

AUG 20 2014

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

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	CC-13-1367-TaDKi
	)		
PATRICK ROY LEWIS,	)	Bk. No.	SV 11-13919-AA
	)		
Debtor.	)		
_____	)		
	)		
KALLMAN & COMPANY LLP,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>OPINION</b>	
	)		
DAVID K. GOTTLIEB, CHAPTER 7	)		
TRUSTEE; JUDITH LEWIS,	)		
	)		
Appellees.	)		
_____	)		

Argued and Submitted on June 26, 2014  
at Pasadena, California

Filed - August 20, 2014

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

Honorable Alan M. Ahart, Bankruptcy Judge, Presiding

Appearances: \_\_\_\_\_

Michael Sanford Kogan of Kogan Law Firm, APC for  
Appellant Kallman & Company LLP; Lawrence D.  
Simons of the Law Offices of Larry D. Simons for  
Appellee David Gottlieb; and Simon Jonathan  
Dunstan of Hughes & Dunstan, LLP for Appellee  
Judith Lewis.

\_\_\_\_\_

Before: TAYLOR, DUNN, and KIRSCHER, Bankruptcy Judges.

1 TAYLOR, Bankruptcy Judge:  
2

3 The bankruptcy court entered an order authorizing a sale of  
4 the bankruptcy estate's interest in a state court action to  
5 creditor Kallman & Company LLP ("K&C"). After the Debtor moved  
6 for reconsideration of the K&C sale order, the chapter 7 trustee  
7 moved to approve the sale of the same property to the Debtor's  
8 non-filing wife pursuant to § 363(i).<sup>1</sup> The bankruptcy court  
9 entered an order approving the § 363(i) sale; K&C appealed.

10 This Panel vacated the order approving the § 363(i) sale and  
11 remanded to the bankruptcy court for further findings of fact and  
12 conclusions of law. See Kallman & Co. LLP v. Gottlieb (In re  
13 Lewis), 2013 WL 2367797 (9th Cir. BAP May 30, 2013). On remand,  
14 the bankruptcy court issued findings and conclusions and entered  
15 a second order approving the § 363(i) sale; K&C again appeals.

16 We conclude that the bankruptcy court was authorized to  
17 enter the second § 363(i) order and that it did not abuse its  
18 discretion in approving the § 363(i) sale to the non-filing wife.  
19 We, thus, AFFIRM the bankruptcy court.

20 **FACTS**

21 The Debtor, Patrick Roy Lewis, has been married to Judith  
22 Lewis ("Judith")<sup>2</sup> since 1992.

23 Prior to filing bankruptcy, the Debtor initiated an action  
24

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25 <sup>1</sup> Unless otherwise indicated, all chapter and section  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
27 All "Rule" references are to the Federal Rules of Bankruptcy  
28 Procedure.

<sup>2</sup> We refer to Judith by her first name for clarity and  
consistency with the prior memorandum decision; we intend no  
disrespect.

1 against K&C - his former employer - in California state court.  
2 The complaint alleged claims for breach of contract, breach of  
3 fiduciary duty, failure to pay wages, and an accounting (the  
4 "Claims"). In response, K&C filed a cross-complaint against the  
5 Debtor.

6 While the state court action was pending (and prior to  
7 judgment), the Debtor filed a chapter 7 bankruptcy petition, and  
8 David K. Gottlieb was appointed as Trustee. Judith did not file  
9 and, thus, was not a debtor. In scheduling the Claims, the  
10 Debtor did not indicate whether they were a community asset or  
11 belonged to him separately, although he specifically identified  
12 the ownership of other scheduled assets.

13 At some point, K&C approached the Trustee about purchasing  
14 the estate's interest in the Claims. Following negotiations, the  
15 parties agreed that K&C would purchase the Claims for \$40,000,  
16 subject to a minimum overbid of \$10,000, and that parties would  
17 enter into mutual releases. The parties reduced the agreement to  
18 a writing, which each executed (the "Agreement").

19 The Trustee sought approval of the sale under § 363(b); the  
20 Debtor opposed. At the sale hearing, the bankruptcy court  
21 overruled the Debtor's opposition and, in the absence of any  
22 overbid, orally approved the sale of the Claims to K&C. The  
23 parties apparently intended to proceed slowly to conclude the  
24 sale; the Agreement did not require payment of consideration from  
25 K&C until 30 days after the closing date, and the closing date  
26 occurred only when the order approving the sale became final and  
27 nonappealable.

28 A week after the K&C sale hearing, Debtor's counsel advised

1 the Trustee that Judith intended to exercise her right under  
2 § 363(i) to purchase the Claims for \$40,000. Unaware of the  
3 brewing controversy, the bankruptcy court entered an order  
4 approving the sale of the Claims to K&C ("K&C Sale Order"). The  
5 Debtor then timely moved for reconsideration and the Trustee  
6 concurrently moved to approve a stipulation to sell the Claims to  
7 Judith under § 363(i). The Trustee based the § 363(i) motion on  
8 his stated assumptions that the Claims were community property  
9 and that a § 363(i) sale was appropriate as the sale to K&C was  
10 not yet consummated.

11 At the subsequent hearing on both the motion to reconsider  
12 and the motion to approve the § 363(i) sale, the parties agreed  
13 that they could not locate any case authority establishing the  
14 date of consummation for purposes of § 363(i). In the absence of  
15 such authority, they disagreed as to when or whether the K&C sale  
16 was consummated. After further argument, the bankruptcy court  
17 orally approved the § 363(i) motion.

18 The bankruptcy court then turned to the reconsideration  
19 motion, which K&C and the Trustee both opposed. The Trustee, in  
20 particular, maintained that the K&C Sale Order was necessary to  
21 establish the price that Judith was required to pay for the  
22 § 363(i) sale. As a result, the bankruptcy court orally denied  
23 the reconsideration motion.

24 The bankruptcy court afterward entered two orders in May of  
25 2012: an order denying the Debtor's reconsideration motion and an  
26 order approving the § 363(i) sale to Judith ("First Judith Sale  
27 Order"). K&C appealed the First Judith Sale Order to this Panel.  
28 The order denying reconsideration was not appealed, and, thus,

1 the K&C Sale Order became final on May 23, 2012.

2 Based on a lack of factual findings as required by Rule  
3 7052, the Panel vacated the First Judith Sale Order and remanded  
4 to the bankruptcy court with instructions to enter its findings  
5 and conclusions and to determine whether the First Judith Sale  
6 Order superseded the K&C Sale Order. The bankruptcy court did  
7 so; it entered a second order approving the § 363(i) sale to  
8 Judith ("Second Judith Sale Order") and issued separate findings  
9 and conclusions supporting its decision. It determined that: the  
10 Claims were community property; the K&C sale was not consummated  
11 before Judith invoked her § 363(i) purchase right; and, in any  
12 event, the Second Judith Sale Order superseded the K&C Sale  
13 Order. K&C timely appealed.

#### 14 JURISDICTION

15 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
16 §§ 1334 and 157(b)(2)(N). We have jurisdiction under 28 U.S.C.  
17 § 158.

#### 18 ISSUES

- 19 1. Was the bankruptcy court authorized to enter the Second  
20 Judith Sale Order?
- 21 2. Did the bankruptcy court abuse its discretion in approving  
22 the sale to Judith pursuant to § 363(i)?

#### 23 STANDARD OF REVIEW

24 We review an order approving a § 363 sale for an abuse of  
25 discretion. Moldo v. Clark (In re Clark), 266 B.R. 163, 168 (9th  
26 Cir. BAP 1998). A review of an abuse of discretion determination  
27 involves a two-pronged test; first, we determine de novo whether  
28 the bankruptcy court identified the correct legal rule for

1 application. United States v. Hinkson, 585 F.3d 1247, 1261-62  
2 (9th Cir. 2009) (en banc). If not, then the bankruptcy court  
3 necessarily abused its discretion. Id. at 1262. Otherwise, we  
4 next review whether the bankruptcy court's application of the  
5 correct legal rule was clearly erroneous; we will affirm unless  
6 its findings were illogical, implausible, or without support in  
7 inferences that may be drawn from the facts in the record. Id.

### 8 DISCUSSION

9 On appeal, K&C argues that the bankruptcy court lacked  
10 authority to enter the Second Judith Sale Order and that, in the  
11 alternative, the bankruptcy court erred in approving the § 363(i)  
12 sale to Judith.

#### 13 **A. The bankruptcy court was authorized to enter the Second** 14 **Judith Sale Order.**

15 K&C argues that the K&C Sale Order became a final,  
16 nonappealable order on May 23, 2012 and, thus, that the sale was  
17 consummated for § 363(i) purposes on the same date. On this  
18 record, we disagree.

##### 19 **1. The sale to K&C was never consummated.**

20 In pertinent part, § 363(i) provides that:

21 Before the consummation of a sale . . . of property of  
22 the estate that was community property of the debtor  
23 and the debtor's spouse immediately before the  
24 commencement of the case, the debtor's spouse . . . may  
purchase such property at the price at which such sale  
is to be consummated.

25 The plain text of the statute makes clear that the debtor's  
26 spouse must both exercise a § 363(i) purchase right and complete  
27 the purchase prior to consummation of the first sale. The Code,  
28 however, does not define "consummation." Only eight other Code

1 sections contain the term in some variation. Most of these Code  
2 sections involve consummation or substantial consummation of a  
3 chapter 11 plan and, while indirectly helpful, involve facts that  
4 are facially distinguishable from an asset sale as is relevant to  
5 § 363(i).<sup>3</sup> The other Code sections including the term  
6 consummation relate to asset sales, but there is no case law in  
7 connection with these sections that aids our analysis here.<sup>4</sup>

8 We, thus, begin with the common meaning of consummation,  
9 which is "[t]he action or an act of completing, accomplishing, or  
10 finishing," OED Online, <http://www.oed.com/view/Entry/39989?>  
11 (last visited August 18, 2014), or "the ultimate end,"  
12 Merriam-Webster Online,  
13 <http://www.merriam-webster.com/dictionary/consummation> (last  
14 visited August 18, 2014). This common meaning dictates that, for  
15 the purposes of § 363(i), a sale of property is consummated when  
16 the sale is complete, accomplished, finished, or at the ultimate  
17 end. Fundamentally, consummation is an elastic concept, based on

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18  
19 <sup>3</sup> See 11 U.S.C. §§ 1101(2) (definition of substantial  
20 consummation of chapter 11 plan), 1112(b)(4)(M) (inability to  
21 effectuate substantial consummation of confirmed chapter 11 plan  
22 constitutes cause to dismiss or convert case), 1127(b) (confirmed  
23 chapter 11 plan may be modified before substantial consummation  
24 of plan), 1127(e) (individual chapter 11 debtor may modify  
25 confirmed chapter 11 plan regardless of whether plan was  
26 substantially consummated), 1141(d)(3) (chapter 11 plan  
27 confirmation does not discharge debtor if, among other things,  
28 debtor does not engage in business after plan consummation),  
1142(b) (bankruptcy court's authority to direct execution or  
delivery of any instrument necessary for plan consummation),  
1145(b)(1)(C) (definition of federal securities underwriter).

<sup>4</sup> See 11 U.S.C. §§ 363(n) (in collusive bidding scheme,  
trustee may recover the difference between the property value and  
the consummated sale price), 741(2)(A)(iii) (definition of  
customer for purposes of § 741).

1 the particular circumstances in the case. In general, however,  
2 it involves more than mere approval of a sale and requires  
3 finalization of the sale; this will typically involve payment.

4 This plain reading of § 363(i) consummation is not  
5 inconsistent with the other Code sections that include the term;  
6 in particular, it is consistent with the definition of  
7 "substantial consummation" for chapter 11 plan purposes in  
8 § 1101(2). Substantial consummation is defined as far more than  
9 plan confirmation; it requires significant progress toward  
10 finalization of the actions required by the plan and the  
11 commencement of distributions. By analogy, consummation of a  
12 § 363 sale does not occur simply because the bankruptcy court  
13 enters an order approving the sale.

14 Here, the bankruptcy court determined that the K&C sale was  
15 not consummated for the purposes of § 363(i). We agree. The  
16 Agreement defined the transaction closing date as the date of  
17 entry of a final and nonappealable order approving the K&C sale.  
18 And, while a closing date is typically the date on which a deal  
19 is finalized and consideration conveyed, the Agreement provided  
20 for payment to the Trustee within 30 days of the closing date.

21 The path to sale consummation was thus cleared when the  
22 bankruptcy court granted the K&C sale motion and approved the  
23 Agreement. Judith, however, erected a barrier to consummation  
24 when she asserted her rights under § 363(i). True, the  
25 bankruptcy court entered the K&C Sale Order prior to Judith's  
26 completion of her purchase. Also true, the bankruptcy court  
27 denied the Debtor's motion for reconsideration of the K&C Sale  
28 Order, such that this order became final and nonappealable on May



1 23, 2012. See Fed. R. Bankr. P. 8002(b)(4); see also In re  
2 Lewis, 2013 WL 2367797, at \*4. These events, however, did not  
3 constitute consummation of the K&C sale; they merely removed  
4 obstacles to consummation of a sale, a consummation that never  
5 occurred.

6 First, the Second Judith Sale Order provided that it  
7 supplanted the K&C Sale Order. Although the second order was  
8 entered on July 22, 2013, it was not entered on a new or  
9 different motion - instead, it related back to the § 363(i)  
10 motion, the bankruptcy court's grant of that motion, and entry of  
11 the First Judith Sale Order.

12 As a result, although the K&C Sale Order was final and  
13 nonappealable as of May 23, 2012, there existed an intervening  
14 order that sold the Claims to Judith. There could be no  
15 consummation of the K&C sale when the Claims were instead sold to  
16 Judith, as specifically authorized by the Code. In this respect,  
17 the term "superseded" is somewhat inapt. The bankruptcy court  
18 actually determined that Judith had the first right to purchase  
19 the Claims at the K&C purchase price. Had she failed to deliver  
20 payment, the K&C Sale Order allowed immediate sale to K&C. The  
21 Trustee was not free to re-market the Claims. Thus, by virtue of  
22 § 363(i), Judith's right to purchase the Claims was superior to  
23 K&C's purchase right, while K&C's right to purchase was superior  
24 to that of any other party.

25 Second, as the bankruptcy court determined and as K&C does  
26 not dispute, K&C never tendered the purchase price to the Trustee  
27 pursuant to the terms of the Agreement. In its defense, K&C  
28 attributes its failure to pay to the Trustee's instruction to

1 hold payment until the bankruptcy court resolved the competing  
2 sale motions. Whether the Trustee directed K&C to hold payment,  
3 however, is ultimately irrelevant - K&C never tendered payment  
4 and, therefore, the sale was never consummated.

5 Arguably, K&C has no one to blame but itself. It could  
6 have assumed certain risks and paid the purchase price  
7 immediately. It also could have eliminated or reduced any risks  
8 by obtaining a waiver of the Rule 6004(h) stay, seeking a  
9 § 363(m) finding that provided protection on appeal, or, again,  
10 immediately paying the purchase price. Instead, it provided  
11 Judith with sufficient time to assert her § 363(i) right and to  
12 prove that she had the ability to make good on her offer.

13 K&C's arguments as to alternative dates for consummation of  
14 the sale - February 22, 2012, the hearing date on which the  
15 bankruptcy court orally approved the K&C sale, and March 8, 2012,  
16 the date that the bankruptcy court entered the K&C Sale Order -  
17 similarly fail. For the reasons already discussed, on neither of  
18 those dates was the sale to K&C completed. Thus, the bankruptcy  
19 court did not err in determining that the K&C sale was not  
20 consummated at the time that Judith exercised her § 363(i)  
21 purchase right.

22 **2. The Second Judith Sale Order supplanted the K&C Sale**  
23 **Order.**

24 K&C also argues that the bankruptcy court erred in  
25 superseding the K&C Sale Order. It disputes that the Second  
26 Judith Sale Order vacated the K&C Sale Order and that the  
27 "evidence on the record" supports the bankruptcy court's decision  
28 to supersede the prior order, one year after the K&C Sale Order

1 became final.

2 Generally, a bankruptcy court may enter an order that  
3 supersedes a prior order without formally vacating the antecedent  
4 order. Indeed, "supersede" means "[t]o annul, make void, or  
5 repeal by taking the place of." Black's Law Dictionary (9th ed.  
6 2009). As a result, in many circumstances, the effect of a  
7 superseding order is the same as vacation of the prior order.  
8 That the bankruptcy court here did not "officially" vacate the  
9 K&C Sale Order is, thus, of no significance when considering the  
10 validity of the Second Judith Sale Order.<sup>5</sup> And as discussed  
11 above, the use of the term "supersede" is somewhat inexact. The  
12 bankruptcy court in substance merely recognized that Judith's  
13 § 363(i) rights were superior to K&C's rights under its prior  
14 order.

15 And, insofar as K&C argues that the final and nonappealable  
16 status of an order divests the bankruptcy court of authority to  
17 enter a superseding order, we emphatically reject that notion.  
18 K&C references no such authority in support of its proposition,  
19 nor could we locate any. Of course, the bankruptcy court may  
20 only supersede or vacate a prior order to the extent that no  
21 intervening rights have vested in reliance on the prior order.  
22 See Meyer v. Lenox (In re Lenox), 902 F.2d 737, 739-40 (9th Cir.

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24 <sup>5</sup> The record, in fact, supports that this was a conscious  
25 decision made by the bankruptcy court. At the April 18 hearing,  
26 Debtor's counsel requested reconsideration of the K&C Sale Order  
27 for the very reason that K&C now seeks to exploit: the existence  
28 of two conflicting sale orders involving the same asset. In  
response, K&C's counsel - joined by Trustee's counsel - asserted  
that there would be no basis for the § 363(i) sale to Judith, if  
the bankruptcy court vacated the K&C Sale Order. The bankruptcy  
court accordingly denied the reconsideration motion.

1 1990) (“[B]ankruptcy courts . . . have the power to reconsider,  
2 modify or vacate their previous orders so long as no intervening  
3 rights have become vested in reliance on the orders.”). Here,  
4 K&C identifies no such right. And § 363(i) expressly  
5 contemplates that exactly such an order may intervene. The  
6 bankruptcy court, thus, was “authorized” to enter the subsequent  
7 order.

8 Further, K&C’s murky challenges to the evidence supporting  
9 the bankruptcy court’s supersession determination and the timing  
10 of the Second Judith Sale Order are unreasonable. As discussed,  
11 the bankruptcy court entered the second order post-appeal,  
12 following this Panel’s issued mandate; thus, the second order  
13 related back to entry of the First Judith Sale Order. The  
14 bankruptcy court effectively conditioned the K&C Sale Order;  
15 again, if Judith failed to tender payment, the K&C Sale Order  
16 allowed an immediate sale to K&C. Contrary to K&C’s argument,  
17 the bankruptcy court was not required to weigh evidence, other  
18 than to make a determination as to whether any intervening rights  
19 vested in reliance on the K&C Sale Order.

20 K&C also urges this Panel to reverse the bankruptcy court’s  
21 decision based on policy reasons. It contends that supplanting a  
22 § 363 sale order upsets the expectations of purchasers,  
23 discourages prospective purchasers from timely making an offer,  
24 undermines confidence in judicial sales, and results in chaos for  
25 the bankruptcy estate.

26 Once again, Judith was not an ordinary bidder at a § 363  
27 sale. In enacting § 363(i), Congress specifically carved out a  
28 special provision for non-debtor spouses and property co-owners.

1 Further, the plain language of § 363(i) is clear and unambiguous.  
2 Thus, while it is true that policy generally favors the finality  
3 of § 363 sales, it is also clear that Congress contemplated that,  
4 in the course of a § 363 sale, two particular categories of  
5 persons can intervene and alternatively purchase property. This  
6 statutory risk is obvious. Indeed, the Rule 6004(h) stay, in  
7 part, allows a spouse or co-owner the time necessary to exercise  
8 this right. In this context, policy does not trump unambiguous  
9 statutory language.

10 Based on the foregoing, K&C has not shown that, for the  
11 purposes of § 363(i), the K&C sale was consummated or that the  
12 bankruptcy court erred in determining that the Second Judith Sale  
13 Order provided rights superior to the K&C Sale Order. It also  
14 has not shown that the bankruptcy court was somehow divested of  
15 authority to enter the Second Judith Sale Order.

16 **B. The bankruptcy court did not abuse its discretion in**  
17 **approving the § 363(i) sale to Judith.**

18 K&C next challenges the bankruptcy court's approval of the  
19 § 363(i) sale. It predominantly argues that Judith lacked  
20 standing to assert a § 363(i) purchase right as the Claims were  
21 not community property; all of its arguments fail.

22 **1. The Claims were community property.**

23 K&C challenges the Judith Sale Order on the grounds that  
24 Judith lacked standing to exercise a § 363(i) purchase right  
25 because the Claims were not community property. In particular,  
26 it contends that the Debtor's schedules - prepared by the same  
27 attorney who represented Judith in the sale - failed to designate  
28 the Claims as community property and, thus, that the Debtor's own

1 evidence refutes the community property presumption. It also  
2 contends that the Trustee failed to show that the Claims were  
3 community property assets.

4 Except as otherwise provided by statute, all property, real  
5 or personal, wherever situated, acquired by a married person  
6 during marriage while domiciled in California is community  
7 property. Cal. Fam. Code § 760. This includes recovery of or a  
8 contingent, future interest in the recovery of a lawsuit. See  
9 Vick v. DaCorsi, 110 Cal. App. 4th 206, 212 n.35 (2003) ("A cause  
10 of action to recover money damages, as well as the money  
11 recovered is a chose in action and therefore a form of personal  
12 property."); Barnett v. First Nat. Ins. Co. of Am., 184 Cal. App.  
13 4th 1454, 1460 (2010) ("[A] cause of action for damages is  
14 community property, as is any recovery on that cause of  
15 action . . . . This is true whether the cause of action is for  
16 injury to real property or financial interests or for personal  
17 injuries."); see also In re Marriage of Biddle, 52 Cal. App. 4th  
18 396, 400 (1997). Thus, there is a strong presumption that  
19 property acquired during the marriage is community property. See  
20 In re Marriage of Valli, 58 Cal. 4th 1396, 1400 (2014); see also  
21 Cal. Fam. Code §§ 760, 802. To rebut the presumption, the  
22 evidence must show "that another statute makes the property  
23 something other than community property." In re Marriage of  
24 Valli, 58 Cal. 4th at 1407 (Chin, J., concurring).

25 The bankruptcy court determined that the Claims were  
26 community property immediately before the commencement of the  
27 bankruptcy case and, thus, property of the estate. Here, it is  
28 undisputed that the Debtor and Judith were married and lived in

1 California when the Claims arose. The presumption of community  
2 property, thus, applies. K&C, as the party challenging the  
3 presumption, bore the burden of showing that the Claims were not  
4 community property. See In re Marriage of Weaver, 127 Cal. App.  
5 4th 858, 864 (2005) (party contesting community property status  
6 bears burden of rebutting presumption). It advanced no evidence  
7 in this regard and failed to meet its evidentiary burden.

8 The fact that the Debtor did not schedule the Claims as  
9 community property did not preclude Judith from asserting a  
10 community property interest in the Claims. She was not a co-  
11 debtor, and she did not sign the schedules. Therefore, the  
12 Debtor's schedules had no preclusive or estoppel effect on  
13 Judith's ability to exercise independently her § 363(i) purchase  
14 right. On this record, there was no error in the bankruptcy  
15 court's determination that the Claims were community property  
16 subject to § 363(i).

17 **2. The remainder of K&C's arguments lack merit, are**  
18 **irrelevant, or both.**

19 K&C's remaining arguments can be dismissed summarily. The  
20 fact that the parties executed the Agreement prior to approval by  
21 the bankruptcy court did not divest the estate of its interest in  
22 the Claims or the Trustee of his ability to sell the Claims. Nor  
23 did executing the Agreement, as K&C claimed at oral argument,  
24 immediately transfer title of the Claims. This was a sale  
25 outside the ordinary course of business, the Trustee could only  
26 sell the Claims after receiving approval from the bankruptcy  
27 court, and the effect of any order approving the sale was stayed  
28 for a period of time that allowed Judith to exercise her § 363(i)

1 rights. See 11 U.S.C. § 363(b); Fed. R. Bankr. P. 6004(h).  
2 Moreover, we reject the notion that whatever rights the Trustee  
3 and K&C had under the Agreement could somehow deprive Judith of  
4 her statutory § 363(i) rights. Simply put, the parties could not  
5 waive Judith's § 363(i) rights for her.

6 Nor did Judith waive her § 363(i) rights when she attended  
7 the K&C sale but did not express interest in purchasing the  
8 Claims at that time; the Code merely required that she purchase  
9 the Claims prior to consummation of the K&C sale. And, finally,  
10 the argument that Judith did not pay the purchase price offered  
11 by K&C, because she did not provide compensation equal to the  
12 cash price plus the value of the release, also fails. This  
13 argument has merit in the abstract, but here K&C failed to  
14 provide any evidence of the value of the release. The Trustee,  
15 however, explained that it was valueless from the perspective of  
16 the estate because any K&C judgment would never be paid. Here,  
17 the estate's assets would be exhausted prior to payment in full  
18 of priority tax claims. The bankruptcy court, thus, implicitly  
19 rejected these arguments in reaching its determinations. On this  
20 record, K&C has not persuaded us that this was error.

21 **CONCLUSION**

22 Based on the foregoing, we AFFIRM the bankruptcy court.  
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