

DEC 08 2014

SUSAN M. SPRAY, CLERK
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NOT FOR PUBLICATION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.	CC-14-1046-KiKuDa
)		
ICE MANAGEMENT SYSTEMS, INC.,)	Bk. No.	8:13-bk-17708-TA
)		
Debtor.)		
<hr/>			
TMC AEROSPACE, INC.,)		
)		
Appellant,)		
v.)	MEMORANDUM¹	
)		
JAMES J. JOSEPH, Chapter 7)		
Trustee,)		
)		
Appellee.)		
<hr/>			

Argued and Submitted on September 18, 2014,
at Pasadena, California

Filed - December 8, 2014

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

Honorable Theodor C. Albert, Bankruptcy Judge, Presiding

Appearances: Daniel Joseph McCarthy of Hill, Farrer & Burrill
LLP argued for appellant, TMC Aerospace, Inc.;
William Miles Burd of Burd & Naylor argued for
appellee, James J. Joseph, Chapter 7 Trustee.

Before: KIRSCHER, KURTZ and DAVIS,² 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. Laurel E. Davis, Bankruptcy Judge for the District of
Nevada, sitting by designation.

1 Secured creditor TMC Aerospace, Inc. ("TMC") appeals an order
2 in part granting the motion of the chapter 7³ trustee, James J.
3 Joseph ("Trustee"), to sell certain assets of the debtor, Ice
4 Management Systems, Inc. ("Debtor"), subject to all existing
5 liens, interests and encumbrances under § 363(b)(1). TMC
6 contended that its lien attached to the proceeds from the sale.
7 The bankruptcy court ruled that because the sale was "subject to"
8 TMC's lien, its lien was left fully intact, and no "proceeds"
9 existed upon which TMC's lien could attach. We AFFIRM.

10 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

11 A. Prepetition events

12 Debtor was in the business of manufacturing and selling
13 devices used to de-ice aircraft. TMC is an integrated aircraft
14 interior products and services holding company. Upon experiencing
15 some financial difficulties, Debtor turned to TMC for funding.

16 TMC and Debtor entered into a series of written agreements
17 related to the licensing of de-icing products to TMC:

18 (a) Exclusive License Agreement; (b) Security Agreement;

19 (c) Patent Security Agreement; and (d) Promissory Note

20 (collectively, the "Agreement"). Under the Agreement, TMC was

21 granted an exclusive license to use Debtor's intellectual property

22 relating to Debtor's aircraft de-icing systems. TMC contends it

23 advanced approximately \$1.3 million to Debtor for various costs

24 (software, payroll advances, project management costs and

25 overhead), as well as an initial cash advance of \$500,000.

26
27 ³ Unless specified otherwise, all chapter, code and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 Trustee disputes this amount, contending TMC is owed only the
2 \$500,000 cash advance.

3 In exchange for the funds to Debtor, TMC was granted a
4 blanket security interest in Debtor's tangible and intangible
5 personal property, including its intellectual property. TMC
6 allegedly received a first priority security interest in Debtor's
7 assets because two of Debtor's other existing secured creditors
8 agreed to subordinate their liens so Debtor could obtain the new
9 funding. TMC perfected its security interest in the collateral by
10 promptly filing a UCC-1 financial statement with the state of
11 California.

12 Debtor eventually defaulted on the Promissory Note. TMC
13 notified Debtor of its default and accelerated the entire debt.
14 In July 2012, Debtor filed suit against TMC in state court seeking
15 rescission and alleging claims for breach of contract and fraud.
16 In short, Debtor contended that TMC failed to provide all of the
17 promised funding. In response, TMC filed a cross-complaint, also
18 alleging breach of contract and seeking to enforce the Agreement.
19 That litigation is still pending, but was stayed once Debtor filed
20 a bankruptcy petition. Another suit is pending in state court
21 filed by other lienholders of Debtor who assert that TMC's
22 security interest should be subordinate to theirs.

23 **B. Postpetition events**

24 Debtor filed a voluntary chapter 7 bankruptcy case on
25 September 13, 2013. Debtor valued its personal property at
26 \$10,352,993.42, which included the claim against TMC valued by
27 Debtor at \$10 million. Debtor also listed intellectual property
28 in the form of twelve pending patents all of which it scheduled

1 with an unknown value. According to its Schedule D, Debtor had
2 approximately \$6 million in secured debt, including TMC's secured
3 claim of \$1,244,294.43. Debtor listed its License Agreement with
4 TMC in its Schedule G.

5 Shortly after the bankruptcy filing, Trustee moved to borrow
6 funds from Debtor's insider, Armacore Holdings, LLC ("Armacore"),
7 for Debtor's daily operating expenses. One member of Armacore is
8 also the chairman of Debtor's board of directors. Trustee
9 ultimately received \$300,000 of the \$450,000 in loans authorized
10 by the court.

11 Trustee did not seek to assume Debtor's License Agreement
12 with TMC within 60 days of the petition date, so it was deemed
13 rejected by operation of law on November 12, 2013. § 365(d)(1).
14 The next day, TMC filed a notice of election under § 365(n) to
15 preserve its license rights.

16 **1. Trustee's first sale motion**

17 Trustee first sought to sell essentially all of Debtor's
18 assets including all intellectual property (the "Assets") free and
19 clear of all liens and interests, including TMC's interest as
20 licensee in the de-icing technology, to stalking horse bidder
21 Armacore. Armacore's offer of cash and the subordination of its
22 existing liens was valued at \$5 million.

23 TMC opposed Trustee's first sale motion, contending that a
24 sale free and clear of its license rights under § 363(f) was an
25 impermissible impairment of its elected license rights under
26 § 365(n). Trustee had also failed to demonstrate adequate
27 protection of those rights under § 363(e). The bankruptcy court
28 agreed with TMC and denied Trustee's first sale motion.

1 **2. Trustee's second sale motion**

2 Trustee again attempted to sell Debtor's Assets to Armacore,
3 this time subject to all existing liens, interests and
4 encumbrances, including the license rights of TMC ("Second Sale
5 Motion"). Trustee valued the cash benefit of Armacore's offer at
6 \$630,000, which included a \$250,000 up-front cash payment.

7 TMC also opposed the Second Sale Motion. Among other things,
8 TMC argued that its first priority security interest would attach
9 to the sale proceeds and, therefore, none of the \$250,000 cash
10 received by Trustee would be available to pay creditors. Thus,
11 the sale would benefit only TMC. TMC contended that Trustee
12 failed to cite any authority that TMC's lien would not attach to
13 the \$250,000 cash payment and it would be too late to do so in his
14 reply brief. TMC also argued that Trustee, as with the prior sale
15 motion, failed to show adequate protection for the proceeds from
16 the sale of TMC's collateral; TMC was owed just over \$1.8
17 million.⁴

18 In reply, Trustee argued that TMC was not entitled to the
19 proceeds for two reasons. First, TMC's claim was disputed by
20 Debtor and other secured lienholders and the pending state court
21 litigation between them involved the validity and priority of
22 TMC's claim. Second, Ninth Circuit law dictated that where
23 debtor's assets are sold subject to a creditor's secured interest,

24 ⁴ While the Second Sale Motion was pending, TMC filed two
25 motions for relief from stay, one permitting it to foreclose on
26 its collateral and the other allowing it to continue with the
27 state court litigation involving Debtor. Trustee opposed both
28 motions, contending that the pending sale of Debtor's Assets and
resultant termination of the automatic stay rendered them moot.
The bankruptcy court granted both motions after ruling on the
Second Sale Motion.

1 the creditor's lien remains intact and, therefore, the creditor is
2 not entitled to a double recovery by also obtaining the sale
3 proceeds. Stodd v. Reynard (In re Shooting Star Enters., Inc.),
4 76 B.R. 154, 156-57 (9th Cir. BAP 1987), aff'd, 843 F.2d 1576 (9th
5 Cir. 1988). In other words, argued Trustee, the funds to be
6 received by the estate were not "proceeds" of TMC's collateral,
7 and thus its lien would not attach to them. As for adequate
8 protection, Trustee argued that TMC had yet to explain what
9 interest it held that was entitled to adequate protection.
10 Trustee disputed the value of TMC's claim, contending it was
11 limited to the initial \$500,000 cash advance. Further, if TMC's
12 expert estimated that losses from the rejection of its license
13 ranged from \$27-\$38 million, and the license itself was worth
14 \$27-\$30 million as TMC contended, then the underlying patents must
15 have equal or greater value. If so, argued Trustee, then TMC was
16 adequately protected.

17 In its sur-reply, TMC argued that Shooting Star did not
18 control in this case. Specifically, TMC argued that the Shooting
19 Star decision was supposedly, but not actually, premised on the
20 notion that proceeds of a sale are not really "proceeds" at all
21 under the Commercial Code or the applicable security documents,
22 because (1) the sale is made subject to that security interest so
23 the proceeds presumably must be for the "equity" in the assets and
24 (2) allowing the creditor to retain its lien while at the same
25 time having a lien on the sale proceeds would allow for an
26 impermissible "double recovery." However, those presumptions,
27 argued TMC, did not necessarily follow from all sales of assets
28 subject to existing liens. TMC agreed that those conclusions made

1 sense in Shooting Star because the bankruptcy court had made
2 actual findings that equity existed in the collateral. Here,
3 however, Trustee had not (1) requested any finding of equity,
4 (2) made any showing that the value of Debtor's Assets exceeded
5 the \$1.8 million owed to TMC or (3) ever contended that Debtor's
6 Assets had equity in them beyond the amount owed to all secured
7 creditors.

8 TMC argued that a buyer is not necessarily paying for the
9 equity cushion when he buys an asset subject to existing liens,
10 and a secured creditor will not necessarily receive a double
11 recovery when that creditor retains the security in the sold
12 collateral and receives the cash proceeds. Citing Stanziale v.
13 Finova Capital Corp. (In re Tower Air, Inc.), 397 F.3d 191 (3d
14 Cir. 2005), TMC argued that it is possible for a secured
15 creditor's debt to exceed both the value of the remaining
16 collateral and the purchase price for that collateral. Therefore,
17 the secured creditor is not getting an impermissible "double
18 recovery" when retaining its security interest in the collateral
19 and receiving the cash proceeds.

20 **3. The bankruptcy court's ruling on the Second Sale Motion**

21 Prior to the hearing on the Second Sale Motion, the
22 bankruptcy court issued its tentative ruling in favor of Trustee,
23 which it ultimately adopted as its final ruling. In the court's
24 opinion, a sale of Debtor's Assets "subject to" under § 363(b)(1),
25 as opposed to one "free and clear" under § 363(f), "substantially
26 change[d] the equation" as to whether TMC's lien attached to the
27 proceeds. In analyzing Shooting Star, the court held that the
28 "subject to" condition means the buyer is purchasing a right,

1 title and interest in collateral, but is not disturbing anything
2 for compensation to which a secured creditor's lien might attach.
3 This logic particularly applied in cases of intellectual property,
4 where the very same quantum exists both before and after the sale.

5 Whether equity existed or not in Debtor's Assets was of no
6 consequence to the bankruptcy court, even if required under
7 Shooting Star. Relying on Shooting Star's holding that proceeds
8 constitute whatever is substituted for the original collateral,
9 the bankruptcy court reasoned that in this sale nothing was being
10 "substituted" for the collateral, which would necessarily trigger
11 the "proceeds" analysis. In the bankruptcy court's view, the sale
12 at issue was more like a quitclaim than a purchase of equity.
13 Trustee was selling the estate's right, title and interest,
14 without warranty, to Armacore subject to existing interests in
15 Debtor's Assets; he was not making any warranty of value or even
16 one of quiet enjoyment. The court distinguished the cases cited
17 by TMC, including Tower Air, as inapposite.

18 In summary, the bankruptcy court did not view the price
19 being offered by Armacore for Debtor's Assets as "proceeds" of
20 TMC's collateral at all because the collateral was not being
21 disposed of or sold in any real sense. Because the sale was made
22 "subject to," the price was only for Trustee's quitclaim to the
23 encumbered assets, "an ephemeral interest not within the
24 definition of proceeds found in CAL. COMM. CODE § 9102(a)(64)⁵ or

25
26 ⁵ CAL. COM. CODE § 9102(a)(64) provides the definition for
27 "proceeds" under state law:

28 (64) "Proceeds," except as used in subdivision (b) of
(continued...)

1 otherwise." Id. at 4. Hence, no additional adequate protection
2 was required because Trustee was not in any way changing or
3 inhibiting the rights TMC might hold in its collateral.

4 After considering the parties' arguments at the hearing on
5 the Second Sale Motion, the bankruptcy court ruled in favor of
6 Trustee, but determined that the value of Armacore's offer would
7 be \$600,000. The opening bid started at \$610,000. Parviz
8 Acquisitions ("Parviz"), an affiliate of TMC, also appeared to
9 bid. Ultimately, Parviz was the successful bidder at \$910,000.
10 In the order approving the Second Sale Motion, paragraph 11 states
11 that the cash consideration received by the estate from the sale
12 constituted unencumbered cash of the estate (the "Sale Order").
13 TMC timely appealed.

14 TMC then filed a motion in the bankruptcy court for a partial
15 stay of the Sale Order pending appeal. In the bankruptcy court's
16 order denying TMC's motion that the stay matter be heard on
17

18 ⁵(...continued)

19 Section 9609, means any of the following property:

20 (A) Whatever is acquired upon the sale, lease, license,
21 exchange, or other disposition of collateral.

22 (B) Whatever is collected on, or distributed on account of,
23 collateral.

24 (C) Rights arising out of collateral.

25 (D) To the extent of the value of collateral, claims arising
26 out of the loss, nonconformity, or interference with the use
27 of, defects or infringement of rights in, or damage to, the
28 collateral.

(E) To the extent of the value of collateral and to the
extent payable to the debtor or the secured party, insurance
payable by reason of the loss or nonconformity of, defects or
infringement of rights in, or damage to, the collateral.

1 shortened time, the court noted that TMC misinterpreted the ruling
2 on the Second Sale Motion. It was not solely based upon a
3 perceived equity in the collateral. Rather, the court believed
4 Shooting Star could be read more expansively than that.
5 Nonetheless, given the disputed value of TMC's lien and the lack
6 of any formal determination of value, the court believed the
7 possibility of equity remained since the parties actively bid
8 against each other to a level considerably higher than the opening
9 bid. The bankruptcy court denied the stay. We granted TMC's
10 motion for a partial stay of the Sale Order pending appeal.

11 **II. JURISDICTION**

12 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
13 and 157(b)(2)(N). We have jurisdiction under 28 U.S.C. § 158.

14 **III. ISSUE**

15 Did the bankruptcy court err in determining that the liens of
16 secured creditors (including TMC's lien) did not attach to the
17 \$910,000 realized in the sale of Debtor's Assets and that those
18 funds were unencumbered and available to pay unsecured creditors'
19 claims and estate expenses?

20 **IV. STANDARDS OF REVIEW**

21 "We review the bankruptcy court's conclusions of law and
22 questions of statutory interpretation de novo, and factual
23 findings for clear error." Clear Channel Outdoor, Inc. v. Knupfer
24 (In re PW, LLC), 391 B.R. 25, 30 (9th Cir. 2008) (citation
25 omitted). We review orders to sell property under § 363(b) for an
26 abuse of discretion. Id. (citing Darby v. Zimmerman (In re Popp),
27 323 B.R. 260, 265 (9th Cir. BAP 2005). A bankruptcy court abuses
28 its discretion if it applies an incorrect legal standard or its

1 factual findings are illogical, implausible or without support
2 from evidence in the record. TrafficSchool.com v. Edriver Inc.,
3 653 F.3d 820, 832 (9th Cir. 2011).

4 **V. DISCUSSION**

5 TMC does not appeal from the bankruptcy court's ruling that
6 the auction sale could proceed or from the confirmed sale to
7 Parviz. Instead, its appeal is limited to the bankruptcy court's
8 ruling that TMC's lien did not attach to the funds received by the
9 Trustee, allowing those funds to be used by the Trustee to pay
10 Debtor's postpetition operating expenses, other administrative
11 expenses and creditors' claims. We address TMC's arguments below.

12 **A. A trustee's duties and sales under § 363**

13 One of the primary duties of a chapter 7 trustee is "to
14 collect and reduce to money the property of the estate for which
15 such trustee serves, and close such estate as expeditiously as is
16 compatible with the best interests of parties in interest."
17 § 704(a)(1). "To fulfill this duty, the trustee's 'primary job is
18 to marshal and sell the assets, so that those assets can be
19 distributed to the estate's creditors.'" In re KVN Corp.,
20 514 B.R. 1, 5 (9th Cir. BAP 2014) (quoting U.S. Tr. v. Joseph
21 (In re Joseph), 208 B.R. 55, 60 (9th Cir. BAP 1997)). "Indeed,
22 underlying all of a chapter 7 trustee's actions, including
23 decisions about sales of property of the estate, is the fiduciary
24 duty to maximize distribution to creditors." In re Ellis, 2011 WL
25 61378, at *2 (Bankr. D. Idaho Jan. 7, 2011) (citing Dye v. Brown
26 (In re AFI Holding, Inc.), 530 F.3d 832, 844-845 (9th Cir. 2008)).

27 To aid a trustee's goal of collecting cash to distribute to
28 creditors, § 363(b) empowers a trustee to sell estate property

1 outside the ordinary course of business, subject to court
2 approval, and after notice and a hearing. Property of the estate
3 may be sold subject to liens, interests and encumbrances under
4 § 363(b)(1).⁶

5 **B. The bankruptcy court did not err in determining that TMC's
6 lien did not attach to the funds received in the sale.**

7 We first consider the threshold issue of whether Shooting
8 Star requires a showing of equity in the assets being sold subject
9 to existing liens, interests and encumbrances under § 363(b)(1)
10 and TMC's contention that the bankruptcy court misapplied Shooting
11 Star's holding. If a showing of equity is not required, then much
12 of TMC's other arguments fail.

13 In Shooting Star, the debtor's major secured creditor, CCBL,
14 had a perfected security interest in all of debtor's existing and
15 after acquired property. 76 B.R. at 154. During the course of
16 the chapter 7 case, the trustee sold inventory and collected
17 accounts receivable, remitting the proceeds to CCBL and reducing
18 its \$400,000 debt. Id. Eventually, Reynard, a guarantor for
19 debtor's obligation to CCBL, purchased CCBL's interest in the
20 remaining assets, valued at \$90,000, for \$62,406. Id. at 154-55.
21 Subsequently, over Reynard's objection, the bankruptcy court
22 approved a sale of the trustee's "right, title and interest" in
23 the remaining assets. Id. at 155. The purchaser, Hal-Optic,
24 agreed to pay \$5,000 for the assets and \$17,000 for estimated
25 unpaid chapter 7 operating expenses. Id. Ultimately, Hal-Optic

26
27 ⁶ Section 363(b)(1) provides that "[t]he trustee, after
28 notice and a hearing, may use, sell, or lease, other than in the
ordinary course of business, property of the estate[.]"

1 tendered a cashier's check for \$5,000, plus \$13,800 for the unpaid
2 chapter 7 operating expenses. Id. Reynard then moved to compel
3 the trustee to turnover all funds received as proceeds from the
4 asset sale. The bankruptcy court ruled that the funds constituted
5 "proceeds" under former CAL. COM. CODE § 9306. Id. Thus, because
6 Reynard was the successor in interest to CCBL's interest in
7 debtor's assets, including any proceeds thereof, Reynard was
8 entitled to receive the proceeds. Id.

9 On appeal, the trustee argued that he sold only his "right,
10 title and interest" in the collateral and not the collateral
11 itself. Hence, the collateral was not "disposed of," and so no
12 proceeds were obtained. Id. In Shooting Star, the court
13 acknowledged that ordinarily monies received by the estate from
14 the sale of an asset subject to a lien are proceeds. The result
15 may be different, the court reasoned, if the trustee sells the
16 estate's interest, subject to the secured creditor's lien rights.
17 In that case, the monies received by the trustee are for the
18 debtor's equity and not for the portion of the collateral
19 necessary to pay the secured debt. In part, the court based its
20 interpretation of the term "proceeds" upon the prohibition in the
21 Official Comment 3 to U.C.C. § 9-306(1987) against double
22 recoveries.⁷ The court stated the secured creditor was
23 sufficiently protected by its interest in the collateral. The

24
25 ⁷ In 1999, the California legislature adopted revisions to
26 the Cal. Com. Code, to become effective on July 1, 2001. The
27 "proceeds" provision contained in Cal. Com. Code §9306 prior to
28 July 1, 2001, was revised and incorporated in Cal. Com. Code
§ 9102(a)(64). This revised provision moved the prohibition
against double recoveries from the official comments to the
statutory text by adding the phrase "to the extent of the value of
collateral." See Tower Air, 397 F.3d at 198 n.8.

1 Ninth Circuit summarily affirmed, adopting the BAP decision in its
2 entirety. 843 F.3d 1576.

3 Thus, Shooting Star stands for the proposition that funds
4 received by the trustee in an asset sale subject to existing
5 liens, interests and encumbrances are not subject to the security
6 interests of the creditors whose liens against the collateral have
7 been left fully intact. In other words, because the funds have
8 not been substituted for the original collateral, they are not
9 "proceeds" within the definition of the Commercial Code and
10 therefore are not subject to attachment by the priority security
11 interests.

12 TMC argues that Shooting Star requires a finding of equity.
13 Unless the trustee shows equity exists in the assets being sold
14 and the bankruptcy court makes that determination, argues TMC,
15 then a secured creditor's lien attaches to what it believes are
16 the "proceeds" received in the sale. TMC argues that Trustee
17 failed to show that any equity existed in Debtor's Assets and the
18 bankruptcy court erred by assuming that a mere offer by Armacore
19 meant that equity did in fact exist. Trustee disagrees that
20 Shooting Star requires a showing or finding of equity or,
21 alternatively, contends the discussion of equity or apparent
22 equity in the assets sold was not necessary to the court's
23 decision. We agree with Trustee.

24 We conclude that Shooting Star does not require a showing by
25 the trustee or a finding by the bankruptcy court of "equity" in a
26 debtor's assets being sold subject to existing liens, interests
27 and encumbrances in order for a trustee to be entitled to the sale
28 funds. Changing the facts of Shooting Star slightly, presume that

1 the lien and assets were both valued at \$90,000. Hence, no equity
2 was available. Nonetheless, a purchaser sees value in the
3 debtor's assets that no one else sees and offers the trustee
4 \$20,000 for the assets subject to the secured creditor's lien.
5 Under Shooting Star, even despite the lack of equity, the
6 creditor's lien would not attach to the sale funds because the
7 funds were not substituted for the collateral, as would be the
8 case in a sale free and clear of all liens under § 363(f), where
9 both the lien and the collateral are gone. The assets being sold
10 serve as collateral for the secured creditor's lien, and by
11 selling the assets "subject to" that lien, the court has left the
12 collateral fully intact. Thus, even without "equity" as we know
13 it in the traditional sense, the result is the same. No
14 substitution has occurred, the funds are not "proceeds" as defined
15 by the Commercial Code, and the secured creditor's lien does not
16 attach to them.

17 Changing the facts in Shooting Star again, presume that the
18 lien was valued at \$100,000 and the debtor's assets were valued at
19 \$90,000, leaving the creditor undersecured by \$10,000 and no
20 perceived equity. A purchaser, for whatever reason, offers to buy
21 the assets subject to all liens, interests and encumbrances for
22 \$20,000. Under Shooting Star, even with the secured creditor's
23 lien being underwater, the lien would still not attach to the sale
24 funds because the funds were not substituted for the collateral.
25 The creditor's lien, which has been left fully intact, is still
26 valued at \$100,000, particularly in the case of intellectual
27 property, and the buyer will have to either satisfy it or risk the
28 creditor foreclosing on its lien.

1 Therefore, contrary to TMC's arguments, Shooting Star does
2 not turn on whether "equity" in the traditional sense exists in
3 the debtor's assets. An equity cushion existed in that case,
4 which raised the concern of a "double recovery." As the
5 bankruptcy court here correctly noted, in a sale subject to, the
6 "collateral is the same as it always was" and the "lien is stuck
7 like glue on it." Hr'g Tr. (Jan. 7, 2014) 7:7-9. The price in
8 such sales is only for the trustee's interest in the encumbered
9 assets, "an ephemeral interest not within the definition of
10 proceeds found in CAL. COM. CODE § 9102(a)(64) or otherwise."

11 We too find Tower Air distinguishable because the insurance
12 policy at issue there was, by statutory definition, "proceeds."
13 397 F.3d at 196. We have no such "proceeds" in the instant case
14 because the funds were not derived from the collateral; the money
15 received by Trustee was in addition to the collateral.

16 We could locate only one case with facts somewhat similar to
17 Shooting Star and that is In re Mannone, 512 B.R. 148 (Bankr.
18 E.D.N.Y. 2014). There, the trustee sought to sell his right,
19 title and interest in debtor's home "subject to" a secured
20 creditor's existing mortgage lien. Debtor had valued the home at
21 \$405,268 and the mortgage lien was valued at \$518,244.60 – i.e.,
22 no perceived equity. Nonetheless, a third-party purchaser offered
23 to buy the home for \$20,000. Trustee argued that the home had no
24 equity (for purposes of debtor's homestead exemption), and that
25 the estate would realize the entire \$20,000. Id. at 150-51.
26 Notably, the secured creditor never argued that it was entitled to
27 the funds. Although the bankruptcy court did not approve the sale
28 for reasons not relevant here, it found Trustee's lack of equity

1 argument flawed, and that the \$20,000 sale price was in fact
2 equity:

3 Where an actual sale is to occur, the fair market value
4 is the sale price, not a valuation given by the Debtor in
5 the schedules or any other estimate or appraisal. The
6 very sale proposed by the Trustee establishes that the
7 Debtor's home is not worth less than the debt in that the
8 Purchaser assumes all the debt. The additional
9 \$20,000.00 is therefore in addition to the debt, and can
10 be considered equity.

11 Id. at 150.

12 Therefore, even if a secured creditor's lien is undersecured
13 according to debtor's (or any other) valuation, the fact a third
14 party is willing to pay something for the over-encumbered asset
15 subject to the lien necessarily means that the asset has "equity"
16 available for the estate (or, in Mannone, that equity is available
17 for debtor's claimed homestead exemption). Thus, even if TMC's
18 lien was undersecured, which was never conclusively established,
19 the sale price of \$910,000 could be considered "equity," even if
20 Shooting Star did impose such a requirement. Accordingly, the
21 bankruptcy court did not err in concluding that Armacore's offer
22 to purchase Debtor's Assets subject to existing liens, interests
23 and encumbrances may have evidenced the estate's equity in them.

24 TMC contends that its affiliate Parviz was not purchasing
25 Debtor's Assets because of any perceived equity, but rather it had
26 other motivations like protecting TMC's license interests. As we
27 noted in First Yorkshire Holdings, Inc. v. Pacifica L 22, LLC
28 (In re First Yorkshire Holdings, Inc.), "[t]he concept of 'equity'
in property is based on the premise that the property itself has
some economic value to its owner." 470 B.R. 864, 868-69 (9th Cir.
BAP 2012) (citation omitted) (emphasis in original). We believe

1 TMC's argument to be a distinction without a difference. As the
2 bankruptcy court correctly noted at the hearing on TMC's stay
3 relief motion:

4 I'm just telling you that when somebody bids money, you
5 think -- you can call it equity, you can call it defense,
6 you can call it whatever you want, but they perceive a
7 value that is at least equal, if not more than what
8 they're putting down in cash, and that's the important
9 point from our perspective, I think.

8 Hr'g Tr. (Feb. 25, 2014) 13:7-12.

9 We also disagree with TMC that the bankruptcy court erred in
10 failing to order adequate protection of TMC's security interest in
11 the funds received from the sale under § 363(e). First, TMC has
12 not cited any authority that adequate protection is required in a
13 case where debtor's assets are being sold subject to existing
14 liens, interests and encumbrances. Further, "'[a]dequate
15 protection' is intended to protect a creditor's interest from
16 diminution in the value of its collateral when the Trustee uses or
17 sells the creditor's collateral." Salyer v. SK Foods, L.P.
18 (In re SK Foods, L.P.), 2011 WL 2709648, at *1 (E.D. Cal. July 11,
19 2011) (citing § 363(b)(1); In re Hawaiian Telcom Commc'ns, Inc.,
20 430 B.R. 564, 604 (Bankr. D. Haw. 2009) ("An undersecured creditor
21 is entitled to adequate protection payments to the extent that its
22 collateral suffers from diminution in value.")). TMC has not
23 asserted or shown that the value of its collateral would decline
24 if it were sold to Armacore or any other purchaser, thus requiring
25 adequate protection.

26 Intellectual property, unlike other types of personal
27 property, would appear to be adequately protected regardless of
28 the buyer. As the bankruptcy court correctly noted, intellectual

