

FEB 22 2016

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

| | | | | |
|----|-------------------------------|---|--------------------|------------------|
| 5 | In re: |) | BAP Nos. | NC-14-1440-KuWJu |
| | |) | | NC-14-1515-KuWJu |
| 6 | THE ZUERCHER TRUST OF 1999, |) | | |
| | |) | Bk. No. | 12-32747 |
| 7 | Debtor. |) | | |
| | _____ |) | | |
| 8 | |) | | |
| 9 | THE ZUERCHER TRUST OF 1999; |) | | |
| | MONICA HUJAZI, |) | | |
| 10 | Appellants, |) | | |
| | |) | | |
| 11 | v. |) | MEMORANDUM* | |
| | |) | | |
| 12 | E. LYNN SCHOENMANN, Chapter 7 |) | | |
| | Trustee, |) | | |
| 13 | |) | | |
| | Appellee, |) | | |
| 14 | _____ |) | | |

Argued and Submitted on January 21, 2016
at San Francisco, California

Filed - February 22, 2016

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

Honorable Hannah L. Blumenstiel, Bankruptcy Judge, Presiding

Appearances: Bradley Kass of Kass & Kass Law Offices argued for appellants the Zuercher Trust of 1999 and Monica Hujazi; Thomas F. Koegel of Crowell & Moring LLP argued for appellee E. Lynn Schoenmann, chapter 7 trustee.

*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 8024-1.

1 Before: KURTZ, WANSLEE** and JURY, Bankruptcy Judges.

2 **INTRODUCTION**

3 These appeals arise from the bankruptcy sale of a two-story
4 mixed-use residential and retail building located on Bayshore
5 Boulevard in San Francisco, California. Over the course of two
6 years, the chapter 11¹ trustee and his successor, the chapter 7
7 trustee, strove to sell the Bayshore property. At each step of
8 the sale process, the debtor the Zuercher Trust and its principal
9 Monica Hujazi opposed the trustees' sales efforts. At bottom,
10 this opposition appears to have been motivated in large part by
11 their belief that the trustees' sales efforts were not going to
12 realize the optimal value for the property. Tellingly, however,
13 during the months the marketing and sale of the property was
14 pending, no one ever expressed a sustained willingness and
15 ability to buy the property in accordance with the proposed sale
16 terms for an amount significantly more than that offered by the
17 purchaser of the property.

18 The bankruptcy court made an explicit finding at the time it
19 approved the sale of the property that the purchaser Rasmi Zeidan
20 was a good faith purchaser within the meaning of § 363(m), and on
21 appeal the Zuercher Trust and Hujazi have challenged that
22 finding. Nothing in the record at the time the good faith
23

24 **Hon. Madeleine C. Wanslee, United States Bankruptcy Judge
25 for the District of Arizona, sitting by designation.

26 ¹Unless specified otherwise, 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. All "Civil Rule" references are to
the Federal Rules of Civil Procedure.

1 finding was made persuades us that this good faith finding was
2 clearly erroneous. Even so, our prior BAP precedent indicates
3 that, when any new facts come to light after the sale is
4 completed plausibly calling into question the good faith of the
5 buyer, the bankruptcy estate and the purchaser only can enjoy the
6 benefit of § 363(m)'s limitation on appellate remedies when the
7 bankruptcy court has duly considered those additional facts and
8 has effectively determined the good faith of the purchaser in
9 light of the additional facts.

10 While we may remand when such new facts come to light while
11 the appeal is pending, so the bankruptcy court can consider them,
12 doing so here would not be an efficient or effective means of
13 resolving these appeals. These appeals are fully briefed and
14 have been orally argued; the more efficient and effective path is
15 for us to consider and resolve the merits of these appeals as
16 presented to us by the parties.

17 Here, the bankruptcy court found, over the Zuercher Trust's
18 and Hujazi's objections, that the chapter 11 trustee had obtained
19 the optimal price for the Bayshore property by selling it to
20 Zeidan for \$3,050,000 and that the sale was in the best interests
21 of the Zuercher Trust bankruptcy estate. On the record before
22 us, the bankruptcy court's findings regarding the sale of the
23 Bayshore property were not clearly erroneous. Accordingly, we
24 AFFIRM.

25 **FACTS**

26 We have some familiarity with the Zuercher Trust bankruptcy
27 case as a result of a prior appeal, Zuercher Trust of 1999 v.
28 Kravitz (In re Zuercher Trust of 1999), 2014 WL 7191348 (Mem.

1 Dec.) (9th Cir. BAP Dec. 17, 2014). As we explained there, the
2 Zuercher Trust was owned and controlled by Monica Hujazi and was
3 formed as a business trust to own, develop and manage California
4 real estate. Hujazi commenced a chapter 11 bankruptcy case on
5 behalf of the Zuercher Trust in September 2012 because a
6 foreclosure sale of some of the trust's real property was
7 imminent. The bankruptcy court ordered the appointment of a
8 chapter 11 trustee in January 2013.

9 After investigating the condition and financial status of
10 the Bayshore property, the chapter 11 trustee determined that the
11 Bayshore property needed to be sold because it was not generating
12 sufficient revenue to fully service the secured debt encumbering
13 the property and pay expenses and operating costs associated with
14 the property.²

15 Accordingly, during the Spring of 2013, the chapter 11
16 trustee engaged in negotiations with RTC-Equity LLC and
17 subsequently filed a motion in July 2013 seeking to sell the
18 Bayshore property to RTC for \$3.1 million, subject to overbid and
19 auction procedures. The Zuercher Trust owned 88.5% of the
20 Bayshore property, and Sterling Heatley owned the other 11.5%.
21 Both of the owners objected to the proposed sale.

22 Heatley did not per se oppose the sale of the Bayshore
23 property, but he thought the property could be sold for
24

25 ²In addition to the excerpts of record provided by the
26 parties, we have reviewed and considered all of the additional
27 sale-related filings attached to the bankruptcy court's
28 electronic docket. We can and do take judicial notice of the
contents of those filings. O'Rourke v. Seaboard Sur. Co.
(In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989).

1 significantly more money if the chapter 11 trustee were to retain
2 a real estate broker to market the property. As for the Zuercher
3 Trust, it claimed that the chapter 11 trustee should attempt to
4 lease the vacant tenant space in the building before determining
5 whether the property should be sold. In addition, the Zuercher
6 Trust asserted that the proposed sale price of \$3.1 million was a
7 fraction of the market value of the property. Both the Zuercher
8 Trust and Heatley relied on a recent appraisal opining that the
9 fair market value of the property was \$4.5 million, and on two
10 broker price opinions in excess of \$4 million.

11 After holding a hearing on the July 2013 sale motion, the
12 court entered an order granting the motion, subject to the
13 condition that, as a prerequisite to the sale, the trustee was
14 required to retain a real estate broker and market the Bayshore
15 property for at least ninety days. However, shortly after the
16 first sales procedures order was entered, RTC withdrew its offer
17 to purchase the Bayshore property for \$3.1 million after further
18 due diligence inspections of the property.

19 Following the loss of his "stalking horse bidder" for
20 purposes of convening a bankruptcy auction sale, the chapter 11
21 trustee filed a motion for approval to employ two real estate
22 brokers. The lead broker had expertise with bankruptcy sales and
23 the sub-broker had expertise with the sale of similar mixed-use
24 properties in the Bay Area.

25 Heatley and the Zuercher Trust opposed the employment
26 motion. Their opposition once again insisted that the market
27 value of the Bayshore property exceeded \$4 million, so the
28 trustee's proposed listing price of roughly \$3.5 million was

1 inadequate. They also complained about the chapter 11 trustee's
2 choice of brokers and his decision to employ two brokers.

3 In response, the chapter 11 trustee explained the particular
4 expertise each broker would bring to the table and also
5 challenged the appraisal and the two broker price opinions on
6 which Heatley and the Zuercher Trust relied for their assertion
7 that the value of the Bayshore property exceeded \$4 million.
8 According to the trustee, all three valuations were based on
9 incomplete and inaccurate information regarding the property.
10 After holding a hearing and considering Heatley's and the
11 Zuercher Trust's opposition, the bankruptcy court entered an
12 order granting the chapter 11 trustee's broker employment motion
13 and approving the \$3.5 million listing price.

14 Shortly after the bankruptcy court approved the employment
15 of the chapter 11 trustee's brokers, the trustee went another
16 round with RTC Equity. This time, RTC agreed to purchase the
17 property for the reduced price of \$2.75 million. The trustee
18 filed a motion seeking to vacate the prior sales procedure order
19 to reflect his new agreement with RTC, but the bankruptcy court
20 denied that motion without prejudice and ordered that the
21 property be marketed through June 2014. In addition, the court
22 directed the trustee to amend his marketing materials to remove
23 any reference to a bankruptcy auction, a stalking horse bidder
24 and overbid procedures and to file monthly reports detailing the
25 status of his marketing and sales efforts.

26 After working with his brokers for several months to market
27 the property, and after lengthy negotiations with more than one
28 prospective purchaser, the chapter 11 trustee found a new

1 stalking horse bidder - Rasmi Zeidan. In June 2014, the trustee
2 and Zeidan entered into a contract for the sale of the Bayshore
3 property for \$3,050,000, subject to bankruptcy court approval and
4 overbid procedures. The chapter 11 trustee then filed a motion,
5 in July 2014, for approval of sale and overbid procedures similar
6 to what the trustee had proposed in July 2013 for the aborted RTC
7 sale.

8 Heatley filed a limited objection to the July 2014 sale
9 procedures motion. In essence, Heatley did not per se oppose the
10 sale but thought that the sale procedures, especially the deposit
11 and overbid amounts, could be lessened to encourage more overbid
12 activity.

13 The Zuercher Trust and Hujazi also filed an opposition.
14 Unlike Heatley, they sought to prevent the sale. They still
15 asserted that the property was worth more than \$4 million and
16 that the proposed sale for significantly less evidenced fraud and
17 collusion between the chapter 11 trustee and Zeidan. The
18 Zuercher Trust and Hujazi relied on an updated version of their
19 June 2013 appraisal, updated as of February 2014. Based on the
20 updated appraisal, the Zuercher Trust and Hujazi claimed that the
21 property was worth \$4.5 million as is and \$5.7 million if fully
22 rented. They argued that the trustee should have obtained an
23 appraisal to support his position that the property was only
24 worth roughly \$3 million.

25 The Zuercher Trust and Hujazi further alleged that the
26 chapter 11 trustee had a history of extensive misdealings, fraud
27 and collusion in conjunction with the sale of the Zuercher
28 Trust's Los Angeles real property. They also claimed that the

1 chapter 11 trustee's lack of good faith was demonstrated by his
2 allowing the property to become dilapidated. The trustee, in
3 reply, denied that the sale of the Zuercher Trust's Los Angeles
4 property evidenced any bad faith on his part. He further pointed
5 to the monthly marketing status reports he had filed between
6 January and June 2014 as detailing the extensive efforts he had
7 undertaken over the last six months to market and sell the
8 property to the highest and best-qualified purchaser. He also
9 asserted that, in light of those efforts, the proposed sale price
10 to be paid by Zeidan (or any successful overbidder) represented
11 the true market value of the Bayshore property. Once again, the
12 chapter 11 trustee attacked the appraisal presented by the
13 Zuercher Trust and Hujazi as not reflecting the true condition of
14 the property. He further reiterated that the estate had no funds
15 available to make repairs and improvements to the property that
16 would be necessary to increase revenue from the property.

17 At the August 2014 hearing on the sale procedures motion,
18 the Zuercher Trust and Hujazi pressed their argument that the
19 trustee should have obtained an appraisal to support his view of
20 the value of the property and that their updated February 2014
21 appraisal was the only reliable evidence of the property's value.

22 The bankruptcy court was not persuaded that the proposed
23 \$3,050,000 sale price was too low. Based on the declarations and
24 other evidence accompanying the sale procedures motion, the
25 bankruptcy court was convinced that the trustee and his brokers
26 had made "good" efforts to market and sell the property and that
27 the results of exposing this property to the market were a valid
28 means of determining the value of the property. The bankruptcy

1 court lessened the overbid deposit requirement to \$200,000, based
2 on Heatley's limited objection, but overruled his objections
3 regarding the initial overbid amount and regarding the
4 requirement that potential overbidders demonstrate their
5 financial ability to close.

6 The bankruptcy court entered its sale procedures order on
7 August 19, 2014, and the Zuercher Trust and Hujazi appealed.

8 Pursuant to the sale procedures order, the chapter 11
9 trustee filed in September 2014 a motion for authorization to
10 sell the Bayshore property to Zeidan for \$3,050,000 or to the
11 highest qualified overbidder at an auction to be held on the date
12 of the hearing on the sale motion. Among other things, the sale
13 authorization motion requested a finding that Zeidan (or other
14 purchaser) qualified as a good faith purchaser within the meaning
15 of § 363(m). In support of the motion, the chapter 11 trustee
16 explained that a sale of the property was necessary to cut off
17 essential but costly maintenance and repair expenses. The
18 trustee also summarized, once again, the efforts he and his
19 brokers already had made to market and sell the property.

20 In support of a good faith purchaser finding, the chapter 11
21 trustee generally pointed to the efforts he and his brokers made
22 to find a willing and able buyer financially capable of closing
23 the sale, and specifically stated: (1) that his dealings with
24 Zeidan were at arms' length and between disinterested/unrelated
25 parties; (2) that the chapter 11 trustee had no prior dealings
26 with Zeidan before entering into negotiations with him for the
27 sale of the Bayshore property; (3) that negotiations with Zeidan
28 were transacted through each party's broker over the course of a

1 few weeks and involved multiple rounds of offers and counter-
2 offers; (4) that the proposed sales price represented the highest
3 and best price a financially capable buyer was willing to pay
4 under the sale terms proposed; and (5) that the proposed sales
5 price accurately reflected the market value of the property.
6 The trustee further noted that the overbid/auction procedures
7 being employed further ensured that the purchaser was acting in
8 good faith.

9 In opposition to the sale authorization motion, the Zuercher
10 Trust and Hujazi primarily challenged the proposed sale price as
11 being well below the property's market value and also objected to
12 the chapter 11 trustee's request for a good faith finding.
13 According to them, a good faith finding would be inappropriate
14 absent an appraisal showing the property to be worth no more than
15 the proposed purchase price of \$3,050,000 and in light of the
16 trustee's alleged misconduct associated with his sale of the
17 Zuercher Trust's Los Angeles property. The Zuercher Trust and
18 Hujazi further argued that a sale of the Bayshore property was
19 inconsistent with the reorganization purpose of the Zuercher
20 Trust's bankruptcy case and that the sale should not be approved
21 absent a tax analysis demonstrating that the sale would not have
22 any adverse tax consequences.

23 At the October 2014 hearing on the sale authorization
24 motion, no parties appeared seeking to participate in an auction
25 or overbid procedures. Thus, the court stated it would address
26 the proposed sale to Zeidan for \$3,050,000. The court ruled that
27 this sale would yield optimal value for the estate and was in the
28 best interests of the estate and its creditors. In so ruling,

1 the court found that the chapter 11 trustee and his brokers
2 “amply” marketed the property for six or seven months and that
3 several purchase offers had been received and considered in a
4 range between \$3 million and \$ 3.5 million - consistent with the
5 initial \$3.5 million listing price. The court further found that
6 the sale and overbid procedures provided adequate opportunity for
7 competitive overbidding and, in fact, the court had modified the
8 proposed procedures to make competitive overbidding more
9 attractive.

10 With respect to the Zuercher Trust’s and Hujazi’s appraisal,
11 the bankruptcy court stated that it did not believe the valuation
12 set forth therein accurately represented the market value of the
13 property in its then-current condition. The court explained
14 that, if the property really was worth between \$4.5 million and
15 \$5 million as claimed in the appraisal, the court would have
16 expected another bidder to come forward with a higher and better
17 offer - but this did not occur.

18 In support of its holding on the market value of the
19 property, the court found that, in this instance, the sale price
20 offered by the successful purchaser after the trustee’s marketing
21 of the property accurately reflected the market value of the
22 property, especially in light of the property’s condition and the
23 opportunity for overbidding.

24 As for the chapter 11 trustee’s request for a finding that
25 the purchaser had acted in good faith, the bankruptcy court
26 explicitly found that Zeidan was entitled to a finding that he
27 qualified as a good faith purchaser. In support of this finding,
28 the court pointed out that the record supported the conclusion

1 that the trustee and Zeidan had negotiated with each other at
2 arm's length and in good faith. The court further pointed to the
3 absence of any credible evidence of fraud or collusion between
4 these parties.

5 Interestingly, at the conclusion of the sale hearing,
6 counsel for Heatley - who had abandoned any lingering opposition
7 he had to the sale - expressed satisfaction with the results of
8 the sale proceedings and further expressed appreciation for both
9 the bankruptcy court's and the chapter 11 trustee's efforts.

10 The bankruptcy court entered its sale authorization order on
11 October 10, 2014, and the Zuercher Trust and Hujazi timely filed
12 a notice of appeal on October 24, 2014.

13 After the sale authorization order was entered, the
14 chapter 11 trustee entered into two amendments of the approved
15 sales contract effectively extending the sale closing deadline.
16 These amendments apparently were necessitated by Zeidan's
17 difficulty in closing the sale without obtaining financing. In
18 exchange for the extensions, Zeidan's forfeitable deposit was
19 increased from \$105,000 to \$155,000. In December 2014, while the
20 extended sale closing period was pending, the Zuercher Trust's
21 bankruptcy case was converted from chapter 11 to chapter 7, and a
22 chapter 7 trustee was appointed to replace the chapter 11
23 trustee. Neither the Zuercher Trust nor Hujazi filed an appeal
24 from the case conversion order.

25 The chapter 7 trustee reviewed all of sale-related filings,
26 as well as the sale agreement, as amended, and concluded that the
27 sale was still in the estate's best interests, in light of the
28 condition of the property, in light of the fact that the loan

1 secured by the first trust deed against the property was maturing
2 in July 2015, and in light of the prior difficulties the
3 chapter 11 trustee encountered in marketing and selling the
4 property. Consequently, the chapter 7 trustee took steps to
5 complete the sale to Zeidan, which included a third amendment to
6 the sale agreement, the addition of a requirement that all of the
7 buyer's funds necessary to close the sale be deposited into
8 escrow, and the resolution of certain concerns raised by the
9 title company acting as escrow holder.

10 In March 2015, the chapter 7 trustee filed her motion
11 seeking formal authorization to close the sale of the Bayshore
12 property according to the terms previously authorized by the
13 bankruptcy court in its October 2014 sale authorization order.
14 In that motion, the chapter 7 trustee asserted that the
15 amendments to the sales contract were minor, did not adversely
16 affect the bankruptcy estate's interests and, hence, did not
17 require court authorization, as contemplated and allowed by the
18 court's October 2014 sale authorization order at paragraph 13.

19 In their opposition to sale closing motion, the Zuercher
20 Trust and Hujazi made three arguments: (1) the pending appeals
21 from the sale procedures order and the sale authorization order
22 divested the bankruptcy court of jurisdiction to hear and
23 determine the chapter 7 trustee's sale closing motion; (2) the
24 sale price was inadequate; and (3) the court should not have
25 approved the sale in the absence of an appraisal demonstrating
26 that the sale price was at or near the market value of the
27 property.

28 The bankruptcy court held a hearing on the sale closing

1 motion on March 12, 2015, at which it granted the motion. The
2 court rejected the Zuercher Trust's and Hujazi's jurisdictional
3 argument. According to the court, its hearing and ruling on the
4 sale closing motion was, in essence, in furtherance and
5 enforcement of its prior sale orders and did not in fact alter
6 those orders or otherwise alter the matters on appeal. As for
7 the Zuercher Trust's and Hujazi's other arguments, the bankruptcy
8 court declined to address them because they merely recapitulated
9 arguments which they had made in opposition to the prior sale
10 motions and which the court already had rejected. The issue of
11 whether Zeidan still qualified as a good faith purchaser was
12 neither raised nor addressed in conjunction with the sale closing
13 motion.

14 On March 18, 2015, the bankruptcy court entered its amended
15 order granting the chapter 7 trustee's sale closing motion. The
16 Zuercher Trust and Hujazi did not file an appeal from that order.

17 **JURISDICTION**

18 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
19 §§ 1334 and 157(b)(2)(N), and we have jurisdiction under
20 28 U.S.C. § 158.

21 **ISSUES**

- 22 1. Do the Zuercher Trust and Hujazi have standing to appeal the
23 bankruptcy court's sale orders?
- 24 2. Does the limitation of appellate remedies set forth in
25 §363(m) apply to this matter and render these appeals moot?
- 26 3. Did the bankruptcy court err when it approved the sale of
27

1 the Bayshore property to Zeidan for \$3,050,000?³

2 **STANDARDS OF REVIEW**

3 The appellants' standing is a question of law we may review
4 sua sponte and that we consider de novo. Menk v. LaPaglia
5 (In re Menk), 241 B.R. 896, 903 (9th Cir. BAP 1999).

6 A bankruptcy court's determination of whether a purchaser of
7 property qualifies as a good faith purchaser for purposes of
8 § 363(m) is a finding of fact reviewed for clear error. Thomas
9 v. Namba (In re Thomas), 287 B.R. 782, 785 (9th Cir. BAP 2002).
10 A finding of fact is not clearly erroneous unless it is
11 illogical, implausible, or without support in the record. Retz
12 v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010).

13 The bankruptcy court's approval of a sale under § 363(b) is
14 reviewed for an abuse of discretion. Fitzgerald v. Ninn Worx Sr,
15 Inc. (In re Fitzgerald), 428 B.R. 872, 880 (9th Cir. BAP 2010).
16 The bankruptcy court abuses its discretion if it applies an
17 incorrect legal rule or makes a clearly erroneous factual
18 finding. United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th
19 Cir. 2009) (en banc).

20
21 ³The propriety of the court hearing and ruling on the March
22 2015 sale closing motion is not before us for review because the
23 Zuercher Trust and Hujazi did not file a notice of appeal from
24 that order. If the Zuercher Trust and Hujazi desired appellate
25 review of that order, they should have filed a timely notice of
26 appeal. The sale closing order was a separately appealable
27 post-judgment order in furtherance of the October 2014 sale
28 authorization order. See generally Hunt v. City of Los Angeles,
638 F.3d 703, 719 (9th Cir. 2011) (identifying post-judgment fees
orders as separately appealable post-judgment orders); Kirkland
v. Legion Ins. Co., 343 F3d 1135, 1139-1140 (9th Cir. 2003)
(identifying post-judgment orders enforcing settlement agreements
as separately appealable post-judgment orders).

1 **DISCUSSION**

2 **1. Standing Issue**

3 The Zuercher Trust and Hujazi lack appellate standing unless
4 they were directly and adversely affected pecuniarily by the
5 orders on appeal. Cheng v. K & S Diversified Invs., Inc.
6 (In re Cheng), 308 B.R. 448, 455 (9th Cir. BAP 2004), aff'd,
7 160 Fed.Appx. 644 (9th Cir. 2005); In re Menk, 241 B.R. at 917.
8 The chapter 7 trustee argues on appeal that neither appellant
9 satisfies this "person aggrieved" standard because the Zuercher
10 Trust bankruptcy estate is hopelessly insolvent. The trustee
11 relies on one of his filed reports on the financial condition of
12 the estate as establishing that the estate has roughly
13 \$29 million in unsecured claims filed against it and roughly
14 \$1.3 million in assets.

15 It is true that, when a bankruptcy estate is hopelessly
16 insolvent, the debtor typically will lack standing to appeal
17 orders affecting the size of the bankruptcy estate. Fondiller v.
18 Robertson (In re Fondiller), 707 F.2d 441, 442 (9th Cir. 1983);
19 see also Duckor Spradling & Metzger v. Baum Trust
20 (In re P.R.T.C., Inc.), 177 F.3d 774, 778 n.2 (9th Cir. 1999).

21 Even so, we decline to dismiss these appeals on standing
22 grounds for two reasons. First, the chapter 7 trustee's evidence
23 regarding the insolvency of the Zuercher Trust bankruptcy estate
24 does not fully account for the estate's potential assets and
25 liabilities. For instance, the insolvency evidence does not
26 account for the potential results of the chapter 7 trustee's
27 adversary proceeding seeking to recover several parcels of real
28 property on fraudulent transfer grounds. The insolvency evidence

1 also does not account for the potential that, if the Zuercher
2 Trust and Hujazi were to prevail in these appeals and the sale
3 order was unwound, the bankruptcy estate arguably might
4 subsequently obtain net sale proceeds in a significantly greater
5 amount if the Bayshore property was later resold. Finally, the
6 insolvency evidence only took into account the amount of
7 unsecured claims filed. The chapter 7 trustee did not offer any
8 estimate regarding what percentage of those claims actually might
9 be allowed.

10 As a second reason for not dismissing these appeals on
11 standing grounds, we note that Hujazi claims to be a co-debtor on
12 many of the same claims filed against the Zuercher Trust estate.
13 As a result, she likely is adversely affected by orders affecting
14 the size of the estate (and the amount of assets available for
15 distribution to creditors) even if she won't be sharing in any
16 distributions from the Zuercher Trust bankruptcy estate.⁴

18 ⁴After these appeals were fully briefed, some of Hujazi's
19 creditors succeeded in obtaining an order for relief against
20 Hujazi in the involuntary chapter 7 case they brought against
21 her, In re Hujazi, Case No. 13-30477 (Bankr. N.D. Cal Nov. 30,
22 2015), and a chapter 7 trustee has been appointed therein. As a
23 result, Hujazi's chapter 7 trustee is entitled to step into
24 Hujazi's shoes for purposes of prosecuting these appeals. See
25 § 323; Rule 6009. Hujazi's chapter 7 trustee recently filed a
26 statement in these appeals indicating that she has not yet had an
27 opportunity to determine whether Hujazi's bankruptcy estate might
28 somehow benefit by her active participation in these appeals. Nonetheless, we have decided to proceed with our resolution of these appeals. Hujazi personally has had a full and fair opportunity to prosecute these appeals and indeed has fully participated in briefing and oral argument. As for Hujazi's bankruptcy estate, we anticipate that her chapter 7 trustee ultimately will conclude that the estate has not been prejudiced by our decision to proceed.

1 Our decision not to dismiss these appeals on appellate
2 standing grounds is bolstered by the fact that appellate standing
3 doctrine is not a constitutional mandate but rather is a
4 prudential, judge-made rule applied in the interests of judicial
5 economy and efficiency. See generally In re P.R.T.C., Inc.,
6 177 F.3d at 778 (describing nature of appellate standing
7 doctrine). In light of the circumstances discussed immediately
8 above, we decline to dismiss these appeals on appellate standing
9 grounds.

10 **2. Mootness Issue**

11 The chapter 7 trustee also argues on appeal that § 363(m)
12 applies to this matter and has rendered these appeals moot.
13 Section 363(m) limits the remedies available on appeal when it is
14 established that the purchaser has acted in good faith. T.C.
15 Investors v. Joseph (In re M Capital Corp.), 290 B.R. 743, 745
16 (9th Cir. BAP 2003).⁵ Section 363(m) provides as follows:

17 The reversal or modification on appeal of an
18 authorization under subsection (b) or (c) of this
19 section of a sale or lease of property does not affect
20 the validity of a sale or lease under such
authorization to an entity that purchased or leased
such property in good faith, whether or not such entity

21 ⁵From time to time in this decision, we cite to the Panel's
22 prior decision in In re M Capital Corp. to support some general
23 statements about the legal effect of and requirements for
24 application of § 363(m). Nothing in this decision is meant to
25 endorse or rely upon the aspect of In re M Capital Corp. holding
26 that the burden of proof to establish good faith for purposes of
27 § 363(m) is on the party seeking to invoke § 363(m). See id. at
28 747-48. As we indicated in In re Zuercher Trust of 1999, 2014 WL
7191348, at *9-10, it is difficult or impossible to reconcile
this aspect of In re M Capital Corp. with Weinstein, Eisen &
Weiss, LLP v. Gill (In re Cooper Commons, LLP), 424 F.3d 963, 970
(9th Cir. 2005), and Burchinal v. Cent. Wash. Bank (In re Adams
Apple, Inc.), 829 F.2d 1484, 1489 (9th Cir. 1987).

1 knew of the pendency of the appeal, unless such
2 authorization and such sale or lease were stayed
pending appeal.

3 11 U.S.C. § 363(m).

4 The trustee points out that the bankruptcy court made an
5 explicit finding regarding the purchaser's good faith in its
6 October 2014 sale authorization order and that the trustee
7 explicitly requested this finding in its moving papers. In turn,
8 the court's good faith finding was supported by its subsidiary
9 findings regarding the circumstances leading up to the sale,
10 regarding the market value of the Bayshore property and regarding
11 the negotiations between Zeidan and the chapter 11 trustee.

12 The Zuercher Trust and Hujazi challenge the good faith
13 finding on appeal on the same grounds they relied on in the
14 bankruptcy court. They claim that the purchase price paid by
15 Zeidan was a fraction of the actual market value of the Bayshore
16 property. In support, they rely on the June 2013 appraisal
17 (updated as of February 2014) they presented to the bankruptcy
18 court. They also claim that the bankruptcy court should have
19 required the trustee to obtain his own appraisal report in
20 support of the purchase price paid for the property before
21 finding that Zeidan had acted in good faith. They further claim
22 that the chapter 11 trustee's alleged misconduct in relation to
23 the sale of the bankruptcy estate's Los Angeles property is
24 indicative of bad faith in relation to the sale of the Bayshore
25 property.

26 The bankruptcy court's findings effectively addressed and
27 rejected all of these claims. The court specifically found that
28 the sale price Zeidan offered and paid reflected the market value

1 of the property because the property was amply exposed to the
2 market and to the opportunity for competitive bidding and that
3 Zeidan's offer was the highest and best offer received compliant
4 with the sale terms. The bankruptcy court further found that the
5 trustee was not obliged to obtain his own supporting appraisal
6 because the direct exposure of the Bayshore property to the
7 market provided an accurate and reliable indication of value.
8 Finally, the court found that none of the Zuercher Trust's and
9 Hujazi's allegations of fraud, collusion or other misconduct were
10 supported by any credible evidence.

11 The bankruptcy court's subsidiary findings were sufficient
12 to support its good faith finding. Our prior decisions indicate
13 that the following factors are relevant to the good faith
14 determination: (1) compliance with approved sale procedures;
15 (2) arms-length negotiations, leading to a sale reflecting a
16 purchase price at or near the market value of the property;
17 (3) opportunity for competitive bidding; (4) knowledge in advance
18 of the sale of who the proposed purchaser is; and (5) the absence
19 of any evidence of fraud, collusion or grossly unfair advantage
20 over other bidders. See In re M Capital Corp., 290 B.R. at
21 746-49; see also Zuercher Trust of 1999 v. Kravitz
22 (In re Zuercher Trust of 1999), 2014 WL 7191348 (Mem. Dec.) (9th
23 Cir. BAP Dec. 17, 2014); Kwai v. Wirum (In re Glob. Reach Inv.
24 Corp.), 2012 WL 933594, at *2-3 (Mem Dec.) (9th Cir. BAP Mar. 20,
25 2012) aff'd, 570 F. App'x 723 (9th Cir. 2014).

26 Here, the bankruptcy court effectively found that each of
27 these factors militated in favor of the court finding that Zeidan
28 had purchased the Bayshore property in good faith. On this

1 record, we cannot say that any of the bankruptcy court's findings
2 relating to Zeidan's good faith were illogical, implausible or
3 without support in the record.

4 These findings also distinguish this matter from the three
5 prior Panel decisions that the Zuercher Trust and Hujazi rely
6 upon in support of their argument regarding the purchaser's
7 alleged bad faith - In re M Capital Corp., In re Thomas and
8 In re Fitzgerald. In In re M Capital Corp. and In re Thomas,
9 there were no good faith findings requested or made at the time
10 the sales motions were approved. In re M Capital Corp., 290 B.R.
11 at 749; In re Thomas, 287 B.R. at 784. And in In re Fitzgerald,
12 the bankruptcy court signed off on a "boilerplate" good faith
13 finding even though the trustee neither requested a good faith
14 finding nor presented evidence to support such a finding.
15 In re Fitzgerald, 428 B.R. at 878, 881. In addition, there was
16 legitimate reason in In re Fitzgerald to doubt the good faith of
17 the purchaser. See id. at 883.

18 That being said, the Zuercher Trust and Hujazi presented for
19 the first time on appeal new facts concerning events occurring
20 after entry of the October 2014 sale authorization order which
21 they assert call into question Zeidan's good faith. The Zuercher
22 Trust and Hujazi point to the two sale closing extensions the
23 chapter 11 trustee granted to Zeidan without court approval and
24 the additional several-month delay in closing permitted by the
25 chapter 7 trustee. According to the Zuercher Trust and Hujazi,
26 these extensions and delays undermine the bankruptcy court's
27 earlier findings regarding the market value of the Bayshore
28 property, regarding the absence of collusion and grossly unfair

1 advantage and, ultimately, regarding Zeidan's good faith.

2 We admit to having a considerable degree of skepticism
3 regarding the inference of bad faith the Zuercher Trust and
4 Hujazi attempt to draw from the events occurring between the time
5 of entry of the October 2014 sale authorization order and the
6 entry of the March 2015 sale closing order. Indeed, we are
7 tempted to hold that no trier of fact reasonably could find on
8 the facts presented that Zeidan lacked good faith in purchasing
9 the Bayshore property.

10 Nonetheless, we already have held in an appeal arising from
11 the same bankruptcy case that, when new facts come to light after
12 the sale authorization order is entered plausibly calling into
13 question the good faith of the purchaser, and when the issue of
14 whether § 363(m) applies is critical to the disposition of the
15 appeal, the appropriate procedure is a limited remand to permit
16 the bankruptcy court to hear and consider the new facts.

17 In re Zuercher Trust of 1999, 2014 WL 7191348, at *13-15 (citing
18 In re Thomas, 287 B.R. at 785-86). This holding qualifies as the
19 law of the case, and we are not aware of any facts militating
20 against application of that doctrine under any of the doctrine's
21 recognized exceptions. See generally Am. Express Travel Related
22 Servs. Co. v. Fraschilla (In re Fraschilla), 235 B.R. 449, 454
23 (9th Cir. BAP 1999) (explaining doctrine and its exceptions),
24 aff'd, 242 F.3d 381 (9th Cir. 2000) (table).

25 Notwithstanding the above, we perceive a key distinction
26 between the matter currently before us and the prior Zuercher
27 Trust appeal this Panel disposed of in 2014: there the Panel
28 apparently concluded that the issue regarding the application of

1 § 363(m) was critical to the resolution of the appeal. Here, in
2 contrast, we are prepared to dispose of this appeal on alternate
3 grounds. When, as here, the merits of the appeal have been fully
4 briefed, oral argument has been held and the resolution of the
5 appeal on the merits is straightforward, we believe the better,
6 more-efficient practice is to hear and decide the merits of the
7 appeal, rather than to remand for a supplemental good faith
8 determination in order to answer the question of whether
9 § 363(m) applies and whether these appeals have thereby been
10 rendered moot.

11 Our decision here to press forward with the merits is
12 consistent with Ninth Circuit law regarding mootness. The
13 proponent advocating mootness has the burden of proof to
14 establish its existence. Focus Media, Inc. v. Nat'l Broad. Co.
15 Inc. (In re Focus Media, Inc.), 378 F.3d 916, 923 (9th Cir.
16 2004). Unless the proponent establishes mootness, the appeal
17 should not be dismissed on that basis. Id.

18 Here, mootness cannot be established unless and until the
19 bankruptcy court on remand makes a supplemental good faith
20 determination and this Panel upholds that determination after
21 remand. Until then, we cannot correctly say that § 363(m)
22 applies and that this appeal is moot.

23 Accordingly, we will proceed to address the merits of these
24 appeals.

25 **3. Merits arguments**

26 While the merits arguments raised by the Zuercher Trust and
27 Hujazi are scattered in different sections of their opening
28 appeal brief, they effectively boil down to four key assertions.

1 All four of these assertions are subsumed within the Zuercher
2 Trust's and Hujazi's overarching claim that the bankruptcy estate
3 did not receive optimal value in exchange for the Bayshore
4 property. The parties do not dispute on appeal that, as a
5 prerequisite to obtaining sale authorization, the trustee needed
6 to demonstrate that the proposed sale would yield optimal value
7 for the bankruptcy estate. See In re Fitzgerald, 428 B.R. at
8 884; Simantob v. Claims Prosecutor, LLC. (In re Lahijani),
9 325 B.R. 282, 288-89 (9th Cir. BAP 2005).

10 The Zuercher Trust's and Hujazi's four key assertions on
11 appeal are as follows: (1) the bankruptcy court erred by finding
12 that the property was amply marketed; (2) the bankruptcy court
13 erred by finding that the sale price obtained from Zeidan
14 accurately reflected the market value of the property; (3) the
15 bankruptcy court erroneously ignored the Zuercher Trust's and
16 Hujazi's appraisal; and (4) the bankruptcy court erred by not
17 requiring the chapter 11 trustee to obtain an appraisal
18 supporting its assertion that the proposed sale price to Zeidan
19 was at or near the market value of the property.

20 With respect to the first two assertions, it suffices for us
21 to say that we have reviewed the entire bankruptcy court record,
22 and we are not persuaded that the court's marketing finding or
23 its finding regarding the value of the Bayshore property were
24 illogical, implausible or without support in the record. While
25 the bankruptcy court reasonably could have drawn other inferences
26 from the facts in the record, its choice between two permissible
27 views of the evidence cannot be clearly erroneous. See Anderson
28 v. City of Bessemer City, N.C., 470 U.S. 564, 574 (1985).

1 As for the third assertion, the bankruptcy court did not
2 ignore the Zuercher Trust's and Hujazi's appraisal. Rather, the
3 court specifically found that it did not believe that the
4 appraisal accurately reflected the market value of the property.
5 The court, instead, credited the evidence of the chapter 11
6 trustee showing that the appraisal was based on inaccurate and
7 incomplete information about the then-current condition of the
8 Bayshore property. Similar to our holding regarding the court's
9 marketing and value findings, we cannot say that the court's
10 findings regarding the appraisal were illogical, implausible or
11 without support in the record.

12 Finally, we hold that the bankruptcy court did not err by
13 not requiring the chapter 11 trustee to obtain an appraisal. The
14 Zuercher Trust and Hujazi have not cited any authority requiring
15 an appraisal under similar circumstances, nor are we aware of any
16 such authority. For the reasons stated by the bankruptcy court,
17 we agree with the bankruptcy court that the chapter 11 trustee,
18 on this record, properly could rely upon his marketing and sales
19 efforts to establish the market value of the Bayshore property.

20 Accordingly, we reject all of the Zuercher Trust's and
21 Hujazi's assertions relevant to the merits of these appeals.

22 **CONCLUSION**

23 For the reasons set forth above, we AFFIRM the bankruptcy
24 court's August 2014 sale procedures order, and we also AFFIRM the
25 bankruptcy court's October 2014 sale authorization order.