NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. ID-06-1326-MoHB ID-06-1365-MoHB
GREG V. THOMASON and DIANA THOMASON,	Bk. No. 03-42400
Debtors.	Adv. No. 04-06134
THOMASON FARMS, INC.; BYRON T. THOMASON; MARILYNN T. THOMASON; NICHOLAS THOMASON; SANDRA THOMASON,	
Appellants,	
v.	**M E M O R A N D U M**[1]
GREG V. THOMASON; DIANA THOMASON; WILLIAM FORSBERG; JANE DOE FORSBERG; NEW BRITAIN INVESTORS; R. SAM HOPKINS, Trustee,	
Appellees.	

Argued and Submitted on June 20, 2007
at Pasadena, California

Filed - August 7, 2007

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

Hon. Jim D. Pappas, Bankruptcy Judge, Presiding.

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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.

Before: MONTALI, HOLLOWELL,[2] and BRANDT, Bankruptcy Judges.

Greg and Diana Thomason ("Debtors") had a bitter falling out with Greg's brothers and their wives, Byron and Marilynn a/k/a Lynn Thomason and Nicholas and Sandra Thomason (the "Siblings").[3] The Siblings, acting for themselves and the family business entity, Thomason Farms Incorporated ("TFI") (collectively, "Appellants"), claim that Debtors and others who take through them have no interest in several farm properties and the corporate stock of TFI. Competing claimants include Debtors, who seek to protect their interests in what may be a solvent estate, their Chapter 7[4] trustee R. Sam Hopkins ("Trustee"), and their former attorney William Forsberg, who received some property from them in payment of his fees ("Forsberg").

Appellants challenge the bankruptcy court's interpretation of conflicting evidence regarding title and its awards of attorneys fees and costs to secured creditor New Britain Investors ("New Britain") and costs to Trustee and Forsberg. We AFFIRM.

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[2] Hon. Eileen W. Hollowell, Bankruptcy Judge for the District of Arizona, sitting by designation.

[3] Like the bankruptcy court, we will sometimes refer to the various Thomason parties by their first names for clarity. No disrespect is intended.

[4] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, because the case from which this appeal arises was filed before its effective date (generally October 17, 2005).

I. FACTS

The Thomason brothers' parents are Charles (now deceased) and Doralee Thomason. In 1976 Charles formed TFI to conduct the family's farming operations on several separate parcels of land in two different counties. That land includes parcels referred to as Agren and Farmstead in Madison County, Idaho, and Teton Pastures in Teton County, Idaho. TFI's original shareholders were Charles and his sons.[5] In 1992 Charles transferred his remaining interest to his sons.

Sometime in the late 1980s or early 1990s Byron, Nicholas, and Greg formed an entity called BNG Partnership ("BNG"). The partnership was formed to receive enhanced federal farm subsidy program payments.

In 1993 the family borrowed $100,000.00 from Robert Erikson. The Siblings and Debtors all signed a promissory note for this debt secured by a mortgage on Teton Pastures. The note and mortgage were later assigned to New Britain.

In 1997, as crop prices and farm income declined, family disputes over management of the business erupted. Byron's wife, Marilynn, began to review the books and records of TFI and BNG, the management of which had previously been left to Greg. The Siblings concluded that Greg was at least guilty of mismanagement and they suspected that he had misappropriated family funds. BNG

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[5] Byron, Nicholas, and Greg were unmarried when Charles formed TFI. In the remainder of this discussion our references to each of them should be understood to include the community property interests of their spouses as appropriate. A fourth son (now deceased) also had an interest in some assets but his widow was bought out of TFI by Byron, Nicholas, and Greg.

was dissolved. On March 23, 1998, a Chapter 12 bankruptcy petition was filed for TFI, signed by Byron and Nicholas (Case No. 98-40278). In 2000 and 2001 the Siblings attempted to foreclose on Greg's interest in his shares of TFI stock based on Greg's alleged debts to TFI. Meanwhile, in February of 1999, the Siblings commenced an adversary proceeding against Greg and Diana in the TFI Chapter 12 case based upon Marilynn's review of the books (Adv. No. 99-6036). In 2002, after a long trial, the bankruptcy court determined that Greg owed TFI $86,439.47. According to the bankruptcy court this "surely disappointed Greg's brothers who, based upon what the Court determined to be the terribly flawed review conducted by Marilynn, alleged [that] Greg owed TFI over $1 million." TFI's Chapter 12 case was dismissed on December 18, 2003.

Because of the protracted adversary proceeding in the TFI bankruptcy case Greg and Diana owed their attorney Forsberg about $70,000 in fees. They lacked cash so they deeded their interests in Agren and Farmstead to Forsberg in March of 2002. The Siblings claim that Debtors had no interest in Agren or Farmstead to convey to Forsberg, because these properties and Teton Pastures allegedly were owned by BNG or TFI and not by Greg and his brothers individually.

Greg and Diana filed their voluntary Chapter 7 petition on November 7, 2003 (Case No. 03-42400). Appellants commenced this adversary proceeding (Adv. No. 04-6134) to quiet title to real and personal property. Other parties filed counter- and cross-claims and among other things Trustee sought authority to sell Agren and Teton Pastures free and clear of other interests and

claims, with interests and liens to attach to the proceeds.

Appellants originally disputed the enforceability of New Britain's lien on Teton Pastures, primarily on statute of limitations grounds. At the start of trial they stipulated that New Britain's mortgage interest in Teton Pastures was valid, enforceable, and superior to their interests but they continued to dispute whether New Britain was bound by an earlier judgment it had obtained against Debtors. They also disputed New Britain's rate of interest and its claim for attorneys' fees and costs.

After a five day trial the bankruptcy court issued its Memorandum of Decision on the merits (the "Merits Decision"). Later it issued an order awarding New Britain $75,091.35 in attorneys' fees and $2,853.01 in costs, supported by another Memorandum of Decision. The bankruptcy court issued a Final Judgment (the "Final Judgment")[6] quieting title, authorizing a sale of Agren and Teton Pastures, and reiterating the dollar amounts owed to New Britain for attorneys' fees and costs as well as principal and interest. The bankruptcy court later issued a Summary Order clarifying the Merits Decision, on New Britain's motion to amend (filed within ten days of the Final Judgment and therefore extending the time to appeal under Rule 8002(b)), and also issued orders awarding Forsberg and Trustee $2,243.36 and

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[6] A final judgment was possible, despite the fact that the Merits Decision contemplates a Phase Two trial on Appellants' nondischargeability claims against Debtors, because by stipulation of the relevant parties the bankruptcy court had earlier issued an order dismissing those claims.

$3,806.03[7] in costs, respectively, and denying them any attorneys' fees, together with supporting Memoranda of Decision. Appellants filed timely notices of appeal.

II. ISSUES

A. Did the bankruptcy court misinterpret the conflicting evidence regarding the parties' interests in real property and TFI's stock?

B. Did the bankruptcy court err in its awards of attorneys' fees and costs to New Britain and costs to Trustee and Forsberg?

III. STANDARDS OF REVIEW

"We review the bankruptcy court's conclusions of law and questions of statutory interpretation de novo, and factual findings for clear error." Village Nurseries v. Gould (In re Baldwin Builders), 232 B.R. 406, 410 (9th Cir. BAP 1999) (citations omitted). A factual finding is clearly erroneous if the appellate court, after reviewing the record, has a firm and definite conviction that a mistake has been committed. Wall Street Plaza, LLC v. JSJF Corp. (In re JSJF Corp.), 344 B.R. 94, 99 (9th Cir. BAP 2006).

IV. DISCUSSION

The bankruptcy judge was presented with conflicting evidence. The Merits Decision states that many documents were drafted by family members without any legal advice, and until

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[7] The bankruptcy court's order awarding costs to Trustee states that he is awarded "$3,8060.03" [sic] and Appellants' Opening Brief (BAP No. ID-07-1365) misinterprets this typographical error to mean that Trustee is awarded $38,060.03. The bankruptcy court's calculations show that the actual award is $3,806.03.

disputes arose the family "treated the various parcels as if owned by the family as a whole, regardless of whose name may appear on a deed." It adds:

> At times during the trial, emotions ran high and hard feelings were evident. In the Court's opinion, the emotional entanglements between the siblings clearly colored the family members' testimony and their perception of critical events.

On this appeal we are acutely aware that the Thomason family has suffered financially and personally. They have lost the family farm and their family relationships have been torn apart.

We also recognize that our role is limited. The parties have already had a five day trial and, as the Supreme Court has explained, it would not be fair or efficient for us to retry the case. "[T]he parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much." Anderson v. Bessemer City, 470 U.S. 564, 575; 105 S.Ct. 1504, 1512 (1985).

The applicable rule provides:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

Fed. R. Civ. P. 52(a) (emphasis added) (incorporated by Fed. R. Bankr. P. 7052).

Under this rule we may not reverse the trial judge if his interpretation of conflicting evidence is "plausible in light of the record viewed in its entirety." Anderson v. Bessemer City, 105 S.Ct. 1504, 1511. "Where there are two permissible views of

the evidence, the factfinder's choice between them cannot be clearly erroneous." Id., 105 S.Ct. at 1511 (citations omitted).

A. Interests in the real property and TFI stock

1. Agren

Appellants cite evidence suggesting that Agren was held by BNG rather than by the brothers individually as co-owners. As shown by the following table, the bankruptcy court relied on considerable evidence to the contrary.

Appellants' evidence and arguments that BNG owned Agren	**Contrary evidence/arguments accepted by bankruptcy court**
(a) BNG funds, including checks drawn on Greg's BNG account, were used to make at least some of the payments to purchase Agren. (b) Property acquired with partnership funds is generally presumed to be partnership property. (c) In 1994 Greg signed a Farm Credit Services loan application balance sheet indicating that Agren was BNG property.	(a) "[P]roperty acquired with partnership funds is partnership property unless a contrary intent is shown." Lettunich v. Lettunich, 111 P.3d 110, 115 (Idaho 2005) (emphasis added).* (Merits Decision p. 36) (b) The deed from the previous owners, recorded 5/1/90 (Ex.519), shows that Agren was originally acquired by Byron, Nicholas, and Greg as individuals. (Merits Decision pp. 32, 35) (c) "'Idaho law presumes that the holder of title to property is the legal owner of that property.' Luce v. Marble, 127 P.3d 167, 173 (Idaho 2005) . . . [and] [o]ne who would claim [the contrary] must establish such claim by evidence that is clear, satisfactory and convincing.' [Id.] at 173 [citation omitted]." (Merits Decision pp. 32-33) (d) "While BNG may have been in existence in 1990 when the brothers acquired [Agren], they did not begin operating under the BNG name until 1991 at the earliest." (Merits Decision p. 37) (e) In 1997 Byron signed a loan application (Ex.317) representing that Agren was owned by the individual Thomason brothers, not BNG. (Merits Decision p. 35)

* The bankruptcy court noted that Lettunich cites Idaho Code § 53-308, which was repealed in 2001, but since the property was acquired prior to the repeal of that statute it applies in this instance. See Lettunich, 111 P.3d 110, 115.

On this record of conflicting evidence we cannot say that the bankruptcy court erred. We must accept its finding that BNG did not own Agren.

Appellants argue in the alternative that the Thomason brothers agreed to transfer Agren (and Teton Pastures) to TFI in exchange for TFI assuming BNG's debts. Again the evidence is conflicting.

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Appellants' evidence and arguments that TFI owned Agren	**Contrary evidence/arguments accepted by bankruptcy court**
(a) Minutes of a TFI shareholders' meeting on March 18, 1997, indicate that BNG would be formally dissolved and debts of BNG would be assumed by TFI. A corporate resolution to that effect was signed by Byron and Nicholas. (b) Document dated March 27, 1997 (the "Property Transfer Agreement") states that in consideration for TFI assuming BNG's debts "we, Byron T. Thomason, Nicholas A. Thomason and Greg V. Thomason, do also irrevocably transfer all proper and legal deeds of the following properties, including all known and unknown minerals and water shares: Agren Property . . . [and] Teton Pasture . . . ." (Plaintiffs' Ex. 3, emphasis added, legal descriptions omitted). The transferee is not named but appears to be TFI. (c) Quitclaim deed, recorded Aug. 5, 2003, purports to transfer Agren to TFI. Although the deed is not signed by Debtors, a copy of the Property Transfer Agreement is attached.	(a) Greg testified that he did not sign the Property Transfer Agreement and never would have signed such an agreement, suggesting that his signature was forged. Transcript of Trial Testimony of Greg Thomason (undated) p. 140:11-19. (i) Byron and his wife Marilynn testified that Greg did sign the document, but the Merits Decision states that they "are by no means unbiased." (ii) Marilynn signed the Property Transfer Agreement as a witness, but as noted in the Merits Decision the corporate minutes of that date do not show her in attendance (and other corporate minutes in the excerpts of record specifically list all parties who are present). (b) Although TFI's corporate resolution mentions assumption of BNG's debt it says nothing about TFI acquiring Agren in return, which is a surprising omission if that were truly the brothers' agreement. (c) Although TFI's minutes reflect a discussion of either selling or leasing Agren they say nothing about transferring Agren from the brothers or BNG to TFI. (d) In 1998, when Byron and Nicholas filed a voluntary Chapter 12 petition for TFI, they did not list Agren (or Teton Pastures) as TFI's real property (Ex.317). (Merits Decision p. 36) (e) If the Property Transfer Agreement had been effective then BNG would have owned Agren as of March 27, 1997, but when the Siblings purported to transfer Agren to TFI on August 5, 2003, they signed the deed as individuals, not on behalf of BNG. (Merits Decision p. 36.)

For all of these reasons the bankruptcy court was not persuaded that Greg ever signed the Property Transfer Agreement

or ever agreed to transfer Agren to TFI. (Merits Decision pp.12-14 and 38.) Appellants have not established that these findings are clearly erroneous.

The bankruptcy court ruled in the alternative that the Property Transfer Agreement did not actually transfer anything.

> First of all, the document is not a deed, nor does it clearly provide that any real property is to be transferred to TFI. But even if the agreement is read to do so, it does not constitute an effective instrument of conveyance. The document was not recorded until it was attached to an August 2003 deed, nor did it contain the required address of the grantee. Idaho Code § 55-601. The signatures on the agreement were never acknowledged as required prior to its recording. Idaho Code § 55-701 et seq; § 55-805. The Court concludes that the [Property Transfer Agreement] did not effectuate any transfer of real property. (Merits Decision pp. 37-38)

Appellants argue that they should be excused from the requirement that the grantee's address be listed because all the parties to the transaction knew Greg's address and a quiet title action is equitable in nature. But see Idaho Code § 55-601 (conveyance of real property must be in writing, subscribed by party disposing of same or agent, and the "name of the grantee and his complete mailing address must appear on such instrument"). Assuming for the sake of argument that Appellants could be excused from the statutory requirement to list TFI's address, they offer no response to the other defects noted by the bankruptcy court.

Appellants argue in the alternative that the bankruptcy court was bound by issue preclusion to hold that TFI owns Agren, and that Debtors and Forsberg are judicially estopped to claim

otherwise, because the bankruptcy court's findings in earlier litigation. In TFI's Chapter 12 case the bankruptcy court stated that "During a family meeting on March 18, 1997, . . . [t]he decision was then made that BNG be dissolved and that [TFI] assume all its assets and just debts." Memorandum of Decision, filed Feb. 12, 2002, at p. 9 (Adv. No. 99-6036) (emphasis added). But BNG's assets did not include Agren, according to the bankruptcy court's findings which we have already held we must follow. Therefore TFI could not acquire Agren from BNG. Issue preclusion and judicial estoppel are inapplicable.

Appellants argue that Debtors and Forsberg have admitted that at least some of Agren was conveyed to TFI. Appellants are arguing a non-issue. The Final Judgment itself states that TFI owns an undivided two-thirds interest in Agren pursuant to the 2003 deed. That deed was effective to transfer the Siblings' own undivided two-thirds interest to TFI, even though it was not signed nor agreed to by Debtors and therefore was ineffective as to them.

In sum, the Merits Decision rejects Appellants' claims that Debtors owned none of Agren. Appellants have not shown any clear error in this conclusion.[8]

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[8] Under the Merits Decision Debtors had ownership of Agren and could transfer it to Forsberg. They did so, but then in October of 2002 Forsberg executed a quitclaim deed transferring part of his interest in Agren back to Greg and Diana, allegedly to correct some legal descriptions. Forsberg retained the rest -- what the parties refer to as the Southwest quarter of Agren.

In keeping with these transfers to and from Forsberg the Merits Decision rules that Debtors (and through them their bankruptcy estate) hold an undivided one-third interest in Agren

(continued...)

As a last resort Appellants rely on a purported post-petition mortgage on Agren granted by TFI and a lis pendens recorded in June of 2003 in Madison County and describing Agren (and Farmstead, and a similar instrument recorded in Teton County). (Exs.52, 53.) The bankruptcy court held that the mortgage is ineffective because TFI had no interest in Agren to convey, and the lis pendens are ineffective because they were filed to give notice of adversary proceedings that have since been dismissed, citing inter alia Jerry J. Joseph C.L.U. Ins. Assoc., Inc. v. Vaught, 789 P.2d 1146, 1148-49 (Idaho App. 1990). Appellants have cited no authority to the contrary.

For all of these reasons we reject Appellants' challenges to the bankruptcy court's Final Judgment quieting title to Agren. Appellants have not shown that they are entitled to any greater interest in Agren than the undivided two-thirds that TFI owns by

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[8](...continued)
except for the Southwest quarter, and Forsberg holds a one-third interest in the Southwest quarter. Before the Final Judgment Forsberg apparently quitclaimed his interest in the Southwest quarter to Trustee (pursuant to a compromise approved by the bankruptcy court in which Trustee agreed not to challenge Forsberg's interest in Farmstead). The Final Judgment therefore rules that Trustee owns a one-third undivided fee simple interest in all of Agren (partly through Debtors and partly through Forsberg) and the remaining two-thirds of Agren is owned by TFI.

Based on this complicated history Appellants challenge not only Trustee's chain of title through Debtors (as discussed in the text) but also his title through Forsberg. Appellants' arguments are difficult to follow, but they appear to claim that Forsberg was not a bona fide purchaser of Agren.

Even if Appellants succeeded in their apparent goal of avoiding the transfers to and from Forsberg, that would leave title with Forsberg's predecessors in title, not Appellants. The bankruptcy court found that Forsberg's predecessors in title were Debtors, not BNG or TFI. Therefore, Appellants' arguments are unpersuasive.

virtue of the August 2003 deed from the Siblings. Appellants have not shown clear error.

2. Teton Pastures

Apart from repeating the same arguments applicable to Agren, Appellants rely on a deed from Charles and Doralee dated February 24, 1976, that purports to convey Teton Pastures to TFI. (Ex.11) That deed was erroneously recorded in Madison County on August 26, 1977. The deed appears to have been kept in the custody of Charles' and Doralee's attorney. It was apparently never delivered to the Thomason brothers and they seem to have been unaware of its existence until 2003. On June 16, 2003, the deed was finally recorded in Teton County. Meanwhile several more deeds were executed, all purporting to convey Teton Pastures to the Thomason brothers individually or to them and their wives.

The bankruptcy court held that the 1976 deed was not controlling. It treated Greg (and his brothers) as good faith purchasers against whom the 1976 deed was void under Idaho Code § 55-812 and 55-818.[9] (Merits Decision pp. 43-44.) Presumably (although no party has raised this issue) it treated Greg and his brothers as purchasers because they invested their labor and personal funds from 1976 through 2003 in reliance on the transfer of Teton Pastures to them, and because they agreed to be

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[9] Idaho Code § 55-812 provides that "Every conveyance of real property other than a lease for a term not exceeding one (1) year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded." Idaho Code § 55-808 provides that the conveyance "must be recorded by the county recorder of the county in which the real property affected thereby is situated."

personally liable on the loan from Mr. Erikson in reliance on the belief that they had the power to convey a mortgage on Teton Pastures to him to protect themselves from personal liability. In any event Appellants have not argued on this appeal that the bankruptcy court erred by treating Greg and his brothers as purchasers. Rather they argue that Greg knew or should have known that TFI owned Teton Pastures and therefore he cannot be a good faith transferee.

Appellants claim that Greg must have been aware that TFI was to acquire Teton Pastures shortly after it was formed because that acquisition was important to the corporation and was discussed at shareholder meetings. The bankruptcy court was persuaded by the evidence to the contrary. It noted that in 1993 the mortgage to Mr. Erikson was granted by the Thomason brothers individually, not as TFI's shareholders. In 1997 Byron and Nicholas executed the Property Transfer Agreement purporting to transfer Teton Pastures from them individually to TFI in 1997, which would have been unnecessary if TFI already owned Teton Pastures. In 1998 Byron and Nicholas did not list Teton Pastures on TFI's original bankruptcy schedules. Most recently on August 5, 2003, the Siblings recorded a quitclaim deed purporting to transfer Agren to TFI. Meanwhile Doralee repeatedly executed deeds conveying Teton Pastures to the Thomason brothers (and their spouses), not to TFI.

The bankruptcy court concluded that any attempt by Charles and Doralee to convey Teton to TFI in 1976 failed and that it was their intent "to ultimately pass on the family farm to [their] three surviving sons in equal shares." The bankruptcy court

ruled that Debtors have an undivided one-third interest in Teton Pastures, subject to the New Britain mortgage. Appellants have not established that this was clear error.

3. Jurisdiction and preclusion issues regarding how much Appellants owe New Britain

The bankruptcy court ruled that because the bankruptcy estate holds an interest in Teton Pastures it is necessary to resolve the status and extent of New Britain's claim in the bankruptcy case. Appellants argue on this appeal that the bankruptcy court erred "in granting judgments to New Britain [] individually against [Byron, Marilynn, Nicholas, and Sandra]." This may be a challenge to the bankruptcy court's jurisdiction to determine the dollar amounts owed from one set of non-debtors (the Siblings) to another non-debtor (New Britain). The bankruptcy court addressed this issue in its Merits Decision:

> Normally, this Court would decline to adjudicate the amount owed by the nondebtors on this [promissory] note [held by New Britain]. However, since the Court has determined that Debtors and their bankruptcy estate own an interest in the property securing the note, and presumably that interest will be liquidated and the secured debt paid, there is ample justification for the Court to adjudicate the amount of the nondebtors' liability on this debt. The [Appellants] and New Britain presumably agreed with this approach, since they actively litigated that issue in this action.

Jurisdictional issues can be raised at any time, and even if they are not raised we have an independent duty to consider jurisdiction. Beck v. Fort James Corp. (In re Crown Vantage, Inc.), 421 F.3d 963, 971 n. 5 (9th Cir. 2005); WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1135 (9th Cir. 1997). Therefore, although Appellants may have actively litigated the amount that

they owe New Britain, they can still argue on this appeal that the bankruptcy court lacked jurisdiction to determine the issue. That said, we agree with the bankruptcy court's analysis.

Among the counter- and cross-claims in this adversary proceeding is Trustee's request for permission to sell Teton Pastures free and clear of liens and the interests of co-owners under Section 363. See 11 U.S.C. § 363(b), (f) and (h). That request necessarily involves determining how to distribute the proceeds. The bankruptcy court had to determine how much of New Britain's secured claim should be paid out to the various parties claiming an interest in Teton Pastures, and that involves determining how much of the debts to New Britain should be paid by those parties. Among other things this depends on what the Siblings owe, as well as what Debtors owe, because they are the parties to the promissory note secured by the mortgage that New Britain Holds. Therefore we are satisfied that the bankruptcy court had to determine the dollar amounts owed by each of those parties and we reject any jurisdictional challenge that Appellants may be making.

Appellants argue in the alternative that the bankruptcy court is precluded by earlier proceedings from awarding New Britain damages above a certain dollar amount. On October 10, 2000, New Britain had obtained a default judgment in state court against Debtors only, in a foreclosure action against all of the Thomason brothers and their wives (Teton County, Case No. CV-

2000-054).[10] That default judgment (Ex.312) was for $123,147.95, including $99,459.96 in principal plus accrued interest, $5,000.00 of attorneys' fees, and $182.00 in costs. New Britain filed an abstract of that judgment in Teton County. The parties assumed that the foreclosure action was stayed but the state court eventually dismissed that action for lack of prosecution.

The bankruptcy court ruled that the default judgment against Debtors liquidated the dollar amounts due, but only as against Debtors:

> Upon entry of that state court judgment, Debtors' obligations under the promissory note were merged and subsumed into the judgment. Allison v. John M. Biggs, Inc., 826 P.2d 916, 917 (Idaho 1992). Thereafter, Debtors were obliged to pay the amount of the judgment debt, including accrued interest, [and] attorney fees and costs awarded by the state court, not the amount due on the note. And interest accrued on the judgment at the state legal rate, not the note rate. Id.
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> But the entry of the default judgment did not liquidate the amount due on the note from the other makers (Nicholas, Byron, Marilynn and Sandra) for principal, interest, attorney fees or costs. . . . [They cannot] claim any benefit from the fixing of the amounts due under the judgment. Instead, their liability continued to be measured under the terms of the note and mortgage, not the judgment.

Merits Decision p. 47.

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[10] The Merits Decision states: "Since New Britain elected to obtain a money judgment against [Debtors], rather than proceed to foreclose on their ownership interest in the mortgaged property, New Britain may have waived its rights under the mortgage. However, since Trustee does not contest New Britain's status as a secured creditor in Debtors' bankruptcy case, the court need not consider such issue." Merits Decision p. 49 n. 27 (citation omitted). That issue also is not before us on this appeal.

The bankruptcy court determined that Debtors only owe New Britain $5,000.00 in attorneys' fees, plus post-judgment interest under Idaho Code § 28-22-104(2) (post-judgment interest at base rate determined by state treasurer plus 5%). In contrast it held that the Siblings owe New Britain $75,091.35 in attorneys' fees and $2,853.01 in costs, mostly incurred in litigating with them after its default judgment against Debtors, and that the rate of interest is 12% and is not capped at the post-judgment rate or the pre-maturity rate in the promissory note.[11] Applying this rate of interest, the bankruptcy court calculated that in addition to attorneys' fees and costs the Siblings owe New Britain principal and interest of $159,138.75 as of the date of entry of the Merits Decision. On this appeal Appellants do not challenge the interest rate ruling per se, but they argue that the judgment against Debtors merged with the underlying promissory note and mortgage and therefore caps their liability as to both interest and attorneys' fees and costs. Appellants cite Schlecht v. Alaska (In re Schlecht), 36 B.R. 236, 240-41 (Bankr. Alaska 1983) (citing Montana v. United States, 440 U.S. 147, 153-54; 99 S.Ct. 970, 973-74 (1979) (merger, bar, and res judicata generally)).

Neither Schlecht nor Montana involved multiple defendants and a judgment against only some of them. We are aware of no

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[11] The promissory note calls for interest at 11% per annum before the note was due and payable, on July 28, 1998, but it does not fix a post-maturity rate and the bankruptcy court held that the statutory interest rate of 12 percent per annum applies, citing inter alia Idaho Code § 28-22-104 and Camp v. Jiminez, 693 P.2d 1080, 1087 (Idaho Ct. App. 1984).

authority supporting Appellants' extended application of the doctrine of merger. We agree with the bankruptcy court that the judgment against Debtors did not cap the Siblings' liability.

In sum, Appellants have not shown that the bankruptcy court exceeded its jurisdiction or that their liability is capped by the default judgment against Debtors. We address Appellants' challenges to the dollar amounts of attorneys' fees and costs later in this discussion.

4. Farmstead

Charles and Doralee transferred Farmstead to Byron, Nicholas, and Greg by a warranty deed dated August 26, 1991, and recorded on July 8, 1992. Appellants nevertheless argue that Debtors did not have the ability to transfer their interest in Farmstead to Forsberg in 2001 and 2002 because the brothers' right to convey the property is limited by a memorandum agreement signed on August 25, 1991 (the "Restrictive Memo"). Appellants argue that Forsberg had constructive notice of the Restrictive Memo because at some point it was recorded.[12]

The Restrictive Memo states in relevant part:

> This memorandum is to acknowledge a verbal agreement entered into between Charles and Doralee Thomason and their now surviving sons, Byron, Nicholas, and Greg Thomason in December 1984, in which it was agreed that Charles and Doralee would transfer the following properties [including Farmstead] and cattle to Byron, Nicholas, and Greg Thomason. * * * The above property will remain in the direct and equal ownership of Byron, Nicholas, and Greg Thomason, as long as [they]

[12] Forsberg presented evidence that the Restrictive Memo does not appear in the chain of title and that he is a good faith purchaser, having obtained a title report and title insurance. The bankruptcy court did not reach these issues.

> continue to farm. In the event of [their] death or voluntary leaving the farm operations, their individual payout will not exceed [$20,000] and all rights and claims are cancelled for above said property. [Emphasis added.[13]]

The bankruptcy court cited authority that "[a] fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended" (Idaho Code § 55-604, emphasis added) and all doubts as to a restriction are to be resolved in favor of the free use of land. D&M Country Estates Homeowners Ass'n v. Romriell, 59 P.3d 965, 969 (Idaho 2002) (citation omitted). We cannot say that the bankruptcy court erred in determining that the Restrictive Memo was ineffective in barring Debtors' transfer of their interest in Farmstead to Forsberg. Accordingly, as set forth in the Final Judgment, Forsberg has an undivided one-third fee simple interest in Farmstead, as do Byron and Nicholas, subject to any community property interest of their respective wives.

5. TFI stock

Appellants claim that Debtors no longer have any interest in TFI because of Greg's debts to TFI. The 1997 Amended Bylaws of TFI provide (§ 6, p. 26) that the corporation will have a lien on stock for shareholder debts. (Exs. 20-21.) The bylaws contain no specific procedure for foreclosing this lien, but Appellants claim to have mailed Greg several notices before foreclosing or

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[13] There was evidence that Greg's departure from farm operations was not voluntary, including Greg's testimony and a letter from Appellants' attorney directing him to cease harvesting crops. Greg also did not receive any payout. The bankruptcy court did not base its ruling on these matters.

repossessing his stock. Greg denies ever receiving such notices.

One notice was allegedly sent by both regular and certified mail, return receipt requested, on January 10, 2000, notifying Greg of a special stockholders and directors meeting. (Ex.22) Greg did not sign any return receipt. The meeting was held on February 26, 2000, and Byron and Nicholas adopted a corporate resolution to begin a process to repossess Greg's stock. (Exs.23, 24.)

A second notice was allegedly sent around October 1, 2000, informing Greg of another special meeting to address "the payback of funds missing and/or not accounted for as well as matching capital accounts of Byron T. Thomason and Nicholas A. Thomason so all stock are valued equally [sic]." (Ex.25.) The meeting was held on November 1, 2000. Byron and Nicholas adopted a corporate resolution purporting to forfeit Greg's stock, as of January 1, 2001, if he "fails to pay the missing monies/unaccounted monies back to [TFI] before January 1, 2001 to [TFI's Chapter 12 trustee] in addition to bringing [his] capital account equal to the capital accounts of [Byron and Nicholas]." (Ex.27.)

A third and final notice was allegedly sent in March of 2001 by regular and certified mail. Greg signed a receipt for this letter (Ex.29) but he insists that the envelope contained only a bill for rents due to TFI for his home, and no information about any stock repossession.

The bankruptcy court made no findings whether Greg actually received notice of the attempts to foreclose his TFI stock. We assume for the sake of discussion that he did receive the three notices that were allegedly sent to him.

The bankruptcy court concluded instead that even if the notices were received they were inadequate. It reasoned that because TFI's amended bylaws do not provide any express procedure to enforce the lien on shareholders' stock, and because a provision for outright forfeiture would be void under Idaho Code § 45-110, the parties presumably intended that general Idaho law apply to enforcement of that lien, citing Davis v. Prof. Bus. Servs., Inc., 712 P.2d 511, 514 (Idaho 1985) (contract includes "all such implied provisions as are necessary to effectuate the intention of the parties, and as arise from the specific circumstance under which the contract was made"). The bankruptcy court also concluded that because TFI did not already have title to Greg's stock it would need to enforce the lien by foreclosing Greg's interest, and in the absence of any contractual or statutory procedure a judicial foreclosure would be required.

> The Idaho Court of Appeals has, in another similar context, concluded that if there is no applicable statutory procedure, "[a] court in equity may determine the scope of the lien and how it will be enforced in each case." Quintana v. Anthony, 712 P.2d 678, 681 (Idaho App. 1985) (deciding that a judicial mortgage foreclosure proceeding may be required by the court to foreclose a vendor's lien).

None of the notices allegedly sent to Greg provided any details as to the amount that Greg allegedly owed TFI or the amount required to equalize his capital account. As Greg also points out, no value has ever been placed on the stock nor has he been given any credit as a result of the foreclosure against the amounts he allegedly owes.

The bankruptcy court contrasted this with a judicial foreclosure procedure, which would have assured that Greg

received adequate and timely notice of TFI's claims against him, an opportunity to object, a fair and impartial means of adjudicating the amount that Greg owed to TFI, and the value to be placed on Greg's stock so that an appropriate credit could have been made against any amounts that he owed. The bankruptcy court also noted -- "[w]hile not suggesting that such a procedure would have been legally adequate" -- that TFI did not follow the requirements set out in its own bylaws for effectuating the transfer of shares, including a right of first refusal and a process for valuing shares. (Bylaws at 23-25.)

Appellants cite no authority contrary to the bankruptcy court's analysis. They have not established that the procedures they followed to foreclose Greg's stock were either agreed to by the TFI shareholders or legally sufficient.

B. Attorneys' fees and costs

The bankruptcy court awarded New Britain $75,091.35 in attorneys' fees and $2,853.01 in costs. Appellants do not dispute that New Britain is entitled to attorneys' fees and costs under the promissory note and mortgage and that it is oversecured and therefore entitled to reasonable fees and costs under Section 506(b). See 11 U.S.C. § 506(b). Instead Appellants raise several arguments to reduce or eliminate those fees and costs.

First, Appellants contend that New Britain is not entitled to any fees for litigating issues of federal bankruptcy law. The bankruptcy court agreed, applying what was then binding Ninth Circuit authority. See Fobian v. W. Farm Credit Bank (In re Fobian), 951 F.2d 1149, 1153 (9th Cir. 1991). See also, e.g., Ford v. Baroff (In re Baroff), 105 F.3d 439, 441-43 (9th Cir.

1997). Appellants argue that the bankruptcy court incorrectly allocated fees between issues of state law and federal bankruptcy law. That issue is now moot because the Supreme Court has abrogated the Fobian line of cases. Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co., 127 S.Ct. 1199 (2007).

Appellants argue that New Britain's participation in the trial was largely unnecessary because of their stipulation at the start of trial that its interest is valid, enforceable, and superior to their interests. But as noted above Appellants continued to dispute New Britain's ability to collect anything above the amount of the default judgment against Debtors, its rate of interest, and its claim for attorneys' fees. As the bankruptcy court observed, the issues at trial were complex and intertwined. Appellants' excerpts of record contain only a few pages of the trial transcripts and they have cited no specific portions of trial that New Britain could have safely missed. Appellants have not shown that New Britain's fees are unreasonable.

Appellants also argue that no fees should be awarded for New Britain's actions taken in TFI's Chapter 12 case because that case was dismissed without any award of fees to New Britain. We disagree. The promissory note provides:

> If suit is instituted to collect this note or any portion thereof, [illegible] to pay, in addition to the costs and disbursements as are allowed by law, such additional sums as the court may adjudge reasonable as attorney's fees [illegible] suit.

The bankruptcy court found that "there has been a continuing course of litigation between the parties spanning several years in the state court action and two bankruptcy cases" and ruled

that therefore "all fees and costs incurred by New Britain in the various legal proceedings to enforce its contract with [Appellants] may be recovered under applicable state law" and it is not limited to recovery of only those fees and costs incurred in "the latest adversary proceeding." (Memorandum of Decision re New Britain's fees and costs, pp. 9-10.) We agree.

Appellants argue that state law does not provide for fees in this situation because a state court would not have awarded fees for litigation in federal bankruptcy court, citing Rockstad v. Erikson, 113 P.3d 1215, 1224-25 (Alaska 2005). Rockstad is inapposite. That decision held that such fees might be recoverable but "awarding fees is still part of the bankruptcy procedure, and as such it is a decision for the bankruptcy court to make." Id. at 1225 (footnote omitted). Assuming without deciding that Rockstad was correctly decided, its procedural deference to a federal bankruptcy court is inapplicable because New Britain did seek and obtain an award of fees in the bankruptcy court.

Appellants claim that because New Britain did not file a proof of claim in TFI's Chapter 12 case it did not hold an allowed claim and therefore was not entitled to any fees. Appellants provide only a partial citation to a single case from a local reporting service -- In re Tondee, 01.3 I.B.C.R. at 115. They have not provided us with a copy of that case and computer searches for a case of that title produced no results. Moreover, the Chapter 12 case was dismissed before the extent of New Britain's secured claim was addressed. New Britain was not listed as a creditor of TFI or given notice of TFI's bankruptcy

case until TFI amended its schedules to claim ownership of Teton Pastures and list the associated mortgage debt. Appellants have not established that anything about the Chapter 12 case limits New Britain's secured claim.

Appellants argue that New Britain mistakenly added attorneys' fees and court costs to the principal balance of the promissory note and then proceeded to charge interest thereon at the contract rate. Appellants provide no cite to the excerpts of record to support this allegation and we are not required to scour the record for any such support. U.S. v. Rewald, 889 F.2d 836, 853 n. 7 (9th Cir. 1989), amended in other particulars by 902 F.2d 18 (1990); Cogliano v. Anderson (In re Cogliano), 355 B.R. 792, 803 (9th Cir. BAP 2006).

Similarly, although Appellants object generally to the costs awarded to New Britain, Trustee, and Debtors they point to no errors in the bankruptcy court's calculation and allowance of those costs. We have been shown no basis to disturb the bankruptcy court's awards.

V. CONCLUSION

The bankruptcy court was faced with conflicting and tangled evidence as to ownership of the Agren, Teton Pastures, Farmstead properties, and TFI stock. We cannot say that it erred in sorting out the proper ownership. Nor are we persuaded that the bankruptcy court erred in determining individual liability on the promissory note held by New Britain or in awarding attorneys' fees and costs to New Britain and costs to Trustee and Debtors. The bankruptcy court's Final Judgment and its orders awarding attorneys' fees and costs are therefore AFFIRMED.