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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NOT FOR PUBLICATION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

In re:) BAP No. NC-11-1187-SaDH
 Global Reach Investment Corp.,)
 Debtor.) Bk. No. 10-32303
 _____)
 Herman Kwai)
 Appellant,)
 v.) **M E M O R A N D U M**¹
 Andrea Wirum, Trustee)
 Appellee.)
 _____)

Submitted on January 19, 2012
at San Francisco, California

Filed - March 20, 2012

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

Honorable Dennis Montali, Bankruptcy Judge, Presiding

Appearances: Chinin Tana argued for Appellant; Charles Patrick
Maher of Luce, Forward, Hamilton & Scripps LLP,
argued for Appellee.

Before: SALTZMAN,² DUNN and HOLLOWELL, Bankruptcy Judges.

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 Hon. Deborah J. Saltzman, Bankruptcy Judge for the Central
District of California, sitting by designation.

1 This appeal arises from the bankruptcy court's order
2 granting the chapter 7³ trustee's motion to sell the debtor's
3 100% interest in stock of Starble International, Ltd. ("Starble")
4 to D. Chan Investment Co. (Cayman) Ltd. ("Chan Investment") as
5 designee of Burlingame Investment Corporation ("Burlingame").
6 For the reasons set forth below, we AFFIRM the bankruptcy court's
7 order authorizing the sale of the Starble stock to Chan
8 Investment.

9 **I. FACTS**

10 On June 22, 2010, Global Reach Investment Corp. (the
11 "Debtor") filed a voluntary chapter 7 petition. In its
12 bankruptcy schedules, the Debtor listed 100% ownership of the
13 Starble stock as an asset with a value of \$4.7 million. Before
14 the Debtor's bankruptcy filing, Herman Kwai ("Kwai"), the
15 Debtor's sole shareholder, and Burlingame, among other entities,
16 were involved in litigation in at least three different courts
17 regarding a variety of issues related to the Debtor and Starble,
18 including matters that could impact the ownership rights to the
19 Starble stock.

20 During the bankruptcy, Andrea Wirum, the chapter 7 trustee
21 (the "Trustee"), sought to sell the Debtor's interest in the
22 Starble stock under section 363. After some negotiations,
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26 ³ Unless otherwise specified, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

1 Burlingame offered \$20,000⁴ to purchase the Debtor's interest in
2 the Starble stock by quitclaim deed. Kwai, among others,⁵ raised
3 several objections to the sale, asserting that: (1) the
4 bankruptcy court could not approve a sale where ownership of the
5 Starble stock was in dispute based on this panel's decision in
6 Darby v. Zimmerman (In re Popp), 323 B.R. 260, 265 (9th Cir. BAP
7 2005); and (2) Chan Investment was not a "good faith purchaser"
8 under section 363(m).

9 Over Kwai's objections, the bankruptcy court approved the
10 Trustee's sale of the Debtor's interest in the Starble stock to
11 Chan Investment. In approving the sale, the bankruptcy court
12 concluded that In re Popp did not apply because the Trustee
13 sought only to sell the Starble stock by quitclaim deed (i.e.,
14 the dispute over ownership of the stock did not matter because
15 the Trustee sought only to sell whatever interest the Debtor
16 owned in the Starble stock, even if that interest was nothing).
17 The bankruptcy court further concluded that Chan Investment was a
18 good faith purchaser within the meaning of section 363(m) because
19 it had negotiated a deal with the Trustee at arms' length, did
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22 ⁴ Burlingame was a creditor of the Debtor and initially made
23 a purchase offer of \$20,000 plus a \$50,000 reduction in its claim
24 against the Debtor. Because the bankruptcy court expressed
25 concerns that a \$50,000 reduction in Burlingame's claim was
26 illusory, it was eliminated from the offer.

27 ⁵ In addition to Kwai, Jeffrey Chang, Michael Choy, Rafael
28 Pacquing and Chinin Tana objected to the sale of the Starble
stock. The bankruptcy court overruled the objections of all
parties except Kwai because they lacked standing to object. Only
Kwai appealed the bankruptcy court's order approving the sale.

1 not engage in fraud and did not collude with the Trustee to
2 purchase the Starble stock.

3 Subsequently, the bankruptcy court denied both Kwai's timely
4 motion to reconsider the order approving the sale and Kwai's
5 timely motion for a stay pending appeal. This appeal followed,
6 and Kwai immediately moved this Panel for a stay pending appeal.
7 By order entered April 28, 2011, this Panel denied Kwai's motion
8 for stay pending appeal for lack of evidence supporting a
9 discretionary stay pending appeal under the factors outlined in
10 Wymer v. Wymer (In re Wymer), 5 B.R. 802, 806 (9th Cir. BAP
11 1980).

12 II. JURISDICTION

13 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
14 §§ 1334 and 157(b)(1) and (b)(2)(N). This Panel has jurisdiction
15 over appeals pursuant to 28 U.S.C. § 158.

16 III. ISSUE

17 Whether the bankruptcy court erred in finding Chan
18 Investment a "good faith purchaser" within the meaning of section
19 363(m).

20 IV. STANDARDS OF REVIEW

21 This Panel reviews a bankruptcy court's factual findings for
22 clear error. In re BCE West, L.P., 319 F.3d 1166, 1170 (9th Cir.
23 2003) (citing Carillo v. Su (In re Su), 290 F.3d 1140, 1142 (9th
24 Cir. 2002)). Mixed questions of law and fact are reviewed de
25 novo. Id. A finding is clearly erroneous if it is "illogical,
26 implausible, or without support in the record." Retz v. Samson
27 (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010) (citing United
28 States v. Hinkson, 585 F.3d 1247, 1261-62 & n.21 (9th Cir. 2009)

1 (en banc)).

2 **V. DISCUSSION**

3 A. Good Faith Finding

4 Sales of estate property under section 363(b) and (c) are
5 insulated from appeals by the safe harbor provision of section
6 363(m). Paulman v. Gateway Ventures Partners III, L.P. (In re
7 Filtercorp, Inc.), 163 F.3d 570, 576 (9th Cir. 1998); In re
8 Ewell, 958 F.2d 276, 280 (9th Cir. 1992); In re Onouli-Kona Land
9 Co., 846 F.2d 1170, 1172-73 (9th Cir. 1988); see also Clear
10 Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 35
11 (9th Cir. BAP 2008). Section 363(m) provides:

12 The reversal or modification on appeal of an
13 authorization under subsection (b) or (c) of this section
14 of a sale or lease of property does not affect the
15 validity of a sale or lease under such authorization to
16 an entity that purchased or leased such property in good
17 faith, whether or not such entity knew of the pendency of
18 the appeal, unless such authorization and such sale or
19 lease were stayed pending appeal.

20 11 U.S.C. § 363(m).

21 Where no stay pending appeal is obtained, an appellate court
22 is precluded from reviewing issues other than the "good faith" of
23 the purchaser. See Ferrari N. Am., Inc. v. Sims (In re R.B.B.,
24 Inc.), 211 F.3d 475, 478-80 (9th Cir. 2000); Ewell, 958 F.2d at
25 281 ("As indicated in § 363(m), a stay is not required to
26 challenge a sale on the grounds that an entity did not purchase
27 in good faith"); see also Licensing by Paolo v. Sinatra
28 (In re Gucci), 105 F.3d 837 (2d Cir. 1997) (failure to obtain
stay of order approving sale deprives appellate court of
jurisdiction to determine any issue other than good faith of
purchaser). Phrased differently, "even though an appeal from an

1 order approving a sale is moot if the sale has not been stayed
2 and is consummated, there are several exceptions." One such
3 exception is "questioning whether the purchaser purchased the
4 property in good faith." In re Fitzgerald, 428 B.R. 872, 880
5 (9th Cir. BAP 2010) (citing Sw. Prods., Inc. v. Durkin (In re Sw.
6 Prods.), 144 B.R. 100, 102-03 (9th Cir. BAP 1992)).

7 Here, despite two attempts (one in bankruptcy court and one
8 in this court), Kwai did not obtain a stay pending appeal.
9 Because Kwai never successfully obtained a stay, we are precluded
10 from reviewing anything other than the "good faith" of Chan
11 Investment.

12 B. Good Faith Purchaser

13 The Bankruptcy Code does not define "good faith purchaser,"
14 but the Panel has found a "good faith purchaser" to be one who
15 buys "in good faith" and "for value." T.C. Investors v. Joseph
16 (In re M Capital Corp.), 290 B.R. 743, 746 (9th Cir. BAP 2003).
17 "Typically, lack of good faith is shown by fraud, collusion
18 between the purchaser and other bidders or the trustee, or an
19 attempt to take grossly unfair advantage of other bidders."
20 Ewell, 958 F.2d at 279. The burden of proof to show "good faith"
21 is on the proponent of good faith. M Capital Corp., 290 B.R. at
22 747.

23 Here, Kwai attacks the bankruptcy court's factual finding
24 that Chan Investment was a "good faith purchaser" by arguing that
25 because Chan Investment had knowledge of adverse ownership claims
26 to the Starble stock (i.e., as the designee of Burlingame, Chan
27 Investment knew of the state court action regarding the ownership
28 dispute), it could not have been a "good faith purchaser" under

1 the reasoning of In re Mark Bell Furniture Warehouse, Inc.,
2 992 F.2d 7, 8 (1st Cir. 1993).⁶

3 Conversely, the Trustee argues that Chan Investment was a
4 good faith purchaser because it negotiated the purchase of the
5 Starble stock for \$20,000 at arms' length, no fraud or collusion
6 existed, and Chan Investment did not take grossly unfair
7 advantage of any other potential purchasers. The Trustee further
8 contends that Mark Bell is unpersuasive because it does not
9 sufficiently define what constitutes "knowledge of adverse
10 claims."

11 The bankruptcy court did not err in finding Chan Investment
12 a "good faith purchaser" within the meaning of section 363(m).
13 The bankruptcy court relied on both written evidence (Mitchell
14 Meyer's declaration) and oral representations of the Trustee at
15 the sale hearing to make its decision. Kwai has not identified
16 any factual basis to show that the bankruptcy court erred in
17 making this determination. Instead, Kwai attempts to persuade
18 this Panel to adopt another circuit's legal standard when the law
19 in the Ninth Circuit is clear:⁷ a "good faith purchaser" is one
20 who buys "in good faith" and "for value." M Capital Corp, 290
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22 ⁶ A good faith purchaser is "one who buys property . . . for
23 value, without knowledge of adverse claims." In re Mark Bell
24 Furniture Warehouse, Inc., 992 F.2d 7, 8 (1st Cir. 1993)
(emphasis added).

25 ⁷ Mark Bell, a First Circuit decision, is not binding
26 precedent in the Ninth Circuit. See Hart v. Massanari, 266 F.3d
27 1155, 1172-73 (9th Cir. 2001) ("[A]n opinion of our court is
28 binding within our circuit, not elsewhere in the country. The
courts of appeal, and even the lower courts of other circuits,
may decline to follow the rule we announce . . .").

1 B.R. at 746. In the Ninth Circuit, the "good faith" inquiry
2 centers on fraud, collusion between the purchaser and other
3 bidders or the trustee or an attempt to take grossly unfair
4 advantage of other bidders - not whether a buyer knows of adverse
5 claims. See Ewell, 958 F.2d at 279.

6 Chan Investment's knowledge of adverse ownership claims to
7 the Starble stock is immaterial. The bankruptcy court found that
8 Chan Investment did not defraud other parties, did not collude
9 with the Trustee, did not take grossly unfair advantage of other
10 potential purchasers and paid \$20,000 for the stock. The
11 bankruptcy court correctly applied Ninth Circuit law in finding
12 Chan Investment a "good faith purchaser" and did not err in this
13 determination. To the extent Kwai challenges the merits of this
14 appeal based on the applicability of In re Popp, 323 B.R. 260, we
15 address this challenge below.

16 C. Applicability of In re Popp

17 Kwai alternatively contends that the safe harbor protections
18 of section 363(m) cannot apply to a sale to which section 363
19 does not apply. See In re Popp, 323 B.R. 260 (reversing approval
20 of a sale of real property under section 363 where the bankruptcy
21 court made a determination that the estate was authorized to sell
22 the property while litigation over ownership was pending). Kwai
23 asserts that because ownership of the Starble stock was in
24 dispute, it was unclear whether the stock even constituted
25 property of the estate to which section 363 could apply.⁸

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27 ⁸ Section 363 provides that "[t]he trustee, after notice and
28 a hearing, may use, sell, or lease, other than in the ordinary
(continued...)

1 Following In re Popp, Kwai argues that the bankruptcy court
2 should have waited until ownership of the Starble stock was
3 finally determined in the state court action before proceeding
4 with a sale under section 363(b).

5 In response, the Trustee asserts that In re Popp is
6 inapplicable for two reasons: (1) the Trustee was selling only
7 whatever interest the estate owned (i.e., quitclaiming the
8 estate's interest, if any, to the potential buyer); and (2) the
9 Debtor specifically listed 100% ownership interest in the Starble
10 stock on its bankruptcy schedules and never disclosed a dispute
11 over ownership until the Trustee sought to sell the stock.

12 The Trustee's arguments are more persuasive. This case is
13 distinguishable from In re Popp. In In re Popp, the chapter 7
14 trustee sought to convey fee title in real property while title
15 was held in a non-debtor third party's name, and there was
16 pending litigation as to whether the real property was property
17 of the estate. Here, the Trustee seeks only to sell whatever
18 interest, if any, the Debtor may own in the Starble stock.
19 Although several parties have sued the Debtor over ownership of
20 the stock, the Debtor unambiguously listed in Schedule B under
21 the subheading "Stock and interests in incorporated and
22 unincorporated businesses" that it "owns 500 shares of common
23 stock [in Starble International Ltd.], representing a 100%
24 interest in Starble"

25 Chan Investment knew of the pending ownership dispute, knew

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27 ⁸(...continued)
28 course of business, property of the estate . . ." 11 U.S.C.
§ 363(b)(1) (emphasis added).

1 the sale terms, knew it would receive the Starble stock by
2 quitclaim deed and knew the Debtor could possibly have no
3 ownership interest in the stock. The bankruptcy court's order
4 simply authorized the Trustee to sell whatever interest the
5 estate had - even if that interest was nothing - to a buyer with
6 full knowledge of the situation. Nothing in In re Popp precludes
7 such an order.⁹

8 VI. CONCLUSION

9 For the reasons set forth above, the bankruptcy court did
10 not err in finding Chan Investment a good faith purchaser subject
11 to the protections of section 363(m) and authorizing the sale of
12 the Starble stock accordingly. We AFFIRM.

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24 ⁹ Further, In re Popp was primarily based on In re Rodeo
25 Canon Dev. Corp., 362 F.3d 603 (9th Cir. 2005), which held that a
26 bankruptcy court could not authorize a sale under section 363
27 until the court determined whether the estate had an ownership
28 interest in the property to be sold. However, the Ninth Circuit
withdrew that opinion on March 8, 2005. See In re Rodeo Canon
Dev. Corp., 2005 WL 663421, Nos. 02-56999, 02-57203 (9th Cir.
March 8, 2005).