NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. AZ-13-1024-PaKuD AZ-13-1043-PaKuD (Consolidated)
IRISH PUB—ARROWHEAD, LLC; IRISH PUB—ARROWHEAD LAND, LLC, Debtors.	Bk. Nos. 09-11124-EPB 09-11137-EPB (Jointly Administered)
JEANEEN BONNETT; 100% NATURAL GOURMET, Appellants,	
v.	**M E M O R A N D U M**[1]
MARGARET GILLESPIE, Chapter 7 7 Trustee; CONCAST, INC.; DOMINIC JONES; ROBERT FOX; MOIRBIA PEORIARE, LLC; MOIRBIA PEORIA, LLC; MOIRBIA, LLC; MOIRBIA SCOTTSDALE LLC; STEVE GOUMAS; MY GOODNESS INC., Appellees.	

Argued and Submitted on January 23, 2014
at Tempe, Arizona

Filed - February 6, 2014

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

Honorable Redfield T. Baum, Sr., Bankruptcy Judge, Presiding[2]

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[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[2] Judge Redfield T. Baum, Sr. entered the order we review on appeal. Due to his retirement from full-time service, the Honorable Eddward Ballinger Jr. is now the presiding judge in the bankruptcy case.

Appearances: John E. Karow, Esq. argued for appellants Jeaneen Bonnett and 100% Natural Gourmet; Oliver J. Davis, Esq. of May Potenza Baran & Gillespie PC argued for Appellee Margaret Gillespie; Brenda K. Martin, Esq. of Osborn Maledon, PA argued for appellees Concast, Inc., Dominic Jones, Robert Fox, Moirbia Peoriare, LLC, Moirbia Peoria, LLC, Moirbia, LLC and Moirbia Scottsdale, LLC.

Before: PAPPAS, KURTZ and DUNN, Bankruptcy Judges.

In this chapter 7[3] case, creditors Jeaneen Bonnett and 100% Natural Gourmet appeal the decision of the bankruptcy court denying their motion to set aside a sale of bankruptcy estate assets. We AFFIRM the decision of the bankruptcy court.

FACTS

Debtor Irish Pub Arrowhead Land, LLC ("Pub Land") owned a parcel of land in Peoria, Arizona. Debtor Irish Pub Arrowhead, LLC ("Pub"), owned and operated the Irish-themed restaurant, "Lis Doon Varma," built on Pub Land's property (together, "the Property"). Steve Goumas is the managing member of Irish Restaurant and Pub Company, LLC ("Irish Restaurant & Pub"), which was the managing member of both Debtors.

At some point not clear in the record, Jeaneen Bonnett ("Bonnett") was the manager of marketing, administration and financial bookkeeping for both Debtors. Bonnett also allegedly owns, in her own right, or indirectly through her wholly owned company 100% Natural Gourmet (together with Bonnett,

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[3] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and "Rule" references are to the Federal Rules of Bankruptcy Procedure. All "Civil Rule" references are to the Federal Rules of Civil Procedure.

"Appellants"), certain intellectual property rights licensed to and used by Debtors.

During construction of Pub, a dispute arose between Pub Land and one of the contractors, Concast, Inc. ("ConcastCorp") when ConcastCorp filed a workman's lien against the Property. To resolve the dispute, Pub Land filed suit against ConcastCorp and others in Maricopa County Superior Court on July 29, 2008. Irish Pub - Arrowhead Land LLC v. Concast, Inc. (the "State Court Litigation"). CV2008-10862. Partly as a result of this on-going contest, on May 21, 2009, Pub and Pub Land each filed petitions for relief under chapter 11. On June 2, 2009, the bankruptcy court ordered joint administration of the two bankruptcy cases.

A creditor filed a motion for appointment of a chapter 11 trustee in the bankruptcy cases on September 11, 2009. ConcastCorp, the second largest creditor, and the United States Trustee subsequently joined in that motion. After a hearing on July 6, 2010, the bankruptcy court ordered the appointment of a trustee; Daniel P. Collins was appointed chapter 11 trustee on July 13, 2010. The court ordered the bankruptcy cases converted to chapter 7 cases on February 17, 2011, and Collins continued as chapter 7 trustee.[4]

The Wells Fargo Loans

In December, 2006, Wells Fargo Bank, N.A. ("Wells Fargo")

[4] Mr. Collins was later appointed to the bankruptcy bench, and at some time before January 3, 2013, Margaret A. Gillespie was appointed successor chapter 7 trustee. Unless there is a need to distinguish between them, we refer to Collins or Gillespie collectively as "Trustee."

made a $2,646,000 loan and a $1,402,000 loan to finance construction of the pub improvements. Debtors jointly executed two promissory notes in favor of Wells Fargo, and secured the notes with deeds of trust on the Property. While not clear in the record, at some time the Wells Fargo loans went into default and, on February 5, 2009, Wells Fargo recorded a Notice of Trustee's Sale of the Property. Pub and Pub Land filed their bankruptcy petitions a short time later.

Wells Fargo commenced a civil suit in Maricopa County Superior Court on September 4, 2009, against Irish Restaurant & Pub, Goumas, Natural Gourmet Enters., Inc., and My Goodness, Inc. to recover from them as guarantors of the Wells Fargo Loans. Wells Fargo Bank, N.A. v. Irish Restaurant & Pub, LLC, et al. CV2009-028358. A stipulated judgment was entered against the guarantors on July 19, 2010 for $2,042,878 (the "Judgment").

Wells Fargo filed a motion for relief from the automatic stay in Debtors' bankruptcy cases on September 3, 2009, seeking authority to complete the foreclosure on the Property. After numerous continued hearings, the bankruptcy court entered a stipulated order granting stay relief on November 3, 2010. As part of an agreement for entry of this order, Wells Fargo assigned the Judgment to Trustee.

Trustee then commenced an adversary proceeding against Appellants, Goumas and certain related parties (the "Adversary Proceeding"). The first four counts in the complaint sought: (1) to pierce the corporate veil of My Goodness and determine that it is an alter ego of Debtors Pub and Pub Land; (2) a declaratory judgment that the intellectual property asserted by

Appellants as their property was in fact property of the estate; (3) avoiding transfer of the intellectual property to a third party; and (4) denying claims of Irish Restaurant & Pub.

The Sale Motion

On May 18, 2012, Trustee filed a motion seeking authority to sell property free and clear of liens, claims and interests pursuant to § 363. Trustee informed the bankruptcy court that he had received an offer of $75,000 for certain assets of the bankruptcy estate from a group he identified as the "Concast Parties," consisting of ConcastCorp, Dominic Jones, Robert Fox, Moirbia Peoriare, LLC, Moirbia, LLC, and Moirbia Scottsdale, LLC. Trustee proposed to sell the following estate assets:

> a. All of Trustee's rights and interests as plaintiff in the Adversary Proceeding [except for counts five through seven that deal with loans made to Debtors].
>
> b. The Judgment and associated rights; and
>
> c. The Debtors' right, title, and interest in and to the intellectual property, including common law rights, together with the good will of the business symbolized by said intellectual property, to the extent such intellectual property exists, including but not limited to, the intellectual property described in the Adversary Proceeding.

Tr. Sale Motion at 3. Trustee's sale motion also proposed a release of claims by the Concast Parties against the estate, and a release of Trustee's claims against the Concast Parties.

Appellants objected to the sale motion on July 3, 2012. Appellants' principal arguments in its objection were: (1) the intellectual property Trustee was attempting to sell was property of the Appellants; (2) the Concast Parties were not good faith purchasers because they had filed a false claim in the bankruptcy

case; (3) ConcastCorp was in litigation with Debtor Pub Land, and Trustee had not considered the value of that claim, which he would release. Trustee responded to Appellants' objection on July 9, 2012, noting that the he was not attempting to sell any disputed intellectual property assets, only the estates' rights to the extent they actually existed. As to the estates' interest in any litigation with ConcastCorp, Trustee asserted that the estates' claims in that litigation were likely not sufficient to warrant pursuit, and releasing the claims would benefit the creditors.

The bankruptcy court conducted a hearing on Trustee's sale motion on July 31, 2012 at which Trustee, Bonnett, Debtors, and the Concast Parties were represented. A hearing transcript is not in the record, but the bankruptcy court's minute entry entered after the hearing recites:

> Bidding commences between Co[n]cast and Bonnett.
>
> The final bid is accepted from Co[n]cast for $115,000.00 and Bonnett is accepted as the backup bidder. An order will not be signed until counsel have had an opportunity to brief whether Co[n]cast is a good faith purchaser by August 3, 2012, with responses due by August 7, 2012.

Appellants filed a "motion" to demonstrate that ConcastCorp was not a good faith purchaser on August 3, 2012. In it, they essentially continued their argument that ConcastCorp had filed a false lien against Pub which had triggered Pub's bankruptcy, and the value of the litigation against ConcastCorp was greater than the value of ConcastCorp's claim against the estates. ConcastCorp responded on August 7, 2012, generally denying the allegations of Appellants.

The bankruptcy court addressed the objection in a minute entry/order on August 10, 2012:

> The essence of the objection [by Appellants] is that prepetition Concast engaged in wrongful conduct which damaged the debtor and its principals and, therefore, according to the objectors Concast cannot be a good faith purchaser. The court concludes that the law is that lack of good faith is shown by fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders. See In re M Capital Corp., 290 B.R. 743 (9th Cir. BAP 2003) and cases cited therein. It appears clear to the court that there are many disputed issues between Concast and the Bonnett Group/and others. However, the test is has Concast wrongfully conducted itself in connection with the auction sale. There is nothing before the court to even hint that Concast acted wrongfully regarding the sale. Rather, the auction sale was fairly conducted and anyone, including the Bonnett Group, was given ample opportunity to overbid Concast.
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> Based on this record, the court concludes that Concast qualifies as a good faith purchaser under Section 363(m).

On August 21, 2012, the bankruptcy court entered an Order granting the sale motion (the "Sale Order"). Among other things, the Sale Order specifically identified the purchasing party, and stated:

> Concast Corporation, Dominic Jones, Robert Fox, Moirbia Peoriare, LLC, Moirbia, LLC, and Moirbia Scottsdale, LLC (the "Concast Parties") made an original offer to purchase the Assets for the amount of $75,000, together with a mutual release of the Concast Parties' claims against the estate and the Trustee's claims against the Concast Parties. The Sale Motion provided for higher and better offers to be entertained at the Sale Hearing. The highest and best offer for the Assets received by the Court and the Trustee at the Sale Hearing was an offer of $115,000, together with the aforementioned additional conditions, from the Concast Parties. . . .
>
> The Court approves the sale of the Assets to the Concast Parties and hereby orders that the sale price for the assets is $115,000 in United States Dollars ("Purchase Price"), together with a mutual release of all claims as specifically set forth in the Sale

Motion.

Sale Order at 2-3. Appellants did not appeal the Sale Order.

On November 28, 2012, Goumas and Appellants filed a motion asking the bankruptcy court to set aside the Sale Order. Appellants argued that case law regarding § 363 sales required that the purchaser be properly identified and give value for the purchase. Appellants suggested that, in the Sale Order, the real purchaser could not be identified with accuracy; that a third party, Martin Boyle, had actually provided $105,000 of the $115,000 purchase price; and that the Concast Parties had prevented Goumas and Appellants from discovering the nature of payments until October 31, 2012.

Trustee responded to this motion on December 11, 2012. According to Trustee, there was no ambiguity in the Sale Order as to the purchaser, the Concast Parties, and that their attorney had given Trustee two checks, one for $105,000 and one for $10,000, to fulfill the terms of the sale. The Concast Parties joined in Trustee's response on December 12, 2012.

The bankruptcy court held a hearing on the motion to set aside the Sale Order on December 19, 2012. A transcript is included in the record. Appellants, Concast Parties, Trustee and Goumas were represented. After hearing arguments of counsel, the bankruptcy court took the matter under advisement.

On January 11, 2013, the court entered a Minute Entry/Order in which it addressed Appellants' and Goumas' arguments:

> The court concludes that both the record here and the sale order are clear and not ambiguous as to the successful bidder. . . . The Sale Order clearly identifies the high bidders; and the court approved backup bidders.

> The undisputed facts are that the purchase price required by the order was timely paid. . . . It is beyond dispute that value was given by the payment of the highest bid amount at the auction. Unlike the case history relied upon by movants, this is not a situation where the future financial ability of the buyer is of concern for any reason. Rather, this is a classic auction where the high bidder gets to buy the auctioned assets. The court can see no reason to set aside the sale because Boyle paid most of the auction/purchase price.
>
> Lastly, movants assert that the successful bidder did not comply with the terms of the sale order. To the contrary the court concludes that the bidder group either complied with or substantially complied with the sale order.

Minute Entry/Order at 2-2.

On January 23, 2013, the bankruptcy court entered an order denying the motion to set aside the Sale Order for the reasons stated in the Minute Entry/Order. Appellants filed a timely appeal.[5]

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(A), (N) and (O). The Panel's jurisdiction is based upon 28 U.S.C. § 158. Trustee suggests that this appeal is moot; we discuss that argument below.

ISSUES

Whether this appeal is moot.

Whether the bankruptcy court abused its discretion in denying appellants' motion to set aside the sale.

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[5] Appellants had filed an appeal of a Minute Entry/Order entered by the bankruptcy court on January 18, 2013; they then filed an appeal of the court's order denying the motion to set aside the Sale Order on February 1, 2013. Both appeals were timely. The Panel consolidated the two appeals on April 17, 2013.

STANDARDS OF REVIEW

We determine our jurisdiction, including mootness issues, de novo. Professional Programs Grp. v. Dep't of Commerce, 29 F.3d 1349, 1352 (9th Cir. 1994).

The bankruptcy court order denying the motion to set aside the Sale Order is reviewed for abuse of discretion. Hasso v. Mozsgai (In re Sierra Fin. Servs.), 290 B.R. 718, 726 (9th Cir. BAP 2002). A bankruptcy court abuses its discretion if it applies an incorrect legal standard, or misapplies the correct legal standard, or if its factual findings are illogical, implausible or without support from evidence in the record. United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009)(en banc).

DISCUSSION

I.

This appeal is not moot.[6]

We first address Trustee's argument that this appeal is equitably moot. It is not.

Equitable mootness applies when "a comprehensive change of circumstances has occurred so as to render it inequitable for a court to consider the merits of the appeal." Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.),

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[6] The equitable mootness argument is raised in Trustee's opening brief. Trustee's Op. Br. at 10. In a Clerk's Order entered on July 18, 2013, Appellants were directed to respond to the mootness question, which they did on July 22, 2013. Our motions panel issued an order determining that the appeal was not moot, subject to further review of the issue by this merits Panel. We agree that this appeal is not moot.

627 F.3d 869, 880-81 (9th Cir. 2012). Equitable mootness is particularly influential in bankruptcy proceedings "where public policy values the finality of bankruptcy judgments because debtors, creditors, and third parties are entitled to rely on a final bankruptcy court order." Id. (citing In re Onouli-Kona Land Co., 846 F.2d 1170, 1172 (9th Cir. 1988)). In cases such as this one, the principal question we face is whether the appeal "present[s] transactions that are so complex or difficult to unwind that the doctrine of equitable mootness would apply." Lowenschuss v. Selnick (In re Lowenschuss), 170 F.3d 923, 933 (9th Cir. 1999). The party arguing for dismissal based on mootness, "bears the heavy burden of establishing that we cannot provide any effective relief." United States v. Gould (In re Gould), 401 B.R. 415, 421 (9th Cir. BAP 2009).

Trustee has not met its burden. The subject sale transaction was not so complex that it would be difficult to unwind. To be sure, equitable mootness applies to appeals of orders concerning sales under § 363.[7] Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 33 (9th Cir. BAP 2008). As the Panel explained:

> Equitable mootness requires the court to look beyond impossibility of a remedy to "the consequences of the remedy and the number of third parties who have changed

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[7] Appellants are incorrect in asserting that equitable mootness only applies to appeals of confirmation of reorganization plans. Although that was the focus of the Thorpe Insulation case, the Ninth Circuit has applied equitable mootness in other contexts. See, e.g., Focus Media, Inc. v. NBC (In re Focus Media, Inc.), 378 F.3d 916, 923 (9th Cir. 2008) (involuntary petitions); Semel v. Dill (In re Dill), 992 F.2d 1004, 1007 (9th Cir. 1984) (attorney's fees).

> their position in reliance on the order that is being appealed." [Darby v. Zimmerman (In re Popp), 323 B.R. 260, 271 (9th Cir. BAP. 2005)]. As we further stated in Popp, "[c]ourts have applied the doctrine of equitable mootness when the appellant has failed to obtain a stay and [although relief is possible] the ensuing transactions are too 'complex and difficult to unwind.'" Id. at 271 (citations omitted). "Ultimately, the decision whether to unscramble the eggs turns on what is practical and equitable." Baker & Drake, Inc. v. Pub. Serv. Comm'n (In re Baker & Drake, Inc.), 35 F.3d 1348, 1352 (9th Cir. 1994).

In re PW, LLC, 391 B.R. at 33. And in Thorpe Insulation, the Ninth Circuit provided guidelines for determining equitable mootness on appeal:

> We have not yet expressly articulated a comprehensive test [for equitable mootness], but our precedents have looked at whether a stay was sought, whether the [transaction] has been substantially consummated, whether third party rights have intervened, and, if so, whether any relief can be provided practically and equitably.

In re Thorpe Insulation, 677 F.3d at 880.

Appellants concede that they did not seek a stay pending appeal of either the Sale Order or of the order denying their motion to set aside the Sale Order. The first criterion for equitable mootness has been met.

The term "substantially consummated" in the Thorpe Insulation decision refers to a term of art in plan confirmation law. A chapter 11 reorganization plan has been substantially consummated if substantially all of the property has been transferred, the debtor or its successor has taken control of substantially all of the property, and distribution under the plan has commenced. See § 1101(2). Analogizing to a sale of property, the Ninth Circuit would likely be concerned in a case like this one if the proceeds of sale had been received by the

seller/trustee and then distributed to the creditors. However, Trustee acknowledges that the funds received for the subject sale remain in his possession and will not be distributed pending the outcome of this appeal. Consequently, the second criterion indicating equitable mootness is not present.

In addition, there are no other "third-party rights" involved in this appeal. All of the parties that could conceivably be affected by any modification to the Sale Order are before the Panel and have actively participated in both the bankruptcy case and this appeal.[8] The third criterion for mootness is not met.

In sum, were the Panel to so decide, it would not be impractical or inequitable to grant the relief Appellants seek. Trustee retains the sale proceeds and could be directed to return them to the Concast Parties. Trustee could also be directed by the bankruptcy court to accept Appellants' backup bid. This appeal is not equitably moot.

II.

The bankruptcy court did not abuse its discretion in denying the motion to set aside the Sale Order.

A.
Reconsideration under Civil Rule 60(b)(2)

The motion to set aside a Sale Order is treated as a motion for reconsideration either under Rule 9023, which incorporates

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[8] The only third party of which we are aware in this dispute may be Martin Boyle. If this sale were unwound, he would presumably have his $105,000 refunded. Boyle has not asserted any rights in the bankruptcy court or in this appeal, so we cannot say that his rights would be affected.

Civil Rule 59, or under Rule 9024, which incorporates Civil Rule 60. In re Sierra Fin. Servs., 290 B.R. at 726. Since Civil Rule 59 only applies when the motion to alter an order is filed within fourteen days of entry of that order, and the motion to set aside the Sale Order in this case was filed over three months after entry of the Sale Order, Appellants' entitlement to relief is measured under Civil Rule 60. Harvest v. Castro, 531 F.3d 737, 746-47 (9th Cir. 2008)(reconsideration motions filed more than fourteen days after entry of an order are treated under Civil Rule 60(b)).

Appellants' various arguments can be reduced to their essence. They contend that they could not challenge the sale and Sale Order before they discovered the true identity of the source of sale funds. Appellants allege that the Concast Parties withheld the fact from the bankruptcy court and them that Martin Boyle would provide $105,000 of the $115,000 to acquire the assets. Appellants represent that they only discovered this fact on October 31, 2012, after numerous requests to Trustee to provide unredacted copies of the payments checks. Therefore, they insist, this fact constitutes "new evidence" that would justify reconsideration of the Sale Order by the bankruptcy court. Appellants' argument invokes Civil Rule 60(b)(2), which provides:

> Rule 60. Relief from a Judgment or Order . . . (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)[.]

Relief from an order or judgment to offer newly discovered evidence under Civil Rule 60(b)(2) is warranted if: (1) the moving party can show the evidence relied on must have existed at the time of the hearing; (2) the moving party exercised due diligence to discover this evidence; and (3) the newly discovered evidence must be of "such magnitude that production of it earlier would have been likely to change the disposition of the case." Feature Realty, Inc. v. City of Spokane, 331 F.3d 1082, 1093 (9th Cir. 2003) (citing Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., Inc., 833 F.2d 208, 211 (9th Cir. 1987)).

In Trustee's response to the motion to set aside the sale motion, he stated that he had received two cashier's checks from the attorney for the Concast Parties within three days of the Sale Order. Consequently, we can conclude that the checks did exist within the time for Appellants to seek a new trial under Civil Rule 59(b). Appellants argue that they attempted on several occasions to obtain copies of the unredacted checks. Trustee does not contest this, and acknowledges that it was not until October 31, 2012 that he complied. In other words, Appellants were seemingly diligent in seeking to discover the evidence.

However, as the detailed Minute Entry/Order of the bankruptcy court shows, the information about the source of the purchase funds targeted by Appellants was not of "such magnitude that production of it earlier would have been likely to change the disposition of the case." Feature Realty, Inc., 331 F.3d at 1093. Indeed, the bankruptcy court considered the evidence concerning the source of the sale proceeds, but found it need not

disturb its order: "The court can see no reason to set aside the sale because Boyle paid most of the auction/purchase price." Minute Entry/Order at 2.

Most of Appellants' arguments seeking to set aside the Sale Order focus on their allegation that the identity of the purchaser was ambiguous. This discussion in both the bankruptcy court and this appeal relates to the Ninth Circuit's decision in Ferrari N. Am., Inc. v. Sims (In re R.B.B., Inc.), 211 F.3d 475 (9th Cir. 2000). There, the debtor R.B.B. was an auto dealership under a franchise with Ferrari North America. Ferrari notified R.B.B. that it would not renew the franchise; R.B.B. reacted by filing for chapter 11 relief. In the bankruptcy case, the trustee received an offer to purchase the franchise from an entity called "Symbolic." The bankruptcy court approved the sale, noting that Symbolic was a combination of two automobile dealerships, North Beach and West Coast. In its order approving the sale, the bankruptcy court was ambiguous in describing the assets sold and Symbolic, at times assigning assets to one of the buyer dealerships, then to another, and at other times an amalgam of both. Id. at 477-78. When asked to review the bankruptcy court's sale order, the Ninth Circuit ruled that:

> [A]s two companies were ambiguously the purchaser, it cannot be concluded that an identified purchaser existed. . . . The assets and lines of credit of North Beach and West Coast could not be mushed together. Ambiguity as to the purchaser was as fatal to the sale as the two ships named Peerless were fatal to the formation of a contract.

Id. at 480.

Citing R.B.B., Appellants argue that any ambiguity in the Sale Order as to the purchaser is fatal to the sale. But as the

bankruptcy court correctly point out, "unlike [in R.B.B.], this is not a situation where the future financial ability of the buyer is of concern for any reason." A review of the R.B.B. case supports the bankruptcy court's interpretation.

In In re R.B.B., the Ninth Circuit cited with approval to a decision of the bankruptcy court in In re Van Ness Auto Plaza, 120 B.R. 545, 547 (Bankr. N.D. Cal. 1990), which provided a list of factors that a bankruptcy court should consider in determining whether an automobile manufacturer acted reasonably in withholding consent to transfer an automobile franchise under California law. Those factors included data on capitalization of assignees of a franchise, their credit worthiness and prior profitability. Thus, under the facts of that case, an assignment or sale of an automobile franchise required the identification of a purchaser/assignee and specific evaluations concerning that party. Because a franchisor must depend upon the creditworthiness of a proposed franchisee, it is understandable how the identity of the true assignee is critical to the bankruptcy court's and parties' evaluation of the merits of a proposal.

In this case, the bankruptcy court determined that the Trustee's proposed cash sale implicated no special requirements from the purchaser. This was instead a "classic auction sale where the high bidder gets to buy the auctioned assets." Case law sets forth only two requirements for a sale under § 363: that there must be an "identifiable" purchaser; and that purchaser must give value. Ewell v. Diebert (In re Ewell), 958 F.2d 276, 281 (9th Cir. 1992); Fitzgerald v. Namba (In re Fitzgerald),

428 B.R. 872, 882 (9th Cir. BAP 2010). Trustee identified the Concast Parties, each by name, as the purchasers in his sale motion, and the bankruptcy court identified the Concast Parties, each by name, as the winning bidders in the Sale Order. Trustee stated that he had received two checks in full payment of the purchase price from the attorney for the Concast Parties. On this record, we conclude that the Concast Parties were adequately identified as the purchaser of the assets, and that they provided value.[9]

The bankruptcy court did not abuse its discretion in denying Appellants' motion to set aside the Sale Order.

B.
Questions concerning the fairness of the Sale Order are not before the Panel.

At oral argument before the Panel, counsel for Appellants suggested that the auction procedures set forth in the Sale Motion were unfair in that they unduly favored Concast Parties and disfavored Appellants. To place Appellants' argument in context, we quote several paragraphs of the Sale Motion:

> 14. Pursuant to 11 U.S.C. § 363, the Trustee proposes to sell the Assets to the Concast Parties, for the offered price of $75,000, together with a mutual release of the Concast Parties' claims against the estate and the Trustee's claims against the Concast Parties, which offer shall be subject to any higher or better offers at a hearing on the motion before the Bankruptcy Court.

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[9] Appellants also suggest that the fact that Trustee substituted Moirbia Scottsdale, LLC for Trustee in the first four counts of the Adversary Proceeding was evidence of the ambiguity of the purchaser. This argument lacks merit. Interest in those four counts was purchased by the Concast Parties in the Sale Order, and they were free to manage those assets as they chose.

> 15. The Assets are to be sold collectively for one price, which is the highest and best offer.
>
> 16. Any competing bidder must provide Trustee's counsel, Justin Niedzialek, proof of their financial ability to purchase the Assets and an earnest money deposit in the amount of $10,000 in certified funds made payable to "Daniel P. Collins, Trustee" three (3) business days prior to the Sale Hearing.
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> 17. The Earnest Money Deposit shall be refundable only if the bidder is not the successful bidder at the Sale Hearing.

Appellants argue that the sale process was unfair because the Concast Parties were not required by Trustee to "pre-qualify" to bid by posting the Earnest Money Deposit, while they had to do so. Trustee's counsel reminded the Panel that the Sale Motion, granted by the bankruptcy court, required only that "competing bidders" make a pre-sale deposit. Appellants argue that this term as used in paragraph 16 is ambiguous because the common meaning of competing bidder would include all parties that compete at the auction and, thus, the bidding procedures unfairly discriminated against Appellants and in favor of Concast Parties.

We reject Appellants' fairness argument for several reasons.

First, this argument was not raised in the bankruptcy court and, therefore, it may not be raised for the first time on appeal. Vegas Townhomes Partners, LP v. Graham (In re Flamingo 55 Inc.), 646 F.3d 1253, 1255 (9th Cir. 2011) ("An issue not raised in the bankruptcy court is waived on appeal.").[10]

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[10] At oral argument, counsel for Appellants represented that he believed this issue had been raised by Appellants in the bankruptcy court. After reviewing the record and pleadings related to the Sale Motion, and the bankruptcy court's Minute Entry/Order denying the motion to set aside the sale, we have (continued...)

Second, even if they timely raised them in the bankruptcy court, Appellants' complaints about the sale procedures should have been addressed in an appeal of the bankruptcy court's Sale Order. In other words, Appellants' argument is far too late to warrant consideration in this appeal from the bankruptcy court's order denying Appellants' request to set aside the sale. United Student Funds, Inc. v. Wylie (In re Wylie), 249 B.R. 204, 215 (9th Cir. BAP 2006)(issues not presented to the bankruptcy court in a reconsideration motion will not be reviewed on appeal).

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[10](...continued)
been unable to confirm this claim. However, the docket does include Appellants' objection to the Sale Motion. We may take judicial notice of the underlying bankruptcy court records relating to an appeal. O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1988). In that objection, Appellants apparently accepted the terms of the Sale Motion, including the payment of $10,000 deposit, but objected to only two of the procedures:

> 50. Jeaneen Bonnett agrees with a down payment of $10,000 and with the $5,000 increments thereon as described in the Motion to Sell.
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> 51. However, Ms. Bonnett objects to the time period of three (3) days for the successful bidder to provide funds; rather, the successful bidder should provide the funds within 24 hours.
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> 52. Bonnett also believes that more time is needed to solicit bids, particularly because certain equity holders/creditors [residing] outside the United States were not notified of the Motion to Sell and other bankruptcy procedures.

Jeaneen Bonnett and 100% Natural Gourmet, Inc.'s Response to Trustee's Motion to Sell Personal Property Free and Clear of Liens, Claims and Interests Pursuant to 11 U.S.C. § 363 at 9, July 3, 2012. Dkt. no. 388.

Third, Appellants' argument is not to be found in their opening brief in this appeal, nor even in their reply brief. An issue not timely raised in a party's opening brief is deemed waived. Friends of Yosemite Valley v. Kempthorne, 520 F.3d 1024, 1033 (9th Cir. 2008).

Finally, even were we to consider Appellants' complaints about the sale process, their argument lacks merit. A trustee's selection of bidding and sale procedures is a matter committed to the trustee's business judgment, to which the bankruptcy court and this Panel give deference. Simantob v. Claims Prosecutor, LLC (In re Lahijani), 325 B.R. 282, 288-89 (9th Cir. BAP 2005). Here, Trustee had engaged in negotiations with Concast Parties which led to their $75,000 opening bid. Trustee was aware that, in addition to the $75,000 bid, Concast Parties agreed to a mutual release of claims with the bankruptcy estate. Trustee indicates in the record that he believed the estate's claims against Concast Parties were not worth pursuing, so he could reasonably conclude that it would be in the best interests of the creditors to secure a release of Concast Parties' claims. All things considered, we cannot conclude that Trustee abused his business judgment by not requiring an Earnest Money Deposit from Concast Parties in advance of the sale. In retrospect, Appellants made the deposit and were allowed to participate in the auction. Moreover, the Concast Parties closed the sale, such that the lack of a deposit from them worked no prejudice on the bankruptcy estate.

CONCLUSION

For these reasons, the bankruptcy court's order denying the

motion to set aside the Sale Order is AFFIRMED.