer, explaining:

[W]hile I appreciated the fact that they wanted to make an offer, it

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[34] Amended and Restated APA dated Mar. 20, 2012, *in* App. at 718-32.

[35] *Id.* at 5-6, ¶ 3.1, *in* App. at 722-23.

[36] Amended Procedures at 2, ¶ 5(b), *in* App. at 751. This provision was specifically intended to allow the Debtor to credit bid the underlying debts secured by the Stock, giving the Debtor significant leverage if he chose to make a bid.

[37] Trial Ex. 73, Email dated Apr. 12, 2012 at 2, *in* App. at 2037 (the Debtor referencing net settlement offer of $150,000 presented to Trustee on March 9th, 2012); Testimony of the Trustee, July 11, 2012 Trial Tr. at 74, *ll.* 3-5, *in* App. at 1246 ("And the $150,000 is the cash amount that the debtor had proposed to pay to me in exchange for me abandoning the stock."), and 153, *ll.* 12-13, in App. at 1325 ("They basically wanted to pay me $150,000 in exchange for me abandoning the stock."); Closing Argument, July 13, 2012 Trial Tr. at 84, *ll.* 20-23, *in* App. at 1608 (Trustee: "The only other alternative that has been presented to me has been an opportunity to abandon the stock in exchange for payment of $150,000. That was an oral offer that was made to me back in March[.]").

[38] Trial Ex. 73, Email dated April 12, 2012 at 2, *in* App. at 2037.

> really wasn't an adequate offer because I was not in a position to evaluate it completely. It didn't comply with the – the bid procedures that we had set up. I told him I didn't think I could just abandon the entire bid procedure and grab their offer especially since it appeared to be apples to oranges. That didn't give me any tax break down, it didn't say anything about the dividends. Plus, the abandonment of the stock, if that is what it was, would probably preclude me from having any right to pursue avoidance of secured debts, liens on the stock.
>
> So for all of those reasons I told them I really couldn't accept that offer, and that I would really rather have them propose [an] offer that included all of those facets so I could compare apples to apples.[39]

C. The Trial

After several continuances, a three-day trial on the motions began on July 11, 2012. Prior to the trial, the parties filed multiple trial briefs, including supplemental briefs and surreplies. The parties stipulated the second amended APA and Procedures resolved numerous objections, among them: 1) Liberty Bank's and Alden's adequate protection objections; 2) the Debtor's mixed bid objection; 3) the SPAs-related objection on Subchapter S eligibility; 4) the $10,000 break-up fee; and 5) the allocation-based objection.[40] The parties also stipulated the following as to the secured claims: 1) Liberty Bank's claim for principal was $1,318,820.45, and interest was $23,232.15 at a per diem of $230.59; 2) Alden's claim for principal was $391,865.59, and interest was $3,886.20 at a per diem of $38.10; and 3) their combined total amount for attorney's fees and late fees was $61,165.16.[41] In other words, on the date of trial, the Stock was encumbered with $1,798,968.55 in liens.[42] However, the

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[39] July 11, 2012 Trial Tr. at 74, *ll.* 8-25, *in* App. at 1246.

[40] *Id.* at 5-7, *in* App. at 1177-79.

[41] *Id.* at 3-5, *in* App. at 1175-77.

[42] *Id.* at 54, *in* App. at 1226; Trial Ex. 74, Prime's Summary of Secured Claims, *in* App. at 2041. We note a one dollar discrepancy as to Liberty Bank's interest on Ex. 74 and what was stated at trial.

Trustee reserved the right to seek avoidance of the liens and the parties agreed that any payments made would be subject to recovery by the Trustee to the extent liens were avoided.[43] As a result of this agreement, the Trustee omitted evidence on lien avoidance.[44]

The parties agreed that four issues remained for trial: 1) whether the proposed sale violated securities law (included in this was whether the legal opinion requirement set forth in the second amended APA was sufficient); 2) whether the proposed sale provided a benefit to the bankruptcy estate; 3) whether the purchasers were good faith purchasers; and 4) the Debtor's standing to object to the § 363 Motion.[45] The Trustee, the Trustee's accountant, the Debtor, Alden, and two securities law experts testified. Numerous exhibits were admitted.

Each side offered expert testimony regarding whether the Stock could be sold pursuant to the second amended APA without violating applicable securities law; specifically, whether the sale fell within an exemption to registration. Both witnesses were highly regarded securities experts, and both generally agreed that they were not comfortable with use of either the Rule 144 or the § 4(1) exemption for the sale at issue, although their levels of discomfort differed. The witnesses disagreed regarding the "Section 4-one-and-a-half exemption," with Prime's expert stating it applied, and the Debtor's expert saying it did not apply because that exemption only applies to a block sale to a single purchaser, which the proposed sale was not.

Regarding the benefit to the estate, the Trustee testified the Stalking Horse Offer's closing price of $1,907,117.35 would result in a $108,148 benefit to the

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[43] July 11, 2012 Trial Tr. at 3, 6, *in* App. at 1175, 1178.

[44] *Id.* at 6, *ll.* 12-17, *in* App. at 1178 ("And as a result of this agreement, the testimony regarding potential avoidance of liens will not be necessary at the hearing. I think the parties all agree that he didn't need to be here today.").

[45] *Id.* at 7-8, *in* App. at 1179-80.

estate.[46] With respect to the purchasers' good faith, no Prime representative or individuals testified. Instead, Prime elicited the following testimony from the Trustee:

> Q: Okay. And are you aware of any fraud committed by the purchasers or Prime regarding the proposed sale?
> A: No.
> Q: Okay. Are you aware of any collusion between the purchasers or Prime with any other bidder?
> A: No.
> Q: In fact, isn't it correct that before the auction takes place, parties have to certify that they have not acted in collusion with anyone pursuant to the bid procedures?
> A: That is correct.
> Q: And are you aware of any attempt by the stalking horse to take unfair advantage of other bidders?
> A: No, just the opposite.[47]

Regarding the Debtor's standing to object to the § 363 Motion, the Trustee testified, even if Prime's claim was ultimately disallowed, the proposed sale would not produce a surplus to the Debtor, thus the Debtor had no pecuniary interest in the sale.[48]

D. The Bankruptcy Court's Decision

On September 6, 2012, the Bankruptcy Court entered its order denying the § 363 Motion and granting the Motion to Compel Abandonment (the "Abandonment Order").[49] It found "[a]fter deducting $1,798,968.55 in secured claims and the sale costs including the anticipated $80,463 trustee fee, approximately $27,685 would be available to distribute to unsecured creditors –

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[46] *Id.* at 110, 154, *in* App. at 1282, 1326; Trial Ex. 74, *in* App. at 2041.

[47] Testimony of the Trustee, July 11, 2012 Trial Tr. at 77-78, *ll.* 14-25, 1-2, *in* App. at 1249-50.

[48] *Id.* at 43, *in* App. at 1215. Ten proofs of claim were filed, and the aggregate balance of proofs of claim excluding Prime was approximately $440,000.

[49] Abandonment Order, *in* App. at 2145-60.

about a 0.9 percent return."[50] It concluded the Trustee failed to establish the proposed sale to Prime was based on sound business judgment or resulted in a fair price because: 1) the Stock's value was not known; 2) the Stock was encumbered; 3) the sale became increasingly complicated and costly; and 4) a less than one percent return does not support a finding of good business judgment. It stated, "[c]ollectively, the evidence weigh[ed] against finding Prime [was] a good faith purchaser" given how closely aligned the Trustee was to Prime and the negligible benefit to unsecured creditors.[51]

Regarding abandonment, it concluded the evidence weighed in favor of abandonment based generally on the same facts and because the evidence failed to show the Stock's value was consequential to the estate. In reaching these conclusions, the Bankruptcy Court relied on the following determinations: 1) the Trustee could not avoid BBI and FEI's liens and claim a possible $1.7 million benefit to the estate because he did not have standing to challenge the liens' attachment based on a breach of a shareholder agreement to which he was not a beneficiary; 2) the Debtor's standing to challenge the § 363 Motion was not germane because Alden, BBI, and FEI had standing to object and the Trustee failed to meet his burden; and 3) the Debtor's $ 150,000 offer was a red herring to be disregarded as it was not officially presented to the Bankruptcy Court nor did anyone offer any admissible evidence regarding it. The Trustee, Prime and the Individual Purchasers appealed the Abandonment Order, filing separate notices of appeal.[52]

E. Post-Abandonment Events

On October 1, 2012, BBI executed a letter agreement, engaging Sheshunoff

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50 *Id.* at 4, *in* App. at 2148.

51 *Id.* at 12, *in* App. at 2156.

52 Notices of Appeal, *in* App. at 2177-86.

& Co. as an agent to sell its principal asset, First State Bank. In mid to late October 2012, First State Bank was sold to Pinnacle Bank. The parties have not revealed the sale terms.

On December 12, 2012, the Trustee and Prime jointly filed motions in the Bankruptcy Court seeking: 1) relief from the Abandonment Order pursuant to Rule 60(b)(2), (3), and (6), and 2) a limited stay of the Abandonment Order pending resolution of the Rule 60(b) motion. They claim they were prejudiced in their prosecution of the § 363 Motion and in their defense of the Motion to Compel Abandonment as the post-trial sale affected the Stock's value. The Debtor, Alden, FEI and BBI's collective response to the Rule 60(b) and stay motions included an affidavit of the Debtor, filed together with a motion to seal it. The Bankruptcy Court granted the motion to seal (the "Seal Order") before any response had been filed. The Trustee and Prime then filed motions to set aside the Seal Order and for leave to examine the affidavit. A hearing was held on the post-abandonment motions on January 16, 2013. On March 7, 2013, the Bankruptcy Court entered its order denying all three motions (the "Rule 60(b) Order"), and both Prime and the Trustee appealed that order.[53]

Standards of Review

For purposes of standard of review, decisions by trial courts are traditionally divided into three categories, denominated: 1) questions of law, which are reviewable *de novo*; 2) questions of fact, which are reviewable for clear error; and 3) matters of discretion, which are reviewable for abuse of discretion.[54] *De novo* review requires an independent determination of the issues, giving no

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[53] Rule 60(b) Order, *in* Appendix of Appellants Trustee and Prime filed in BAP Appeal Nos. KS-13-022, -023, -024, & -025 ("2013 App.") at 2758-69.

[54] *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *see* Fed. R. Bankr. P. 8013; *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1370 (10th Cir. 1996).

special weight to the bankruptcy court's decision.[55] "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[56] Under the abuse of discretion standard, a court abuses its discretion only when it makes a clear error of judgment, exceeds the bounds of permissible choice, or when its decision is arbitrary, capricious or whimsical, or results in a manifestly unreasonable judgment.[57]

Because multiple standards of review apply in this case, we will set forth the standard of review applicable to each error alleged by the parties below on an issue-by-issue basis.

Appellate Jurisdiction

This Court has jurisdiction to hear timely filed appeals from final orders, final collateral orders, and, with leave of court, interlocutory orders of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[58] The Trustee, Prime, and the Individual Purchasers timely filed their Notices of Appeal from the bankruptcy court's final orders and the parties have consented to this Court's jurisdiction by not electing to have the appeals heard by the United States District Court for the District of Kansas.[59] But

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[55] *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

[56] *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

[57] *Eastman v. Union Pac. R.R. Co.*, 493 F.3d 1151, 1156 (10th Cir. 2007).

[58] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-3.

[59] An order authorizing abandonment is a final order. *In re Johnston*, 49 F.3d 538, 540 (9th Cir. 1995). Although an order denying approval of sale of property may be deemed interlocutory, if it is issued in conjunction with a final order it becomes a final order. *See In re Kopexa Realty Venture Co.*, No. KS-03-082, 2004 WL 1170526 (10th Cir. BAP May 25, 2004); *Big Shanty Land Corp. v. Comer Props., Inc.*, 61 B.R. 272, 277 (N.D. Ga. 1985) (treating, without analysis, an order denying approval of sale of property as an interlocutory order); *Dutch*

(continued...)

even when a timely appeal of a final order is made, this Court lacks jurisdiction to review the order if the appellant lacks standing to bring the appeal.[60]

Standing to appeal is limited to those "aggrieved" by a bankruptcy court's order.[61] Under the "persons aggrieved" standard, parties will have standing to appeal a bankruptcy court order only if their "rights or interests are directly and adversely affected pecuniarily by the decree or order of the bankruptcy court."[62] Attendance and objection at a bankruptcy court proceeding are prerequisites for being a "person aggrieved."[63] Based on these standards, the Individual Purchasers are not persons aggrieved by the Abandonment Order as they did not participate in the proceedings below. They neither filed the § 363 Motion nor opposed the Motion to Compel Abandonment, and they did not appear at the hearing on those motions. Although Kevan Acord appeared at the hearing, he did so as a representative of Prime, and not as a representative of the Individual Purchasers. Accordingly, their appeal, BAP No. KS-12-78, must be dismissed.

The Trustee and Prime (collectively "Appellants") are aggrieved by the Abandonment Order, and because some form of effective relief may be fashioned

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[59] (...continued)
Lake Knoll Holdings, LLC v. Sunnybrook Homeowners Ass'n, Inc., No. 13-538, 2013 WL 3338783 (D. Minn. July 2, 2013) (order denying motion to sell did not leave the bankruptcy court with nothing to do but execute the order, it left open other possibilities to pursue). Likewise, a court's decision on a Rule 60(b) motion is a final order, provided the ruling or judgment challenged by the Rule 60(b) motion was a final decision of the trial court. *Stubblefield v. Windsor Capital Grp.*, 74 F.3d 990, 993 (10th Cir. 1996) (quoting *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991)).

[60] *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994) ("Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation.").

[61] *In re Kopexa Realty Venture Co.*, 240 B.R. 63, 65 (10th Cir. BAP 1999).

[62] *Holmes v. Silver Wings Aviation, Inc.*, 881 F.2d 939, 940 (10th Cir. 1989) (internal quotation marks omitted).

[63] *In re Weston*, 18 F.3d 860, 864 (10th Cir. 1994).

for them, this Court has appellate jurisdiction over their appeals.[64]

Discussion

This appeal involves a trustee's duty under § 704(a)(1) to expeditiously reduce a debtor's property to money for equitable distribution to creditors, whether by authorizing him to sell the property in the non-ordinary course of business under § 363 or compelling him to abandon the property under § 554(b). Although the issues in a motion for a § 363 sale and a motion to compel abandonment overlap, thus suggesting a single hearing is logical and practical, this case illustrates the dangers in doing so.

A. Denial of the § 363 Motion

Section 363(b) authorizes a trustee, after notice and a hearing, to use, sell, or lease property of the estate outside of the ordinary course of business. A trustee must show: 1) a sound business reason exists to sell the property; 2) adequate and reasonable notice of the terms has been given to parties in interest; 3) the proposed sale price is fair and reasonable; and 4) the buyer has acted in good faith.[65] The Bankruptcy Court concluded that the Trustee provided adequate and reasonable notice, but did not meet his burden as to sound business judgment, fair sale price, or good faith. We review a decision to deny a § 363(b) sale for abuse of discretion.[66]

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[64] Although the parties did not raise mootness as an issue, we conclude these appeals are not moot due to the subsequent sale of First State Bank to Pinnacle, a third party, because we can fashion some form of effective relief to Appellants despite the sale. *See In re K.D. Co., Inc.*, 254 B.R. 480, 486 (10th Cir. BAP 2000) (court obligated to decide, *sua sponte*, the jurisdictional issue of whether an appeal has been rendered moot by subsequent events). Pinnacle only purchased BBI's asset, not BBI itself, which means the Stock, and possible proceeds of the sale, are still within the Debtor's control. The Debtor's FEI stock was unaffected by the sale.

[65] *In re JL Building, LLC*, 452 B.R. 854, 859 (Bankr. D. Utah 2011).

[66] *In re 240 N. Brand Partners, Ltd.*, 200 B.R. 653, 656 (9th Cir. BAP 1996) (bankruptcy court's decision to deny § 363 motion reviewed for abuse of

(continued...)

1. The Bankruptcy Court's findings as to sound business reason, fair sale price, and good faith were not premature because Appellants invited the Bankruptcy Court to make these determinations to approve the proposed sale to Prime.

Appellants argue the Bankruptcy Court's conclusions as to sound business judgment, fair price, and good faith were premature because an auction had not taken place.[67] They contend the Bankruptcy Court abused its discretion when it concluded the costs of the proposed sale outweighed the potential return because the actual return to unsecured creditors cannot be determined until the auction procedures are approved, an auction is actually held, and the winning bid ultimately selected. Although persuasive at first blush, this argument fails in light of Appellants' decision to forgo the two-step auction process and in fact, urge the Bankruptcy Court to approve a direct sale to Prime.

Property of the estate may be sold at a public or a private sale.[68] Generally, in the context of a sale of assets by auction with or without the use of a stalking horse bidder, two hearings are required: one to approve the auction and bidding procedures, and another hearing, after the auction, to approve the sale to the winning bidder.[69] Indeed, this is exactly how the § 363 Motion was first presented.[70]

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[66] (...continued)
discretion); 89 C.J.S. *Trial* § 1324 (2014) (citing *Crone v. Nuss*, 263 P.2d 809 (Kan. Ct. App. 2011) ("Finding that a party did not meet its burden of proof is a negative factual finding . . . . [that] will not be disturbed absent proof of an arbitrary disregard of undisputed evidence or some extrinsic consideration, such as bias, passion, or prejudice.").

[67] Prime's Brief filed in BAP Appeal Nos. KS-12-074, -077, & -078 ("Prime's Brief") at 21, 27, and 30.

[68] Fed. R. Bankr. P. 6004(f).

[69] *See* 2 Hon. William L. Norton, Jr. & William L. Norton III, *Norton Bankr. Law & Practice 3d* § 44:26, at 44-71-73 (2014).

[70] § 363 Motion at 6, *in* App. at 476 ("WHEREFORE, the Trustee respectfully requests that the Court approve the attached bidding procedures, to set a time for
(continued...)

The Trustee, however, sought an expedited hearing for the § 363 Motion, advising "[he and Prime] agreed to forego a two-step process in seeking first a bidding procedures order and then a sale hearing, and has agreed to combine the two requests to one hearing[.]"[71] Ironically, the Debtor and Alden urged the Bankruptcy Court to bifurcate the motions because two legal issues inherent to the procedures motion needed to be heard first: 1) whether the Stock could be sold free and clear of the stockholder restriction agreement, and 2) whether Prime was a qualified bidder under SEC rules.[72] Appellants took the position that everything (from approval of the run-of-the-mill procedures to approval of the sale itself, or if the sale did not get approved, to abandonment) could be taken up at a single hearing.

At trial, Prime's counsel advised the parties had resolved numerous objections, leaving four issues for trial – among them, whether the proposed sale provided a benefit to the bankruptcy estate and whether the purchasers were good faith purchasers.[73] The Trustee testified: 1) he rejected the Debtor's alternate bid of $150,000 for failing to address tax ramifications, postpetition dividend distributions, and the lien avoidance issue; 2) no other qualifying bids had been submitted; 3) Prime's offer was the best available price; and 4) the proposed sale

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[70] (...continued)
the sale hearing, establish objection deadlines, approve the sale [free and clear of liens], and for other relief as is just and proper.").

[71] *See* Trustee's Motion to Shorten Time for Notice of Hearing on Motion for Order (1) Approving Auction and Bid Procedures; (2) Approving Expense Reimbursement; and (3) Authorizing Sale of Assets Free and Clear of Liens, Claims and Encumbrances, Subject to Higher or Better Offers, To Set Time For Hearing Thereon By Special Setting And To Set Objection Deadline at 1, ¶ 4, *in* App. at 493; January 18, 2012 Status Conference Tr. at 7-8, *in* App. at 566-67.

[72] January 18, 2012 Status Conference Tr. at 4-8, *in* App. at 563-67; Debtor's Objection to § 363 Motion at 3, *in* App. at 603.

[73] July 11, 2012 Trial Tr. at 7-8, *in* App. at 1179-80.

to Prime was ultimately in the best interest of the estate.[74] Under these circumstances, Appellants invited the Bankruptcy Court to approve the proposed sale to Prime and make these determinations. Appellants cannot now argue the Bankruptcy Court erred by prematurely making such decisions under the invited error doctrine.[75] For this reason, we hold the Bankruptcy Court's findings as to sound business judgment, fair price, and good faith were not premature because no auction was held. While the § 363 Motion began as a request to approve an auction bidding procedure, it morphed into a request to approve a private sale to Prime.[76]

2. The Bankruptcy Court's findings as to fair sale price were clearly erroneous.

The Bankruptcy Court concluded "[t]he Trustee did not offer evidence of a fair sale price," noting the Stock had not been appraised nor marketed.[77] It found the evidence showed Prime's Offer was based on paying off the liens and leaving a pittance return to unsecured creditors, and there was no evidence it was based on the value of the Stock.[78] It further found the Trustee's only indication of price was Prime's Offer, and that offer was insufficient to establish fair price because the Trustee failed to solicit other bids.[79]

Appellants contend the Bankruptcy Court erred in its conclusion as to fair

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74 *Id.* at 57, 62, 73-74, 78-79, *in* App. at 1229, 1234, 1245-46, 1250-51.

75 *United States v. Edward J.*, 224 F.3d 1216, 1222 (10th Cir. 2000) ("The invited error doctrine prevents a party from inducing action by a court and later seeking reversal on the ground that the requested action was error.") (internal quotation marks omitted).

76 Because of this, we will hereafter refer to the Stalking Horse Offer as Prime's Offer.

77 Abandonment Order at 9, *in* App. at 2153.

78 *Id.* at 10, *in* App. at 2154.

79 *See* Rule 60(b) Order at 6, *in* 2013 App. at 2729.

price because: 1) an appraisal is not required when the asset is unique and hard to value; 2) evidence of the Stock's value was presented; and 3) the Trustee sufficiently marketed the Stock under the circumstances.[80] Prime also argues the Bankruptcy Court applied an improper legal standard by allegedly requiring the Trustee to offer an appraisal to demonstrate "concrete evidence" of value.[81] We reject this particular argument. The Bankruptcy Court did not require an appraisal, it simply noted the lack of an appraisal to bolster its finding of no evidence of fair price. The Bankruptcy Court appears to have used the phrase "concrete evidence of value" to discount Prime's suggestion that BBI and FEI could have exercised their option to purchase before the sale as being speculative.[82] We assign no error in doing so given BBI and FEI rebuffed the Trustee's request to make an offer.

We do, however, agree with Appellants with respect to the Bankruptcy Court's fair-price analysis. First, evidence the Trustee sought bids from BBI and FEI (which they rebuffed),[83] and he considered (but rejected) the Debtor's $150,000 Offer is contrary to the Bankruptcy Court's finding that the Trustee did not solicit other bids. As such, to the extent the Bankruptcy Court may have negatively inferred lack of fairness to Prime's Offer based on that finding, we

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80 Prime's Brief at 24-27; Trustee's Brief at 21-25.

81 Prime's Brief at 24. Whether the bankruptcy court applied the correct standard is a legal determination and entails *de novo* review. *Jobin v. McKay (In re M & L Bus. Mach. Co., Inc.)*, 84 F.3d 1330, 1334-35 (10th Cir. 1996).

82 The Bankruptcy Court took the phrase "concrete evidence of value" from *In re Nelson*, 251 B.R. 857, 861 (8th Cir. BAP 2000). In that case, the bankruptcy court granted the debtor's motion to compel abandonment of two buildings despite the trustee's contentions that the buildings had value as rental property and that equity of redemption in the property provided a source of value for the estate. The *Nelson* bankruptcy court found the rental benefit speculative at best. The Eighth Circuit BAP affirmed, concluding the bankruptcy court properly determined the buildings were of inconsequential value, especially since the liens encumbering the buildings exceeded their fair market value.

83 Trial Ex. 64, Letter Dated March 6, 2012, *in* App. at 1940-41.

conclude such inference is not supported by the record and is contrary to the Bankruptcy Court's own conclusion the Trustee had provided adequate notice of the § 363 sale.[84] Although the extent of marketing and the competitiveness of bids are generally relevant in determining the fairness of a proposed price, they do not support a negative inference in this instance given the nature of the asset at issue. Both parties' experts testified that the Trustee cannot market the Stock without violating SEC law. Thus, a negative inference based on not publicizing the sale would not be warranted here. Moreover, the evidence indicates the Trustee notified the majority of those individuals that would be interested in purchasing the Stock of his desire to sell the Stock.[85] Thus, the lack of other offers does not give rise to a negative inference.

Second, it appears the Bankruptcy Court may have overemphasized the methods and motives behind Prime's Offer. Even if Prime's offer was derived by adding a pittance return to the secured claims, that alone would not support a negative finding as to fair price. Buyers generally want to purchase an item at the lowest price possible, which does not mean the price is unfair. An unfair price conclusion based on a pittance return to unsecured creditors confuses § 363's fair-price analysis with § 554's inconsequential benefit to the estate analysis. Fair price focuses on the value of the asset, not the net result to unsecured creditors. For example, if a car's blue book value is $5,000, a sale price of $4,950 would be fair even if the net return to the estate was only $1. While considerations of liens against the asset and costs of the sale are reflected in the final sale, such considerations are not part of the fair-price analysis.

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[84] *Edwards & Deutsch Lithographing Co. v. Rottman*, 398 F.2d 1020, 1021 (10th Cir. 1968) (the clearly erroneous rule applies not only to basic facts but also to differing inferences which may be drawn from those facts).

[85] The market for a minority interest in closely-held banking companies is very small. Typically, current shareholders of the companies or the companies themselves are interested in purchasing a minority interest in a company's stock.

Third, Prime's Offer was not the Trustee's only indication of price.[86] The Debtor's $150,000 Offer and Prime's Offer represent two competing offers for the Stock.[87] They appear comparable, being both in the $1.9 million range. The Bankruptcy Court disregarded the Debtor's $150,000 Offer, explaining it did so because the offer had not been officially presented to it, no one introduced any admissible evidence regarding that offer, and the Trustee requested the offer be disregarded. As this was undisputed evidence, we conclude that it should have been considered. The Trustee testified that offer had been made, and Trial Exhibit 73, an e-mail between the Trustee and the Debtor admitted into evidence, referenced it.[88] The Debtor's counsel reiterated the $150,000 Offer at trial,[89]

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[86] To a certain extent, the Bankruptcy Court also discounted Prime's offer because it questioned whether Prime's offer was the best available price. If an offer is the best available price, then it presumably is fair. Whether or not Prime's offer was the best one is irrelevant, however, in determining if it was a fair price. Being "the best and highest offer" supports a fair price finding, but the converse is not necessarily true. For example, if an asset's value is $5,000 and there are two competing bids, one for $4,500 and the other for $4,000, both offers are fair under *Bel Air Associates*, *see infra* n.98. The latter offer may not be the best, but it nonetheless offers a fair price. We intimate no opinion as to whether Prime's offer was the best.

[87] *See Bank of Am. Nat. Trust and Sav. Ass'n v. 203 N. La Salle P'ship*, 526 U.S. 434, 457 (1999) (acknowledging "the best way to determine value is exposure to a market" rather than a determination by a bankruptcy judge); *In re Excello Press, Inc.*, 890 F.2d 896, 905 (7th Cir. 1989) (price obtained from commercially reasonable auction is the market value); *In re Boston Generating, LLC*, 440 B.R. 302, 323 (Bankr. S.D.N.Y. 2010) ("highest and best offer" after a robust, open, and fair process reflected the asset's market value). These cases suggest the best way to determine a fair price is to have an open auction.

[88] July 11, 2012 Trial Tr. at 73-74, 152-53, *in* App. at 1245-46, 1324-25; Trial Ex. 73 at 2, *in* App. at 2037 ("Also, I'm not aware of any response to the net settlement offer of $150,000 presented to you on March 9th, 2012. In comparison to the proposed stalking horse bid, it is appr. $1.75MM (secured creditor liens) plus $150,000 for a total of $1.9MM, since I re-affirmed these loans.").

[89] July 11, 2012 Trial Tr. at 152-54, *in* App. at 1324-26 (Debtor's counsel: "We made the offer, Your Honor, and the offer stands[.] It may be that if the Court goes forward with the motion, we'll put that offer in that kind of bid. But we were unaware that he was waiting for more information. So what we understood until we got here today was that $150,000 was still on the table and he was considering it."). *See also id.* at 27-28, *ll.* 24-24, 1-4, *in* App. at 1199-1200

(continued...)

calling it a real, rather than hypothetical offer,[90] and proffered that the Debtor was willing to add postpetition dividends as part of the $150,000 Offer.[91] The Trustee's request to disregard that offer was made in the context of it being unfair to expect him to figure out the value of an offer that included postpetition distribution during cross-examination.[92] Although the Trustee was defending his rejection of the offer, he was not denying the existence of it altogether.

Finally, after reviewing the entire record, we conclude the Bankruptcy Court should have made affirmative findings as to the Stock's value, but did not do so. The Bankruptcy Court concluded the Stock's value was not known. But evidence of the Stock's value included, *inter alia*, the Debtor's schedules and amended schedules, and the companies' financial statements.[93] The Debtor is an officer, director, and shareholder of the companies, thus his valuation may be considered.[94] Corporate financial statements evince book value and were part of

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[89] (...continued)
(Alden's counsel: "the evidence is that Aaron Buerge has a offer of $150,000, that when the subtractions are made for the trustee's fees, legal fees, et cetera, the net benefit to the estate will be far higher than if this stalking horse bidder is accepted.").

[90] July 13, 2012 Trial Tr. at 111, *ll.* 19-23, *in* App. at 1635 (Debtor's counsel: "I wanted to address the – what is called the hypothetical $150,000 offer. Your Honor, much like [the Trustee], who I think was talking not so much as a lawyer but telling the Court what happened. There was a real offer of $150,000.").

[91] July 11, 2012 Trial Tr. at 156, *ll.* 5-7, *in* App. at 1328 (Debtor's counsel: "Well, if I represented to you that the debtor is willing to – and he will testify to this, make the dividends to you as part of the $150,000."). Prime objected to the Debtor's counsel testifying and the Bankruptcy Court sustained the objection. The Debtor did not testify to this.

[92] Trustee's Closing Argument, July 13, 2012 Trial Tr. at 86, *in* App. at 1610.

[93] Alden's and Liberty Bank's proof of claims are also probative of the Stock's value.

[94] An owner of property may testify as to its value because he is presumed to have special knowledge of the property. *Ins. Co. of Pa. v. Smith*, 435 F.2d 1029, 1031 (10th Cir. 1971) (owner may testify as to his opinion of the value of property).

the record.[95] While the Bankruptcy Court recited the scheduled valuation, it never acknowledged the companies' financial statements.

In sum, we conclude the Bankruptcy Court's negative findings as to fair price to be contrary to the evidence. Evidence of the Stock's value is in the record, yet the Abandonment Order does not explain why the Bankruptcy Court rejected it. Additionally, the Bankruptcy Court should not have disregarded the Debtor's $150,000 Offer. We decline to weigh the evidence and remand for further findings consistent with this opinion. We intimate no opinion as to the value of the Stock or whether Prime's proposed price was fair.

3. The Bankruptcy Court's finding Prime was not a good faith purchaser was clearly erroneous.

As an initial matter, the circuits are split as to whether a good faith purchaser finding is required to approve a sale under § 363(b).[96] Contrary to what the Bankruptcy Court has said, the Tenth Circuit has not ruled on this issue.[97] Because the Bankruptcy Court made a determination as to Prime's lack of good

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[95] BBI's FR Y-9SP dated December 31, 2011 (Ex. 33), *in* App. at 1848-55; FEI's FR Y-9SP dated December 31, 2011 (Ex. 34), *in* App. at 1856-63; Prime's Global Response to the Objections to the § 363 Motion at 6, *in* App. at 676; Trustee Letter dated March 6, 2012 (Ex. 64), *in* App. at 1940-41. *See In re Frezzo*, 217 B.R. 985, 989 (Bankr. E. D. Pa. 1998) (courts should consider book value in valuation of non-controlling stake in the stock of a closely held corporation).

[96] *Compare In re Abbots Dairies of Pa., Inc.,* 788 F.2d 143 (3d Cir. 1986) (good faith finding required), *with In re M Capital Corp.*, 290 B.R. 743 (9th Cir. BAP 2003) (good faith finding not required at the time of sale).

[97] *In re Lotspeich*, 328 B.R. 209, 218 (10th Cir. BAP 2005) (noting split). The Bankruptcy Court cited *In re Independent Gas & Oil Producers, Inc.*, 80 F. App'x 95 (10th Cir. 2003), for the proposition that the Tenth Circuit requires a finding of good faith before authorizing a sale. Abandonment Order at 7 n.17, *in* App. at 2151. In that case, the district court had dismissed an appeal of a bankruptcy court order voiding certain prepetition transfers of assets from the debtor to his wife because during the appeal, the trustee had sold the assets to a creditor of the estate. *Id.* at 96. The Tenth Circuit concluded the district court erred in dismissing the appeal as moot without first remanding the matter to the bankruptcy court to determine whether the sale of assets was made to a good faith purchaser. *Id.* at 100. Thus, *Independent Gas* is inapposite as it involved principles of bankruptcy mootness and not the approval of a § 363 sale.

faith, we need not decide whether it was a necessary finding, just whether there is support in the record for it.[98]

The parties disagree on what standard of review applies to the good faith determination. Appellants suggest *de novo* review, while Appellees urge application of the clear error standard. Because we conclude the Bankruptcy Court erred under either standard, we need not resolve that disagreement.

Neither the Bankruptcy Code nor the Bankruptcy Rules define a good faith purchaser. The Tenth Circuit, however, has held that a "good faith purchaser" is one who buys in "good faith" and for "value."[99]

Good faith of a purchaser speaks to the integrity of his conduct in the course of the sale proceeding.[100] Typically, a purchaser's good faith is lost by "fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders."[101] Failing to reveal ulterior motives that may affect a court's reasoning or material facts also destroys good faith.[102] In assessing the good faith of a purchaser, courts have considered

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[98] It is unclear whether the Bankruptcy Court made a specific determination as to Prime's good faith. It made a negative finding (the Trustee did not carry his burden, *see* Rule 60(b) Order at 5-6, *in* 2013 App. at 2728-29), yet affirmatively found no arm's length negotiations and no fair value offered. Because both parties argue in terms of the Bankruptcy Court affirmatively finding Prime was not a good faith purchaser and the Bankruptcy Court made some affirmative findings, we will construe it likewise.

[99] *In re Bel Air Assocs., Ltd.*, 706 F.2d 301, 305 n.12 (10th Cir. 1983) (purchaser deemed to have paid value if he paid at least 75% of the appraised value of the asset). *But see In re W.A. Mallory Co., Inc.*, 214 B.R. 834, 837-38 (Bankr. E.D. Va. 1997) (noting that an arbitrary percentage which a proposed purchase price needs to meet before a sale is consummated does not serve the purposes of the Bankruptcy Code, which historically has preserved a great deal of latitude for courts to craft the appropriate remedy in each unique situation).

[100] *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978).

[101] *In re M Capital Corp.*, 290 B.R. at 746-47.

[102] *In re White Crane Trading Co., Inc.*, 170 B.R. 694, 705 (Bankr. E.D. Cal. 1994) (purchaser lacked requisite good faith where parties failed to reveal the

(continued...)

factors such as: 1) whether the sale was negotiated at arm's length; 2) whether any officer or director of the debtor holds any interest in or is otherwise related to the potential purchaser; and 3) whether fraud or collusion exists among the prospective purchaser, any other bidders, or the trustee.[103]

Ultimately, the Bankruptcy Court concluded Prime was not a good faith purchaser "because the proposed sale was not for fair value and there was no arm's length negotiation."[104] The Bankruptcy Court appears to have relied upon the following facts to support its conclusion of no arm's length negotiation between Prime and the Trustee: 1) the Trustee offered to reduce his statutory fee instead of requiring Prime to increase its bid to ensure a return to unsecured creditors; 2) Prime prosecuted the Trustee's motion while he was in some measure relegated to a witness called by Prime's counsel; 3) Prime funded the sale costs, which are normally administrative expenses of the estate; and 4) their close alliance contributed to the Trustee's failure to seek or consider other options.[105] The Bankruptcy Court also found Prime lacked good faith because its representatives did not testify at the hearing.

We conclude the Bankruptcy Court's finding of no arm's length negotiations is unsupported by the record. If anything, the Trustee forced Prime

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[102] (...continued)
proposed sale would violate state consumer protection laws). The Bankruptcy Court cited *White Crane Trading Co.* for the proposition that a purchaser's good faith is not limited to situations involving fraud or collusive bidding. That is an overly broad construction of *White Crane Trading Co.* Although it did not involve allegations of fraud, collusion or unfair advantage *per se*, it nonetheless involved some type of affirmative misconduct by the proposed purchaser – failing to reveal the existence of a permanent state court injunction barring the proposed purchaser from participating in the type of sale contemplated.

[103] *See In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 147 (3d Cir. 1986).

[104] *See* Rule 60(b) Order at 6, *in* 2013 App. at 2729 (Bankruptcy Court summarizing its ruling).

[105] Abandonment Order at 11-12, *in* App. at 2155-56.

to make an offer. He testified he filed his motion to abandon to spur Prime to make an offer – "to put up or shut up."[106] Contrary to the Bankruptcy Court's finding, the Trustee considered other options: the Debtor's initial $10,000 offer and his $150,000 Offer. He also sought bids from BBI and FEI, which the Bankruptcy Court noted they rebuffed.[107] He testified he wanted and hoped for a bidding war.[108] The Trustee's offer to reduce his statutory fees, without more (*i.e.*, evidence of a kick-back), is not an indication the Trustee and Prime were colluding. Indeed, Appellees ascribe no ill will to the Trustee.[109] Moreover, the Bankruptcy Court made no affirmative findings of collusion between the Trustee and Prime.

It did, however, find Prime and the Trustee too closely aligned because Prime exceeded the norm in prosecuting the § 363 Motion. We disagree. Prime undoubtedly did a lot of the heavy lifting (drafting the APA and amended APAs), but this is not uncommon in bankruptcy. The Trustee filed separate briefs in support of the § 363 Motion and in opposition to the Motion to Compel Abandonment. Likewise, he made his own closing arguments at trial. We also disagree with the Bankruptcy Court's characterization of the Trustee being in some measure relegated to a witness called by Prime's counsel. It made practical sense for Prime's counsel to call the Trustee as a witness. Further, Prime's agreement to fund the sale costs supports finding arm's length negotiations

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[106] October 12, 2011 Hearing Tr. at 4, *ll.* 12-18, *in* App. at 311; Testimony of the Trustee, July 11, 2012 Trial Tr. at 127, *ll.* 20-25, *in* App. at 1299.

[107] Abandonment Order at 11, in App. at 2155 ("BBI and FEI are not obligated to buy back the stock, and they rebuffed the Trustee's request they make an offer."); Trustee Letter dated March 6, 2012 (Ex. 64), *in* App. at 1940-41.

[108] Testimony of the Trustee, July 11, 2012 Trial Tr. at 128, *ll.* 22-23, *in* App. at 1300.

[109] Joint Trial Brief of the Debtor, Liberty Bank, Alden, FEI, and BBI at 23, *in* App. at 655.

between the two because it is detrimental to Prime, while beneficial to the estate.

As for the absence of testimony from Prime's representatives, while a negative inference may be drawn, it appears to be the sole basis upon which to conclude Prime was not a good faith purchaser. The Trustee testified he was not aware of any fraud or collusion by Prime, nor of Prime taking unfair advantage over other bidders.[110] This testimony was uncontroverted, and the Bankruptcy Court made no credibility determinations that suggest the Trustee's testimony should be discounted. More importantly, Appellees made no allegations of affirmative misconduct on Prime's part, nor did the Bankruptcy Court make any specific findings regarding Prime's conduct in the course of the proceedings.

Instead, the Bankruptcy Court appears to have inferred lack of good faith on the following observations: 1) Prime should not have had to increase its bid to cover accruing postpetition per diem interest; 2) Prime should not have had to escrow an additional $50,000 to cover the secured creditors' attorney fees; 3) Prime primarily prosecuted the § 363 Motion; and 4) Prime funded the sale costs which would normally be administrative expenses of the estate. We note that the first two observations were followed by the comment, "[i]f there is not an adequate equity cushion, the Trustee should not administer this asset[.]" This confuses the good faith purchaser analysis of § 363(b) with the Trustee's duties under §§ 554 and 704 to administer or abandon property of the estate. Good faith focuses on the purchaser's conduct, not the Trustee's conduct (unless collusion was in play, which the Bankruptcy Court did not find). In any event, incrementally increasing its bid to cover accruing postpetition per diem interest and escrowing $50,000 to cover secured creditors' attorney fees indicate a willingness on Prime's part to provide adequate protection to the secured

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[110] Testimony of the Trustee, July 11, 2012 Trial Tr. at 77-78, *in* App. at 1249-50.

creditors, while keeping the proposed price down. As a buyer, Prime's goal was to obtain the lowest possible price for the Stock. Being assertive and active does not constitute lack of good faith, nor does trying to obtain the lowest price for the Stock so long as Prime did not manipulate the price or take unfair advantage of prospective bidders. As noted earlier, the latter two observations are motivationally benign.

Appellees claim that two of Prime's members are involved in banking, law, and accounting and yet have proposed an APA in violation of the SPAs and Securities Act, which demonstrates manifest bad faith.[111] But the fact that Prime initially offered an APA that may have violated the SPAs and SEC laws simply illustrates what the Bankruptcy Court has found - the SEC issues were complex and not completely understood by the parties advancing the sale. It does not support an inference of bad faith or evil motive on Prime's part. Amending the APAs indicated a willingness on Prime's part to work through the Objectors' concerns and issues, evincing good faith.

The Bankruptcy Court's negative good faith conclusion relied in large part on its conclusion that the proposed sale would not generate fair value. But as discussed above, the Bankruptcy Court's fair-price analysis improperly focused on the net return to unsecured creditors and relied on factual findings that were clearly erroneous. These errors in turn affected its conclusion that Prime was not a good faith purchaser. We conclude the Bankruptcy Court's negative good faith purchaser finding was clearly erroneous.

4. The Bankruptcy Court's finding regarding sound business judgment was not clearly erroneous.

The Bankruptcy Court concluded the Trustee had not met his burden to prove the proposed sale was based on sound business judgment because the

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[111] Joint Trial Brief of the Debtor, Liberty Bank, Alden, FEI, and BBI at 23-24, *in* App. at 655-56.

evidence showed: 1) the costs of the sale were extremely high and increased with each amended APA; 2) the SEC issues were complex and not completely understood by the parties advancing the sale; 3) the Trustee could not market the stock without violating SEC law; 4) the risk of failing to close the sale was high, 5) the Stock's value was not known; and 6) the anticipated return to unsecured creditors was *de minimis* at less than one percent. It held that "[t]his result [a less than one percent return to unsecured creditors] does not support a finding of good business judgment."[112] The Bankruptcy Court further noted, although the Trustee had wide discretion in the conduct of the sale, the Bankruptcy Court had "wide latitude in deciding whether to grant or deny approval [of the sale of estate assets]" and that it "may interfere with the trustee's judgment to safeguard the diverse interests of the debtor, creditors, bidders, and equity holders."[113]

Prime argues the Bankruptcy Court erred by substituting its own judgment for that of the Trustee.[114] It claims the Bankruptcy Court did not make the necessary findings to support its conclusion that the sale was not supported by sound business reasons, specifically that the Trustee was acting in an irrational, arbitrary or capricious manner, clearly contrary to reason and not justified by the evidence.[115] We disagree.

Courts must review a trustee's business judgment to determine ***independently*** whether the judgment is a reasonable one.[116] Although a trustee's judgment on the sale of estate assets and the procedures for sale is entitled to

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112 Abandonment Order at 9, *in* App. at 2153.

113 *Id.* at 6, *in* App. at 2150.

114 Prime's Brief at 18.

115 *Id.*

116 3 *Collier on Bankruptcy* ¶ 363.02[4] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014) (emphasis added).

judicial deference and courts should refrain from substituting their judgment for the trustee's, this does not mean that a court may not do so, when appropriate. Prime cites no authority to support its contention the Bankruptcy Court must have made specific findings of a trustee acting irrationally, arbitrarily, capriciously, unreasonably, or unjustifiably to disapprove a trustee-recommended sale, and we too located none.[117]

The sound business prong focuses on whether the Trustee's judgment was reasonable and whether a sound business justification exists supporting the sale to Prime. The Trustee testified he was attempting to sell the Stock because his primary job as a trustee is to liquidate assets for the benefit of the estate. According to him, Prime's total purchase price was approximately $1.9 million, total liens encumbering the Stock were $1.71 million, and the estimated net benefit to the estate before taxes was $108,148.80 less any excess attorney's fees over and above the escrow reserve.[118] If the sale price exceeded the liens, then presumably a sound business reason existed to sell the Stock. But this presumption may be rebutted.

Here, the Trustee's benefit analysis was incomplete. Deductions for the Trustee's fee ($80,463.52),[119] his attorney's fee (no more than $5,000),[120] his

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[117] Courts must assess whether the proposal is consistent with the trustee's fiduciary responsibilities since under no circumstances may the trustee act on behalf of the estate in a manner inconsistent with the duties imposed upon him as a fiduciary. *In re Engman*, 395 B.R. 610, 624-29 (Bankr. W.D. Mich. 2008). Although the Abandonment Order does not talk in these terms, it is sufficiently clear the Bankruptcy Court was considering the trustee's execution of his duties when it criticized his failure to market, solicit other bids, and close alignment with Prime.

[118] Trial Tr. at 52-54, *in* App. at 1224-26.

[119] *Id.* at 113, *in* App. at 1285; Ex. Z, *in* App. at 2122.

[120] *Id.* at 115, *in* App. at 1287.

accountant's fee (approximately $1100),[121] and the Debtor's $15,000 priority tax claim[122] have not been made. After all these admitted deductions, the estimated benefit to the estate is less than $6,600,[123] which amount will likely be consumed entirely by the excess secured creditors' attorney's fees.[124]

The Bankruptcy Court listed a myriad of other concerns it had regarding the proposed sale to Prime: the high and increasing costs of the proposed sale, the likelihood of a third amendment to the APA, the complexity of the sales transaction due to the SEC issues, and the high risk of failing to close. We do not share the Bankruptcy Court's concern regarding the ever-increasing costs as the majority of them will be borne by the purchaser. The Bankruptcy Court's concerns regarding the SEC issues and the risk of failing to close, however, are supported by the record. Appellees' expert testified a SEC compliance letter cannot be issued, while Appellants' expert said that one could if certain information were provided. Because the Trustee's benefit analysis was incomplete and conflicting evidence exists as to the SEC issues, we cannot conclude the Bankruptcy Court's negative sound business finding was clearly erroneous. Accordingly, we affirm the Bankruptcy Court's disapproval of the proposed sale to Prime.

5. The Bankruptcy Court abused its discretion in denying the § 363 Motion because it did not entertain the Debtor's $150,000 Offer, nor consider whether a private auction was a better alternative.

We nonetheless conclude the Bankruptcy Court abused its discretion by not considering whether a private auction or the Debtor's $150,000 Offer was

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121 *Id.* at 183, *in* App. at 1355 (approximately 10 hours at $110 an hour).

122 *Id.* at 133, *in* App. at 1305.

123 $108,148 - $80,463.52 - $15,000 - $5,000 - $1100 = $6,584.48.

124 *See* Abandonment Order at 10 n.25, *in* App. at 2154 ("Secured creditors' fees have already exceeded $50,000[.]").

preferable to the proposed sale to Prime. In *In re Engman*, the court succinctly summarized the court's duty in considering whether to approve a § 363 sale:

> The court, in determining whether to give that authority, is to consider whether the trustee's proposal is the best among all alternatives that are brought to its attention and, in doing do, must give those who have standing to oppose the trustee's proposal the opportunity to suggest other alternatives that might be better.[125]

Although the Trustee no longer advocated an auction, the requirement of court approval means that the responsibility ultimately is the court's to assure that optimal value is realized by the estate under the circumstances.[126] If the Stock's value was unknown and the Bankruptcy Court had concerns the Trustee did not solicit other bids, then the Bankruptcy Court could have considered an auction as an alternative since the best way to determine value is exposure to a market.[127] Once the Debtor's counsel reiterated the $150,000 Offer, the Bankruptcy Court had an obligation to consider it as an alternative.[128]

B. Approval of the Motion to Compel Abandonment

Section 554(b) allows bankruptcy courts to order abandonment of estate property "that is burdensome to the estate or that is of inconsequential value and benefit to the estate."[129] The party seeking abandonment bears the burden to make out a prima facie case, which can then be rebutted by evidence that the

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[125] 395 B.R. 610, 629 (Bankr. W.D. Mich. 2008).

[126] *Id.* at 625 (citing *In re Lahijani*, 325 B.R. 282, 288-89 (9th Cir. BAP 2005)).

[127] *Bank of Am. Nat. Trust and Sav. Ass'n v. 203 N. La Salle P'ship*, 526 U.S. 434, 457 (1999) (acknowledging "the best way to determine value is exposure to a market" rather than a determination by a bankruptcy judge).

[128] *In re Moore*, 608 F.3d 253 (5th Cir. 2010) (secured creditor's overbid required the court to consider the appropriateness of an auction and § 363 sales process; failure to consider those alternatives was abuse of discretion).

[129] On its face, § 554(b) permits compelled abandonment upon a showing that property is either of inconsequential value and benefit to the estate or burdensome to the estate. Because the Bankruptcy Court made no specific finding of burdensomeness to the estate, we will not address that issue.

estate does have some equity in the property, including, *inter alia*, proof that the secured creditor's liens are or can be subordinated to an interest of the trustee.[130] We review a bankruptcy court's abandonment decision for an abuse of discretion.[131]

The Bankruptcy Court concluded that the Stock was of inconsequential value and benefit to the estate because the proposed sale would generate an insignificant dividend to unsecured creditors. It found the Stock's value unknown, but whatever it may have been, it was generally depreciating. It also found Appellants had failed to demonstrate a possible avoidance action could increase the estate's equity in the Stock. This negative finding was based in part on its legal conclusion that the Trustee lacked standing to avoid Liberty Bank's and Alden's liens based on a breach of the SPAs' transfer restriction provisions.[132]

1. The Bankruptcy Court erred in determining that the Trustee lacked standing to challenge the liens encumbering the Stock based on the Debtor's alleged breach of the Stock's transfer restrictions.

Standing is a legal determination reviewed *de novo*.[133] The Bankruptcy Court concluded the Trustee could not challenge and avoid the liens encumbering the Stock based on a breach of the shareholder agreement because he was not a beneficiary of the transfer restriction, citing *Craig v. Union County Bank (In re*

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130 *In re Paolella*, 79 B.R. 607, 610 (Bankr. E.D. Pa. 1987). If a secured creditor's liens can be avoided, then the estate's equity in the property increases.

131 *In re Johnston*, 49 F.3d 538, 540 (9th Cir. 1995). *See also Miller v. Generale Bank Nederland, N.V. (In re Interpictures Inc.)*, 217 F.3d 74 (2d Cir. 2000) (order resolving motion to compel abandonment is reviewed under abuse of discretion standard).

132 Abandonment Order at 13-15, *in* App. at 2157-59.

133 *In re Kaiser Steel Corp.*, 998 F.2d 783, 788 (10th Cir. 1993).

Crabtree)[134] and *Blackwell v. Lurie (In re Popkin & Stern)*.[135] In reaching this conclusion, the Bankruptcy Court found *Timberland Bancshares, Inc. v. Garrison (In re Garrison)*[136] inapplicable because the corporation that issued the stock successfully avoided the lien, not the trustee. It reasoned that if the security interest never attached in the first place, the liens never existed, and the trustee would have been holding unattached stock, not the avoided, unperfected lien.

The Bankruptcy Court's avoidance analysis is flawed. First, if a security interest never attached, then the Trustee holds stock free of any lien, not unattached stock. Second, we disagree with the Bankruptcy Court's reliance upon *Crabtree* and *Popkin & Stern*. The Bankruptcy Court cited *Crabtree* for the proposition that "[a] Chapter 7 trustee does not have standing to challenge attachment based on a breach of a shareholder agreement unless he is a beneficiary of the transfer restriction."[137] This proposition, however, was conclusory dicta stated in a footnote.[138] Moreover, *Crabtree* is factually distinguishable. In *Crabtree*, the trustee sought turnover of debenture and stock, claiming no one had a perfected security interest in the debenture and stock when the debtor's petition was filed. Ultimately, the *Crabtree* court held the trustee was not entitled to turnover of the debenture and stock because it found that the creditor's interest in the debenture and stock was perfected on the petition date. *Crabtree* involved multiple transfers, a consent judgment declaring a subsequent transfer void, and a determination that the previous transfer was properly perfected under state law. Here, the Bankruptcy Court never determined whether

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134 48 B.R. 528 (Bankr. E.D. Tenn. 1985).

135 238 B.R. 146 (8th Cir. BAP 1999), *aff'd*, 242 F.3d 376 (8th Cir. 2000).

136 462 B.R. 666 (Bankr. W.D. Ark. 2011).

137 Abandonment Order at 14, *in* App. at 2158.

138 *Crabtree*, 48 B.R. at 533 n.15.

the transfers to Liberty Bank and Alden complied with state law.

The Bankruptcy Court cited *Popkin & Stern* for the proposition that transfer restrictions in shareholder agreements protect the company and the non-transferring shareholders, not the seller. Although such language appears in that case, it appears to have been taken out of context.[139] In *Popkin & Stern*, the trustee executed a money judgment he held against the debtor by selling the debtor's stock to other shareholders possessing contractual rights of first refusal. The debtor appealed, arguing because he was the seller by virtue of the fact that it was his stock being sold, only he could have provided the necessary notice mandated by the shareholders' agreement. The Eight Circuit BAP held the debtor lacked standing to object to the sale on grounds of notice because he was not the seller in the sense that he contemplated.[140] It concluded in the case of a sale from execution on the shares as a judgment creditor, the trustee steps into the debtor's shoes as the seller and can provide the required notice. In this case, as to the proposed sale, the Trustee is the seller and has provided adequate notice. But in the anticipated avoidance action, the Debtor was the seller (he pledged the Stock to Liberty Bank and Alden) and the Trustee is stepping into the shoes of a hypothetical judicial lien creditor (one of the non-transferring shareholders).

Third, *In re Hill*[141] better resembles the facts in this case and specifically addresses a trustee's standing to bring an avoidance action seeking to have a debtor's pledge of stock declared null and void.[142] In *Hill*, the debtor had pledged his stock in a closely-held corporation to one of his creditors in violation of the

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139 *Popkin & Stern*, 238 B.R. at 150.

140 *Id.* at 151.

141 981 F.2d 1474 (5th Cir. 1993).

142 Because *Hill* is on point, we need not dissect the Bankruptcy Court's analysis of the *Garrison* case.

terms of the corporation's articles of incorporation. The bankruptcy court held the trustee had standing to bring an avoidance action because:

> even though "[t]he Trustee has no independent power of avoidance, but may act only upon the right of one unsecured creditor holding an allowable claim, against whom the transfer or obligation was invalid under state law," the claim of John Pico – an unsecured creditor and stockholder in Lucullus who is entitled to claim the benefit of the transfer restriction – supplies the necessary derivative standing.[143]

The Fifth Circuit affirmed the bankruptcy court's analysis and held the trustee enjoyed such standing.[144] It further stated:

> Moreover, lest there be some question concerning the legal right of the trustee, standing in the shoes of the Debtor, to contest the validity of a stock pledge which is valid and uncontestable between the parties *inter se*, we note that for such purposes the trustee in bankruptcy is accorded the status of a third party.[145]

Hill's analysis is persuasive. As the Tenth Circuit has explained:

> To understand the full import of [section] 544, one must first understand the power of a bankruptcy trustee to stand in the shoes of an hypothetical creditor of the debtor to effect a recovery from a third party. Simply stated, from the reservoir of equitable powers granted the trustee to maximize the bankruptcy estate, Congress has fashioned a legal fiction. Not only is a trustee empowered to stand in the shoes of a debtor to set aside transfers to third parties, but the fiction permits the trustee also to assume the guise of a creditor with a judgment against the debtor. Under that guise, the trustee may invoke whatever remedies provided by state law to judgment lien creditors to satisfy judgments against the debtor.[146]

This status arises whether or not such a creditor actually exists.[147] Here, the Trustee stepped into the shoes of one of the non-transferring shareholders.

For the above reasons, we conclude the Bankruptcy Court erred in holding the Trustee did not have standing to challenge the liens encumbering the Stock.

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143 *Hill*, 981 F.2d at 1478.

144 *Id.* at 1479.

145 *Id.*

146 *Zilkha Energy Co. v. Leighton*, 920 F.2d 1520, 1523 (10th Cir. 1990).

147 5 *Collier on Bankruptcy* ¶ 544.03 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014).

We remand this issue to the Bankruptcy Court for a hearing to allow the Trustee to present evidence and to make further findings. We intimate no opinion as to the merits of such an avoidance action. Our ruling here moots Appellants' due process violation argument.

2. The Bankruptcy Court abused its discretion in compelling abandonment.

The Bankruptcy Court's decision to compel abandonment focused on Prime's Offer and its anticipated benefit or lack thereof to the estate. However, abandonment under § 554's inconsequential prong requires an analysis of value and benefit. Section 554(b) originally allowed abandonment if the property was burdensome or of inconsequential value to the estate, but was amended in 1984 to require a finding of both inconsequential value and inconsequential benefit to the estate before the court can order a compelled abandonment.[148] Here, the Bankruptcy Court failed to make the requisite holding as to the Stock's value.

In the Rule 60(b) Order, the Bankruptcy Court stated:

> [it] did not hold that the gross value of the stock was inconsequential; what the Court held is that Prime's offer to purchase the stock, after payment of encumbrances, costs and fees, would generate an inconsequential dividend of $27,000 to pay on approximately $3 million in unsecured claims. This net payment rendered the asset of inconsequential value to the estate.[149]

Value and benefit are distinct. We agree Prime's Offer results in an inconsequential benefit to the estate. But the Bankruptcy Court found evidence as to the Stock's value lacking. If the Stock's value is unknown, then it is axiomatic that the Debtor failed to meet his burden to compel abandonment. Although the Bankruptcy Court recited that the Debtor bore the burden to show

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[148] *Morgan v. K.C. Mach. & Tool Co. (In re K.C. Mach. & Tool Co.)*, 816 F.2d 238, 245 (6th Cir. 1987).

[149] Rule 60(b) Order at 5, *in* 2013 App. at 2728.

abandonment,[150] throughout the Abandonment Orders it repeatedly allocated the ultimate burden to prove value to the Trustee. While the Trustee bore the burden to prove the proposed price was fair, which in turn required proof of the Stock's value to support his proposed sale to Prime, the Debtor bore an independent burden to prove the Stock's value for abandonment.

We conclude compelled abandonment is not available where the value of the property has not been established. The Bankruptcy Court either confused the two motions or erroneously applied the burden of proof. The Debtor's competing $150,000 Offer evinces the Stock is of some consequential value to the estate. As we stated earlier, the Bankruptcy Court abused its discretion when it disregarded it. Under these circumstances, the Bankruptcy Court abused its discretion in compelling abandonment.[151]

C. The Rule 60(b) Order

Appellants also appeal the Bankruptcy Court's order denying them relief from the Abandonment Order. Appellants' Rule 60(b) motion attempted to convince the Bankruptcy Court that the Buerge family lied during, and leading up to, trial. The Bankruptcy Court concluded the newly discovered evidence would probably not have produced a different result at trial on either the motion to sell or the motion to compel abandonment.

Appellate courts generally review an order denying relief under Rule 60(b) for abuse of discretion.[152] Given our review of the Abandonment Order and our

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150 Abandonment Order at 8, 16, *in* App. at 2152, 2160.

151 An order compelling abandonment is the exception, not the rule. Absent an attempt by the trustee to churn worthless property just to increase fees, compelling abandonment is rare. *In re Viet Vu*, 245 B.R. 644, 647 (9th Cir. BAP 2000); 4 Hon. William L. Norton, Jr. & William L. Norton III, *Norton Bankr. Law & Practice 3d* § 74:4, at 74-16-17 (2014). The Bankruptcy Court made no finding regarding churning.

152 *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1009 (10th Cir. 2000) (continued...)

reversal, Appellants' appeal of the Rule 60(b) Order is moot.[153]

Conclusion

This case was unduly complicated by the procedural error caused by the Trustee's ill-advised decision to forgo the two-step process required to approve an auction and the Bankruptcy Court's decision to combine the § 363 Motion with the § 554 motion. The issues in a § 363 Motion and an abandonment motion are interrelated. But those motions, nonetheless, were distinct. A denial of a § 363 Motion does not automatically mean that the property should be abandoned. For the reasons stated above, we AFFIRM IN PART and REVERSE IN PART the Bankruptcy Court's Abandonment Order.[154] We AFFIRM the portion of the order disapproving the proposed sale to Prime, but REVERSE the portions of the order denying the § 363 Motion and compelling abandonment and REMAND the matter to the Bankruptcy Court for a hearing to allow the Trustee to present evidence as to lien avoidance and to make further findings consistent with this opinion regarding: 1) the Stock's value; 2) whether a better alternative has been presented; and 3) if a sale is warranted, whether it is free and clear of liens under § 363(f)(1). We DISMISS the appeals of the Rule 60(b) Order, BAP Nos. KS-13-22, 23, 24 and 25 as MOOT. Finally, we DISMISS the Individual Purchasers'

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[152] (...continued)
(denial of a Rule 60(b) motion reviewed for abuse of discretion).

[153] To the extent the Rule 60(b) Order denied Appellants access to the contents of Debtor's sealed affidavit, that was harmless error because the Bankruptcy Court specifically did not consider the affidavit in rendering its decision on the post-abandonment motions.

[154] Appellants' motion to supplement their Appendix (Doc. 67) in BAP Appeal Nos. KS-12-074, -077, & -078 was referred to this panel. We have considered this motion, and it is granted in part and denied in part. We deny Appellants' request to add the deposition transcripts of Justin Buerge and Elaine Paxton as they were not considered by the court below. We grant their request to supplement the App. to include pleadings and a hearing transcript filed or heard after the Abandonment Order was issued since this Opinion addresses the appeals of both the Abandonment Order and the Rule 60(b) Order.

appeal, BAP No. KS-12-78, for lack of jurisdiction.

CORNISH, Bankruptcy Judge, dissenting in part.

I respectfully dissent from those portions of the Opinion that reverse the Bankruptcy Court. Absent clear error, I would affirm in all respects.