

DEC 11 2017

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. NV-17-1086-LTiF  
 )  
 LIFE ENHANCEMENT PRODUCTS, ) Bk. No. 3:14-bk-51572-BTB  
 INC., )  
 )  
 Debtor. )  
 )  
 SAMUEL KORNHAUSER, )  
 )  
 Appellant, )  
 )  
 v. ) **MEMORANDUM\***  
 )  
 LIFE ENHANCEMENT PRODUCTS, )  
 INC.; JAMES S. PROCTOR, )  
 Chapter 11 Trustee, )  
 )  
 Appellees. )

Argued and Submitted on December 1, 2017  
at Reno, Nevada

Filed - December 11, 2017

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

Honorable Bruce T. Beesley, Bankruptcy Judge, Presiding

Appearances: Appellant Samuel Kornhauser argued pro se; Louis  
M. Bubala, III of Kaempfer Crowell argued for  
Appellee James S. Proctor.

Before: LAFFERTY, TIGHE,\*\* and FARIS, Bankruptcy Judges.

\*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.

\*\*Hon. Maureen A. Tighe, U.S. Bankruptcy Judge for the  
Central District of California, sitting by designation.

1 Creditor Samuel Kornhauser appeals the bankruptcy court's  
2 order approving the chapter 11 trustee's motion to sell Debtor's  
3 assets free and clear under § 363.<sup>1</sup> Kornhauser, who filed an  
4 unsecured claim in the chapter 11 case, did not prove he had an  
5 interest in the assets being sold and failed to obtain a stay  
6 pending appeal. The sale - which the bankruptcy court found was  
7 to a good faith buyer - closed shortly before this appeal was  
8 filed. Accordingly, we DISMISS this appeal as statutorily moot  
9 under § 363(m).

#### 10 **FACTS**

11 Debtor-Appellee Life Enhancement Products, Inc. ("LEP"),  
12 located in Minden, Nevada, manufactured and sold nutritional  
13 supplements. Its president, Wallace Block, owned 99.2 percent of  
14 the corporation. LEP leased its manufacturing and office space  
15 from Scientific Nutritional Formulations, LLC ("SNF"), a limited  
16 liability company wholly owned by Block.

17 In late August 2014, Kornhauser obtained a \$2.5 million  
18 state court judgment against LEP for unpaid legal fees and other  
19 damages. Block was also a defendant in that litigation, but no  
20 judgment was entered against him because he filed an individual  
21 chapter 7 case shortly before the judgment was entered.  
22 Kornhauser eventually obtained a judgment in Block's bankruptcy  
23 case declaring the debt nondischargeable.

24 On September 17, 2014, LEP filed for chapter 11 relief.  
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26 <sup>1</sup>Unless specified otherwise, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
28 "Rule" references are to the Federal Rules of Bankruptcy  
Procedure.

1 Kornhauser filed a proof of claim for \$2,592,961.50 based on the  
2 state court judgment. The proof of claim did not categorize the  
3 claim as secured, and the attached Proof of Claim Itemization  
4 Chart explicitly referred to the claim as unsecured.  
5 Nevertheless, Kornhauser attached to the claim form a copy of a  
6 "Secured Promissory Note" dated March 25, 2005 for \$450,000,  
7 which named Block as the obligor and was signed by Block, and a  
8 "Pledge Agreement" whereby Block granted Kornhauser a security  
9 interest in Block's stock in LEP. Also attached were copies of  
10 UCC Financing Statements filed with the Nevada and California  
11 secretaries of state, naming Block as the debtor and referencing  
12 as collateral "\$450,000 secured promissory note and pledge  
13 agreement that has increased to \$700,000." Kornhauser also  
14 attached to his claim a copy of the judgment against LEP.  
15 Kornhauser's claim made him the largest unsecured creditor of the  
16 estate, and he has actively participated in the case since it was  
17 filed.

18 In April 2015, the bankruptcy court appointed Appellee James  
19 S. Proctor ("Trustee") as chapter 11 trustee. In the months that  
20 followed, the Trustee worked to improve LEP's cash flow and  
21 profits and actively pursued potential purchasers for LEP's  
22 assets.

23 In the meantime, in Block's bankruptcy, Kornhauser  
24 challenged Block's claim of exemption in his LEP stock.  
25 Kornhauser also filed adversary proceedings in Block's and LEP's  
26 bankruptcy cases seeking to pierce the corporate veil and to  
27 require turnover of LEP's and SNF's assets to Block's chapter 7  
28 estate. The bankruptcy court stayed those adversary proceedings

1 in December 2016.

2 On February 7, 2017, the Trustee filed a motion to sell free  
3 and clear under § 363 substantially all of LEP's assets,  
4 consisting of personal property, inventory, records, intangible  
5 property, and goodwill (the "Sale Motion"). The assets were to  
6 be sold to Sierra Nevada Bioscience, LLC ("SNB") for \$500,000,  
7 subject to overbid. In the Sale Motion, the Trustee noted that  
8 Kornhauser had asserted an interest in the assets based on his  
9 claims in the stayed adversary proceedings. The Trustee stated  
10 that he did not believe Kornhauser had a security interest in the  
11 assets such that § 363(f) would apply, but he argued out of an  
12 abundance of caution that if it did, the sale could proceed free  
13 and clear of Kornhauser's claims under either § 363(f)(4) (bona  
14 fide dispute over validity of interest) or § 363(f)(5) (entity  
15 can be compelled in a legal or equitable proceeding to accept a  
16 money satisfaction of his interest).

17 Kornhauser filed an opposition and a request for a  
18 continuance of the hearing on the Sale Motion, complaining that  
19 he had not had time to investigate the sale and the proposed  
20 buyer (despite the Sale Motion having been timely served). He  
21 argued that the assets were worth significantly more than the  
22 proposed sale price and expressed concern that the sale might be  
23 a "sham," i.e., that the proposed buyer had some connection with  
24 Block that would result in Block continuing to control the  
25 assets. Kornhauser also argued that his veil-piercing litigation  
26 in Block's bankruptcy case needed to be resolved before any sale  
27 of LEP's assets.

28 At the March 7, 2017 hearing on the Sale Motion, no party

1 appeared with an overbid. Kornhauser was the only party who had  
2 filed an objection to the sale. At the hearing, he articulated  
3 his objections and requested a continuance, which the bankruptcy  
4 court denied. The bankruptcy court, however, permitted witness  
5 testimony regarding the bona fides of the sale and the method by  
6 which the Trustee had arrived at the purchase price.

7 After hearing testimony and argument, the bankruptcy court  
8 approved the sale and waived the 14-day stay under Rule 6004(h),  
9 entering its written order on March 15, 2017. The court found,  
10 among other things, that (i) Kornhauser was not a secured  
11 creditor entitled to the provisions of § 363(f); (ii) Kornhauser  
12 did not hold a secured claim against LEP; alternatively,  
13 Kornhauser did not properly perfect any security interest in LEP  
14 because the financing statement did not identify the stock or any  
15 property of LEP; (iii) the buyer purchased the property in good  
16 faith under § 363(m); (iv) the buyer was not a successor in  
17 interest under Nevada law; and (v) LEP's lease with SNF was  
18 rejected upon closing of the sale.

19 The asset sale closed March 20, 2017.<sup>2</sup> That same day,  
20 Kornhauser filed a timely notice of appeal. The bankruptcy court  
21 denied Kornhauser's request for a stay pending appeal, as did a  
22  
23  
24

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25 <sup>2</sup>The Trustee requested that we take judicial notice of three  
26 exhibits attached to the Trustee's Report of Sale, alleging that  
27 Kornhauser failed to include those exhibits in his excerpts of  
28 record. But those exhibits are already included in the record.  
We therefore deny the Trustee's request for judicial notice as  
moot.

1 BAP motions panel.<sup>3</sup>

2 **JURISDICTION**

3 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
4 §§ 1334 and 157(b) (2) (N). Subject to the mootness analysis set  
5 forth below, we have jurisdiction under 28 U.S.C. § 158.

6 **ISSUE**

7 Whether this appeal is moot.

8 **STANDARD OF REVIEW**

9 We review our own jurisdiction, including questions of  
10 mootness, de novo. Ellis v. Yu (In re Ellis), 523 B.R. 673, 677  
11 (9th Cir. BAP 2014) (citing Silver Sage Partners, Ltd. v. City of  
12 Desert Hot Springs (In re City of Desert Hot Springs), 339 F.3d  
13 782, 787 (9th Cir. 2003)).

14 **DISCUSSION**

15 The asset sale closed on March 20, 2017, and both of  
16 Kornhauser's requests for a stay pending appeal were denied.  
17 Section 363(m) provides:

18 The reversal or modification on appeal of an  
19 authorization under subsection (b) or (c) of this

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20  
21 <sup>3</sup>Kornhauser filed a Request for Judicial Notice attaching  
22 copies of three documents entered on the bankruptcy court docket  
23 after this appeal was filed: (i) Third Application for Order  
24 Approving Compensation and Reimbursement of Expenses for Kaempfer  
25 Crowell, Attorney for Trustee - filed April 19, 2017; (ii) Samuel  
26 Kornhauser's Opposition to the Third Application - filed May 3,  
27 2017; and (iii) the Declaration of Ernie Vicentina, CFO of GVC  
28 Financial Services, LLC, an investment banking firm, opining that  
LEP's business was potentially worth \$2 million - filed May 5,  
2017. Generally, we do not consider facts outside the record  
that was before the bankruptcy court when it made its ruling.  
See United States ex rel. Robinson Rancheria Citizens Council v.  
Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992). Appellant's  
Request for Judicial Notice is therefore DENIED.

1 section of a sale or lease of property does not affect  
2 the validity of a sale or lease under such  
3 authorization to an entity that purchased or leased  
4 such property in good faith, whether or not such entity  
5 knew of the pendency of the appeal, unless such  
6 authorization and such sale or lease were stayed  
7 pending appeal.

8 Under this provision, a sale of property under § 363 cannot be  
9 challenged on appeal unless the court's authorization and the  
10 sale were stayed pending appeal. Adeli v. Barclay  
11 (In re Berkeley Del. Ct. LLC), 834 F.3d 1036, 1039 (9th Cir.  
12 2016). "The requirement to seek a stay pending appeal only  
13 applies to purchases of estate property that were made in good  
14 faith, and is designed to protect the interests of good faith  
15 purchasers by guaranteeing the finality of property sales." Id.  
16 (citing Onouli-Kona Land Co. v. Richards (In re Onouli-Kona Land  
17 Co.), 846 F.2d 1170, 1172 (9th Cir. 1988)). Here, the bankruptcy  
18 court explicitly found that the buyer purchased the assets in  
19 good faith. The evidence in the record supports that finding,  
20 and Kornhauser does not challenge it.

21 Nevertheless, Kornhauser argues that this appeal is not  
22 moot. He asserts that § 363(m) is inapplicable because that  
23 provision does not apply to sales under § 363(f). But § 363(f)  
24 did not apply to Kornhauser; that subsection applies only to an  
25 entity that has an interest in the property to be sold:

26 The trustee may sell property under subsection (b) or  
27 (c) of this section **free and clear of any interest in**  
28 **such property of an entity other than the estate**, only  
if-

(1) applicable nonbankruptcy law permits sale of such  
property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such

1 property is to be sold is greater than the aggregate  
2 value of all liens on such property;

3 (4) such interest is in bona fide dispute; or

4 (5) such entity could be compelled, in a legal or  
5 equitable proceeding, to accept a money satisfaction of  
6 such interest.

7 § 363(f) (emphasis added).

8 The bankruptcy court found:

9 Mr. Kornhauser is not a secured creditor entitled to  
10 the provisions of 11 U.S.C. § 363(f). . . .  
11 Mr. Kornhauser does not hold a secured claim against  
12 this Debtor based on Mr. Block's pledge of stock in  
13 this Debtor to secure a note from Mr. Block to  
14 Mr. Kornhauser. . . . Mr. Kornhauser did not properly  
15 perfect any security interest in Debtor with the filing  
16 of the financing statement, as the financing statement  
17 does not identify the stock or any property of Debtor.

18 Because Kornhauser had no interest in the assets, § 363(f)  
19 had no bearing on him.

20 On appeal, Kornhauser contends that he is a secured creditor  
21 because Block's \$450,000 promissory note is secured by LEP's  
22 assets and stock and by SNF's assets. He also references his  
23 \$2.5 million judgment against LEP. We see no error, however, in  
24 the bankruptcy court's finding that Kornhauser had no security  
25 interest (or other interest) in the assets.

26 Under § 363(p) (2), Kornhauser had the burden of proof on the  
27 issue of the validity, priority, or extent of any interest in the  
28 assets. See Chequers Inv. Assocs. v. Hotel Sierra Vista Ltd.  
P'ship (In re Hotel Sierra Vista Ltd. P'ship), 112 F.3d 429, 434  
(9th Cir. 1997) (party asserting an interest in post-petition  
revenues must prove (i) that it holds a perfected security  
interest and (ii) the amount of money to which its liens attach).  
Kornhauser failed to meet that burden. The pledge agreement

1 attached to Kornhauser's proof of claim pledged LEP stock owned  
2 by Block. The UCC financing statement referenced as collateral  
3 "\$450,000 secured promissory note and pledge agreement that has  
4 increased to \$700,000." It did not reference any LEP assets.  
5 The judgment, standing alone, did not create a lien on LEP's  
6 personal property assets, and there is nothing in the record to  
7 suggest that Kornhauser took any steps to create such a lien.<sup>4</sup>

8 In support of his assertion that the appeal is not moot,  
9 Kornhauser cites the Panel's opinion in Clear Channel Outdoor,  
10 Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25 (9th Cir. BAP 2008).  
11 In that case, the BAP held that the lien-stripping portion of an  
12 order approving an asset sale free and clear of a nonconsenting  
13 junior lienholder's interest under § 363(f)(5), which had not  
14 been stayed pending appeal, was neither equitably nor statutorily  
15 moot. The Panel reasoned that the lien-stripping portion was not  
16 equitably moot because the Panel could reverse the transfer of  
17 Clear Channel's lien to the sale proceeds and hold that it  
18 remains attached to the property sold without prejudicing anyone  
19 not a party to the appeal. The Panel further found no statutory  
20 mootness because § 363(m) is inapplicable to lien-stripping

21 \_\_\_\_\_  
22 <sup>4</sup>In Kornhauser's reply brief, he seems to assert that he has  
23 a recorded judgment lien against LEP's assets. But his citation  
24 to the record refers to the judgment entered in Marin County  
25 (California) Superior Court. There is no evidence in the record  
26 that the judgment was recorded with any county recorder, which is  
27 required to create a lien on real or personal property. See Nev.  
28 Rev. Stat. § 353C.170 (recordation of judgment creates a lien  
upon all real and personal property situated in the county that  
is owned by the judgment debtor), and Nev. Rev. Stat. § 17.350 (a  
foreign judgment may be filed with the clerk of a Nevada district  
court and thereafter enforced in Nevada the same as a Nevada  
judgment).

1 authorizations under § 363(f). Id. at 35-36. Kornhauser argues  
2 that even if we find the sale authorization to be moot, we should  
3 apply Clear Channel in finding the lien-stripping aspect of the  
4 sale not moot. But Clear Channel is distinguishable: in that  
5 case, it was undisputed that the appellant had a lien in the  
6 property to be sold. Here, as discussed above, Kornhauser did  
7 not prove that he had any interest in LEP's assets.

8 **CONCLUSION**

9 For the reasons explained above, this appeal is statutorily  
10 moot. Accordingly, we DISMISS.