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APPENDIX A

United States Court of Appeals
for the Fifth Circuit

No. 21-11244

United States Court of Appeals
Fifth Circuit
FILED
April 17, 2023
Lyle W. Cayce
Clerk

In the Matter of: RE Palm Springs II, L.L.C.
Debtor,

SR Construction, Incorporated,
Appellant,

versus

Hall Palm Springs, L.L.C.; RE Palm Springs II, L.L.C.,
Appellees,

In the Matter of: RE Palm Springs II, L.L.C.
Debtor,

SR Construction, Incorporated,
Appellant,

versus

RE Palm Springs, L.L.C.; Hall Palm Springs, L.L.C.,
Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC Nos. 3:20-CV-3486, 3:20-CV-3487

Before Higginbotham, Southwick, and Higginson, *Circuit Judges*.

Patrick E. Higginbotham, *Circuit Judge*:

Federal bankruptcy provisions date to the Founding, embedded into our Constitution as a core tenet of the country's economic vitality.[1] And with good reason: "[d]ebt was an inescapable fact of life in early America . . . [that] cut across regional, class, and occupational lines,"[2] and debtor's prisons were antithetical to the new democratic ideal. So, in parallel with the industrialization and modernization of our markets, the Bankruptcy Code matured, its execution shifting to an independent court staffed by an array of

[1] *See* U.S. Const. Art. I, § 8, cl. 4 (endowing Congress with the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States").

[2] BRUCE MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 3 (2002).

able judges selected by merit and expert in the field,[3] giving bankruptcy courts with their new status a crucial role in freeing the entrepreneurial energy indispensable to our nation's economy. It is on this stage that the current action arrives, an effort to salvage the building of a hotel in the face of market demands shrunk by the covid virus and other difficulties.

I.

SR Construction held a lien on real property owned by RE Palm Springs II.[4] The property owner is a corporate affiliate of Hall Palm Springs LLC, who had financed the original undertaking for a separate real estate developer. The latter requested leave of the bankruptcy court to submit a credit bid to purchase the property from its affiliate, which the bankruptcy court granted. The bankruptcy court later approved the sale and discharged all liens. The construction company appealed the bankruptcy court's credit-bid and sale orders. Finding that the lender was a good faith purchaser, the district court affirmed the bankruptcy court and dismissed the appeal as moot under Bankruptcy Code § 363(m). Now, "[a]cting as a

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[3] *See generally* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

[4] RE Palm Springs II was initially named Hall Palm Springs II LLC.

second review court,"[5] we AFFIRM.

II.

A.

In November 2016, Palm Springs, LLC, a commercial real estate developer and the original owner of real property in Palm Springs, California, contracted with SR Construction to develop its Property and build a hotel, but it did not go well. Approximately a year later, the developer financed the construction with Hall Palm Springs LLC,[6] securing its loan with a deed of trust. At the same time, it entered into a separate Subordination Agreement with the construction company, giving the lender priority of repayment over the construction company.

The developer terminated the construction company on October 22, 2019, owing it $14,151,000 for the work completed. Nine days later, the developer and owner defaulted on loan obligations owed to the lender, and the lender gave notice that it was accelerating the debt. The construction company then filed its mechanic's lien on the Property on November 25, 2019.

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[5] *Matter of Lopez*, 897 F.3d 663, 668 (5th Cir. 2018) (quoting *Official Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.)*, 801 F.3d 530, 538 (5th Cir. 2015)).

[6] Note that the developer (Palm Springs, LLC) and the lender (Hall Palm Springs, LLC) are unrelated, and the record does not reveal any overlap in ownership.

B.

In January 2020, the construction company filed suit in California state court against myriad parties, including both the developer and the lender, seeking to foreclose on its mechanic's lien as superior to other liens and the lender's deed of trust.

On February 12, 2020, the lender's president formed an affiliated corporate entity (the "affiliate") and became its sole manager and organizer. Following the lender's acceleration of the debt, the developer conveyed the Property to the affiliate pursuant to a conveyance agreement "as an alternative to foreclosure." By its terms, the developer would be "released from [its] obligations with respect to the [l]oan and [the developer] shall be entitled to a net profits interest in the Property" in the amount of 50 percent. The affiliate intended to finish construction and develop the hotel, but more trouble came; "with the impact of the novel coronavirus COVID-19 on the hospitality industry, coupled with the filing of numerous lawsuits . . . [the lender] concluded that the sale of the Hotel to a strategic buyer would yield the maximum value for all parties."

Within the ensuing six months, the lender and its affiliate undertook several discrete actions to prepare for bankruptcy. In June 2020, the affiliate changed its name, and around the same time, the lender retained r^2 Advisors ("r^2"), a third-party with relevant experience, to oversee the affiliate's restructuring. To ensure arm's-length objectivity, as

represented to the bankruptcy court, the lender "caused . . . to convey ownership of [the affiliate] to r^2" such that "the entire sales process [wa]s under the control and supervision of r^2."

Then, on July 22, 2020, the affiliate filed for bankruptcy in the Northern District of Texas and filed motions for leave to hire a pre-selected real estate agent, to authorize the affiliate to borrow funds from the lender (its corporate affiliate), and to approve specific bankruptcy sales and bidding procedures.

C.

The bankruptcy court held multiple hearings and on August 24, 2020 approved the retention of r^2 as the restructuring organization and the bidding and sales procedures, complimenting the Parties for presenting "a game plan that could . . . get creditors paid in full quite soon," observing it "not an unusual game plan" in high stakes financing. The bankruptcy court then approved a proposed real estate broker, finding the firm "well qualified" and lacking any conflicts or impairments. And, finally, it approved the debtor-in-possession loan from the lender as "the only game in town" with substantively "reasonable" conditions in light of the circumstances. This left the lender, as the debtor-in-possession, with the power to veto any sale. The bankruptcy judge followed with related orders formally approving the needed processes and personnel.

One of the orders approved an auction and

bidding process requiring a "stalking horse,"[7] McWhinney Real Estate Services, Inc., to submit its bid on August 28, 2020, alongside a nonrefundable $2.5 million deposit. Other bidders in the auction were required to submit bids and deposits by October 5, 2020, the sale hearing to be held eleven days later.

The marketing and sale of the Property garnered substantial interest. The real estate brokerage engaged in an aggressive marketing campaign, hosting site visits from "8 potential buyer groups" and executing approximately 268 confidentiality agreements from potential buyers seeking to perform due diligence. Several bids were proposed, though none conformed to the specified format, timing, or financial arrangements approved by the bankruptcy court. The stalking horse also submitted a proposal for $35,450,000, though it ultimately declined to make the deposit by the deadline and backed out entirely.

Prior to the auction deadline but after the stalking horse had dropped out, with no outstanding

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[7] "A stalking horse refers to an entity that is willing to place a bid on a debtor's asset in order to either set a baseline bid from which the true value of the estate can be assessed or serve as a catalyst to inspire other bidders." *In re Energy Future Holdings Corp.*, 990 F.3d 728, 744 (3d Cir. 2021) (citations omitted); *see also Matter of Walker Cnty. Hosp. Corp.*, 3 F.4th 229, 232 n.2 (5th Cir. 2021) ("'An initial bidder' in a bankruptcy proceeding may serve as a so-called 'stalking horse,' whose initial research, due diligence, and bid may encourage later bidders." (alteration and quotation marks omitted)).

bids, the lender sought leave to submit a credit bid for the Property pursuant to 11 U.S.C. § 363(k), which confers secured creditors a right to credit bid their allowed claims.[8] The construction company opposed, urging that the bid was "premature." While the construction company contested the credit bid, the auction proceeded apace, ultimately garnering only the lender's credit bid of $37,279,365.74—almost $2 million more than the floor set by the stalking horse's proposal.

The bankruptcy court held evidentiary hearings on November 3, 5, and 6, 2020 regarding the lender's ability to submit a credit bid and on the free and clear sale of the Property. In broad strokes, the construction company argued—as it does here—the sale should not proceed because: 1) the lender (and intended purchaser) was aware of adverse claims to the Property, namely the construction company's adversary proceeding as well as its action in California state court; and 2) because the lender had fraudulently manipulated the bankruptcy proceedings, including rigging the bankruptcy sale process, to acquire the Property free and clear of all liens at the lienholders' expense, including the construction company's.

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[8] *See* 11 U.S.C. § 363(k) ("At a sale . . . of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.").

At the culmination of the final hearing, the bankruptcy court approved the sale. Shortly before the hearing concluded, the construction company moved for a stay pending appeal, which the bankruptcy court denied. Three days later, the bankruptcy court issued its formal order granting the lender's Motion to submit a bid, and on November 18, 2020, a formal order approving the sale free and clear of all liens, claims, encumbrances, and interests and, in so doing, denying the construction company's motion to stay the sale. These orders gave rise to this appeal.

Parallel to its objection, the construction company sought to bar the developer from conveying the Property to the affiliate or another non-party entity. It filed an adversary proceeding in the bankruptcy court against the lender, the affiliate, and the developer. The construction company also brought a separate action in California seeking a determination that its lien on the Property is senior to the lender's deed of trust.

D.

The construction company timely filed notices of appeal of the bankruptcy court's orders to the district court, which consolidated the appeals, affirmed the bankruptcy court's finding that the lender was a good-faith purchaser, and dismissed the appeal as moot. The construction company timely appealed.

III.

A purchaser bears the burden of establishing good faith under 11 U.S.C. § 363(m)[9] and a district court's dismissal of an appeal from bankruptcy court as moot is reviewed *de novo*.[10] The standard of review for a good-faith determination by the bankruptcy court that renders the appeal moot "is a matter of some confusion in our circuit."[11] No published opinion in this Court has weighed in conclusively on the choice between *de novo* or clear error review, and one unpublished opinion filed years ago reviewed such a finding for clear error but with no analysis of the standard.[12] More recently, this Court declined to reach the question because a determination of good faith failed "under either standard of review."[13] We take this path again. As the lender prevails under *de novo* review, we need not and hence do not address the less rigorous clear error standard.

IV.

The Bankruptcy Code makes clear that "[t]he

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[9] *In re TMT Procurement Corp.*, 764 F.3d 512, 520 (5th Cir. 2014).

[10] *See In re Ginther Trusts*, 238 F.3d 686, 688 (5th Cir. 2001) (per curiam).

[11] *In re TMT*, 764 F.3d at 521.

[12] *See In re Beach Dev., LP*, No. 07-20350, 2008 WL 2325647, at *1–3 (5th Cir. June 6, 2008) (unpublished) (per curiam) (referencing repeatedly the fact that the parties failed to show clear error absent analysis as to the correct standard of review).

[13] *In re TMT*, 764 F.3d at 521.

reversal or modification on appeal of an authorization . . . of a sale . . . of property does not affect the validity of a sale . . . under such authorization to an entity that purchased . . . such property in good faith . . . unless such authorization and such sale . . . were stayed pending appeal."[14] "The Bankruptcy Code does not explicitly define 'good faith,'" but this Court has "defined the term in two ways": (1) a notice-based definition, wherein a "good faith purchaser" is "'one who purchases the assets for value, in good faith, and without notice of adverse claims'"; and (2) a conduct-based definition, meaning one who does not engage in "'misconduct'" including, *inter alia*, "'fraud, collusion between the purchaser and other bidders, or an attempt to take grossly unfair advantage of other bidders.'"[15] We review the construction company's claim under each test in turn.

A.

The construction company argues that the lender is not a good faith purchaser because there were live "adverse claims" of which the lender was aware. "The Bankruptcy Code does not provide a

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[14] 11 U.S.C. § 363(m). Here, the authorization and sale of the Property were not stayed pending appeal. Accordingly, a determination that the lender acted in good faith moots this appeal. *In re TMT*, 764 F.3d at 519.

[15] *In re TMT*, 764 F.3d at 521 (citations and footnotes omitted) (first quoting *Hardage v. Herring Nat'l Bank*, 837 F.2d 1319, 1323 (5th Cir. 1988); and then quoting *In re Bleaufontaine, Inc.*, 634 F.2d 1383, 1388 n.7 (5th Cir. 1981)).

definition of '*adverse* claim.'"[16] It only defines a "*claim*": (1) the "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured;" or (2) the "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured."[17] We have described this definition of "claim" as "broad[]."[18]

The Parties dispute the breadth of this definition when "claim" is read in conjunction with the word "adverse," as this Court has not yet precisely defined "adverse claims." In *In re TMT*, we stated only that "knowledge that there are objections to the transaction is not enough to constitute bad faith."[19] In other words, an adverse claim "requires *more*" than simply "some creditor . . . objecting to the transaction and . . . trying to get the district court or the court of

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[16] *Id.* at 522 (emphasis added).

[17] 11 U.S.C. § 101(5).

[18] *In re TMT*, 764 F.3d at 522.

[19] *Id.* (quoting *In re EDC Holding Co.*, 676 F.2d 945, 947 (7th Cir. 1982)).

appeals to reverse the bankruptcy judge."[20]

Citing *Black's Law Dictionary*, the construction company contends both that "a claim can be adverse even if it does not arise from a color or claim of title," and that its adversary proceedings in the bankruptcy court, which would "avoid the transfer of the [P]roperty to [the affiliate]" and "thus remov[e] the [P]roperty from the bankruptcy estate," are adverse. The construction company also points to its "pre-petition California state-court suit asserting that [its] liens are senior in priority to the lender's deed of trust and seeking to foreclose on the [P]roperty" as an adverse claim satisfying this threshold. Finally, the construction company contends that the bankruptcy and district courts improperly considered the *merits* of its adversary proceedings and California suit to influence their findings rather than the lender's *knowledge* of such actions. By contrast, the lender, citing *Ballentine's Law Dictionary*, argues that the term "adverse claim" "connotes an 'element of hostility under a color or claim of title'" such that neither the objection nor the state court action nor the federal bankruptcy adversary proceeding rise to an "adverse claim" required to nullify the sale.

In *In re TMT*, this Court invalidated a bankruptcy sale because "[t]he [debtor-in-possession] Lender had knowledge that a third-party, entirely unrelated to the bankruptcy proceeding, had an

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[20] *Id.* (emphasis added) (quoting *In re EDC Holding Co.*, 676 F.2d at 947).

adverse claim *to* the [property]" in the form of an ownership interest.[21] Given such a claim, this Court concluded that the lender "d[id] not qualify as a good faith purchaser,"[22] citing to the Seventh Circuit case *Rock Industries*, which connects a "good faith purchaser" to ownership because the "purchaser [wa]s seeking to extinguish adverse claims *to* title."[23] *Darby v. Zimmerman (In re Popp)*,[24] a Ninth Circuit Bankruptcy Appeals Panel took the same course, reversing a sale order approved by the bankruptcy court because "[t]he parties dispute[d] title *to* the [p]roperty" sold.[25] Finally, the Supreme Court explains that "adverse claims" with regard to good faith purchasers implies ownership must be disputed, stating that the knowledge required to vitiate such a label is of "defect in [title], or adverse claim *to* it."[26] These cases make clear that, under the notice-

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[21] *Id.*

[22] *Id.*

[23] *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978).

[24] 323 B.R. 260 (B.A.P. 9th Cir. 2005).

[25] *Id.* at 262.

[26] *Boone v. Chiles*, 35 U.S. 177, 210 (1836) (emphasis added) ("Strong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser, who has put himself in peril by purchasing a title, and paying a valuable consideration, without notice of any defect in it, or adverse claim to it."). Truly, a longstanding precedent.

definition of a good faith purchaser, the threshold for an "adverse claim" is a dispute in ownership interest. The district court here held that the construction company "has not asserted an ownership interest," "only a mechanic's lien," the claims filed by the construction company do not rise to the level of an "adverse claim" so as to vitiate the lender's status as a "good faith purchaser."

The construction company cites language from *Rock Industries* that notice of adverse claims "*usually* becomes an issue when an alleged good faith purchaser is seeking to extinguish adverse claims *to* title of which he had no actual or constructive notice at the time of sale."[27] It argues this language implied that the concern "could also arise in other circumstances" beyond concerns as to defects in title, such as the one here. But it is equally plausible that the Seventh Circuit's inclusion of the qualifier "usually" speaks to the frequency of title claims or notice thereof, not to the elements of an adverse claim. Adopting the construction company's reasoning *arguendo*, *Rock Industries* did not articulate such a scenario,[28] that is even if this lone 44-year-old out-of-circuit precedent

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[27] *In re Rock Indus.*, 572 F.2d at 1198 (emphases added).

[28] *See id.*

were binding,[29] the inclusion of "usually" is dicta.[30] A greater concern forecloses lowering the standard to claims below questions of ownership interests: doing so, as the lender points out, would open the proverbial floodgates and "countless sales under [S]ection 363 of the Bankruptcy Code would be invalid," which, this Court has held, stands antithetical to "Congress's strong preference for finality and efficiency in the bankruptcy context."[31]

The construction company also points to two separate actions as adverse claims. First, the construction company relies on its state court action filed prior to the bankruptcy petition, which asserts that the construction company's lien is superior to the lender's deed of trust and that the construction company has the right to foreclose on the Property to

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[29] *See, e.g.*, *United States v. Penaloza-Carlon*, 842 F.3d 863, 864 & n.1 (5th Cir. 2016) (holding that other circuits' decisions are persuasive only).

[30] *See United States v. Wallace*, 964 F.3d 386, 389 (5th Cir.) (stating that where "discussion" is "established . . . as dicta, [it is] therefore not binding"), *cert. denied*, 141 S. Ct. 910 (2020); *United States v. Stracener*, 959 F.2d 31, 32 (5th Cir. 1992) ("As pure dicta, the Court's parenthetical comment does not have binding force."); *Carpenter Paper Co. v. Calcasieu Paper Co.*, 164 F.2d 653, 655 (5th Cir. 1947) ("These statements, however, as the opinion itself shows, were dicta not necessary to the decision of the case and not intended to have the force of a binding adjudication.").

[31] *In re Energytec, Inc.*, 739 F.3d 215, 218–19 (5th Cir. 2013) (quoting *Hazelbaker v. Hope Gas, Inc. (In re Rare Earth Minerals)*, 445 F.3d 359, 363 (4th Cir. 2006)).

enforce its security interest. But a lien does not confer ownership rights, and the construction company does not suggest otherwise. The transfer of the Property by the developer to the affiliate, subject to the encumbrances against the Property—including the construction company's—does not implicate ownership rights or give rise to a distinct ownership dispute, meaning that it does not constitute an "adverse claim."

Second, the construction company asserts that the adversary proceedings in the bankruptcy court brought under California law constitute "adverse claims," even under the ownership interest standard. They do not. Several of the provisions to which the construction company points this Court, California Civil Code §§ 3439.04–05, make transfers voidable as to the specific creditor involved in that transaction, not to all creditors.[32] Thus, under these provisions, that a third party—here, the construction company—believes the conveyance between two other parties is fraudulent does not confer to that third party the right to void the transfer.

California Civil Code § 3439.07 is the lone salient provision pointed to by the construction company. It provides for the "[a]voidance of the transfer or obligation," among other forms of equitable

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[32] The only other provision to which construction company points the court, California Civil Code § 3439.02, is inapposite, as it simply defines insolvency without creating a private right of action. *See* Cal. Civ. Code § 3439.02.

relief.[33] But as the district court correctly observed, the lender "was the senior lien holder" given the subordination agreements lienholders signed—including the construction company. This contractual agreement neuters the construction company's claim to equitable relief under this provision. It follows that the adversary proceedings in the bankruptcy court do not constitute adverse claims.

In sum, neither a mechanic's lien nor an adversary proceeding to find that a transfer may be voidable (not that it is void) constitute an "adverse claim" affecting a purchaser's good faith status in bankruptcy proceedings. We hold that the lender does not fail this Court's notice-of-adverse-claims test and retains its status as a "good faith purchaser."

B.

The construction company also argues that the lender is not entitled to "good faith purchaser" status because it engaged in misconduct and fraud. We disagree. This Court has previously stated that "misconduct" including "fraud, collusion between the purchaser and other bidders, or an attempt to take grossly unfair advantage of other bidders" could

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[33] Cal. Civ. Code § 3439.07(a)(1). Notably, the construction company only raises this provision in its reply brief, but "[a]n appellant abandons all issues not raised and argued in its initial brief on appeal." *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994) (emphasis omitted) (collecting cases). Nevertheless, we address this argument on its merits.

"destroy a purchaser's good faith status."[34] The construction company argues the lender did just that, claiming that the lender, both "in preparation for and during the sale itself" engaged in conduct "specifically intended to affect the sale price or control the outcome of the sale."[35] The construction company cites multiple data points: (1) the lender's control over "both the deed of trust and the [P]roperty encumbered by the deed of trust"; (2) the affiliate's name change; (3) the arrangement between the lender and r^2; (4) the lender's engagement of an allegedly inadequate the real estate broker; (5) the lender's involvement in securing the stalking-horse bidder (who ultimately failed to make a bid); and, most importantly, (6) the bidding procedures themselves. The lender, on the other hand, argues that the construction company's data points are nothing more than "a false narrative, based upon contortions of the facts and misinterpretations thereof."

A deeper review betrays the construction company's argument. It first cites the lender's control over "both the deed of trust and the [P]roperty encumbered by the deed of trust." That the lender came to obtain both interests, however, is not nefarious *per se*. To the contrary, as the district court found, the lender obtained the deed to secure the loan and obtained the Property when the developer "defaulted on its loan with [the lender]," prompting the

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[34] *In re Bleaufontaine*, 634 F.2d at 1388 n.7.

[35] *In re Gucci*, 126 F.3d 380, 390 (2d Cir. 1997).

lender to exercise its contractual right, accelerate the loan, and strike an agreement to obtain the Property via its affiliated entity in lieu of foreclosure. The construction company argues that the lender "convinced" the developer to do so "for no stated consideration." The record shows otherwise. Here, the consideration given by the lender consisted of accepting the property *subject to the existing debts* as well as the promise to pay out 50 percent of future profits to the developer. This line of inquiry fails to show misconduct. It rather reflects a market actor responding to market forces and exercising its contractual rights.

The construction company also references the affiliate's name change from Hall Palm Springs II to RE Palm Springs II, asserting that this was "an attempt to minimize the appearance of control." That the bankruptcy court, the district court, and now this Court have the details of the transactions belies the idea that changing a name concealed any wrongdoing.[36]

The construction company next points to the fact that the lender was actually financing any payments to r^2, and r^2 also occasionally spoke with the

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[36] *See, e.g.*, *E.E.O.C. v. Boeing Servs. Int'l*, 968 F.2d 549, 556 n.7 (5th Cir. 1992) ("We pause briefly to note that if the issue was before us, we would not hold that a cat was a dog simply because a defendant called the cat a dog." (citing William Shakespeare, *Romeo and Juliet*, act II, sc. ii ("What's in a name? That which we call a rose By any other name would smell as sweet."))).

lender. Neither fact demonstrates misconduct. The content of these few conversations, to the extent described in testimony, does not suggest malfeasance or misconduct. And regarding the financing, the construction company identifies no other means by which to pay for an objective third-party like r^2 to oversee the bankruptcy. In other words, as the district court concluded, "[a]lthough [the lender] maintained a form of control over r^2 as the DIP Lender, [the construction company] does not point to any facts or evidence showing that [the lender] *exerted this control* to commit a fraud upon the bankruptcy court."[37]

The construction company raises the lender's role in choosing the real estate broker as another datapoint. Even if the lender's authority to choose the broker was problematic in the abstract, the choice itself fails to evince bad faith, as the firm retained was "known [as a] national expert in the hospitality space" and staffed with "experts in California hotel sales." And even though the brokerage's managing director was not himself licensed in California, he was a licensed broker elsewhere whose practice was "100 percent dedicated to the hotel space" and who had nearly a decade and a half of experience in the field. There was no error in declining to read bad faith into the lender's choice.

The construction company points to the lender's selection of the stalking horse bidder as giving rise to an inference of bad faith because "the stalking-horse

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[37] Emphasis added.

bidder contract did not even contain a bid price." The construction company's recitation of the record omits vital details regarding the stalking horse, and specifically the consideration at issue. The stalking horse agreement reads:

> The consideration for the purchase of the Property shall be a purchase price to be mutually agreed upon between Purchaser and Seller prior to the expiration of the Due Diligence Period in an aggregate amount that is not less than an amount that is acceptable to [the lender] . . . with a specific Purchase Price dollar amount no later than two (2) Business Days after the expiration of the Due Diligence Period.

The stalking horse submitted a proposal for $35,450,000 at the August 24, 2020 hearing approving the sale motion, days before the deadline and above the amounts proposed in letters of intent by other potential bidders. While the stalking horse did not follow through on its proposed bid, failing to make the required deposit and then pulling out altogether, the credit bid was substantially higher than the proposed stalking horse bid—almost $2 million more, or 5% higher—undermining the construction company's questions of the stalking horse's failure to pony up, a question that would have purchase had the stalking horse's failure to bid resulted in a substantially *lower* final purchase amount. And as for allegations of collusive conduct, the broker testified that he never

spoke with the lender regarding the credit bid. Thus, the construction company fails to marshal any evidence showing collusive activity between the lender and the stalking horse calculated to scare off other bidders.

Finally, the construction company points to several of the bid procedures as setting the auction up for failure. The construction company asserts, for example, that the bid process was too short, inhibiting investors' ability to inspect the Property and conduct the requisite due diligence prior to the bid deadline. Yet the marketing campaign produced extensive interest, notwithstanding its purported brevity: 268 individuals executed confidentiality agreements for due diligence and seven different investor groups took a tour of the facility—four toured it multiple times, and one toured it five times. The process also produced multiple letters of intent for concededly noncompliant bids (*i.e.*, bids that did not conform to the timing and pricing requirements), though they were below the stalking horse's bid. Moreover, the district court correctly notes that when no conforming bids were made in the initial bidding timeline, the timeline was extended further and "came with incentives," namely "no Overbid Protections . . . and no break-up fee," exhibiting additional good faith efforts to solicit external investment. These facts all support the findings of the bankruptcy and district courts that the lender and the affiliate worked in good faith to

effectuate a sale to a third party.[38]

In another bidding procedure-related contention, the construction company argues that because "the bid procedures gave [the lender] an absolute veto right over any bid submitted by any party," the lender set the procedures up to fail. But the bankruptcy court made clear that such an arrangement "is not uncommon" and is instead "just sort of the nature of the beast" in bankruptcy, cutting against an inference of bad faith. Moreover, there is no evidence in the record that bidders were in any way impaired or chilled by such a dynamic, further undermining any inference the construction company would ask this Court to make.

Indeed, despite the construction company's protests, the facts substantiate rather than undermine the lender's status as a "good faith purchaser." That the lender disclosed each of the salient facts to the bankruptcy court strongly favors a finding of good faith, as courts properly look to the transparency of the process as indicative of one's intent.[39] The disclosures,

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[38] So, too, does this undermine the construction company's argument that bad faith can be inferred because the bidding procedures did not require any party to market the facility. A lack of a duty to market bears not at all when compared to the actions undertaken.

[39] *See In re Xact Telesolutions, Inc.*, No. 05-CV-1230, 2006 WL 66665, at *6 (D. Md. Jan. 10, 2006) (collecting cases to demonstrate that when evaluating a party's status as a good faith purchaser, "courts have considered whether the sale involved full disclosure to the

in concert with the lender's actions to market the Property (including the lender's actions to facilitate the marketing campaign such as "offer[ing] to provide financing to prospective purchasers"), the extension of the marketing process, and the timing of the lender's credit bid—after all other prospective buyers had fallen through—satisfy the lender's burden of establishing itself as a good faith purchaser.

Nor can we look away from the circumstances framing the bid process and the decisions of the bankruptcy and district courts, namely the carrying costs associated with an unfinished property and the Covid-19 pandemic. Testimony shows that the monthly carrying costs were approximately $70,000 and no alternative financing was identified to cover these costs once the DIP loan expired. Given the Property's incomplete state and the expiring funding, the bankruptcy court accurately described the Property as "a wasting asset." This further empties the argument that the short timetable—itself a debated proposition—gives rise to an inference of bad faith.

The Property was conveyed from the developer to the affiliate on March 13, 2020, and the Grant Deed is dated March 27, 2020, just as the COVID-19

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court," which militates strongly in favor of finding good faith); *cf. Old Cold, LLC*, 558 B.R. 500, 516 n.6 (B.A.P. 1st Cir. 2016) (holding that, in some circumstances, an insider sale is to be encouraged "so long as the insider status is disclosed at the beginning of the case, and there is no evidence of collusion" (citing *Hower v. Molding Sys. Eng'g Corp.*, 445 F.3d 935, 939 (7th Cir. 2006)), *aff'd sub nom. In re Old Cold LLC*, 879 F.3d 376 (1st Cir. 2018).

pandemic—and corresponding lockdowns—began to spread across the country.[40] The pandemic not only destabilized the current market, but also created questions about how the industry would look and operate in a post-COVID world. Put simply, the pandemic dramatically changed not only the lender's plans for the Property, but it also severely impacted the affiliate's ability to market and sell a hotel, particularly an unfinished one. In sum, these two factors must also be weighed in considering whether any of the actions or procedures, particularly with regard to pricing or timing issues, were performed in bad faith or as a result of sub-optimal external forces beyond the lender's control.

The record facts, framed by the external context and circumstances, make plain that there is no error in the judgments of the able bankruptcy and district courts. The lender did not engage in fraud and was a "good faith purchaser."

* * * *

We AFFIRM.

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[40] *See Big Tyme Invs., L.L.C. v. Edwards*, 985 F.3d 456, 460 (5th Cir. 2021) ("As all are painfully aware, in early 2020 our nation was gripped with an unprecedented public health emergency caused by COVID-19. On March 11, 2020, the World Health Organization ('WHO') declared a global pandemic in response to the spread of COVID- 19."); *see also In re Approval of the Jud. Emergency Declared in the S. Dist. of California*, 955 F.3d 1135, 1136 (9th Cir. 2020) ("The Governor of the State of California declared a Proclamation of a State of Emergency to exist in California on March 4, 2020.").

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:
RE PALM SPRINGS II, LLC,
Debtor,

SR CONSTRUCTION, INC.,
Plaintiff/Appellant,

v. CIVIL ACTION NO. 3:20-CV-3486-B

RE PALM SPRINGS II, LLC and HALL PALM SPRINGS, LLC,
Defendants/Appellees.

MEMORANDUM OPINION AND ORDER

Before the Court in this bankruptcy appeal is Appellant SR Construction, Inc. ("S.C.")'s, appeal of the Credit Bid and Sale Order from the bankruptcy court (Doc. 1). For the reasons that follow, the appeal is **AFFIRMED** in all respects. This appeal is **DISMISSED WITH PREJUDICE**.

I.

BACKGROUND

This is a bankruptcy appeal wherein the lender has become the owner of the bankruptcy estate and no other creditors are likely to receive anything of value. S.C. appeals the Credit Bid Order of the bankruptcy court in the pending Chapter 11 bankruptcy of RE Palm Springs II, LLC ("RE Palm Springs"). *See* Doc. 14, Appellant's Br., 1. Below, the Court briefly recounts the facts giving rise to the order and recounts additional facts from the record where necessary to address the parties' arguments.

In 2017, S.C. was engaged to construct a hotel in Palm Springs, California (the "Property"). Doc. 14, Appellant's Br., 5. The then-owner of the Property obtained construction financing from Hall Palm Springs, LLC ("HPS") secured by a deed of trust in the Property. *Id.* at 4, 6. S.C. was not paid for its work and was eventually terminated mid-project. *Id.* at 6. S.C. maintains that at the time it was terminated, it was owed over $14,000,000 for work it had completed. *Id.* After it was terminated, S.C. recorded a mechanic's lien on the Property and filed suit in California (the "State Court Action") seeking to foreclose on such lien. *Id.* at 6–7.

Meanwhile, the then-owner of the Property defaulted on its loan with HPS, and HPS accelerated the loan. *Id.* at 5. Soon after, the organizer of HPS formed RE Palm Springs.[1] *Id.* The original owner of

[1] According to the record, HPS formed an entity called Hall Palm Springs II, LLC, but that entity changed its name to RE Palm Springs II, LLC on May 28, 2020. *Id.*

the Property then transferred the Property to RE Palm Springs and a grant deed was recorded. *Id.* According to S.C., RE Palm Springs "gave no consideration for the [g]rant [d]eed, but took ownership subject to $50 million in liens and security interests." *Id.* RE Palm Springs then filed its voluntary Chapter 11 bankruptcy petition. *Id.*

On August 24, 2020, the bankruptcy court held a hearing to adjudicate Debtor's Sale Motion. *Id.* at 9. The Sale Motion asked the court to approve of a bid auction process with a stalking horse bidder. *Id.* At the hearing, the stalking horse bidder revealed a bid amount of $35,430,000. *Id.* The bankruptcy court approved the Debtor's Sale Motion at the hearing. Doc. 12-7, R., 10823–24. The Court codified the ruling in a written order on August 26, 2020, which, in relevant part, required the following: the stalking horse asset purchase agreement filed by August 28, 2020; an additional deposit of $2,000,000 by the stalking horse bidder by September 28, 2020; all qualifying bids submitted by October 5, 2020; final bids from qualifying bidders submitted by October 12, 2020; and a sale hearing on October 16, 2020. Order, *In re RE Palm Springs II, LLC*, No. 20-31972 (Bankr. N.D. Tex. Aug. 26, 2020), Doc. No. 108, 2–4. Ultimately, the stalking horse bidder withdrew its bid, and the auction produced no other bids. Doc. 27, Appellant's Suppl. Br., 13–14; Doc. 14, Appellant's Br., 9.

With no other bids for the Property, HPS moved the bankruptcy court to authorize a credit bid where it would buy the Property by offsetting the remaining

construction loan amount. *See* Expedited Mot., *In re RE Palm Springs II, LLC*, No. 20-31972 (Bankr. N.D. Tex. Oct. 13, 2020), Doc. No. 198. Before the bankruptcy court ruled on this motion, S.C. filed an adversary proceeding in the bankruptcy court against HPS and RE Palm Springs (the "Adversary Proceeding") seeking, among other relief, an injunction enjoining the sale of the Property pending determinations of the propriety of the initial transfer of the Property to RE Palm Springs from the prior owner and the priority of S.C.'s security interest in the Property. Doc. 3-17, Movant's Ex. Q, 4. That proceeding remains pending. Nonetheless, by an order dated November 9, 2020, the bankruptcy court accepted HPS's credit bid (the "Credit Bid Order"). Order, *In re RE Palm Springs II, LLC,* No. 20-31972 (Bankr. N.D. Tex. Nov. 9, 2020), Doc. No. 248. Then, following two days of evidentiary hearings, the bankruptcy court found, among other things, that HPS was a good-faith purchaser under 11 U.S.C. § 363(m) and approved the sale of the Property. Order at 4–7, *In re RE Palm Springs II, LLC*, No. 20-31972 (Bankr. N.D. Tex. Nov. 18, 2020), Doc. No. 262 (the "Sale Order").

S.C. sought a stay of the Sale Order from the bankruptcy court but did not receive one. *Id.* Soon after, S.C. appealed the Credit Bid Order and the Sale Order in this Court and sought a stay of the Sale Order pending resolution of its appeal. *See* Doc. 2, Mot. Stay. The Court denied the motion, *see SR Constr. Inc., v. Hall Palm Springs, LLC*, *2020* WL 7047173, at *1

(N.D. Tex. Dec. 1, 2020)[2], and the sale of the Property closed on January 26, 2021. Doc. 14, Appellant's Br., 12.

S.C. raises three issues on appeal. First, S.C. argues that "the Bankruptcy Court erred . . . in granting HPS'[s] *Expedited Motion to Authorize Credit Bid Pursuant to 11 U.S.C. § 363(k)*" because HPS did not present admissible evidence of "a valid, senior-most secured interest" on the Property. *Id.* at 1. Second, S.C. argues that the bankruptcy court erred by approving the Credit Bid Order without verifying the amount of HPS's security interest on the Property. *Id.* Third, S.C. contends that the bankruptcy court erred and violated S.C.'s due process rights by "issuing the Credit Bid Order prior to even considering the written objections and Adversary Proceeding brough by SRC." *Id.*

On April 5, 2021, HPS moved to dismiss SRC's appeal. Doc. 15, Mot. Dismiss. The Court suspended all appellate briefing deadlines pending the resolution of HPS's motion. Doc. 17, Order. On July 29, 2021, the Court denied HPS's motion to dismiss and directed the parties to brief the Court on "the issue of whether HPS was a good-faith purchaser." Doc. 26, Order, 6. Appellant S.C. filed its brief on August 27, 2021. Doc. 27, Appellant's Suppl. Br. HPS filed its appellee brief on September 24, 2021. Doc. 28, HPS's Appellee Br. The Debtor, RE Palm Springs, filed its appellee brief

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[2] On April 13, 2021, the Court consolidated cause number 3:20-cv-3487-B into the above-styled action. *See* Doc. 18, Order.

on September 27, 2021. Doc. 29, RE Palm Springs's Appellee Br. S.C. filed its reply on October 8, 2021. Doc. 30, Appellant's Reply. The appeal is fully briefed and ripe for review.

II.

LEGAL STANDARD

Final judgments, orders, and decrees of a bankruptcy court may be appealed to a federal district court. 28 U.S.C. § 158(a). Because the district court functions as an appellate court in this scenario, it applies the same standards of review that federal appellate courts use when reviewing district court decisions. *In re Webb*, 954 F.2d 1102, 1103–04 (5th Cir. 1992) (citations omitted). "[T]he Bankruptcy Code forbids appellate review of certain un-stayed orders . . . ." *In re Pacific Lumber Co.*, 584 F.3d 229, 240 (5th Cir. 2009) (citing 11 U.S.C. §§ 363(m), 364(e)). Section 363(m) moots appeals "so long as the sale was made to a good-faith purchaser and was not stayed pending appeal." *In re Pursuit Holdings (NY), LLC*, 845 F. App'x 60, 62 (3d Cir. 2021) (quoting *In re WestPoint Stevens, Inc.*, 600 F.3d 231, 247 (2d Cir. 2010)).

The Fifth Circuit has defined "good faith" two ways. *In re TMT Procurement Corp.*, 764 F.3d 512, 521 (5th Cir. 2014) (per curiam). By one definition, a "good faith purchaser" is "one who purchases the assets for value, in good faith, and without notice of adverse claims." *Hardage v. Herring Nat'l Bank*, 837 F.2d 1319, 1323 (5th Cir.1988) (quoting *In re Willemain*,

764 F.2d 1019, 1023 (4th Cir.1985)). And, "knowledge of an adverse claim requires something more" than "[h]aving knowledge that there are objections to the transaction" that a party is trying to get reversed in a district or appeals court. *In re TMT*, 764 F.3d at 522 (quoting *In re EDC Holding Co.*, 676 F.2d 945, 947 (7th Cir.1982)). For the alternative definition, "the misconduct that would destroy a purchaser's good faith status . . . involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." *In re Bleaufontaine, Inc.*, 634 F.2d 1383, 1388 n.7 (5th Cir. Unit B Jan. 1981) (quoting *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978)). "The proponent of 'good faith' bears the burden of proof." *In re TMT*, 764 F.3d at 520 (citation omitted). Whether to review a finding of "'good faith' . . . *de novo* or under clear error is a matter of some confusion in [the Fifth Circuit]." *Id.* at 520–21.

III.

ANALYSIS

"It is well established" that claims not presented to the bankruptcy court cannot be heard on appeal. *In re Ginther Trs.*, 238 F.3d 686, 688–89 (5th Cir. 2001) (per curiam) (quoting *In re Gilchrist*, 891 F.2d 559, 561 (5th Cir. 1990)). Thus, an appellant may not appeal the good faith of a purchaser without first having raised the issue in the bankruptcy court. *In re Davis*, 746 F. App'x. 392, 396 (5th Cir. 2018) (per curiam); *In re Gilchrist*, 891 F.2d at 561.

S.C. raised the issue of good faith in the Bankruptcy Court. Appellant's Am. Designation R. & Statement Issues Appeal, *In re RE Palm Springs II, LLC*, No. 20-31972 (Bankr. N.D. Tex. Nov. 18, 2020), Doc. No. 284. Therefore, the Court will consider S.C.'s arguments about HPS's status as a good faith purchaser of the Property and addresses each argument below. Furthermore, the Court's review is limited to the issue of good faith because that is the only preserved ground for review of the Credit Bid Order and Final Sale Order under 11 U.S.C. § 363(m). *See Pursuit Holdings (NY), LLC*, 845 F. App'x at 62. The Court will first address the issue of the proper standard of review and then address the issue of whether HPS was a good faith purchaser.

A. Standard of Review

Before diving into the substantive arguments of the parties, the Court must first decide whether to review the bankruptcy court orders de novo or under a clear error standard. S.C. urges the Court to review the orders de novo while HPS and RE Palm Springs urge the Court to review the orders for clear error. Doc. 27, Appellant's Br., 3; Doc. 30, Appellant's Reply, 2; Doc. 28, HPS's Appellee Br., 12; Doc. 29, RE Palm Springs's Appellee Br., 2. The Fifth Circuit has yet to decide whether a district court should apply de novo or clear error review for a finding of good faith by the bankruptcy court. *TMT Procurement*, 764 F.3d at 520–21.

The district court reviews the bankruptcy

court's findings of fact for clear error and reviews issues of law de novo. *In re Soileau*, 488 F.3d 302, 305 (5th Cir. 2007). Mixed questions of law and fact are reviewed de novo. *TMT Procurement*, 764 F.3d at 519. Several circuit courts have held that "[t]he 'good-faith purchaser' determination is a mixed question of law and fact," and thus, reviewed de novo. *In re Gucci*, 126 F.3d 380, 390 (2d Cir. 1997); *see also In re Mark Bell Furniture Warehouse, Inc.*, 992 F.2d 7, 8 (1st Cir. 1993); *In re Revco D.S., Inc.*, 901 F.2d 1359, 1366 (6th Cir. 1990); *In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 147 (3d Cir. 1986). But other circuit courts, including the Fifth Circuit, have reviewed a finding of good faith for clear error. *In re Beach Dev. LP*, 2008 WL 2325647 (5th Cir. June 6, 2008) (per curiam); *In re Cooper Commons, LLC*, 430 F.3d 1215, 1220 (9th Cir. 2005). However, the opinion in *In re Beach Development LP*, as an unpublished opinion, did not establish precedent and only serves the purpose of "res judicata, collateral estoppel or law of the case." Fed. R. App. P. 47.5.4. Therefore, the Court is not bound by the application of clear error review in *In re Beach Development LP*.

Under clear error or de novo review, the Court would reach the same determination in this case. Therefore, the Court need not decide today the appropriate level of review for a bankruptcy appeal for a question of a good faith purchaser. *See TMT Procurement*, 764 F.3d at 521 ("[U]nder either standard of review, we find that the determination of good faith does not pass muster.").

B. Good Faith Purchaser Under 363(m)

S.C. argues that HPS was a not a good faith purchaser under either Fifth Circuit definition of good faith. Doc. 27, Appellant's Suppl. Br., 23, 28. HPS, among other arguments, claims the bankruptcy court correctly concludes it was a good faith purchaser and that this appeal is, therefore, statutorily moot under § 363(m). Doc. 28, HPS's Appellee Br., 17. HPS states that S.C. relies on "baseless conjecture to construct an alternative view of the facts" while not demonstrating that any factual findings by the bankruptcy court are clearly erroneous. *Id.* at 21–23. RE Palm Springs echoes the argument made by HPS. Doc. 29, RE Palm Springs's Appellee Br., 5.

The Court will now examine whether HPS was a good faith purchaser under each definition, beginning with the good faith definition that requires "notice of adverse claims." *See Hardage*, 837 F.2d at 1323.

1. Whether HPS Knew of an Adverse Claim

S.C. contends that HPS was not a good faith purchaser under § 363(m) because HPS knew of adverse claims. Doc. 27, Appellant's Suppl. Br., 23. S.C. relies on the *TMT Procurement* and *Popp* cases for this argument. *Id.* at 23–25. S.C. asserts that the State Court Action and Adversary Proceeding before the Bankruptcy Court qualify as adverse claims. *Id.* at 26. S.C. contends that the transfer of property is voidable under CALIFORNIA CIVIL CODE §§ 3439.02,

3439.04, 3439.05. *Id.* at 26. If voided, the "Property would not be Property of the Debtor's bankruptcy case" and could not have been sold in the Bankruptcy Court. *Id.* at 27. S.C. concludes that HPS's knowledge of these adverse claims "means that HPS could not be a good faith purchaser within the meaning of Bankruptcy Code § 363(m)." *Id.* at 28.

HPS argues that the Bankruptcy Court knew of the State Court Action, the Adversary Proceeding, and the objections to HPS's claim and took these into consideration when determining HPS's good faith purchaser status. Doc. 28, HPS's Appellee Br., 24–25, 27. Further, HPS asserts that an adverse claim relates only to a dispute of actual ownership. *Id.* at 25. As for the State Court Action, HPS contends that the statutes only make a transfer of property voidable to a creditor and would not void the transfer as to everyone with an interest in the Property. *Id.* at 26. Since S.C. seeks foreclosure of its lien, this tacitly acknowledges S.C.'s lack of an ownership interest in the Property. *Id.* at 27. Lastly, HPS asserts that even if a bona fide dispute existed as to the ownership of the Property, this would not preclude HPS from being a good faith purchaser. *Id.* at 28–30.

Next, RE Palm Springs takes issue with S.C.'s reliance on *TMT Procurement* because "the Fifth Circuit examined the good faith of a lender—not a purchaser—" and knowledge of an adverse claim requires knowledge of a claim by a third-party, which S.C. is not. Doc. 29, RE Palm Springs's Appellee Br., at 8–9. RE Palm Springs then discusses four cases that

RE Palm Springs contends are more analogous to the facts of this case. *Id.* at 10–12.

In *TMT Procurement*, the appellant initiated an action in state court and alleged "breach of fiduciary duty, fraud, fraudulent inducement, negligent misrepresentation, and unjust enrichment" by the appellee, which resulted in appellee obtaining 100,000,000 shares of appellant's stock and three seats on appellant's board of directors. 764 F.3d at 515. The following year, twenty-three foreign marine shipping companies owned by the appellee filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code. *Id.* at 516. As part of the bankruptcy proceedings, the bankruptcy court ordered the appellee to place 25,000,000 shares of appellant's stock in the court's custody. *Id.* at 516–17. The bankruptcy court later approved two DIP Orders that approved $20 million in post-petition financing and gave the DIP Lender "a first priority lien and security interest in the" appellant's stock. *Id.* at 518. The appellant alleged "the DIP Lender did not act in 'good faith'" because "the DIP Lender was on notice of [the appellant's] adverse claim to the [stock]." *Id.* at 520–21. The Fifth Circuit held that "[t]he DIP Lender had knowledge that a third-party, entirely unrelated to the bankruptcy proceedings, had an adverse claim to the [stock]" and therefore, "the DIP Lender does not qualify as a good faith purchaser or lender." *Id.* at 522.

The Court finds the *TMT Procurement* case dissimilar to the present action. First, the appellant in *TMT Procurement* had an ownership interest in the

property in dispute—the stock—while S.C. has not asserted an ownership interest in the Property, only a mechanic's lien. Doc. 15-7, R., 10676; *see TMT Procurement*, 764 F.3d at 515. Second, *TMT Procurement* concerned the good faith of a lender and not a purchaser, which created a different relationship between the debtor and appellants than here. *Id.* at 518.

However, the Court finds the discussion of an adverse claim in *TMT Procurement* instructive. A claim is defined "broadly to include a right to payment or a right to equitable remedy." *Id.* at 522 (quoting 11 U.S.C. § 101(5)). Further, a "right to payment' [means] nothing more nor less than an enforceable obligation." *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991). Under this broad definition, S.C. had a claim because it had a "right to payment, whether or not . . . reduced to judgment." 11 U.S.C. § 101(5). However, S.C.'s claims fall outside the ambit of the definition of an adverse claim. An adverse claim must be something more than trying to reverse the bankruptcy court. *TMT Procurement*, 764 F.3d at 522. This appeal, the Adversary Proceedings and the State Court Action are all attempts to reverse the bankruptcy court. The Adversary Proceeding before the bankruptcy court requested that the bankruptcy court determine that the Debtor's interest in the Property is "voidable as a fraudulent transfer under California law." *In re RE Palm Springs II, LLC*, No. 20-03135 (Bankr. N.D. Tex. Oct. 30, 2020), Doc. No. 1, ¶ 10. S.C. relies on the same statutory provisions in the State Court Action, CALIFORNIA CIVIL CODE §§ 3439.04 and 3439.05.

See id. ¶¶ 61–98. Section 3439.04(a)(1) makes voidable the transfer of the Property if HPS acted with "actual intent to hinder, delay, or defraud any creditor of the debtor." And § 3439.05(a) potentially voids the transfer of the Property if the debtor did not "receiv[e] a reasonably equivalent value." Both statutes make the transfer of the Property voidable and not void as to the creditor. CALIFORNIA CIVIL CODE §§ 3439.04 ("A transfer made or obligation incurred by a debtor is voidable . . . ."); § 3439.05 ("A transfer made or obligation incurred by a debtor is voidable . . . ."). Thus, the claims in the Adversary Proceeding and State Court Action—if successful—would reverse the bankruptcy court as to S.C. and are therefore not adverse claims. Accordingly, HPS purchased the Property without knowledge of adverse claims.

Turning to the *Popp* case, S.C. fares no better. There, the appellant appealed two bankruptcy court orders authorizing the sale of property. *In re Popp*, 323 B.R. 260, 262 (B.A.P. 9th Cir. 2005). The appellant had "some interest in the property," but the bankruptcy court authorized the sale of the property as part of the bankruptcy estate before determining the full extent of the interests in the property in the adversary proceeding. *Id.* at 263–64. The Ninth Circuit Bankruptcy Appellate Panel reversed the bankruptcy court "since the court's determination of disputed ownership was duplicative and parallel to the essential subject of a pending adversary proceeding." *Id.* at 269. This could lead to "inconsistent and ultimately inconclusive litigation as to the true ownership of the Property." *Id.*

The issue for the court in *Popp* was who owned the property. *Id.* at 269. The court specifically held that courts should "promote consistent and unfragmented decisionmaking when faced with the need to determine predicate issues such as property ownership in the Section 363 context." *Id.* at 270. The Ninth Circuit Bankruptcy Appellate Panel took issue with the bankruptcy court determining ownership of the property in two separate proceedings "that was not binding in any way in the [other proceeding]." *Id.* Here, S.C. does not contend that it has any possessory interest in the Property. Through the Adversary Proceeding and the State Court Action, S.C. seeks to set aside the conveyance of the Property from the original owner to RE Palm Springs as a fraudulent conveyance. Doc. 30, Appellant's Reply, 13. As stated above, the Adversary Proceeding and State Court Action seek to overturn the bankruptcy court, not to obtain possession of the Property. Setting aside the conveyance would not give S.C. any possessory interest in the Property and therefore, cannot be an adverse claim to the Property.

As the State Court Action and Adversary Proceeding do not qualify as adverse claims, HPS was a good faith purchaser of the Property under this definition of a good faith purchaser.

2. Whether the Purchase of the Property Involved Fraud or Collusion, or HPS Took Grossly Unfair Advantage of Other Bidders

S.C.'s second argument is that HPS manipulated the bankruptcy and sale process to "launder" the Property through the bankruptcy proceedings. Doc. 27, Appellant's Br., 20. S.C. liberally cites to the record in its reply brief to set forth the facts for its argument. Doc. 30, Appellant's Reply, 4–10. S.C. starts by attempting to refute the bankruptcy court's "findings that the purchase agreement was the result of arm's length negotiations between the Debtor and HPS." Doc. 27, Appellant's Suppl. Br., 29; Doc. 30, Appellant's Reply, 4–8. Next, S.C. argues that the bidding procedures essentially prevented other bidders from submitting any competing bids and guaranteed HPS would have the only bid at the end of the auction process and take possession of the Property. Doc. 27, Appellant's Suppl. Br., 30–32; Doc. 30, Appellant's Reply, 9. Lastly, S.C. contends "that HPS never advanced any moneys to the Debtor pre-bankruptcy" and "never verified what amount if any was advanced by HPS to the Original Owner." Doc. 27, Appellant's Suppl. Br., 32; Doc. 30, Appellant's Reply, 7–10.

HPS rebuts S.C. by arguing that HPS's conduct during the purchase of the Property demonstrates good faith. Doc. 28, HPS's Appellee Br., 30. Even though HPS was an insider, HPS contends that this does not establish bad faith per se. *Id.* at 31. HPS also contends the bankruptcy court found that HPS sufficiently distanced itself from the Debtor during the auction period, which further demonstrates good faith. *Id.* at 33. Additionally, HPS did not collude with the Debtor nor any other parties or take grossly unfair advantage

of other bidders despite the expeditious nature of the short bidding process. *Id.* at 34–35.

RE Palm Springs argues that the record lacks any evidence of "fraud, collusion, or attempts to take unfair advantage of other bidders." Doc. 29, RE Palm Springs's Appellee Br., 6. First, HPS offered financing to complete construction on the Property. *Id.* Second, the auction realtor testified that HPS did not interfere in the bidding process and "all serious potential bidders were contemplating using some form of financing to be provided by HPS." *Id.* Additionally, RE Palm Springs asserts that the Bankruptcy Court found "no 'cause' to deny HPS its credit bid right under 11 U.S.C. § 363(k)" and "inferred good faith" based in part upon HPS's offer to finance construction for potential bidders. *Id.* at 7.

The Court agrees with Appellees. While the facts paint a less than rosy picture, the bankruptcy court did not err by finding that HPS purchased the Property in good faith. The Court will now address each of S.C.'s three contentions about the alleged manipulation of the bankruptcy and sale process in the full light of the records from the bankruptcy court.

i. The purchase agreement

S.C. relies on the following facts in the appellate record to argue that the purchase agreement demonstrates a lack of good faith by HPS. Doc. 30, Appellant's Reply, 4–8. HPS was the sole owner of Hall Palm Springs II, LLC and formed the Debtor for the

purpose of taking title to the Property. Doc. 10-4, R., 836–37; Doc. 11-18, R., 8717; Doc. 12-8, R., 10909. The Property was valued in "as is" condition at $72,000,000 according to a January 2020 appraisal. Doc. 10-4, R., 810; Doc. 12-7, R., 10738. After defaulting on the construction loan, the original owner conveyed the Property to the Debtor without receiving any consideration. Doc. 11-9, R., 6999, 7092; Doc. 11-22, R., 9447; Doc. 12-6, R., 10474. This transfer did not include a reduction in the debt as consideration for the transfer of ownership, nor did the Debtor pay the tax under the California Documentary Transfer Tax Act.[3] Doc. 11-9, R., 6999, 7092; Doc. 12-4, R., 10381; Doc. 11-19, R., 8908; Doc. 11-22, R., 9447; Doc. 12-6, R., 10474. At the time of conveyance, the Property had

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[3] The California Documentary Transfer Tax Act in relevant part provides:

> The board of supervisors of any county or city and county, by an ordinance adopted pursuant to this part, may impose, on each deed, instrument, or writing by which any lands, tenements, or other realty sold within the county shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his or their direction, when the consideration or value of the interest or property conveyed (exclusive of the value of any lien or encumbrance remaining thereon at the time of sale) exceeds one hundred dollars ($100) a tax at the rate of fifty-five cents ($0.55) for each five hundred dollars ($500) or fractional part thereof.

CAL. REV. & TAX CODE § 11911(a).

$35,430,000 in debt owed to HPS and over $20,000,000 in mechanic's liens. Doc. 10-2, R., 249; Doc. 10-4, R., 838. HPS then changed the name of the Debtor from Hall Palm Springs II, LLC to RE Palm Springs II, LLC, a change that S.C. asserts occurred "to disguise HPS'[s] involvement in the Original Transfer." Doc. 30, Appellant's Reply, 7 n.7; *see also* Doc. 11-18, R., 8717; Doc. 11-19, R., 8908. HPS and RE Palm Springs were also both involved in state court actions concerning the Property and mechanic liens on the Property in California. Doc. 11-9, R., 7092–99; Doc. 11-10, 7100–31; Doc. 11-14, R., 8033; Doc. 11-8, R., 6850; Doc. 12-7, R., 10675–76.

HPS hired r^2 Advisors ("r^2") as manager of the Debtor and transferred its membership interest in the Debtor to r^2. Doc. 10-2, R., 382; Doc. 11-4, R., 824–29. r^2 received compensation from HPS through a non-obligatory DIP loan. Doc. 10-2, R., 382–83; Doc. 10-4, R., 796. For the bankruptcy proceedings, r^2 recognized its role in monetizing the Property for HPS. Doc. 12-7, R., 10770.

While these facts paint the picture of a bankruptcy process that ended with a less than ideal outcome, they do not demonstrate error by the bankruptcy court. First, the conveyance provided for the net profits of the disposition of the Property to be split between HPS and the original owner, a form of consideration. *See In re KrisJenn Ranch, LLC*, 629 B.R. 589, 594 (Bankr. W.D. Tex. 2021) (discussing net profits as the consideration for the assignment of property); 17 Am. Jur. 2d Contracts § 116 (2021)

("Accordingly, sufficient consideration may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."). Further, the conveyance transferred all the debt to the Debtor, a detriment, and the original owner received relief from the debts, a benefit. *See* Doc. 12-8, R., 11067–68 (discussing the attachment of liens following the conveyance of the Property and finding "that there was consideration"). While the Court need not find consideration for this appeal, the Court finds no error from the bankruptcy court on this matter.

Second, the January 2020 appraisal likely received little consideration by the bankruptcy court because S.C. submitted a more recent appraisal, which more accurately represented the contemporaneous real estate market. S.C.'s appraisal listed the "as is" value of the Property as $56,600,000. Doc. 12-7, R., 10708. However, that appraiser relied on incorrect information to assess the value of the Property. Doc. 12-8, R., 10850–51. At the November 6, 2020 hearing in the bankruptcy court, the appraiser admitted that he used $17,956,000 as the estimated amount to complete the hotel. *Id.* at 10851. The actual estimated cost was over $31,000,000. *Id.* Thus, the actual "as is" appraisal value of the Property was approximately $43,000,000. *Id.* Ultimately, the Property obtained a credit bid of $37,279,365.74, nearly eighty-seven percent of the appraised value. *See In re Gucci*, 126 F.3d at 380 ("Generally speaking, a purchaser who pays 75 percent of the appraised value of the assets

has tendered value, but where the purchaser is found to have acted in good faith the auction price suffices to demonstrate that the purchaser paid 'value' for the assets.") (citations omitted). Therefore, the Court finds no error in the assessment of the appraisals by the bankruptcy court.

Third, the California Documentary Stamp Tax provides for several exemptions to the tax. CAL. REV. & TAX CODE §§ 11901–11935. One exception applies to circumstances where the mortgagee takes the deed "in lieu of foreclosure." *Id.* at § 11926. Another exception applies to conveyances "[c]onfirmed under the Federal Bankruptcy Code." *Id.* at § 11923. While the Court did not take argument on this particular issue, the bankruptcy court did not err by not considering the California Documentary Stamp Tax to the extent that S.C. desired.

Fourth, the name change of the Debtor and hiring r^2 demonstrates a lender with extensive involvement in the bankruptcy process, but not a lack of good faith. HPS changed the name of Hall Palm Springs II, LLC to RE Palm Springs II, LLC on May 28, 2020—less than two months before filing the Petition. Doc. 11-18, R., 8722. Neither party took the opportunity to explain the name change except for S.C.'s innuendo of fraudulent intent. *See* Doc. 30, Appellant's Reply, 7 n.7; Doc. 12-8, R., 11067. HPS also hired r^2 to manage the Property through the bankruptcy process on July 10, 2020—less than two weeks before filing the Petition—and transferred HPS's membership interest in the Property to r^2. *See*

Doc 10-4, R., 824. Although HPS maintained a form of control over r^2 as the DIP Lender, S.C. does not point to any facts or evidence showing that HPS exerted this control to commit a fraud upon the bankruptcy court. The only fact that S.C. provides is r^2's admission that their purpose was to monetize the assets. *See* Doc. 27, Appellant's Suppl. Br., 10. As the basic purposes of Chapter 11 are (1) to "preserv[e] going concerns" and (2) "maximiz[e] property available to satisfy creditors," r^2's admission is nothing more than an admission of the second policy of Chapter 11 as identified by the Supreme Court. *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 435 (1999). Therefore, the bankruptcy court did not err in evaluating these facts and finding no bad faith.

ii. The bidding procedures

The thrust of S.C.'s recitation of the next set of facts is that HPS manipulated the bidding procedures to end up with the Property at the end of the process. *See* Doc. 27, Appellant's Suppl. Br., 10–12. HPS asked the bankruptcy court to approve the bid procedures, the stalking horse bidder, and the real estate broker on the Petition Date. Doc. 10-2, R., 227, 246. HPS chose the real estate agent for the Property and obtained the stalking horse bidder. Doc. 12-8, R., 10990, 11017; Doc. 12- 7, R., 10730. The stalking horse bidder contract did not contain a purchase price until after the bankruptcy court raised the issue at the August 24 hearing. Doc. 11-25, R., 10048; Doc. 12-7, R., 10660, 10777.

The bidding process consisted of six weeks of marketing, required a $2,000,000 nonrefundable bid deposit, took place in California during August to October 2020 (the midst of the Covid-19 pandemic), and granted HPS a veto right over submitted bids. Doc. 10-17, R., 3529, 3539–41; Doc. 11-24, R., 9932. After the stalking horse bidder withdrew its bid, the Debtor and HPS extended the marketing process for two more weeks. Doc. 10-17, R., 3537. An expert witness testified that six months to a year would be a more appropriate marketing period for an undeveloped hotel such as the Property. Doc. 12-8, R., 10837–38.

As for the stalking horse bidder, the original Agreement of Purchase and Sale ("APS") dated July 21, 2020—one day prior to the Petition date—did not include a price. Doc. 11-25, R., 10041, 10048. But the agreement contained a paragraph setting the price at a "price to be mutually agreed upon between Purchaser and Seller prior to the expiration of the Due Diligence Period in an aggregate amount that is not less than an amount that is acceptable to Hall Palm Springs, LLC." *Id.* at 10048. The Court finds nothing nefarious about this series of events or the lack of a purchase price because the Purchaser did not get to start the due diligence period until the effective date of the APS. *Id.* at 10057. Approximately halfway through the due diligence period, the stalking horse bidder presented the bid amount at the August 24 hearing. Doc. 12-7, R., 10660; *see also* Doc. 11-25, R., 10057 (giving the stalking horse bidder fifty-nine days to conduct due diligence). The Court finds no error by the bankruptcy court in finding no bad faith based on

these facts.

The bidding process resulted in an unfortunate outcome, but it also occurred during unprecedented times. The timing and context of this case closely resembles *In re Heritage Hotel Assocs., LLC*, 2020 WL 8611083 (Bankr. M.D. Fl. Sept. 11, 2020). In *Heritage Hotel*, the Debtor sought to sell a hotel prior to the Covid-19 pandemic. 2020 WL 8611083, at *1. Unfortunately, the purchasers failed to close at the agreed $10,000,000 and the hotel had to go into a bidding process during the Covid-19 pandemic. *Id.* The bidding process was approved on August 3, 2020, with a stalking horse bidder and a deadline for bids on August 20, 2020. *Id.* at *2. Ultimately, the hotel sold for $8,000,000. *Id.* While *Heritage Hotel* had a more successful outcome, the case is illustrative of the impact that Covid-19 had on finished properties. Turning to the instant case, the Property was an unfinished hotel that was only 60% complete, laden with debt with no revenue streams, and listed at a much higher price. Doc. 10-2, R., 148–210, 238; Doc. 12-8, R., 10986. The bankruptcy court approved a marketing period nearly three times the length of the bidding procedures in *Heritage Hotel*. *See* 2020 WL 8611083, at *1. Furthermore, the bankruptcy court in this case had to consider the fact that none of the parties found a lender to maintain the Property after December 31, 2020. Doc. 12-8, R., 10900–91, 11069. Thus, the deadline for disposing of the Property was December 31, 2020. *Id.* The two week marketing extension came with incentives, no Overbid Protections ($1,200,000) and no break-up fee (two

percent of the cash price). Doc. 10-17, R., 3538, 3542. Therefore, the bankruptcy court did not err in considering that these facts showed good faith.

iii. HPS's loans

Lastly, S.C. takes issue with the validity of HPS's loans that became the credit bid amount. r[2] never confirmed the amount of debt owed by the original owner to HPS. Doc. 12-8, R., 11029–30, 11033–34. Additionally, HPS never advanced any funds to the Debtor prior to the Petition Date because this amount would have to be transferred to the original owner. *Id.* at 10989; Doc. 11-15, R., 8221.

A credit bid allows the holder of a claim to "offset [their] claim against the purchase price of such property." 11 U.S.C. § 363(k). The statute "enables the creditor to purchase the collateral for what it considers the fair market price (up to the amount of its security interest) without committing additional cash to protect the loan." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 644 n.2 (2012). The "credit bid provides a weapon for a secured creditor who is dissatisfied with a potential sales price to increase the bid to what it deems to be fair market value, thereby protecting the benefit of its bargain." *In re Phila. Newspapers, LLC*, 418 B.R. 548, 563 (E.D. Pa. 2009), *aff'd*, 599 F.3d 298 (3d Cir. 2010). "If the secured creditors submit the highest (or only) bid for the company and acquire the bankruptcy estate's assets, the creditors are, in effect, able to use the § 363 sale to trade their debt for control of the business." *In*

re Walter Energy, Inc., 911 F.3d 1121, 1153 (11th Cir. 2018).

HPS held a lien against the property in the amount of $37,279,365.74. Doc. 10-1, R., 67. The Chief Restructuring Officer never audited the amount of debt owed to HPS. Doc. 12-8, R., 11033–34. But he did have the data files and admitted to having seen the construction loan documents. *Id.* at 11033. The original loan was in the amount of $54,000,000, and HPS had not advanced the full amount of the loan to the original owner. The grant deed shows that the original owner owed $32,627,619.44 as of March 10, 2020. Doc. 11-9, R., 7092–96. By July 22, 2020, the debt had grown to $36,844,340.64. Doc. 10-2, R., 170. The loan agreement had a default rate of "over 9 percent, . . . a few million dollars a year." Doc. 12-7, R., 10797. In addition to this, HPS provided the Debtor with a $1,000,000 DIP loan at six percent interest. *Id.* at 10764, 10780–81, 10796; Doc. 10-16, R., 3178, 3331. Taking this evidence into consideration, the Court does not find any error in the bankruptcy court's evaluation of these facts.

More important than the loan amount, HPS was the senior lien holder because HPS had all parties with "any lien or liens . . . or rights (contractual or statutory) to deferred compensation, fees or payment, the undersigned has or in the future may have . . . [fully subordinate their lien] in favor of [HPS]." Doc. 10-19, R., 3910–51. S.C. signed one of these subordination agreements on October 24, 2017. *Id.* at 3937. Therefore, HPS had the lien on the Property

senior to any party to the subordination agreements, including S.C.

Lastly, no other party submitted a bid. The bankruptcy court made clear that other parties were welcome to submit a credit bid but none chose to do so. Doc. 12-8, R., 10942. S.C. was one of the larger lien holders and could have submitted a credit bid as HPS did. *See id.* This did not occur and the only bid in front of the bankruptcy court was HPS's. *Id.* at 10935–36. The Court finds no error by the bankruptcy court in its evaluation that these facts did not show bad faith.

iv. Final consideration of all the facts

Taking all of these facts together, the Court finds HPS acted with good faith during the bankruptcy proceedings. The facts do not demonstrate "fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." *See Bleaufontaine, Inc.*, 634 F.2d at 1388, n.7. Even viewing the facts in the record in a favorable light towards S.C. does not illuminate any bad faith by HPS. Ultimately, HPS submitted the only bid for the Property and acquired the Property through a trade of its debt. *See Walter Energy*, 911 F.3d at 1153. This in turn left the other creditors with nothing. Such a disappointing result does not establish that HPS acted with bad faith. Accordingly, the Court finds HPS was a good faith purchaser of the Property.

IV.

CONCLUSION

For the foregoing reasons, the rulings of the bankruptcy court are **AFFIRMED** in all respects. This appeal is **DISMISSED WITH PREJUDICE.**

SO ORDERED.

SIGNED: November 15, 2021.

/s/
JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

APPENDIX C

[COURT SEAL]

The following constitutes the ruling of the court and has the force and effect therein described.

CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
THE DA TE OF ENTRY IS ON
THE COURT'S DOCKET

Signed November 18, 2020

/s/
United States Bankruptcy Judge

IN THE UNITED STATES
BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re
RE PALM SPRINGS II, LLC,
Debtor.

CASE NO. 20-31972-sgj11
Chapter 11

ORDER APPROVING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTOR'S ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES, AND INTERESTS

On November 5 and 6, 2020, the Court held a sale hearing on the *Motion for Entry of Order (I) Authorizing and Approving: (A) Bid Procedures; (B) Stalking Horse Bidder and Overbid Protections; and (C) Form and Manner of Notices*; *(II) Scheduling a Sale Hearing; (III) Approving the Sale of Substantially All of the Debtor's Assets Free and Clear of All Liens, Claims, Encumbrances, and Interests; and (IV) Granting Related Relief* [Docket No. 6] (the "Motion")[1] filed by RE Palm Springs II, LLC ("Debtor") on July 22, 2020. Having considered the Motion, all pleadings that were filed in opposition to the Motion, the record in the above-captioned Chapter 11 Case and the arguments of counsel and the evidence presented at the November 3, 2020 credit bid hearing and the November 5, 2020 and November 6, 2020 hearings in support of the relief requested in the Motion (the "Sale Hearings"), and after due deliberation and sufficient cause appearing therefore,

THE COURT HEREBY FINDS AND DETERMINES THAT:[2]

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[1] All capitalized terms not defined herein shall have the meaning given to them in the Motion.

[2] All findings of fact and conclusions of law announced by the Court at the Sale Hearings are hereby incorporated herein to the

A. It has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157(b)(1) and 1334(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (N) and (O). Venue is proper in this District and in the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

B. As evidenced by the certificates of service on file with the Court, the notice given of the Motion and the Bid Procedures (as amended, the "Bidding Procedures") was reasonable and sufficient in light of the circumstances and nature of the relief requested, and no other or further notice of the Sale Hearings or the sale (the "Sale") of the property located at 414 North Palm Canyon Drive, Palm Springs, California, APN No. 513-081- 049, together with all related assets to be purchased (the "Purchased Assets") by Hall Palm Springs, LLC (the "Buyer") pursuant to the terms of the Agreement of Purchase and Sale (the "Purchase Agreement") attached hereto as **Exhibit "A"**, is necessary. A reasonable and fair opportunity to object to the Motion, the Sale and the relief granted in this Order has been afforded under the circumstances. All parties who objected to the Motion and the Sale had a full and fair opportunity to present argument and evidence in pleadings filed with the Court or presented to the Court at the Sale Hearings, and to examine and cross-examine witnesses at the Sale Hearings.

C. The legal and factual bases set forth in the Motion

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extent not inconsistent herewith.

and at the Sale Hearings establish just cause for the relief granted herein; granting the relief is in the best interests of the Debtor, the Debtor's estate, and the creditors thereof.

D. As demonstrated by evidence proffered or adduced and the representations of counsel at the Sale Hearings, the Debtor has conducted a fulsome marketing process and a fair and open sale process in compliance with the Bidding Procedures. The Bidding Procedures were substantively and procedurally fair to all parties, were the result of arm's length negotiations, and afforded a full, fair, and reasonable opportunity for any interested party to make a higher or otherwise better offer to purchase the Purchased Assets. The Bidding Procedures have been complied with in all material respects by the Debtor and the Buyer.

E. The consideration to be provided by the Buyer pursuant to the Purchase Agreement: (i) is fair and reasonable; (ii) is the highest and otherwise best offer for the Purchased Assets; and (iii) constitutes reasonably equivalent value and fair consideration for the Purchased Assets under the Bankruptcy Code, the Uniform Voidable Transactions Act, the Uniform Fraudulent Transfer Act, the Uniform Fraudulent Conveyance Act, and any similar applicable laws of the United States, any state, territory, possession thereof, and the District of Columbia. The terms and conditions set forth in the Purchase Agreement are fair and reasonable under the circumstances and were not

entered into for the purpose of, nor do they have the effect of, hindering, delaying, or defrauding any creditor of the Debtor under any of the foregoing federal or state laws or any other applicable laws.

F. The Purchase Agreement and Sale were proposed, negotiated, and entered into by and among the Debtor and the Buyer without collusion or fraud, in good faith, and at arm's length. The Buyer is a good faith purchaser within the meaning of Bankruptcy Code section 363(m) and is therefore entitled to the full protection of that provision with respect to the Purchase Agreement and the Sale.

G. The Debtor has articulated good and sufficient reasons for this Court to grant the relief requested in the Motion as provided herein. Such good and sufficient reasons were set forth in the Motion and on the record at the Sale Hearings and are incorporated by reference herein and, among other things, form the basis for the findings of fact and conclusions of law set forth herein. Specifically, the Debtor has demonstrated a sound business justification for the Court to approve the Sale, the assignment and assumption of the Assigned Contracts, and this Order under 11 U.S.C. §§ 363 and 365 prior to, and outside of, a plan of reorganization in that, among other things, absent the immediate consummation of the Sale, the value of the Purchased Assets will be harmed. To maximize the value of the Purchased Assets, it is essential that the Sale occur within the timeframe

set forth in the Purchase Agreement.

H. The Buyer would not have entered into the Purchase Agreement and would not consummate the Sale if the transfer of the Purchased Assets to the Buyer and the assumption and assignment of the Assigned Contracts to the Buyer were not free and clear of all mortgages, pledges, options, security interests, charges, rights of first refusal, hypothecations, encumbrances on real or personal property, easements, encroachments, rights of way, restrictive covenants on real or personal property, real or personal property licenses, leases, or conditional sale arrangements, debts, liabilities, obligations, judgments, mechanics' liens, artisans liens, charging liens, suppliers' liens, design professionals' liens, laborers' liens, construction liens, constitutional, statutory and other liens, and claims (as that term is defined in section 101(5) of the Bankruptcy Code), including rights or claims based upon successor or transferee liability, whether accrued or fixed, direct or indirect, liquidated or unliquidated, absolute or contingent, matured or unmatured, known or unknown, determined or undeterminable, including those arising under any law or action and those arising under any contract or otherwise, and including any rights, claims, or causes of action based on any theories of transferee or successor liability (collectively, the "Liens, Claims, and Interests"). Liens, Claims and Interests do not include (1) Permitted Exceptions (as defined in the Purchase Agreement), (2) valid and existing property tax

liens, and (3) any valid and existing warehouseman's lien in favor of Beltmann Integrated Logistics (collectively, the "Exceptions").

I. Subject to the provisions of this Order, the Debtor may sell the Purchased Assets free and clear of all Liens, Claims and Interests, because, in each case, one or more of the standards set forth in section 363(f)(3) through (5) of the Bankruptcy Code have been satisfied. In particular, except for the holders of claims on account of the Exceptions, each entity with a Lien, Claim, and Interest in the Purchased Assets to be transferred to the Buyer: (i) is party to a bona fide dispute with the Debtor concerning such party's Lien, Claim, and Interest (§ 363(f)(4)) or (ii) could be compelled in a legal or equitable proceeding to accept money satisfaction of such Lien, Claim, and Interest (§ 363(f)(5)). Additionally, the Debtor satisfies section 363(f)(3) of the Bankruptcy Code because the Purchased Assets are being sold for a price that equals or exceeds their fair market value.

J. The Purchase Agreement and Sale do not constitute an impermissible *sub rosa* chapter 11 plan for which approval has been sought without the protections that a disclosure statement would afford. The Purchase Agreement and Sale neither impermissibly restructure the rights of the Debtor's creditors nor impermissibly dictate a liquidating plan for the Debtor.

K. The findings of fact and conclusions of law herein constitute the Court's findings of fact and conclusions of law for the purposes of Bankruptcy Rule 7052, made applicable pursuant to Bankruptcy Rule 9014. To the extent any findings of facts are conclusions of law, they are adopted as such. To the extent any conclusions of law are findings of fact, they are adopted as such.

NOW THEREFORE, IT IS HEREBY

1. **ORDERED** that the notice of the Motion, the Bidding Procedures, and the Sale Hearings are approved as proper and adequate under the circumstances. It is further

2. **ORDERED** that the Motion is **GRANTED** and the sale to the Buyer is approved, as the highest and best offer, for the credit bid purchase price of $37,279,365.74 pursuant to section 363(k) of the Bankruptcy Code and other consideration in accordance with the terms and conditions that are set forth in the Purchase Agreement. It is further

3. **ORDERED** that pursuant to 11 U.S.C. § 365, the Debtor is authorized to (i) assume the agreements set forth in **Exhibit "B"** hereto and assign such to the Buyer; and (ii) take all other action necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion. It is further

4. **ORDERED** that pursuant to 11 U.S.C. §§ 363(b) and 363(f)(3), (f)(4) and (f)(5), the Debtor is

authorized to (i) sell the Purchased Assets to the Buyer free and clear of all Liens, Claims, and Interests, and other encumbrances; and (ii) take all other action necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion. For the avoidance of doubt, Liens, Claims and Interests do not include the Exceptions. It is further

5. **ORDERED** that except as set forth in the Purchase Agreement, all persons and entities, including, but not limited to, the Debtor, all debt security holders, all equity security holders, governmental, tax and regulatory authorities, employees, former employees and shareholders, administrative agencies, governmental departments, secretaries of state, federal, state and local officials, counterparties to all contracts, customers, lenders, trade and other creditors, and their respective successors or assigns and any trustees thereof holding Liens, Claims, and Interests of any kind or nature whatsoever against or in the Debtor or the Purchased Assets (other than the Exceptions), hereby are forever barred, estopped, and permanently enjoined from asserting against the Buyer, its successors, designees, or assigns, its property, or the Purchased Assets conveyed in accordance with the Purchase Agreement, such persons' or entities' Liens, Claims, and Interests. It is further

6. **ORDERED** that pursuant to section 363(f) of the Bankruptcy Code, effective upon closing, the Sale

will vest in the Buyer all right, title, and interest of the Debtor and the bankruptcy estate in and to the Purchase Assets, free and clear of all Liens, Claims and Interests, and other encumbrances, other than the Exceptions. It is further

7. **ORDERED** that this Order is and shall be effective as a determination that, upon and subject to the occurrence of the closing of the Sale, all Liens, Claims, and Interests, and other encumbrances, other than the Exceptions, have been and hereby are adjudged and declared to be unconditionally released as to the Purchased Assets. It is further

8. **ORDERED** that the provisions of this Order authorizing the sale and assignment of the Purchased Assets free and clear of all Liens, Claims and Interests shall be self-executing, and neither the Debtor nor Buyer shall be required to execute or file releases, termination statements, assignments, consents, or other instruments in order to effectuate, consummate and implement the provisions of this Order. It is further

9. **ORDERED** that the Buyer has not assumed any liabilities of the Debtor, except for the agreements set forth in **Exhibit "B"**. It is further

10. **ORDERED** that the Debtor is authorized to execute any documents, releases, termination statements, assignments, consents, instruments or any such documents on behalf of any third party

that are necessary or appropriate to effectuate or consummate the Sale. It is further

11. **ORDERED** that this Order (a) shall be effective as a determination that, upon the Closing Date, all Liens, Claims, and Interests of any kind or nature whatsoever existing as to the Purchased Assets prior to the Closing Date (other than the Exceptions) have been unconditionally released, discharged, and terminated, and that the conveyances described herein and the Purchase Agreement have been effected, and (b) shall be binding upon and shall govern the acts of all entities, including without limitation, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies, governmental departments, secretaries of state, federal, state, and local officials, and all other persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register, or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to any of the Acquired Assets. For the avoidance of doubt, all Liens, Claims, and Interests with respect to the Excluded Assets (as defined in the Purchase Agreement), and all Exceptions, shall continue with the same validity, force, effect, and priority as they now have, subject to any claims and defenses the Debtor may possess with respect thereto.

12. **ORDERED** that the Buyer is hereby authorized to file, register, or otherwise record a certified copy of this Order, which, once filed, registered, or otherwise recorded, shall constitute conclusive evidence of the release of all Liens, Claims, and Interests (other than Exceptions) in such Purchased Assets of any kind or nature whatsoever. This Order is deemed to be in recordable form sufficient to be placed in the filing or recording system of each and every federal, state, or local government agency, department or office. And it is further

13. **ORDERED** that each and every federal, state, and local governmental agency or department is hereby authorized to accept any and all documents and instruments necessary and appropriate to consummate the Sale, including all agreements entered into in connection therewith, and this Order. And it is further

14. **ORDERED** that the Debtor, and any escrow agent upon the Debtor's written instruction, shall be authorized to make such disbursements on or after the closing of the Sale as are required by the Purchase Agreement or order of this Court, including, but not limited to, (a) any delinquent real property taxes and outstanding post-petition real property taxes prorated as of the closing with respect to the real property included among the purchased assets; and (b) all other closing costs. It is further

15. **ORDERED** that the Debtor and its officers, employees and agents be and they hereby are authorized to execute the Purchase Agreement, or other related documents that are reasonably necessary or appropriate to complete the Sale, and to undertake such other actions as may be reasonably necessary or appropriate to complete the Sale. It is further

16. **ORDERED** that except as otherwise provided in the Motion, the Purchased Assets shall be sold, transferred, and delivered to Buyer on an "as is, where is" or "with all faults" basis. It is further

17. **ORDERED** that the Buyer is approved as a good faith purchaser under 11 U.S.C. § 363(m) of the Bankruptcy Code, and Buyer shall be entitled to all protections of 11 U.S.C § 363(m) of the Bankruptcy Code. It is further

18. **ORDERED** that the request for a stay pending appeal made by counsel for SR Construction, Inc. at the Sale Hearings be and hereby is **DENIED**. It is further

19. **ORDERED** that this Court retains jurisdiction to enforce and implement the terms and provisions of this Order and the Purchase Agreement, all amendments thereto, any waivers and consents thereunder, and each of the documents executed in connection therewith in all respects, including retaining jurisdiction to (a) compel delivery of the Purchased Assets to the Buyer; and (b) resolve any

disputes arising under or related to the Purchase Agreement. And it is further

20. **ORDERED** that the Purchase Agreement and any related documents or other instruments may be modified, amended or supplemented by the parties thereto, in a writing signed by both parties without further order of the Court, provided that any such modification, amendment or supplement does not have a material adverse effect on the Debtor's bankruptcy estate.

END OF ORDER

SUBMITTED BY:
Charles B. Hendricks
State Bar No. 09451050
Emily S. Wall
State Bar No. 24079534
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Counsel for RE Palm Springs II, LLC

APPENDIX D

[COURT SEAL]

The following constitutes the ruling of the court and has the force and effect therein described.

CLERK, U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
THE DA TE OF ENTRY IS ON
THE COURT'S DOCKET

Signed November 9, 2020

/s/
United States Bankruptcy Judge

IN THE UNITED STATES
BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re
RE PALM SPRINGS II, LLC,
Debtor.

CASE NO. 20-31972
Chapter 11

ORDER GRANTING HALL PALM SPRINGS, LLC'S EXPEDITED MOTION TO AUTHORIZE CREDIT BID PURSUANT TO 11 U.S.C § 363(k)

This matter having come before this Court on November 3, 2020 on the Expedited Motion to Authorize Credit Bid Pursuant to 11 U.S.C. § 363(k) filed by Hall Palm Springs, LLC ("**HPS**") in the above-captioned chapter 11 case, and the Court having considered the Motion, and it appearing that this Court has jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334; and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C, §§ 1408 and 1409; and due and proper notice having been provided; and it appearing that no other or further notice need be provided; and after considering the Motion, the objections, and the evidence, the Court having found and determined that the relief sought in the Motion should be granted based on the Court's findings and conclusions as stated orally on the record, it is hereby **ORDERED** that:

1. The Motion is **GRANTED** pursuant to the Court's oral ruling issued at the hearing on November 3, 2020. HPS' credit bid in the amount of $37,279,365.74 on the sale of the Debtor's assets is hereby authorized.

2. This Court shall retain jurisdiction to hear and determine all matters arising from or

related to this Order.

IT IS SO ORDERED.

End of Order

RESPECTFULLY SUBMITTED BY:

Frank J. Wright
Texas Bar No. 22028800
Jeffery M. Veteto
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