

FEB 18 2009

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

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7 In re: ) BAP No. EC-08-1199-HJuMk  
8 MARTIN A. YACK; HELEN M. YACK, )  
9 Debtors. ) Bk. No. 07-25642  
10 \_\_\_\_\_ )  
11 MARTIN A. YACK; HELEN M. YACK, )  
12 Appellants, )  
13 v. ) **MEMORANDUM**<sup>1</sup>  
14 MICHAEL P. DACQUISTO, Trustee; )  
15 WASHINGTON MUTUAL BANK; U.S. )  
16 TRUSTEE, )  
Appellees. )  
\_\_\_\_\_ )

Argued and Submitted on January 22, 2009  
at San Francisco, California

Filed - February 18, 2009

Appeal from the United States Bankruptcy Court  
for the Eastern District of California

Honorable Christopher M. Klein, Chief Bankruptcy Judge, Presiding

\_\_\_\_\_  
Before: HOLLOWELL, JURY and MARKELL, Bankruptcy Judges.

27 <sup>1</sup> This disposition is not appropriate for publication.  
28 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.

1 Martin and Helen Yack ("Debtors") appeal a bankruptcy court  
2 order denying their request for abandonment of the bankruptcy  
3 estate's interest in a lawsuit -- a putative class action  
4 involving monetary and non-monetary claims --filed by the Debtors  
5 against one of their creditors. We AFFIRM the bankruptcy court's  
6 order.

7 **I. FACTS**

8 Debtors filed for chapter 7 bankruptcy relief on July 20,  
9 2007.<sup>2</sup> Michael Dacquisto was appointed as trustee ("Trustee").  
10 On their bankruptcy schedules, Debtors did not list any  
11 contingent or unliquidated claims or any claims or causes of  
12 action on their Schedule B of personal property. The Debtors  
13 were granted a discharge in their no asset case and the  
14 bankruptcy case was closed on November 16, 2007.

15 Two days after their chapter 7 case was closed, on November  
16 19, 2007, Debtors commenced an action in the Northern District of  
17 California ("District Court Action"), based upon events that  
18 occurred prior to the bankruptcy case involving their bank,  
19 Washington Mutual ("WaMu")<sup>3</sup> (these events will be referred to for  
20 ease of reference as giving rise to "Debtors' Claims").

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21  
22 <sup>2</sup> Unless otherwise indicated, all chapter, "Code," and  
23 section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-  
24 1532 and to the Federal Rules of Bankruptcy Procedure, Rules  
1001-9037.

25 <sup>3</sup> On September 25, 2008, the United States Office of Thrift  
26 Supervision seized Washington Mutual Bank from Washington Mutual,  
27 Inc. and placed it into a Federal Deposit Insurance Corporation  
28 (FDIC) receivership. The FDIC, as receiver, then immediately  
sold the banking subsidiaries, including Washington Mutual Bank  
that is a party here, to JPMorgan Chase. The bank reopened the  
next day. The holding company, Washington Mutual, Inc., filed  
bankruptcy the next day, September 26, in Delaware, where it is  
incorporated, and is not a party to this appeal.

1 Debtors were long-time customers of WaMu. For many years,  
2 Martin Yack's pension and social security benefits were directly  
3 deposited into Debtors' WaMu checking account. On November 20,  
4 2006, pursuant to a notice of levy, WaMu withdrew \$237.00 from  
5 Debtors' checking account and collected a \$75.00 processing fee.  
6 The levy was obtained by a debt collection agency, Sunlan-020105  
7 ("Sunlan"), which had a judgment against Debtors in the amount of  
8 \$10,383.61 for unpaid credit card debt. Sunlan obtained a Writ  
9 of Execution in Butte County, California and sent the Writ to the  
10 Sheriff's Office in Los Angeles County, California, which in  
11 turn, sent a notice of levy to WaMu.

12 There is some dispute about what happened after WaMu  
13 withdrew funds from Debtors' account: the Debtors allege that  
14 although they informed WaMu the money in the account was pension  
15 and social security funds, not subject to attachment, WaMu denied  
16 them use of their money until February 2007. WaMu alleges the  
17 money was never delivered to the Sheriff's Office pursuant to the  
18 levy and that all funds were credited back to the account on  
19 November 28, 2006.<sup>4</sup>

20 Just shy of a year after these events occurred, Debtors  
21 filed the District Court Action against WaMu, Sunlan, the Butte  
22 County Clerk's Office and the Los Angeles County Sheriff's  
23 Department. Helen and Martin Yack, et. al v. Wash. Mut. Inc.,  
24 et. al., Case No. C07-5858-PJH. The Debtors alleged seven  
25 different causes of action related to the November 2006 events:  
26 (1) a Fair Debt Collection Practices Act claim against WaMu and  
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28 <sup>4</sup> The Debtors were later featured in a front page article in  
The Wall Street Journal, on April 29, 2007, about individuals  
whose social security benefits had been wrongfully attached.

1 Sunlan; (2) a claim under the Anti-Attachment provision of the  
2 Social Security Act against all defendants; (3) a claim for  
3 violation of § 704.080 of the Cal. Civ. Code against WaMu; (4) a  
4 claim for violation of Cal. Civ. Code § 1788.10 et. seq.; (5) a  
5 claim for unfair business practices under Cal. Bus. & Prof. Code  
6 § 17200 et. seq.; (6) a claim under the Due Process and Supremacy  
7 Clauses; and (7) a 42 U.S.C. § 1983 claim both against the Los  
8 Angeles County Sheriff's Office and Butte County Clerk's Office  
9 ("Amended Complaint").

10 WaMu and Sunlan filed a joint motion to dismiss the District  
11 Court Action for failure to state a claim and lack of subject  
12 matter jurisdiction. Los Angeles County Sheriff's Office also  
13 filed a motion to dismiss for failure to state a claim and joined  
14 in WaMu's and Sunlan's motion to dismiss for lack of subject  
15 matter jurisdiction.<sup>5</sup>

16 On April 23, 2008 (while the District Court Action was  
17 pending), Debtors filed a Motion to Reopen their chapter 7  
18 bankruptcy case "for the purpose of notifying the court that the  
19 debtors are plaintiffs in a class action" and "to determine  
20 whether the estate should be substituted for the debtors in the  
21 litigation." Debtors' Motion to Reopen was prompted by  
22 correspondence between WaMu's attorney and Debtors' counsel  
23 regarding Debtors' failure to schedule Debtors' Claims in their  
24 bankruptcy case, as well as the motions to dismiss filed in the  
25 District Court Action. The Motion to Reopen was granted April  
26 28, 2008 and the Trustee was appointed on May 2, 2008.

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28  
<sup>5</sup> Butte County did not appear in the District Court Action;  
there is no proof it was properly served.

1 On May 12, 2008, the Debtors filed a Motion to Request  
2 Abandonment Pursuant to Bankruptcy Rule 6007 ("Abandonment  
3 Motion"), seeking the abandonment of the bankruptcy estate's  
4 interest in Debtors' Claims. The Trustee sent a letter to  
5 Debtors on May 27, 2008 indicating he had no objection to the  
6 Abandonment Motion. WaMu filed an opposition, contending  
7 Debtors' Claims held value for the estate. The Trustee then  
8 withdrew his letter and filed a response and opposition to the  
9 Abandonment Motion, stating he required more time to evaluate  
10 Debtors' Claims. The bankruptcy court heard the matter on June  
11 10, 2008. Counsel for Debtors did not appear. The bankruptcy  
12 court entered a minute order denying the Abandonment Motion  
13 without prejudice on June 13, 2008.<sup>6</sup>

14 On June 20, 2008, Debtors filed a Renewed Motion to Request  
15 Abandonment Pursuant to Bankruptcy Rule 6007 ("Renewed  
16 Abandonment Motion"), docketed as a Motion for Reconsideration.  
17 WaMu again filed an opposition, as did the Trustee. Debtors  
18 filed a reply, and the matter was heard on July 21, 2008. By the  
19 time of the hearing on the Renewed Abandonment Motion, the  
20 Trustee was engaged in negotiations to sell or compromise  
21 Debtors' Claims with WaMu for a sum that would provide a  
22 substantial distribution to unsecured creditors.<sup>7</sup>

23 Prior to the hearing in the bankruptcy court, on June 23,  
24 2008, the District Court Action was dismissed in its entirety

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25  
26 <sup>6</sup> At the June 10, 2008 hearing, the bankruptcy court issued  
27 findings of fact and conclusions of law orally on the record. No  
28 transcript of the proceeding is available either in the Excerpt  
of Record or on the bankruptcy case docket.

<sup>7</sup> At oral argument, the Trustee informed the Panel that  
negotiations are on-going.

1 with prejudice. The district court found that because the  
2 Debtors failed to disclose Debtors' Claims in the bankruptcy  
3 proceedings, they (1) lacked standing to pursue Debtors' Claims,  
4 and (2) were judicially estopped from proceeding with Debtors'  
5 Claims against the defendants ("District Court Dismissal Order").

6 At the July 21, 2008 hearing, the bankruptcy court noted  
7 that since the Debtors still had the right to appeal the District  
8 Court Dismissal Order, the issue was not moot. The bankruptcy  
9 court issued findings of fact and conclusions of law orally on  
10 the record and entered a Civil Minute Order denying the Renewed  
11 Abandonment Motion on July 24, 2008 ("Abandonment Order"). In  
12 its findings of fact and conclusions of law, the bankruptcy court  
13 determined that: (1) because the Debtors' Claims were not listed  
14 on Debtors' bankruptcy schedules, they were not abandoned  
15 pursuant to § 554(c), and the Trustee still owned Debtors'  
16 Claims; and, (2) because Debtors' Claims had some value and  
17 benefit to the estate, the Trustee did not have to abandon them.  
18 Debtors timely filed an appeal.

## 19 20 **II. JURISDICTION**

21 The bankruptcy court had jurisdiction under 28 U.S.C.  
22 §§ 1334 and 157(b)(2). We do not have jurisdiction over appeals  
23 that are constitutionally moot. Drummond v. Urban (In re Urban),  
24 375 B.R. 882, 887 (9th Cir. BAP 2007).<sup>8</sup> Nor do we have  
25 jurisdiction over bankruptcy court orders that are not final.

26  
27  
28 <sup>8</sup> There is no basis for an equitable mootness claim in this  
case. See e.g., Clear Channel Outdoor, Inc. v. Knupfer (In re  
PW, LLC), 391 B.R. 25, 33-35 (9th Cir. BAP 2008).

1 Belli v. Temkin (In re Belli), 268 B.R. 851, 855 (9th Cir. BAP  
2 2001).

3 **A. Mootness.**

4 Mootness is a jurisdictional issue we consider sua sponte.  
5 Felton Pilate v. Burrell (In re Burrell), 415 F.3d 994, 997 (9th  
6 Cir. 2005). An appeal is moot if events have occurred that  
7 prevent an appellate court from granting effective relief.  
8 Ederel Sport, Inc. v. Gotcha Int'l L.P. (In re Gotcha Int'l  
9 L.P.), 311 B.R. 250, 253-54 (9th Cir. BAP 2004).

10 On December 22, 2008, the Panel issued an order to the  
11 parties requesting further briefing to explain why this appeal is  
12 not moot. The order was issued based upon Debtors' indication,  
13 at the July 21, 2008 hearing before the bankruptcy court, and in  
14 their briefs before this Panel, that because the Trustee failed  
15 to take over the District Court Action, the statute of  
16 limitations had run on Debtors' Claims. It was also unclear from  
17 the record whether Debtors had timely appealed the District Court  
18 Dismissal Order.

19 The District Court Dismissal Order was entered on June 23,  
20 2008. The Federal Rules of Civil Procedure require that every  
21 judgment be "set forth on a separate document" and must be  
22 entered in the docket. Fed. Rule Civ. P. 58(a). The district  
23 court entered its separate judgment on August 15, 2008.<sup>9</sup> Because  
24

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25  
26 <sup>9</sup> See Helen and Martin Yack, et. al. v. Wash. Mut. Inc., et.  
27 al., Case No. C07-5858-PJH, District Court, Northern District of  
28 California, at docket number 58. We have taken judicial notice  
of documents filed in the District Court Action in order to  
determine whether Debtors timely appealed the District Court  
Dismissal Order. Ehrenberg v. Cal. State Univ. (In re Beachport  
Entm't), 396 F.3d 1083, 1088 (9th Cir. 2005).

1 the time for appeal runs from the date of entry of the judgment,  
2 Debtors' appeal, on September 15, 2008, of the judgment of  
3 dismissal was timely. Fed. R. App. P. 4(a).

4 The statute of limitations may be suspended until the final  
5 disposition of an appeal. COLTOFF, PAUL, ET. AL., 54 C.J.S.  
6 LIMITATIONS OF ACTIONS § 154 (2008). Debtors' counsel stated at oral  
7 argument that he believed the statutes of limitation on most of  
8 Debtors' Claims are suspended while Debtors' appeal is pending.  
9 In any event, the unfair business practices claim under Cal. Civ.  
10 Code § 17200 has a four year statute of limitations, and has not  
11 yet run.

12 The Trustee and WaMu assert this appeal is moot because the  
13 district court has held that even if Debtors' Claims were  
14 abandoned, Debtors are judicially estopped from prosecuting them  
15 because of their failure to list them on their bankruptcy  
16 schedules. However, if we reverse the bankruptcy court's  
17 Abandonment Order, and the Ninth Circuit reverses the District  
18 Court Dismissal Order, including the finding that judicial  
19 estoppel bars Debtors' prosecution of Debtors' Claims, then the  
20 Debtors could litigate at least their California unfair business  
21 practices claim. Even if this scenario requires a precise  
22 alignment of events, there is a possibility of providing  
23 effective relief to the Debtors. As a result, this appeal is not  
24 moot.

25 **B. Finality.**

26 An order authorizing abandonment is a final order. See  
27 e.g., Johnston v. Webster (In re Johnston), 49 F.3d 538, 540 (9th  
28 Cir. 1995); Malden Mills Indus., Inc. v. Maroun (In re Malden

1 Mills Indus.), 303 B.R. 688, 696 (1st Cir. BAP 2004). It is not  
2 clear, however, if an order denying abandonment, as in this case,  
3 is a final order since Debtors are not precluded from filing a  
4 motion to abandon in the future.

5 The standard for determining finality in bankruptcy cases is  
6 more flexible than in other contexts. Frontier Properties, Inc.  
7 v. Elliott (In re Frontier Properties, Inc.), 979 F.2d 1358, 1363  
8 (9th Cir. 1992). Flexible finality focuses on whether the order  
9 being appealed affects substantive rights and finally determines  
10 a discrete issue. In re Belli, 268 B.R. at 854. A bankruptcy  
11 court order is final under the flexible standard if it "(1)  
12 resolves and seriously affects substantive rights and (2) finally  
13 determines a discrete issue to which it is addressed." In re  
14 Frontier Properties, 979 F.2d at 1363.

15 The factors to be considered in applying the flexible  
16 finality standard include: (1) the need to avoid piecemeal  
17 litigation; (2) judicial efficiency; (3) systemic interest in  
18 preserving the bankruptcy court's role as a fact finder; and (4)  
19 whether further delay would cause either party irreparable harm.  
20 Saxman v. Educ. Credit Mgmt. Corp. (In re Saxman), 325 F.3d 1168,  
21 1171 (9th Cir. 2003) (quoting Knupfer v. Lindblade (In re Dyer),  
22 322 F.3d 1178, 1187 (9th Cir. 2003)).

23 In this case, judicial efficiency could be promoted if the  
24 Panel were to reverse the Abandonment Order because the Debtors  
25 would regain their claims and the bankruptcy court would not  
26 needlessly engage in factual findings regarding a proposed sale  
27 by the Trustee or other disposition of the Debtors' Claims. On  
28 the other hand, if we affirm the bankruptcy court, there is a

1 high likelihood that there will be a second appeal of any order  
2 approving the Trustee's disposition of Debtors' Claims. However,  
3 finality is determined prior to a decision on the merits of an  
4 appeal. Therefore, because a decision in favor of the Debtors  
5 would promote judicial economy, the Abandonment Order may be  
6 considered a final order. In re Dyer, 322 F.3d at 1187; Bonner  
7 Mall P'ship v. U.S. Bankcorp Mtg. Co. (In re Bonner Mall P'ship),  
8 2 F.3d 899, 904 (9th Cir. 1993).

9 Furthermore, if we defer considering the appeal of the  
10 Abandonment Order and the Trustee pursues a sale of Debtors'  
11 Claims to a good-faith purchaser, an appeal of the sale order may  
12 be rendered moot unless Debtors, who are elderly and on fixed  
13 incomes, obtain a stay pending appeal. See Onouli-Kona Land Co.  
14 v. Richards (In re Onouli-Kona Land Co.), 846 F.2d 1170, 1172-73  
15 (9th Cir. 1988. This would then prevent any future review of the  
16 Abandonment Order as that review would be rendered moot.  
17 Irreparable harm could, therefore, result to the Appellants if  
18 the Abandonment Order is not reviewed now.

19 Accordingly, we find the Abandonment Order is final under  
20 the flexible finality standard and we have jurisdiction to review  
21 the merits of the appeal. 28 U.S.C. § 158.

### 22 **III. ISSUE**

23 Did the bankruptcy court abuse its discretion in denying  
24 Debtors' Renewed Abandonment Motion?

### 25 **IV. STANDARDS OF REVIEW**

26 We review abandonment orders for an abuse of discretion.  
27 Johnston v. Webster (In re Johnston), 49 F.3d 538, 540 (9th Cir.  
28 1995). A bankruptcy court "abuses its discretion if its decision

1 is 'based on an erroneous conclusion of law or when the record  
2 contains no evidence on which the [bankruptcy court] rationally  
3 could have based that decision.'" Viet Vu v. Kendall (In re Viet  
4 Vu), 245 B.R. 644, 647 (9th Cir. BAP 2000) (quoting Vanderpark  
5 Properties, Inc. v. Buchbinder (In re Windmill Farms, Inc.), 841  
6 F.2d 1467, 1472 (9th Cir. 1988)).

## 7 **V. DISCUSSION**

8 A party with an interest in the bankruptcy case can request  
9 a bankruptcy court to order the trustee to abandon property of  
10 the estate if they establish: (1) the property is either  
11 burdensome to the estate; or, (2) is of inconsequential value and  
12 benefit to the estate. See 11 U.S.C. § 554(b); In re Sullivan &  
13 Lodge, Inc., 2003 WL 22037724 at \*4 (N.D. Cal. 2003); In re Viet  
14 Vu, 245 B.R. at 647. However, an order compelling abandonment is  
15 "the exception, not the rule." Id. (citing Morgan v. K.C. Mach.  
16 & Tool Co. (In re K.C. Mach. & Tool Co.), 816 F.2d 238, 245 (6th  
17 Cir. 1987)). "The only issue before the court in an application  
18 for abandonment is whether there is a reason that the estate's  
19 interest in the property should be preserved or, instead, whether  
20 the property is so worthless or burdensome to the estate that it  
21 should be removed therefrom." In re K.C. Mach. & Tool Co., 816  
22 F.2d at 246.

23 Debtors contend that Debtors' Claims should be abandoned  
24 because they are mostly injunctive relief claims that have no  
25 value for the estate or putative class action claims that would  
26 be difficult or impossible for the Trustee to assert. Debtors  
27 also assert a right to the injunctive relief claims regardless of  
28 their failure to disclose those claims in their bankruptcy

1 schedules. Because of this latter assertion, our analysis begins  
2 by reviewing the bankruptcy court's determination that all of  
3 Debtors' Claims were property of the estate.

4  
5 **A. Property of the Estate.**

6 Property of the bankruptcy estate includes "all legal or  
7 equitable interests of the debtor in property as of the  
8 commencement of the case." 11 U.S.C. § 541(a)(1). Causes of  
9 action existing at the time the bankruptcy petition is filed are  
10 property of the estate. Sierra Switchboard Co. v. Westinghouse  
11 Elec. Corp., 789 F.2d 705, 708 (9th Cir. 1986) (citations  
12 omitted); Suter v. Goedert (In re Suter); 396 B.R. 535, 541-42  
13 (D. Nev. 2008).

14 The events giving rise to Debtors' Claims occurred eight  
15 months prior to the filing of the bankruptcy case. Debtors'  
16 Claims are not "so personal [to the Debtors] as to exclude [them]  
17 from the bankruptcy estate." Id. at 546.<sup>10</sup> Therefore, we agree  
18 with the bankruptcy court that Debtors' Claims are included in  
19 the bankruptcy estate. Henson v. Lucas (In re Henson), 2006 WL  
20 3861370 at \* 5 (Bankr. N.D. Cal. 2006) (if "debtor could raise a  
21 claim at the commencement of the bankruptcy case, the claim

22  
23 <sup>10</sup> The District Court in In re Suter envisioned three  
24 reasons a cause of action may be so personal as to exclude it  
25 from the estate: (1) intimately personal claims serving as a  
26 catharsis for the debtor; (2) claims that would be unfair to keep  
27 from public scrutiny if they were sold; (3) personal injury  
28 claims where compensation is intended to make a plaintiff whole,  
not merely to pay off a debt. "Each of these reasons stems from  
righting a wrong done to a plaintiff herself." Id. In this  
case, because Debtors' Claims are a putative class action they  
are not so personal that they are excluded from the bankruptcy  
estate.

1 becomes the exclusive property of the bankruptcy estate.”)

2 (emphasis in original).

3 Debtors’ Claims remained property of the estate even after  
4 the bankruptcy case was closed. When a debtor fails to correctly  
5 schedule an asset, including a cause of action, the asset remains  
6 the property of the bankruptcy trustee forever (or until  
7 administered or formally abandoned by the trustee). 11 U.S.C.  
8 § 544(d); Griffin v. Allstate Ins. Co., 920 F.Supp. 127, 130  
9 (C.D. Cal. 1996) (“Lawsuits remain part of the bankruptcy estate  
10 unless the bankruptcy trustee abandons them.”); Lopez v.  
11 Specialty Restaurants Corp. (In re Lopez), 283 B.R. 22, 31-32  
12 (9th Cir. BAP 2002). We conclude that the bankruptcy court  
13 correctly determined Debtors’ Claims were property of the  
14 bankruptcy estate.

15  
16 **B. Inconsequential Value and Benefit to the Estate.**

17 Debtors argue Debtors’ Claims have no value to the estate  
18 primarily for two reasons. First, Debtors contend that because  
19 the improperly frozen funds in Debtors’ bank account were  
20 eventually returned to Debtors, any monetary claims are of  
21 minimal value. Debtors maintain that Debtors’ Claims are  
22 primarily putative class claims for injunctive or declaratory  
23 relief which cannot provide value to the estate.

24 In support of this notion, Debtors cite to cases in which  
25 courts declined to judicially estop a debtor, who did not  
26 disclose injunctive relief claims in a bankruptcy case, from  
27 later pursuing those claims because the injunctive relief claims  
28 did not add value to the estate. See e.g., Burnes v. Pemco

1 Aeroplex, Inc., 291 F.3d 1282 (11th Cir. 2002); Barger v. City  
2 of Cartersville, 348 F.3d 1289 (11th Cir. 2003). Debtors' cases  
3 are not persuasive in the context of this case. In considering a  
4 motion to abandon property, the analysis is solely directed to a  
5 determination of whether the claims have any potential value for  
6 the benefit of the estate's creditors, not, as in the cited  
7 cases, to presume a claim's lack of value as a factor in the  
8 debtor's favor in applying principles of judicial estoppel.

9 Second, Debtors contend that the Trustee lacks standing to  
10 either maintain or settle Debtors' Claims (in particular the  
11 injunctive relief and class action claims), making them  
12 worthless.<sup>11</sup> Debtors' argument assumes that settlement is the  
13 only method of disposition of Debtors' Claims. However, the

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14  
15 <sup>11</sup> Debtors undercut their argument regarding standing by the  
16 contradictory assertion, at the hearing on July 21, 2008, and  
17 before the Panel at oral argument, that if the Trustee had only  
18 substituted himself for the Debtors in the District Court Action,  
there would not be a statute of limitations issue. The following  
exchange is an example:

19 MR. GROBMAN: . . . The Trustee only had to protect this  
20 litigation asset both individually and on behalf of the  
21 class, only had to substitute itself, for the Yacks to  
22 protect what is supposedly this valuable asset and in  
accordance with this fiduciary responsibility.

23 THE COURT: Isn't the Trustee just a real party in interest  
24 as a matter of law without having to be substituted?

25 \* \* \*

26 THE COURT: The Trustee is a real party of interest, does the  
27 Trustee-

28 MR. GROBMAN: Right.

Hr'g Tr. 33:10-17; 34:4-6 (July 21, 2008).

1 Trustee can also sell or compromise causes of action. 11 U.S.C.  
2 § 363. A compromise of a cause of action that is property of the  
3 estate is the "equivalent of a sale of the intangible property  
4 represented by the [cause of action]." Goodwin v. Mickey  
5 Thompson Entm't Grp., Inc. (In re Mickey Thompson Entm't Grp.,  
6 Inc.), 292 B.R. 415, 421 (9th Cir. BAP 2003). A "settlement"  
7 that is a purchase by a party of a cause of action of the estate  
8 is more accurately either a compromise or a sale. Id.

9 Debtors mistake the negotiations between the Trustee and  
10 WaMu as finalizing a full settlement of Debtors' Claims that  
11 would provide a mutual release of claims between WaMu and the  
12 entire putative class. They are piqued by what they consider to  
13 be WaMu's "attempt to pay a premium" to the Trustee to keep the  
14 class action claims from going forward.<sup>12</sup>

15 Even assuming, arguendo, this were the case, the bankruptcy  
16 trustee has the duty and authority to take actions that "maximize  
17 the value of the estate." 11 U.S.C. § 704; Commodity Futures  
18 Trading Comm'n v. Weintraub, 471 U.S. 343, 352, 105 S.Ct. 1986,  
19 1993 (1985); In re Moore, 110 B.R. 924, 927 (Bankr. C.D. Cal.  
20 1990); Schnelling v. Thomas (In re AgriBioTech, Inc.), 319 B.R.  
21 207, 211 (D. Nev. 2004) (trustee is required to "marshall all of  
22 the estate's property for the estate's benefit"). Indeed, the  
23 bankruptcy trustee must "collect and reduce to money the property  
24 of the estate." 11 U.S.C. § 704(a)(1) (emphasis added).

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26 <sup>12</sup> The Trustee stated at oral argument that he is not  
27 attempting to settle any third party claims because such claims  
28 are not property of the estate. Only the disposition of Debtors'  
personal claims and monetary claims are being negotiated with  
WaMu.

1 To that end, the bankruptcy trustee has the "authority to  
2 act for the benefit of the estate and may sell a cause of action,  
3 prosecute it in nonbankruptcy court, settle it, or abandon it to  
4 the debtor as of inconsequential value to the estate." In re  
5 Lopez, 283 B.R. at 32-33. The bankruptcy trustee must determine,  
6 in his sound business judgment, what disposition is in the best  
7 interests of the estate. In re Moore, 110 B.R. at 927.

8 The trustee's authority is discretionary. Id. at 928.  
9 However, "if consideration is offered for a cause of action, then  
10 the cases are clear that the trustee must take affirmative action  
11 to resolve the matter." Id.; see also, In re McCarron, 1994 WL  
12 553050, \*3 (Bankr. D. Idaho 1994) (abandonment of causes of  
13 action was not proper when defendant was offering to buy them);  
14 In re Sullivan & Lodge, Inc., 2003 WL 22037724, \*5 (N.D. Cal.  
15 2003) (causes of action were not "entirely without value" because  
16 there was an offer to purchase them; trustee required to "explore  
17 the potential upside of a sale").

18 Here, both the Trustee and the bankruptcy court determined  
19 there was some potential value to the estate from Debtors'  
20 Claims:

21 THE COURT: There is property that is of value and  
22 benefit to the estate, how much, I don't know what it  
23 is.

24 \* \* \* \*

25 There is unquestionably a monetary claim. The Trustee  
26 unquestionably owns that. The debtors have-it is  
27 alleged, have an individual right to a taking of the  
injunction. The Trustee has an interest in that if  
that right to obtain an injunction has value. Whether  
it does or not, may be a complex question.

28 (July 21, 2008 Hr'g Tr. at 42, ¶11-17).

1 Because Debtors' Claims have potential value for the benefit  
2 of the estate, abandonment of Debtors' Claims would only be  
3 proper if they were too burdensome to realize that value.

4 **C. Burdensome to the estate.**

5 Debtors argue Debtors' Claims are overly burdensome to the  
6 estate because if the Trustee attempts to settle Debtors' Claims,  
7 he will be "embroiled in lengthy and expensive proceedings"  
8 dealing with class action procedure. Debtors contend the Trustee  
9 would be required to provide notice to prospective class members  
10 of any proposed settlement of Debtors' Claims, and that such  
11 settlement could not be approved because it would give a  
12 disproportionate recovery to Debtors to the detriment of the  
13 prospective class members.<sup>13</sup> See e.g., In re Ball, 201 B.R. 204  
14 (Bankr. N.D. Ill. 1996); Young v. Higbee Co., 324 U.S. 204, 65  
15 S.Ct. 594 (1945); Diaz v. Trust Territory of Pac. Islands, 876  
16 F.2d 1401 (9th Cir. 1989).

17 As discussed above, the Trustee has authority to dispose of  
18 Debtors' Claims. The cases cited by Debtors, Ball, Higbee, and  
19 Diaz, have no relevance to whether the Trustee should be  
20 compelled to abandon Debtors' Claims. Any issues regarding  
21 settlement of Debtors' Claims, including the putative class  
22 action (if it were to be revived by a reversal of the District  
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25 <sup>13</sup> Debtors argue the "bankruptcy courts will then be  
26 required to engage in complex procedures under Rule 23(e) of the  
27 Federal Rules of Civil Procedure—a rule with no bankruptcy law  
28 counterpart—to determine if the Trustee has settled for a  
disproportionate recovery compared to the actual value of the  
individual claim, and whether prospective class members will be  
prejudiced by the individual settlement." (Appellant's Opening  
Brief at 29).

1 Court Dismissal Order), are matters to be resolved (if at all) at  
2 the time the Trustee disposes of Debtors' Claims.<sup>14</sup> Any  
3 "fundamental conflicts of interest" that Debtors allege would  
4 prohibit the Trustee from settling Debtors' Claims are not yet a  
5 ripe issue for our review.

6 Debtors did not establish that Debtors' Claims were overly  
7 burdensome or lacked value or benefit to the estate. The  
8 bankruptcy court correctly determined that the Trustee should not  
9 be compelled to abandon Debtors' Claims when they had potential  
10 collective value.

## 11 VI. CONCLUSION

12 Because we find that the bankruptcy court did not abuse its  
13 discretion in determining that Debtors' Claims had value and  
14 benefit to the estate without being overly burdensome to the  
15 Trustee, we **AFFIRM** the bankruptcy court's order denying Debtors'  
16 Renewed Abandonment Motion.

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28 <sup>14</sup> Notably, the District Court Action was not certified as a  
class action prior to the District Court Dismissal Order.