No. 23-148

IN THE

Supreme Court of the United States

SR CONSTRUCTION, INC.,

Petitioner,

—v.—

RE PALM SPRINGS II, LLC and HALL PALM SPRINGS, LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 363(b) of the Bankruptcy Code enables debtors to sell the bankruptcy estate's property outside the ordinary course of the bankrupt entity's business. Interested parties may object to such a sale and may appeal orders entered over their objection. Recognizing that § 363 serves an essential, value-maximizing role in bankruptcy, Congress included § 363(m) to protect sale orders from modification or reversal on appeal where no stay pending appeal was obtained and the buyer purchased the property in good faith. This advances Congress's strong preference for finality and efficiency in bankruptcy.

Congress did not define "good faith" in the Bankruptcy Code; but over nearly a half-century, the circuits have developed general guidelines that define "good faith" in the negative – by conduct and notice that would obviate a purchaser's good faith status. This framework allows bankruptcy courts to determine good faith on fact-intensive inquiries and bestow § 363(m) immunization as warranted. Here, the Fifth Circuit honed the definition by setting the threshold for an adverse claim as "a dispute in ownership interest" (notice of which would destroy good faith status). Pet. App. 15a. Petitioner's question presented obscures the issue and misstates facts. Properly framed, the question presented is:

Did the Fifth Circuit err in concluding that neither a mechanic's lien nor an adversary proceeding alleging that a transfer of property to the debtor may be voidable constitutes an "adverse claim," notice of which would affect a purchaser's good faith status for the purposes of § 363(m)?

CORPORATE DISCLOSURE STATEMENT

Respondent Hall Palm Springs, LLC *now known as* Canyon Palm Springs Hotel, LLC is a limited liability company organized and existing under the laws of the State of Texas. Hall Palm Springs, LLC's ultimate parent company is Hall Phoenix/Inwood Ltd. Its intermediate parent companies are Hall Palm Springs Holdings, LLC and Hall Asset Holdings, LLC. No publicly held corporation owns 10% or more of Hall Phoenix/Inwood Ltd.'s equity.

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The opinion of the Fifth Circuit is reported at 65 F.4th 752 and is reproduced in the appendix at Pet. App. 1a. The opinion of the District Court is unpublished, but available at 2020 U.S. Dist. LEXIS 224334 and 2020 WL 7047173 and is reproduced in the appendix at Pet. App. 27a. The relevant Bankruptcy Court orders are reproduced in the appendix at Pet. App. 55a and 69a.

The Bankruptcy Court order dated November 18, 2020 (Pet. App. 55a) incorporates by reference all findings of fact and conclusions of law announced by the Bankruptcy Court on November 6, 2020, to the extent not inconsistent with the order; the oral decision is reproduced at Resp. App. 104a-120a.

PRELIMINARY STATEMENT

Section 363(m) of the Bankruptcy Code codifies Congress's strong preference for finality and efficiency in bankruptcy sales. Without its important protections, bidders for bankruptcy estate assets would be compelled to anticipate a risk of being dragged through endless rounds of appeals; that risk would factor directly into bid amounts and would dramatically diminish the value of the estate to the detriment of creditors. In acknowledgment of this problem, Congress provided § 363(m) as the specific solution by restricting on appeal the reversal or modification of a sale that was "in good faith" absent a stay pending appeal. This statutory mootness is the gatekeeper to finality on any grounds other than the purchaser's good faith.

Congress has not defined "good faith" in the Bankruptcy Code, leaving it to the courts to exercise judgment in application of § 363(m). The results are guideline definitions that in effect assume good faith and then look for conduct or knowledge that would destroy such good faith status. The circuits uniformly find certain types of misconduct can eliminate good faith – such as fraud and collusion. In the limited circumstances where it has arisen, some of the circuits have also looked to whether a purchaser has notice of "adverse claims." All of these considerations are easily reconcilable together as a framework to allow bankruptcy courts – as fact finders – to exercise necessary discretion in determining whether to award a purchaser § 363(m) protections.

In this case, the bankruptcy court, district court, and Fifth Circuit squarely found that the purchaser

Hall Palm Springs, LLC acted in good faith. In doing so, the Fifth Circuit addressed the then-undefined term of "adverse claims" and concluded that it must be a claim where there is a dispute in ownership. SR Construction, Inc.'s mechanic's lien and court proceedings did not rise to that threshold. No other circuit has directly defined "adverse claims" with such precision and no existing opinion contradicts that of the Fifth Circuit. Therefore, no true circuit split is implicated.

Moreover, the facts of this case arose during the unprecedented impacts of the coronavirus pandemic on the hospitality industry, which had an undeniable effect on the bankruptcy court's decisions and the surrounding events. Still, the sale closed years ago, construction has continued with new money invested in the property, and, consequently, it is impossible for the sale to be unwound. Even if SR Construction were successful here, there would not be a clean end, but instead a new beginning of likely years more of appeals. This case simply presents a uniquely poor vehicle for review of the underlying issues. Likewise, there is nothing here that is of considerable national importance to overcome the other flaws of this case.

The petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

Stripping away all the baubles, the substance of this case is that of a disgruntled former general contractor (SR Construction) exercising its legal rights for the apparent purpose of obstructing a free and clear bankruptcy sale. In a practical light, there

is no conceivable end game except strategic impediment and delay.

The central subject of this case is a boutique hotel property in the heart of Palm Springs, California. For the purposes of these facts, the real estate was originally owned by Palm Springs, LLC who intended to develop the hotel property.

A. Pre-Petition Background

1. SR Construction was hired by the original owner to construct the hotel. Pet. App. 4a, 28a. In October 2017, the original owner obtained construction financing of up to $54,750,000.00 from Hall Palm Springs, secured by a deed of trust on the property. *Id.* At the same time, SR Construction, among others, signed a subordination agreement in favor of Hall Palm Springs, which provided that "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 [Hall Palm Springs]." Pet. App. 52a. These transactions placed Hall Palm Springs in senior lien priority on the property. Pet. App. 4a, 52a.

2. Development of the property under SR Construction did not go well. Pet. App. 4a. Two years after financing was obtained and construction began, the original owner terminated SR Construction, with the hotel still unfinished. *Id.* SR Construction maintains that it was owed in excess of $14 million for work in had completed at that time. Pet. App. 28a. Shortly thereafter, the original owner defaulted on its loan obligations to Hall Palm Springs. Pet. App. 4a.

Hall Palm Springs gave notice that it was accelerating the debt. *Id.*

3. On November 25, 2019, SR Construction filed its mechanic's lien against the property. Then in January 2020, SR Construction filed suit in California state court against a myriad of parties, including the original owner and Hall Palm Springs. Despite its signed subordination agreement, SR Construction alleged that its mechanic's lien was superior to Hall Palm Springs' deed of trust, among other liens, and sought foreclosure. Pet. App. 4a-5a;

4. Meanwhile, Hall Palm Springs worked to address the defaulted and accelerated construction loan. On February 12, 2020, the organizer of Hall Palm Springs formed the affiliate entity RE Palm Springs II, LLC f/k/a Hall Palm Springs II, LLC for the purpose of taking title to the property. Pet. App. 5a. By a conveyance agreement dated March 13, 2020 and a grant deed dated March 27, 2020, the original owner conveyed the property to RE Palm Springs subject to all pre-existing liens, including that of Hall Palm Springs and SR Construction. Pet. App. 44a. At the time of the conveyance, the property had liens in excess of $55 million, more than $20 million of which were mechanic's liens. Pet. App. 45a. The conveyance agreement released the original owner from its loan obligations to Hall Palm Springs and gave the original owner a 50 percent net profits interest in the property. Pet. App. 5a.

5. RE Palm Springs initially intended to finish construction of the hotel. Unfortunately, these events coincided with the start of unprecedented government restrictions to address the novel coronavirus COVID-

19. *Id.* On March 19, 2020, the State of California entered its first shelter-at-home order; such regional orders would continue into January 2021.[1] The immediate impact on the hospitality industry was staggering. That, along with the numerous lawsuits arising from SR Construction's tenure as general contractor, caused RE Palm Springs to arrive at the conclusion that a sale to a strategic buyer would yield maximum value for all parties. Pet. App. 5a.

6. An informal marketing process was conducted, and bids were solicited from over thirty parties, from which the highest bidder was identified. In consideration of the pending litigation and existence of junior liens, it was determined that there was a need to sell the property free and clear, and that the supervision of a bankruptcy court would provide the most transparent and expeditious forum to achieve the highest and best price for all those concerned.

7. To prepare for bankruptcy, RE Palm Springs engaged r² Advisors, a third-party turnaround management company, to oversee the restructuring. Pet. App. 5a. To ensure arm's-length objectivity, Hall Palm Springs caused 100% of the ownership of RE Palm Springs to be conveyed to r² Advisors such that the entire sales process would be under its control and supervision. r² Advisors then engaged its own legal counsel to represent RE Palm Springs.

8. With r² Advisors at the helm, RE Palm Springs proceeded into bankruptcy with a well-thought-out

[1] https://calmatters.org/health/coronavirus/2021/03/timeline-california-pandemic-year-key-points/

plan to further market and then sell the unfinished property to a third party.

B. Procedural Background

1. *The Bankruptcy Case.* On July 22, 2020, RE Palm Spring filed its chapter 11 bankruptcy case in the Northern District of Texas. Through its first-day motions, RE Palm Springs obtained orders to (i) retain r^2 Advisors as its chief restructuring officer; (ii) retain a "well qualified" real estate broker with a national presence; and (3) authorize debtor-in-possession financing from Hall Palm Springs on substantively "reasonable" conditions in light of the circumstances. Pet. App. 6a. No interested party brought forward any alternative lending option.

2. The bankruptcy court also approved bidding and auction procedures that included a third-party stalking horse bidder and opportunity for overbids. Pet. App. 7a. Hall Palm Springs did not intend to and was not authorized to credit bid at that time. The real estate broker engaged in an aggressive marketing campaign, which garnered substantial interest. Approximately 268 interested parties executed confidentiality agreements to perform due diligence and eight potential buyer groups made site visits. Hall Palm Springs offered to finance construction for potential bidders. Pet. App. 43a. Several bids were proposed, but none conformed to the specified format, timing, or financial arrangements approved by the bankruptcy court in the bidding procedures. Pet. App. 7a. The stalking horse bidder submitted a proposed bid of $35,450,000, but ultimately backed out before making the nonrefundable deposit required by the bid procedures. With no conforming bids made in the

initial bidding period, the timeline was extended for two weeks. Pet. App. 23a. Even still, the auction process produced no bids. Pet. App. 29a.

3. On October 13, 2020, with no conforming bids made, and with no party willing to provide further debtor-in-possession financing, Hall Palm Springs sought leave to submit a credit bid for the property pursuant to 11 U.S.C. § 363(k); hearing on such motion was set for Tuesday, November 3, 2020. Pet. App. 8a. On Friday, October 30, 2020, only after the initial bid period produced no conforming bids and only after Hall Palm Springs sought to credit bid. SR Construction filed an objection to Hall Palm Springs claim and filed an adversary proceeding seeking, among other things, an injunction of the sale of the property and declaration of priority of its mechanic's lien. Pet. App. 30a.

4. The bidding and auction procedures produced only one bid – Hall Palm Springs's credit bid of $37,279,365.74, which was almost $2 million more than the floor originally set by the third-party stalking horse proposal. Pet. App. 8a. The bankruptcy court held evidentiary hearings on November 3, 5, and 6, 2020, regarding Hall Palm Springs's ability to submit a credit bid and to authorize the free and clear sale of the property. At the conclusion of the hearings, the bankruptcy court allowed Hall Palm Springs's credit bid (Pet. App. 69a) and approved the sale of the property. Pet. App. 55a. SR Construction never sought to credit bid its debt.

5. The bankruptcy court found that Hall Palm Springs was a good faith purchaser under § 363(m). In its oral findings (incorporated in the sale order by

reference), the bankruptcy court specifically addressed § 363(m) and the protections it confers:

> A couple of additional points. 363(m) has been eluded [sic] to a couple of times. It, of course, provides that reversal or modification on appeal of an order authorizing a sale of property does not affect the validity of the sale to any purchaser in good faith. I do find good faith here under 363(m) for 363(m) purposes.
>
> The evidence has not been refuted, in my mind, that showed we had a sophisticated seller and purchaser negotiating at arm's length. And that they acted in good faith. I know there's a lot of, I'll use the term mudslinging, for lack of a better term, about what happened, for example, March 13th, 2020. Rather than foreclose, go forward with a 12 or 18 month process to foreclose on the property, the borrower agreed to transfer the property to a Hall affiliated entity. That sometimes happens. We sometimes call that a deed in lieu of foreclosure. And in that Hall entity is the current debtor entity renamed RE Palm Springs II. But then, of course, the equity interest of Hall was given away to the CRO's firm to divest ownership interest.
>
> You know, there's just nothing I've heard here that suggests there was something bad faith, sinister. In fact, the irony here to me is that the bankruptcy was then later filed after COVID hit and changed the Hall entity's desire to complete the project and they filed a bankruptcy where everything is, you know,

> transparent, full disclosure, people's opportunity to take discovery, weigh in with their positions, put in their own evidence. So I do find good faith here for purposes of 363(m). Resp. App. 114a-115a.

The sale order further provided specifically that:

> 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.
> Pet. App. 59a.

Shortly before the sale hearing concluded, SR Construction requested a stay pending appeal, which the bankruptcy court denied. Pet. App. 9a.

6. *District Court Appeal.* SR Construction appealed both the credit bid order and the sale order, which were ultimately consolidated into a single appeal. SR Construction filed emergency motions for stays pending appeal, therein alleging that "sale of the [p]roperty would be impossible to unwind[.]" The motions for stay were denied. Hall Palm Springs and RE Palm Springs filed a motion to dismiss the appeals as statutorily moot under § 363(m). The district court denied dismissal relief, finding that SR Construction's objection to Hall Palm Springs's good faith purchaser status to be preserved for appeal. The district court

ordered the parties to brief only the good faith purchaser issue.

7. Following briefing, the district court affirmed the bankruptcy court's findings and found that Hall Palm Springs "acted with good faith during the bankruptcy proceedings" and that "[t]he 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." Pet. App. 53a (internal citations omitted). The district court also concluded that no matters raised by SR Construction qualified as adverse claims to the property with respect to Hall Palm Springs's good faith status. Pet. App. 41a Accordingly, the district court dismissed the appeal as moot.

8. *Fifth Circuit Appeal.* SR Construction appealed the dismissal to the Fifth Circuit. Finding Hall Palm Springs to prevail under *de novo* review, the Fifth Circuit declined to reach the § 363(m) standard of review question. Pet. App. 10a. The Fifth Circuit affirmed the district court, finding that "[t]he record facts, framed by the external context and circumstances, make plain that there is no error in judgement of the able bankruptcy and district courts." Pet. App. 26a. The Fifth Circuit was unequivocal that Hall Palm Springs conducted itself in good faith, finding that "despite [SR Construction's] protests, the facts substantiate rather than undermine [Hall Palm Springs's] status as a 'good faith purchaser.'" Pet. App. 24a.

9. In its opinion, the Fifth Circuit also addressed the evolved definition used to determine good faith purchaser with respect to notice of adverse claims,

holding that "the threshold for an 'adverse claim' is a dispute in ownership interest" and that "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." Pet. App. 15a, 18a.

REASONS FOR DENYING THE WRIT

This case lacks the common characters of a case warranting further review. There is no true circuit split. The fact pattern is complex and heavily influenced by pandemic events. The question presented does not raise an issue of national importance. In sum, this Court should not expend its precious time and resources on this case.

A. The Fifth Circuit's Definition of Good Faith in Applying Section 363(m) Does Not Implicate a Split of Authority Among the Circuit Courts

1. *The Definitions of Good Faith are Easily Reconcilable.* Petitioner frames the definitions of "good faith" across the circuits as being in conflict; but there is no rational for reaching such a conclusion. As Petitioner notes, courts have considered definitions premised upon: (1) conduct; and (2) conduct plus notice of adverse claims. These definitions are consistent, evolving, reconcilable, and form holistic guidelines for bankruptcy courts to apply to specific case facts.

2. The conduct definition is general only. In effect, it assumes good faith of the purchaser because it

operates in the negative by identifying "misconduct that would destroy a purchaser's good faith status" to include "fraud, collusion between the purchaser and other bidders, or an attempt to take grossly unfair advantage of other bidders." As developed, this definition has been an exercise of intentional restraint by the courts to prevent it from being too exhaustive. This exemplifies the almost purely fact specific inquiries and determinations necessary for a bankruptcy court to decide good faith status for § 363(m) purposes. Each of the lower courts found Hall Palm Springs to meet the conduct definition, including the Fifth Circuit which analyzed the complained of conduct and still found Hall Palm Springs was a good faith purchaser.

3. In seeking the intervention of this Court, Petitioner does not contest the veracity or substance of conduct analysis. It neither complains about its application nor suggests that a review by this Court would change the underlying findings of Hall Palm Springs's good faith conduct.[2]

4. Each circuit that has reviewed good faith in the § 363(m) context considers the purchaser's conduct, or misconduct, irrespective of whether notice of adverse claims is considered. Moreover, the circuits repeatedly

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[2] Petitioner also does not contend that this Court's recent *MOAC Mall Holdings* decision affects the posture of this case or the rulings below. *MOAC Mall Holdings, LLC v. Transform Holdco LLC*, 143 S. Ct. 927, 932 (2023). Respondent agrees; because Petitioner is expressly seeking reversal of a sale authorized under § 363(b) and did not obtain a stay of said sale, only the good faith determination is at issue.

reference each other's decisions in support of their definition construction.

First Circuit. In *In re Old Cold*, the First Circuit most recently stated that acting in good faith meant "that the party must purchase without fraud, misconduct, and must not take grossly unfair advantage of other bidders." *Mission Prod. Holdings, Inc. v. Old Cold LLC* (*In re Old Cold, LLC*), 879 F.3d 376, 384 (1st Cir. 2018) (internal quotations omitted).

Second Circuit. Citing the Third Circuit's decision in *In re Abbots Dairies of Pennsylvania, Inc.*, the Second Circuit defined "the good-faith analysis" to be "focused on the purchaser's conduct in the course of the bankruptcy proceedings" with a prohibition on "fraudulent, collusive actions specifically intended to affect the sale price or control the outcome of the sale." *Licensing by Paolo v. Sinatra* (*In re Gucci*), 126 F.3d 380, 388-390 (2d Cir. 1997) (citing *In re Abbotts Dairies*, 788 F.2d 143, 149 (3d Cir. 1986).

Third Circuit. The decision of *In re Abbotts Dairies* cites to the Seventh Circuit decision of *In re Rock Indus.* in discussing similar misconduct that would typically "destroy a purchaser's good faith status" to be "fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." 788 F.2d at 147 (citing *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir. 1978). Moreover, the recent Third Circuit decision of *In re Pursuit Capital Management, LLC* cites back to *In re Abbotts Dairies* and the Second Circuit's *In re Gucci* for the same definition. *Pursuit Capital Mgmt. Fund I, L.P. v. Burtch* (*In re Pursuit Capital Mgmt., LLC*), 874 F.3d 124, 135 (3d Cir. 2017).

Fourth Circuit. The often cited Fourth Circuit decision of *Willemain v. Kivitz* also cites *In re Rock Indus.* for the same misconduct that would typically destroy a good faith purchaser's status. 764 F.2d 1019, 1023-34 (4th Cir. 1985) (citing *In re Rock Indus. Mach. Corp.*, 572 F.2d at 1198). *Willemain v. Kivitz* is also cited by the Second Circuit in *In re Gucci*. 126 F.3d at 390.

Fifth Circuit. The Fifth Circuit definition is now controlled by the *In re RE Palm Springs II* decision, which underlies this case. Pet. App. 1a; *SR Const., Inc. v. Hall Palm Springs, LLC* (*In re RE Palm Springs II, LLC*), 65 F.4th 752 (5th Cir. 2023). Like each of the decisions preceding the *In re RE Palm Springs II* decision looks to "misconduct" that would "destroy a purchaser's good faith status." Pet. App. 19a.

Sixth Circuit. In *In re Made in Detroit*, the Sixth Circuit also chooses to cite to the decisions of *In re Rock Indus.*, *In re Gucci*, and *In re Abbotts Dairies* for the same proposition that there must be a demonstration "that there was fraud or collusion between the purchaser and the seller or other bidders, or that the purchaser's actions constituted an attempt to take grossly unfair advantage of other bidders." *Made in Detroit, Inc. v. Official Comm. Of Unsecured creditors of Made in Detroit, Inc. (In re Made in Detroit, Inc.)*, 414 F.3d 576, 581 (6th Cir. 2005) (internal quotation omitted).

Seventh Circuit. The early case of *In re Rock Indus.* – already shown to be cited by numerous decisions – provides a foundation for review of purchaser's misconduct. More current Seventh Circuit

decisions, such as *Lardas v. Grcic* cited to by Petitioner, reference the circuit's decision in *In re Andy Frain Services, Inc.*, 798 F.2d 1113, 1125 (7th Cir. 1986); *see also Lardas v. Grcic*, 847 F.3d 561, 568 (7th Cir. 2017) (cert. denied); *see also Hower v. Molding Sys. Eng'g Corp.*, 445 F.3d 935, 939 (7th Cir. 2006). In *In re Andy Frain Services*, the Seventh Circuit quotes *In re Rock Indus.* under the predecessor Bankruptcy Rule 805 in defining good faith. 798 F.2d at 1125. The definition used with respect to conduct, however, stayed the same.

Eighth Circuit. In *In re AFY*, the Eighth Circuit reviews purchaser's conduct using an indirect quote of the *In re Rock Mach.* definition. *Sears v. U.S. Trs.* (*In re AFY*), 734 F.3d 810, 818 (8th Cir. 2013) (quoting *In re Burgess*, 246 B.R. 352, 356 (8th Cir. B.A.P. 2000) (quoting *In re Rock Indus.*, 572 F.2d 1198).

Ninth Circuit. As shown by Petitioner, the Ninth Circuit has a long history of considering conduct in defining good faith purchaser by also following the text of *In re Rock Indus.* Pet. 16. Most recently, the *In re Berkeley Del. Court* decision discusses the types of conduct that show an "absence of good faith" based on the same premises already discussed. *Adeli v. Barclay* (*In re Berkeley Del. Court, LLC*), 834 F.3d 1036, 1041 (9th Cir. 2016).

Tenth Circuit. The Tenth Circuit's good faith conduct consideration also arises under the *In re Rock Indus.* definition. *In re Bel Air Assocs.*, 706 F.2d 301, 305 n.11 (10th Cir. 1983). As Petitioner notes, the use of this definition has been affirmed by the Tenth Circuit. *In re Independent Gas & Oil Producers, Inc.*

Guadano v. Holbrook (*In re Indep. Gas & Oil Producers, Inc.*), 80 F. App'x 95, 99 (10th Cir. 2003).

Eleventh Circuit. The recent *In re Stanford* decision from the Eleventh Circuit similarly discusses the circuit's adoption of a traditional equitable definition. *Reynolds v. Servisfirst Bank* (*In re Stanford*), 17 F.4th 116, 124 (11th Cir. 2021). Therein, the court notes consideration of whether there is "any fraud or misconduct" *Id.*

D.C. Circuit. Finally, the D.C. Circuit looks to "misconduct that could destroy the buyer's good faith" by citing to *In re Bel Air Assoc.* and *In re Rock Indus.*, among others. *In re Magwood*, 251 U.S. App. D.C. 389, 785 F.2d 1077, 1081, fn. 6 (1986).

5. It is simple to see that whatever the nuanced factual circumstances have been, where a finding of good faith is reviewed the core of the review is based on traditional equitable principles, most importantly misconduct by the purchaser that would destroy its presumed good faith status.

6. The notice of adverse claim analysis is actually an addition to the underlying conduct definition, rather than a unique definition; it prescribes as assessment of whether the purchaser purchased "the assets for value, in good faith, and without notice of adverse claims." Pet. App. 11a. The bankruptcy court still reviews, separate from the notice of adverse claims, whether the purchaser acted in good faith. It adds a function of good faith in knowledge in addition to good faith in conduct. It is on this the substance of Petitioner's request turns.

7. Petitioner implores this court to find that the circuit courts are here conflicted; that some circuits examining conduct only with others adding in adverse claims is disjointed or varied in application. However, each strategy harkens back to the central concept – the integrity of the purchaser's conduct.

8. Few circuits have faced cases with notice of adverse claims as an issue; the circuits that have recognized notice of adverse claims as sufficient to defeat good-faith status have done so in conjunction with a conduct review (as shown above). In effect, each such notice equates to an act of mental misconduct that would destroy the purchaser's good faith status. Like the conduct review, the circuits maintain the effective assumption of good-faith status and then define what knowledge and types of adverse claims would be sufficient to destroy such status.

9. Still most of the relevant cases are not directly on point to the question at bar. The First Circuit *In re Old Cold* decision relies on the earlier *In re TMT Procurement* decision from the Fifth Circuit to support its conclusion that knowledge of a challenge to a credit bid right is "not the type of 'adverse claim' that . . . deprives the purchaser of good faith status." 879 F.3d 386-87. The 1981 First Circuit decision in *Greylock Glen Corp. v. Cmty. Sav. Bank* merely acknowledged that former Bankruptcy Rule 805 made knowledge of appeals irrelevant to the analysis. 656 F.2d 1, 4 (1st Cir. 1981). The Fourth Circuit *Willemain v. Kivitz* decision similarly cites notice of adverse claims as part of the good-faith analysis, but it does not define adverse claim beyond that of knowledge of an appeal being insufficient. 764 F.2d 1025. This tracks through the Second Circuit, the Sixth Circuit, the Eighth

Circuit, and the Eleventh Circuit – each of which has noted this addition of notice of adverse claims definition without providing further substantive rulings. *See In re Gucci*, 126 F.3d at 390; *In re Made in Detroit*, 414 F.3d at 581; *In re AFY*, 734 F.3d at 818; *In re Stanford*, 17 F.4th at 124. These decisions and the other decisions citing only the purchaser's conduct for the definition failed to squarely present any issue of adverse claims.

10. The adverse claims that have arisen have been ownership claims. *See In re Rock Indus.*, 572 F.2d 1195; *Darby v. Zimmerman* (*In re Popp*), 323 B.R. 260 (B.A.P. 9th Cir. 2005). This Court has even explained 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.'" Pet. App. 14a (quoting *Boone v. Chiles*, 35 U.S. 177, 210 (1836) (emphasis added).

11. *There is No Opinion in Conflict with the Fifth Circuit Opinion.* The Fifth Circuit appropriately recognized that no other court has strictly defined "adverse claim" in the context of § 363(m). Pet. App. 11a-12a. Petitioner fails to cite to even a single case where less than a dispute to ownership has alone qualified as a sufficient adverse claim under § 363(m) to warrant reversal.[3] No other circuit court or even district court has addressed this exact definitional issue. Novelty does not equate with a split of authority demanding review. Such an undeveloped issue

[3] Petitioner cites to the 1998 First Circuit decision in *Jeremiah v. Richardson*, which as discussed below is misaligned with the case at bar due its own unique factual posture.

nationwide is not an appropriate candidate for certiorari. *See* Sup. Ct. R. 10(a).

12. *Even if there were a Conflict, Insufficient Circuit Opinions Exist to Warrant Intervention.* The narrowness of this issue means that very few circuit courts have issued opinions that bear on the definition of "adverse claims." The *Jeremiah v. Richardson* case is relied on heavily by the Petitioner. It is a decades old case where good faith was eliminated "in light of the credible allegations of fraud" against the purchaser without affecting the authorized sale. 148 F.3d 17, 22 (1st Cir. 1998).[4] Therein, the subject adversary proceeding sought "to set aside the mortgage on the property acquired . . . allegedly by prepetition fraud." *Id.* at 19. This is plainly inapposite to the conduct of Hall Palm Springs in this case.

First, there have been found to be no credible allegations of fraud. Second, the Trustee in that case "had characterized the adversary proceeding as a 'good claim' and thought his chances of winning it were favorable; whereas here, neither the bankruptcy court nor district court found Petitioner's likelihood of success sufficient to warrant a stay, and no court has found the adversary proceeding on its face to be a "good claim." *Id.* at 20. Third, the *Jeremiah* case deals with settling a questionable mortgage used as consideration in the overall sale transaction. There are no credible facts to suggest that Respondent's deed

[4] While the First Circuit did conclude that the purchaser was not a good faith purchaser under § 363(m), it also held that such conclusion did not affect its analysis. *Id.* at 23. In fact, the First Circuit affirmed the bankruptcy court's decision, upon its "informed, reasoned, and independent decision to approve" the only realistic proposal before it. *Id.* at 25.

of trust was not a valid lien on the property or that the credit bid did not provide fair value.

More importantly, the *Jeremiah* decision does not even attempt to define adverse claim beyond its oblique reference to the adversary proceeding.

13. Petitioner further relies on several decisions citing the 1978 Seventh Circuit decision of *In re Rock Indus.* As discussed above, that decision also does not directly define adverse claims, instead providing only vague guidance that "notice of 'adverse claims' has meant . . . no 'actual knowledge of the defects in the title [to the assets bought].'" 572 F.2d at 1198 (citing *Mesirow v. Duggan*, 240 F.d2d 751,758 (8th Cir. 1957). The Seventh Circuit adds only that it *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 of at the time of sale." *Id.* (emphasis added). In its analysis, the Fifth Circuit reconciled this finding as merely commentary and not constraining. Pet. App. 16a.

14. *The Fifth Circuit was Correct in its Definition.* Contrary to Petitioner's protestations, the Fifth Circuit was correct in its determination that "the threshold for an 'adverse claim' is a dispute in ownership interest." Pet. App. 15a. As the Fifth Circuit recognized "lowering the standard to claims below questions of ownership interest . . . would open the proverbial floodgates and countless sales under [S]ection 363 of the Bankruptcy Code would be invalid, which . . . stands antithetical to 'Congress's strong preference for finality and efficiency in the bankruptcy context.'" Pet. App. 16a (quoting *In re Energytec, Inc.*, 739 F.3d 215, 218-19 (5th Cir. 2013)

(other internal quotations omitted). Certainly, there is some tradeoff of appellate rights to ensure finality (and maximized sales) occur. As has been the case here, an argument for a lower standard impedes such end.

B. This Case is a Uniquely Poor Vehicle to Review the Issues Raised

Petitioner contends that "[t]his case presents an ideal vehicle to address these issues" because "[i]t will allow the Court to provide a clear rule about the definition of "good faith" for purposes of section 363(m). To the contrary, it is difficult to imagine another case with more issues complicating clean resolution of the question presented.

1. *Disputed Facts.* This case does not provide "undisputed facts." All the way to the Fifth Circuit, Petitioner offered misstatements, unsupported conjecture, and twisting of the facts to support its dispute of Respondent's good faith. Pet. App. 19a-24a ("despite [SR Construction's] protests, the facts substantiate rather than undermine [Hall Palm Springs's status as a 'good faith purchaser'"]. Petitioner suggests that "[t]here are no factual disputes" about Respondent's notice of Petitioner's claims, only "about the legal effect of that notice and whether [Respondent] can claim the protection of section 363(m)." Pet. 26. First, Petitioner offers its petition with continued factual misstatements (discussed below in Section D). Second, factual disputes remain as to the nature of Petitioner's claims. Petitioner persists with its baseless allegation that it holds a superior lien to Respondent. In doing so, Petitioner omits the fact that it signed a

subordination agreement with Respondent. Pet. App. 4a, 52a. Petitioner also disputes the lower courts' findings concerning the substance of its adversary and state court proceedings. Petitioner deflects these findings as improperly addressing the merits; in actuality, the claims therein are merely defined for what they are.

Petitioner contends that its adversary proceeding implicates removal of the Property from the bankruptcy estate, but it does so on a misreading of the plain language of the underlying California statutes. Pet. App. 17a-18a (discussing the substance of those statutes). Moreover, nothing actually suggests that the adversary proceeding or Petitioner's lien "affect[s] the ability to convey good title" in a §363(b) sale or in the prepetition conveyance transaction completed subject to all liens. Pet. 23. If baseless allegations in an adversary proceeding were to be deemed sufficient to eliminate § 363(m) good-faith status, then any dissatisfied creditor could freely appeal, which would be counter to legislative intent.

2. Certainly, there is no dispute of Respondent's knowledge of the subject claims. Respondent exercised transparency and full disclosure with the bankruptcy court; so, not only did Respondent know of these claims but any interested buyer was on notice of these claims via the publicly-filed bankruptcy pleadings. All of Petitioner's claims were forefront throughout the sale process, such that no one could purchase the property without knowledge of the claims. In fact, if the mere existence of an adversary proceeding is an "adverse claim," then § 363(m) could very rarely protect a purchaser. *See* Pet. 23 (arguing for a mere existence standard).

3. *Alternative Bases for Mootness.* Even if this Court were to disagree with the decision below, the sheer separation between consummation of the sale and the end of this stage of the appeal would reasonably give rise to arguments of equitable mootness. Respondent has acted in reasonable reliance on the unstayed sale order by investing millions of dollars more finishing construction of the hotel, which is slated to open late this year. The proverbial eggs have not only been scrambled but have been combined into an omelet with many other ingredients. Statutorily moot or not, the sale cannot reasonably be unwound even on reversal. This invokes equitable mootness, which is an active legal issue in its own right.

4. *Contrary to Congressional Intent.* While likely not unique to this case, certiorari here would put this case yet further from the finality and efficiency intended in § 363(b) by Congress. More than two and a half years have passed since consummation of the sale, all of which time Respondent has remained embroiled in unrelenting appellate litigation. To select this case for further consideration, even to affirm, would add time and hardship on Respondent. Without a stay and its accompanying bond, Respondent is limited in its post-appeal recourse against Petitioner to redress this continuing harm.

5. Section 363(m) was designed to prevent a grinding appeal such as this. Cleverly, Petitioner has advanced narrower and narrower disputes to keep this appeal alive. Nevertheless, Petitioner has never shown Respondent's conduct to lack the foundational

integrity. The facts of this case deserve an earlier conclusion.

C. The Question Presented is not of Considerable National Importance

Petitioner contends that "[t]his case presents an important question of bankruptcy law" without any detailed discussion of why. While § 363(b) is a very commonly used mechanism in bankruptcy, no one except Petitioner suggests that the posture of the "good faith" definition desperately needs this Court's review. In fact, § 363(m) results in rare disputes.

Petitioner offers no explanation for why this issue, if so important, should not be left to the legislative process; or why the circuit courts now suddenly cannot continue to mold these terms as they have for decades. If "adverse claims" must truly be defined to include as commonplace bankruptcy claims as junior liens and incomplete foreclosure proceedings, Petitioner can present its concerns to the Advisory Committee on Bankruptcy Rules where the issue can be studied and the magnitude of the suggested change can be considered with all potential affected parties in mind. This Court's limited docket is no place to enact a change that could affect nearly every sale free and clear, especially when no true conflict exists among the circuits.

D. Supreme Court Rule 14.4 Supports Denial of the Petition

Pursuant to Supreme Court Rule 15.2, Respondent addresses the following, in addition to the corrections

noted above, which warrant denial pursuant to Supreme Court Rule 14.4:

1. *The Consideration to Original Owner*. Petitioner falsely asserts that "Hall Palm Springs convinced the [original] owner to convey the property (without any stated consideration) to Respondent[.]" Pet. App. 2. Petitioner goes on to somewhat confusingly suggest that "[i]t is not clear what (if any) consideration was given by [RE Palm Springs] to [the original owner] in exchange for the property." Pet. 6. Both the district court and the Fifth Circuit have resoundingly rejected Petitioners allegation of lack of consideration by pointing to the release of original owner from liability on the construction loan and the net profits participation noted in the conveyance agreement, as well as the conveyance being subject to existing liens. These allegations are a transparent effort to shore up the claims Petitioner contends qualify as "adverse." Such misstatements and mischaracterizations would cloud any clean and effective resolution of the issue presented if certiorari were granted.

2. Petitioner also makes the incomplete and misleading statement that the transaction with the original owner left it "with all of its liabilities but without the primary asset." Pet. 6. Petitioner leaves out that while original owner no longer had the asset, all liens remained against such asset. Petitioner's statement implies that its ability to collect was somehow altered, when in fact it was not.

3. *Misleading Timeline in Bankruptcy*. In its Statement, Petitioner presents events in the bankruptcy case in a misleading sequence. Immediately after stating that RE Palm Springs filed

for bankruptcy, Petitioner states that it "objected to Hall Palm Springs'[s] claim in the bankruptcy and filed an adversary proceeding" before it states that "[t]he bankruptcy court approved procedures to attempt to sell the property." Pet. 2.-3. As described above, Petitioner did not file the claim objection and adversary proceeding until the eve of the credit bid and sale hearings. Petitioner implies this same misdirect later on its Petition, when it states that its objection was filed "[d]uring the bidding process[.]" Pet. 7. While technically true, it did not file the claim objection until after the initial bid period and only after it became clear no bids other than Respondent's credit bid would emerge.

E. Standard of Review is Not a Proper Subsidiary Question.

Petitioner improperly seeks to obtain review of an issue not included in the question presented – the standard of review for a dismissal under § 363(m). Like many other circuits, the Fifth Circuit did not reach that issue. Pet. App. 10a. Such a request would bypass the ordinary process of appellate review.

1. Even if certiorari is granted, an argument is only "fairly included" under Supreme Court Rule 14.1(a) if it raises a "prior question." *Lebron v. v. National Railroad Passenger Corporation*, 513 U. S. 374, 381 (1995). "That is, resolving the new argument must be 'a predicate to an intelligent resolution of the question presented.'" *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 595 U.S. 178 (2022) (THOMAS, J., dissenting) (quoting Ohio v. Robinette, 519 U.S. 33, 38 (1996) (internal quotation marks omitted in original)). Here, it is wholly unnecessary to decide standard of

review first in order to decide the meaning of "good faith" for the purposes of § 363(m). Standard of review would be a uniquely independent question for this Court to consider. Unquestionably, Petitioner references it as a subsidiary question in an attempt "to change the question to one that seems more favorable." *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 472 (2017) (THOMAS, J., dissenting).

CONCLUSION

For the foregoing reasons, this Court should deny the Petition.

Respectfully submitted,

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September 14, 2023

APPENDIX

Appendix A

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

BK. NO: 20-31972-SGJ

IN RE:

RE PALM SPRINGS II, LLC

D E B T O R.

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, that on the 6th day of November, 2020, before the HONORABLE STACEY G. JERNIGAN, United States Bankruptcy Judge at Dallas, Texas, the above styled and numbered cause came on for hearing, and the following constitutes the transcript of such proceedings as hereinafter set forth:

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P R O C E E D I N G S

THE COURT: This is Judge Jernigan and we are going to resume RE Palm Springs. We are in day two of a hearing on a motion to sell.

Let me first call roll and make sure we have our lawyers that we need on the phone or the video.

For the debtor, do we have Ms. Wall and Mr. Holmes?

MS. WALL: Yes. Good morning, Your Honor. Emily Wall and Steve Holmes on behalf of the debtor.

THE COURT: All right. For Hall, the secured lender, it looks like we have Mr. Wright back with us, correct?

MR. WRIGHT: Yes, Judge. Frank Wright on behalf of Hall Palm Springs.

THE COURT: All right. Very good.

It looks like we have Mr. Amin back with us for SRC; is that correct?

MR. AMIN: Good morning, Your Honor, that's correct. Ismail Amin SRC.

THE COURT: All right. Very good.

Do we have Mr. Mang back for Jacobsson?

MR. MANG: Yes, Your Honor, good morning. It's Tinho Mang for Jacobsson Construction Engineering, Inc.

THE COURT: Good morning.

I see Ms. Clark back this morning. You represent, I guess, is it Encore Steel and it seems like there's one other entity, correct?

MS. CLARK: Just Encore Steel, Your Honor. Katherine Clark on behalf of Encore Steel, Inc. And I have with me today Mr. Derek Maggio, a representative of Encore Steel.

THE COURT: All right. Thank you. I think I got mixed up because you said maybe there were two different lien claims your client asserts, maybe a warehousemen's lien, as well as --

MS. CLARK: I believe that's Ms. Lowe's client.

THE COURT: Okay. Sorry about that. I'm getting --

MS. CLARK: That's okay.

THE COURT: I'll have it straight here in a minute.

All right. So speaking of Ms. Lowe, do we have you there this morning?

MS. LOWE: Yes. Good morning, Your Honor. Melissa Lowe on behalf of Crowner Sheet Metal Products and Beltmann Logistics.

THE COURT: Okay. So you --

MS. LOWE: Good morning, Your Honor.

THE COURT: You were the one who said one of your clients has a warehouseman's lien?

MS. LOWE: That's right, Your Honor.

THE COURT: And which entity was it?

MS. LOWE: That's Beltmann Logistics.

THE COURT: Okay. Thank you.

All right. Let's see. Who did I miss? Did I miss any lawyers who wish to appear?

All right. When we stopped yesterday evening, we were told by Mr. Amin that he wanted to present an appraiser today. Is that where we go next, Mr. Amin?

MR. AMIN: Your Honor, that's correct. I have Michael Baker from CBRE on the line, as well, to testify.

THE COURT: All right. Any housekeeping matters before I swear him in?

MR. AMIN: None from SRC at this point, Your Honor.

THE COURT: All right. Anyone?

Okay. Mr. Baker, would you say, testing one, two, so we can pick up your video screen and I will swear you in?

MR. BAKER: Yes, Your Honor. Testing, one, two.

THE COURT: Okay. We see you.

Please raise your right hand.

(The witness was sworn by the Judge.)

THE COURT: All right. Thank you,

Mr. Amin, you may proceed.

MR. AMIN: Thank you, Your Honor.

MICHAEL BAKER

The witness, having been duly sworn to tell the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. AMIN:

Q. Good morning, Mr. Baker.

A. Good morning.

Q. Can you hear me okay?

A. Yes, very good.

Q. Great.

Are you currently employed, sir?

A. Yes.

Q. By whom?

A. CBRE Hotels.

Q. And what do you do for CBRE Hotels?

A. My title is director. And I work -- we are a market research and consulting firm that focuses in, exclusively on hotels, including the valuation appraisal of hotels, along with other consulting matters for hotel owners, investors, and borrowers.

Q. And do you have any professional titles or licensing (inaudible word due to audio cutting out)?

A. Yes. I'm a certified commercial appraiser in the State of California.

Q. And when did you become a certified appraiser in California?

A. 2013.

Q. Okay. And you said you specialize in commercial real estate; is that correct?

A. Yes. Specifically hotels, but, yes, commercial real estate.

Q. And how long have you been specializing in hotels?

A. 8 1/2 years, almost.

Q. Okay. Now, has -- has CBRE hotels performed an appraisal at the property located at 404 North Palm Court in Palm Springs, California?

A. Yes.

Q. And I'd like to direct you to that appraisal. Do you have a copy of that, sir?

A. Yes.

MR. AMIN: And that, Your Honor, for the record is SRC Exhibit 9.

THE COURT: Okay.

Q. Now, sir, did you prepare this document?

A. Yes.

Q. And with respect to the document, you came up to an appraised value; is that correct?

A. That's would correct

Q. And would you walk us through the appraised value and methodologies that you used?

A. Sure. We primarily relied upon the income approach, which looks at the potential cash flow of the hotel, because this is the methodology that most buyers in the marketplace would use. And then as a secondary approach, we considered the sales comparison approach as a test of reasonableness. Two values that were derived were the upon completion value of the hotel, upon completion of construction. And then the as-is value of the hotel. And that was primarily done by looking at projecting the potential cash flow for the hotel upon opening in November of 2021, and deducting off the cost to complete that to come up with the as-is value.

Q. Thank you. And did you ultimately determine an as-is value of the property for the date of August 21, 2020?

A. Yes, we did.

Q. And what was that amount?

A. $56.6 million.

Q. And did you also come up with a value for the property fully completed November 2021?

A. Yes.

Q. And what was the value?

A. $80.8 million.

Q. You said 80,800,000; is that correct?

A. Yes. 80,800,000.

Q. Okay. Now, just to clarify something that we discussed back on August 24th, there was a typo in the report; is that correct?

A. That's correct.

Q. Okay. And the date of the completion, did you intend that date to be November 21st, 2020?

A. Yes, I did.

Q. And the date it that was 56,600,000; is that correct?

A. Yes, 56,600,000.

Q. Okay. Now, with respect to the appraised value of the property, based upon your professional experience in the hotel industry, you know, for a property of this size and magnitude, how long would it typically take to market it?

A. We estimated a sales and marketing period of 6 to 12 months.

Q. And for a partially constructed project like this, you know, would it require a fairly significant marketing budget?

A. Well, in our appraisal, we didn't opine on that specifically. But we assumed that it would require at least a standard amount, or perhaps more market and asset in that condition.

Q. But would you consider a sale process in less than 60 days of a property of this size and magnitude to be reasonable?

No. No, I would not.

Q. And why not?

A. Well, as I mentioned, because of current market conditions, you know, we suggested it would be -- you know, a 6 to 12 month window is what would be reasonable. You know, even in the best of times, prior to COVID-19, a hotel is a very complicated piece of real estate. It's an operating business. It requires selling your rooms on a nightly basis. And, you know, that would be, you know, somewhere in the 3 to 6 month window in a good market. So, you know, given the global pandemic conditions that we're in, you know, I think that a 6 to 12 month window is far more reasonable.

Q. Does CBRE Hotels have a good understanding of the Palm Springs market?

A. Yes. We have done extensive work in that market. The signatory to the report along with me was Jeff Lagossi, who has worked in that market, you know, for 30 years. So we've done numerous appraisals in the Coachella Valley over the years. And

we have an extensive data base on properties within the area.

Q. Thank you.

MR. AMIN: Your Honor, at this time I'd move to admit Exhibit 9 into evidence.

THE COURT: Okay. You got kind of garbly there. You said, at this time what?

MR. AMIN: SRC -- SRC moves to admit Exhibit 9 into evidence.

THE COURT: Any objections?

MR. WRIGHT: Judge, Hall would object. On the face of of the appraisal in the first paragraph it states, the function of this appraisal is for the internal use by SR Construction, Inc, and may not be relied upon by other persons or entities. So on its face, it has been restricted and cannot be relied upon the Court in this hearing.

THE COURT: All right. I overrule that objection. I'm going to admit it.

MR. AMIN: Thank you, Your Honor. I have nothing further from Mr. Baker at this time and pass the witness.

THE COURT: All right. I guess I'll start with the debtor. Mr. Holmes, or, Ms. Wall, any examination of this witness?

MS. WALL: Yes,briefly, Your Honor. Emily Wall for the debtor.

CROSS-EXAMINATION

BY MS. WALL:

Q. Hi, Mr. Baker. Can you hear me okay?

A. Yes, good morning.

Q. Good morning.

Have you ever visited this property in Palm Springs?

A. I have. I did not in connection with this assignment. But I've certainly driven past it on previous occasions, as has my colleague that did the report along with me.

Q. Have you seen -- visited the property since the bankruptcy has been filed on July 22nd of 2020?

A. No, I have not.

Q. So you haven't seen the current state of this property; is that right?

A. Not in person, but I've certainly viewed photos on-line that showed various -- various points during construction.

Q. Okay. Would the unfinished state of the hotel help or hurt its value; in your opinion?

A. I'm sorry, could you repeat that?

Q. Sure. Would the unfurnished state of the hotel help its value, or hurt it, in your opinion?

A. It deteriorate -- it detracts from the value.

Q. All right. What information did you use to prepare this appraisal?

A. We used a variety of sources, including in-house data that CBRE has, as well as external sources. We used data from Smith Travel Research to -- which is a third-party firm that tracks the hotels across the country, in this case a set of hotels that could be compared in the market that this hotel would compete with. And Smith Travel Research provides a, what

they call a custom trend report that provides the historical ADR and occupancy of the hotels that we considered (inaudible word) to this under construction project. We also used data from R Hotel Horizons platform, which is one of the only firms in the country that does a hotel forecast, (indecipherable few words) in the hotel market. We also used data from our CBRE Hotel's annual trends data base, which provides the profit and loss statements of, you know, 5,000 hotels across the country. You know, upscale, boutique hotels such as the proposed, or under construction subject property.

Q. Okay. Thank you.

A. Yep.

Q. Did your analysis include some comparable hotel sales?

A. Yes.

Q. And were any of those comparable sales for partially completed hotels?

A. No, they were not.

Q. And were any of the comparable sales sold out of a bankruptcy estate?

A. No, they were not.

Q. And --

A. I think that it's important to note that they are not because -- first of all, the sales comparison approach, as I mentioned, is really just there as a test of reasonableness. It's not the way that buyers of hotels like this actually used. They are -- they are purchasing the sails. But the reason that there were no partially constructed hotels or bankruptcy sale hotels is because, you know, they are very few and far

between. And, you know, it's a more appropriate methodology to look at hotels that sold, you know, not under duress and then make a deduction --

MS. WALL: Okay. I'm going to object to non-responsive after -- anything after, no.

THE COURT: Okay. I sustain that.

Q. Mr. Baker, you've talked about before that you are not a hotel broker; is that correct?

A. That's correct.

Q. And you also recall testifying previously in this case that you have absolutely no concerns with the ability of Hodges Ward Elliott to market this property?

A. Correct. But that's assuming -- that doesn't -- they are a very credible hotel brokerage firm. But I still wouldn't want them to be forced to sell it under distress in a short-time window.

Q. Okay.

A. But they are a very credible firm.

MS. WALL: Again, Your Honor, I'll object as non-responsive after the initial answer.

THE COURT: Sustained.

MS. WALL: I'll pass the witness.

THE COURT: All right. Mr. Wright, any cross from Hall?

MR. WRIGHT: Yes, Judge.

THE COURT: Okay.

CROSS-EXAMINATION

BY MR. WRIGHT:

Q. Mr. Baker, in your appraisal you say it's a restricted appraisal. What do you mean by that?

A. Well, restricted appraisal is geared to a specific audience. As mentioned earlier, you know, talking to somebody that's already familiar with the property. And it's, you know, just stating the results, as opposed to stating exactly how you got to the results.

Q. And is it true, as you stated in your appraisal, that it is based on files that are not part of the appraisal?

A. Can you repeat that question?

Q. Is it accurate to say that this appraisal is based on files that you maintain that were not part of the appraisal?

A. That's correct.

Q. And is the analysis and the opinions, you know that you -- the data that you gathered, it is located somewhere else outside of this appraisal, correct?

A. Correct.

Q. Now, you've stated that you determined a value as of August 21, 2020 for an as-is value and then November 1, 2021 for an as-complete value. Did you determine how long it would take to complete the hotel?

A. Yes.

Q. And how long was that?

A. That's approximately -- approximately 15 months from the August 2020 date to the completion date of November of 2021.

Q. Okay. So it's your opinion that it would take 15 months to complete the hotel?

A. No. We had to factor in that after it gets sold, you have to get, you know, re-started. So it wasn't necessarily hammer and nails on August 21st, 2020. But it would be a process to get it complete.

Q. Are you aware of testimony that has been given in this case that it would take 10 to 12 months to complete the hotel?

A. No.

Q. If that's true, then if you added on to that a 6 to 12 months marketing period, that would put you at almost two years, right?

A. Yeah, approximately.

Q. How did you factor in COVID in your valuation?

A. Well, as I mentioned, our firm has a forecasting platform that does econometric forecasting for major markets across the country. And one of those markets is the Coachella Valley. And they are a team of economists that factor in all of the economic implications of COVID-19 into their Coachella Valley forecasts as they do across the country. So it certainly was a consideration of the deterioration in terms of the Palm Springs and Coachella Valley hotel (indecipherable word) factored into our projection.

Q. And how did you determine the cost to complete the hotel?

A. That was gathered from -- we -- it was our understanding that, I guess from the bankruptcy filings that the -- approximately 36.8 million had been extended already. And then we factored in a certain

amount to complete -- to restart and complete the project.

Q. So you based your cost to complete off of the amount of the loan proceeds that had not been funded?

MR. AMIN: I'm -- I'm going to object, Your Honor, to the extent it calls for evidence not in the record.

THE COURT: Overruled.

Mr. Baker, we're waiting on an answer.

Q. Did you hear the question?

A. Yeah. So we were provided a number that approximately 36.8 million had been extended, as of the date of our appraisal. And so we took that number and understood that, you know -- and we factored an amount to complete it from where it stood as of the date of our appraisal to amount completed. So we added on to that from that amount.

Q. And were you aware that equity contributions had been made by the original borrower in the context of completing this hotel?

A. We do not have that information.

Q. So the only information you had is the original intended loan amount plus what you understood to be the amount that had been advanced; is that correct?

A. When you say, the amount that had been advanced, I'm not sure what you mean by that.

Q. Well, you said 36.8 million had been funded.

A. Yes, correct.

Q. And do you know if that was the amount that actually had been funded or was that the amount that had been funded plus an interest accrual?

A. My understanding, that was the total amount that had been spent to date, which may have included an interest accrual. But I didn't have a detailed line by line what that actually entailed.

Q. And you didn't work off of a contractor's budget for completion of the hotel, correct?

A. Correct.

Q. Would you agree that if your estimate of costs for the completion of the hotel is incorrect, that that would change your value?

A. Yes, that's correct. It could change the value.

Q. I saw a reference in your appraisal that you worked off of data that was gathered in March of 2020; is that correct?

A. Yes. For some -- for some of the -- some aspects of the appraisal, yes.

Q. And so that data would not have taken into account the full affects of COVID; is that correct?

A. That data, yes. But, again, that's one small part of the overall appraisal. Because some of the hotels in the competitive (indecipherable word) were closed in March. So, again, the forecast going forward that was factored in absolutely included COVID-19.

Q. And none of the comparable sales that you looked at included hotels that were under construction, correct?

A. Correct.

Q. And certainly not hotels that had been under construction for roughly five years, correct?

A. Correct.

Q. All right. I want to share the appraisal with you. Can you see it?

A. Yes.

Q. And this is the appraisal dated August 23, 2020. And it's marked as SRC Exhibit 9.

A. Yes.

Q. All right. In the first paragraph you state that this is a restricted appraisal, correct?

A. Yes.

Q. And you also state that the function of this appraisal is for internal use by the SR Construction, Inc., and may not be relied upon by other persons or entities, correct?

A. Correct.

Q. Was it your intention for this to be relied upon by this Court?

A. No.

Q. I didn't hear your answer.

A. I said, no.

Q. Okay. If we go to page 3 -- I guess it's page 2 of the appraisal. Under scope of work you state, the report includes only the appraiser's conclusions. It cannot be properly understood without reference to the appraiser's files, which is maintained within our work product. So you would agree that there's no way for anyone to properly understand this report without access to those files, which we do not have of record today, correct?

A. (Inaudible response).

THE COURT: Mr. Baker, we're getting more and more background noise. It's getting harder and harder to hear you. Is there anything you can do about that?

THE WITNESS: Can you hear me now?

THE COURT: Yeah. We can hear you. It's the background noise of some sort that --

THE WITNESS: Yeah. It's quiet where I am. I'm not sure what background noise you're referring to. I'm sorry.

THE COURT: Okay. It's actually better right now, so I don't know if you adjusted something.

THE WITNESS: Okay.

THE COURT: But it is better.

All right. Continue.

THE WITNESS: Okay.

Q. And then in your appraisal on page 4 of your appraisal, paragraph number 5 says, for purposes of this appraisal, we have assumed the partially constructed hotel and retail project will open November 1, 2021.

A. Uh-huh, yes.

Q. If that date changes and moves out a year, would that affect your valuation?

A. Yes.

Q. If we go to page 6 under extraordinary assumptions you state, we did not have access to the actual development budget or costs for the subject hotel, including the ground floor retail. As will be noted at the end of this report, the as-is value is contingent, in part, on the total development cost. Based on published reports, the developer obtained a

construction loan for approximately 54,800,000. We have assumed this was an accurate reflection of the cost to develop the project, correct?

A. Yes.

Q. And, again, as I asked you earlier, if it turns out that that is not an accurate assessment of the cost, that would change your valuation?

A. Correct.

Q. I want to take you to page 12. You state here with respect to the as-is value -- and, again, the way you got to the as-is value is you took a valuation a year from now of $80 million and then backed into an as-is value; is that correct?

A. That's correct.

Q. And you say the as-is value was derived by subtracting the cost to complete the partially completed subject hotel from the upon completion value. This included consideration of costs for restarting a fall project, as well as profit. But then the amount you put in here as left to spend was $17,956,000. And you derived that amount from looking at the total budget of the loan less the amount disbursed; is that right?

A. That's correct.

Q. Are you aware of testimony in this case that the actual cost to complete was estimated to be north of $31 million?

A. No, I'm not.

Q. And if that's true, that would substantially change your valuation, correct?

A. Yes.

Q. In fact, if instead of 18 it's 31 million, you would take 13 million, roughly, off of 56 and that would drop it down to 43 million, just on its own?

A. All things being equal, yes.

Q. Now, you said you have no issue with HWE and they're, in fact, a very credible broker; is that correct?

A. That's correct.

Q. And, in fact, this -- their business, is selling hotels, correct?

A. That's correct.

Q. It's not something that you do, you appraise hotels?

A. That's correct.

Q. And you have not run a sale process for this property, have you?

A. I have not.

MR. WRIGHT: Pass the witness.

THE COURT: All right. I should have asked do any of the subcontractors wish to examine Mr. Baker. So how about that? Mr. Mang, we'll start with you?

MR. MANG: Your Honor, I don't have anything to ask this witness.

THE COURT: All right. Ms. Clark?

MS. CLARK: Your Honor, I don't have any questions for the witness.

THE COURT: Ms. Lowe?

MS. LOWE: No, Your Honor, nothing from me. THE COURT: All right. Any redirect, Mr. Amin?

MR. AMIN: Your Honor, just very briefly.

REDIRECT EXAMINATION

BY MR. AMIN:

Q. Mr. Baker, can you hear me okay?

A. Yes.

Q. Okay. Sir, the restricted appraisal language that Mr. Wright referenced in the report, is that standard language in an appraisal?

A. Yes. For the (inaudible word) appraisal, yes.

Q. Did you have a lot of time to conduct this appraisal?

A. No.

Q. And you -- Ms. Wall asked you a question about the types of hotel comparable sales you relied on. And you said that -- you said it was more appropriate to look at hotels under more reasonable circumstances and then you got cut off. Would you please (inaudible rest of statement).

A. You got a little bit -- cut off a little bit at the very end of there.

Q. Sorry. I'm asking about your response to Ms. Wall's question about the types of hotels that are appropriate for you to compare to this project.

A. Yeah. We're trying to determine a market value, not a distressed value. So looking at partially constructed hotels or bankruptcy foreclosure sales wasn't as appropriate. And those types of sales and conditions are far less frequent and it's more appropriate to look at the types of sales that we did use, which were, you know, existing or completed hotels under normal market conditions.

Q. And finally, Mr. Baker, in your experience in the hospitality market, has COVID-19 impacted the ability of CBRE to market hotel properties?

A. Well, I don't work for CBRE Hotel Brokerage. But we do have a hotel brokerage group and I think the answer to that would be, yes.

Q. Thank you, Mr. Baker.

MR. AMIN: I have nothing further, Your Honor.

THE COURT: Any recross, Ms. Wall?

MS. WALL: No, Your Honor.

THE COURT: Mr. Wright, any recross?

MR. WRIGHT: No, Judge.

THE COURT: All right. Thank you, Mr. Baker for your testimony. You're excused.

THE WITNESS: Thank you, Your Honor.

THE COURT: All right. Mr. Amin, I think we understood that this was going to be the last of SRC's evidence, correct?

MR. AMIN: That's correct, Your Honor.

THE COURT: All right. Ms. Clark, I understood we might get some evidence from you. Do you have a witness to call?

MS. CLARK: Yes, Your Honor, I do. Katherine Battaia Clark on behalf of Encore Steel, Inc. We would call Mr. Derek Maggio.

THE COURT: Okay. Is that M-a-g-g-i-o?

MS. CLARK: That is correct.

THE COURT: All right.

MR. WRIGHT: Judge, Frank Wright on behalf of Hall Palm Springs.

We would object to this witness. This witness was not disclosed in the witness and exhibit list. They didn't disclose any witnesses in their case in chief. So the only purpose they could offer this witness for would be rebuttal testimony, so if it's being offered for that purpose. But if they're trying to prove up their main case in chief, we object to the testimony.

THE COURT: All right. Ms. Clark, what about that?

MS. CLARK: Your Honor, this is for rebuttal. Again, with Mr. Loughridge's testimony yesterday, we believe that there are certain things that have been called into question about what has happened with respect to the mechanic's lienholders. And we would like to make the record clear on that point.

THE COURT: So there is going to be rebuttal evidence to what point of Mr. Loughridge?

MS. CLARK: In particular, Your Honor, Mr. Wright asked Mr. Loughridge about whether SR Construction had claims against Encore. And I want to be very clear about what those are. It does require a little bit of background. But I do -- I do think it's worth establishing what exactly is at issue in the California suits as opposed to what might be at issue here in the bankruptcy.

THE COURT: All right. Well, I'll overrule the objection and allow a little bit of evidence, with the understanding it's really just to rebut some sort of evidence or impressions that Mr. Loughridge may have testified about that you think are not correct and it might help the Court.

All right. Mr. Maggio, I need you to say, testing, one, two, so that I pick up your video and can swear you in.

MR. MAGGIO: Testing, one, two.

THE COURT: All right. Well, I hear you. I'm not seeing you yet. Can you trying testing, one, two again?

MR. MAGGIO: Testing one, two, again.

THE COURT: All right. Well -- there you are. Okay. Please raise your right hand.

(The witness was sworn by the Court.)

THE COURT: All right. Thank you. Ms. Clark, you may proceed.

MS. CLARK: Thank you, Your Honor.

DEREK MAGGIO

The witness, having been duly sworn to tell the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MS. CLARK:

Q. Mr. Maggio, can you please state your name for the record.

A. Derek Maggio.

Q. And you work for Encore Steel, Inc.?

A. That's correct.

Q. What is your role at Encore Steel, Inc.?

A. I'm a project manager.

Q. How long have you held that role?

A. For six years.

Q. In that role, are you familiar with a project in Palm Springs, California, the Hyatt Andares project?

A. Yes.

Q. Were you the project manager for that on behalf of Encore Steel for that project?

A. Yes.

Q. As it stands today, is Encore Steel still owed money for work it performed on that project?

A. Yes.

Q. And the money that is owed, is that -- pursuant to what contract is that money owed?

A. That's our contract with SR Construction.

Q. And has Encore taken steps to get repaid, or to get paid for the work it did, that it performed at the project?

A. Yes, we have.

Q. And did those steps include giving notice of non-payment?

A. Yes.

Q. And did those steps include filing a lien?

A. That's correct, yes.

Q. Mr. Maggio, do you have a copy of the mechanic's lien that was filed -- that was recorded on behalf of Encore Steel?

A. Yes.

Q. Okay. Are you familiar with that document?

A. Yes.

Q. And do you have personal knowledge of the things that are asserted in that lien claim?

A. Yes.

MS. CLARK: Your Honor, we -- Encore Steel has added Exhibit 3, their mechanic's lien. And it's at docket 242-3. And we would move to admit the lien.

MS. WALL: Your Honor, the debtor objects to admission of that. The exhibit list at 242 was filed one day before the hearing on November 4th.

THE COURT: Okay. What's your response to the timeliness problem?

MS. CLARK: Your Honor, these are the same exhibits which we had for the prior hearing. And, frankly, Your Honor, with all of the filings we had to do, I just didn't realize we didn't have our exhibit list filed. This mechanic's lien is not news to anyone. So I don't think it's prejudicial, even if it was late.

THE COURT: Okay. It was a bit garbly the first part of your response. You said it was already on your witness and exhibit list for the bid procedures hearing; is that what you are -- excuse me, the credit bid hearing?

MS. CLARK: I believe so, Your Honor. I may be wrong about that, but I believe that it was.

MS. WALL: Your Honor, I don't recall that Encore Steel filed a witness and exhibit list for the credit bid hearing on Tuesday.

MS. CLARK: We definitely did.

MS. WALL: I stand corrected. I see it. Thank you.

THE COURT: Okay. I'll overrule the objection. I'll allow the exhibit. It's, again, docket entry 242-3.

MS. CLARK: Thank you, Your Honor. It's admitted?

THE COURT: Yes.

Q. And, Mr. Maggio, in addition to Encore having its lien recorded, are you aware that Encore filed suit in the State of California to enforce its lien rights?

A. Yes.

Q. And as part of that litigation, are you aware of any party disputing the lien of Encore Steel?

A. No.

Q. So if Mr. Wallace testified yesterday that SR Construction has brought claims against Encore Steel, do you have an understanding of what those claims are about, if they're not about the validity of Encore's lien?

A. No.

Q. Do you understand during the project were there any issues that Encore and SR Construction had a disagreement over with respect to payment?

A. Yes.

Q. And can you help -- can you tell me what those were, just generally?

A. They -- we were having trouble getting paid, because the payments, as time went on, came later and later. And towards the end of 2018, they began to dispute our work percent complete versus actual percent complete, when our argument all along had been our subcontract amount was never correct. Because the value of the subcontract amount was lesser than the value of the bid proposal. So --

Q. So -- go ahead.

A. Well, I was just going to say, so from time of award, from the time we received the letter of intent versus the time we were subcontracted, the values never matched. So their -- the disagreement was based on an inaccuracy to begin with.

Q. So was there any dispute that Encore actually performed the work, to your knowledge?

A. No.

Q. And so does that help you recall what the issue is in the California litigation on the part of SR Construction?

A. Not exactly. We -- we did all the work and we billed our work on a monthly basis. And then we stopped receiving payments for the work that we had already performed. And so that was when we had taken the steps to protect ourselves.

Q. Right. Okay. Mr. Loughridge testified to the fact that there are some bonds in place. Has Encore sought to collect on those bonds?

A. Yes.

Q. Do you think it would be fair if Encore were limited to collecting on those bonds as opposed to having both its lien rights intact and the ability to collect on the bonds?

A. No, that would not be fair.

MS. CLARK: Your Honor, I pass the witness.

THE COURT: All right. Any cross-examination of Mr. Maggio?

MS. WALL: Not from the debtor, Your Honor.

THE COURT: Anyone?

MR. WRIGHT: None from Hall.

THE COURT: All right. Hearing no other requests for examination, Mr. Maggio, you're excused. Thank you for your testimony.

THE WITNESS: Thank you, Judge.

THE COURT: Okay. All right. I think I heard yesterday that this would be all of the remaining evidence. So --

MS. CLARK: Your Honor, just to be clear, if I may?

THE COURT: Okay.

MS. CLARK: There's one additional -- we filed it as an exhibit, but we would just ask that the Court take judicial notice of the fact that our adversary complaint was filed -- I don't know where my note is on that of what docket number it is. It's our Exhibit 5 at docket 242-5 of this case. But it appears on the main -- the docket in the main case of this bankruptcy.

THE COURT: All right. Well, I can certainly take judicial notice that it exists. I think there are at least four adversary proceedings that have been filed. And obviously I'm not reading those complaints for the truth of the matter asserted therein. It's just to show me there is a lien assertions and arguments about validity and extent and priority of liens. All right. So I will take judicial notice of that.

Anything else?

MS. CLARK: Thank you, Your Honor.

MS. CLARK: Not from Encore, Your Honor.

THE COURT: All right. Well, I heard there was not going to be anything from Mr. Mang and there was not going to be anything from Ms. Lowe, so I'll go back to Ms. Wall. Anything in the nature of rebuttal evidence at this time?

MS. WALL: No, Your Honor.

THE COURT: All right. And I will ask the same thing of Mr. Wright. Anything in the nature of rebuttal from Hall?

MR. WRIGHT: No, Judge.

THE COURT: All right. Well, let's hear closing arguments.

Ms. Wall.

MS. WALL: Thank you, Your Honor.

Between Tuesday's hearing, yesterday's -- the beginning of this hearing, and then so far today, the evidence has shown that this sale is a sound exercise of the debtor's business judgment. In fact, the sale is the only viable option to avoid further diminution in value of the hotel and the best solution for the new problem that the debtor finds itself in.

So one of the alternatives we heard proposed by the objectors are to appoint a Trustee. I feel bad for that Trustee, if that were to happen. They would be in a terrible situation with no money. A wasting asset that's by all accounts fully encumbered. And having to scramble for financing just to keep the property insured and secure.

Another alternative is to dismiss the case or abandon the property, both of which have the same result. We're back where we started in a foreclosure process in California that takes 12 to 18 months. And what happens to the property in the mean time? It just sits and continues to decline.

Another -- there was mention of transferring the case to California. We've already been down that road and had a long hearing on that. And the only possible

result of that is (indecipherable few words). And the same financing challenges that any Trustee would face, if they were to be appointed.

The evidence that has been put on has not shown any bad faith, any self-interest, or any gross negligence. We've had adequate and reasonable notice of the sale. A sale motion was filed on July 22nd. The (indecipherable word) were initially approved on August 24th and then amended on October 7th. The debtor complied with all of the requirements of the bid procedures order in terms of all of the notices it was required to file and serve on all parties.

And (indecipherable word) the creditors is very reasonable under the very unique circumstances of this case. The whole concept that the debtor came up with has been designed from day one to benefit everyone with an interest in this property, to the extent that there's value. And as I mentioned in my opening statement, I wish that there was more value. I wish the market was better and that we would be here today with a $50 million plus offer. But that didn't happen. And no evidence suggests that that's possible.

The appraisal that we discussed today -- appraisals are, at best, a prediction of what the market will do. We tested the market. And it (indecipherable few words) what Mr. Baker's appraisal suggested that it would.

And, Your Honor, I would note for Hall, this would certainly be a very expensive avenue if its plan all along was just to bid on this debt. But funding a DIP loan up to a million dollars and plus the legal fees that they're incurring through their own counsel, which are not even part of the credit bid now.

Your Honor, none of the alternatives or suggested alternatives that the opposing parties have mentioned do anything to preserve value of this property, extract it from litigation, or get it in a position to be concluded.

The testimony from Mr. Bourret demonstrated that the credit bid amount equals or exceeds the current market value of the property. And the liens of the objecting parties just don't have value based on the market value of the property, under the circumstances of this case.

Your Honor, (indecipherable few words), I believe, under subsection (f)(3) of Section 363 and the case law interpreting subsection (f)(3) as value liens based on the underlying value of the property, which is consistent with Section 506(a) of the Code. And so long as there's a justifiable sale price, that's the best price attainable under the circumstances.

There are three cases, Your Honor, that I will note. The Terrace Garden Partnership case out of the Western District of Texas Bankruptcy Court. That was Judge Leif Clark. The Bumper Industries Corp, case out of the Southern District of New York Bankruptcy Court. And the In re Holland (phonetic) case out of the Eastern District of Virginia Bankruptcy Court. All three of those Courts found that property could be sold free and clear of liens under Section 363(f)(3) when the sale price is less than the face amount of the liens, so long as that sale price is equal to or greater than the value of the liens asserted and would obtain the best possible price obtainable under the circumstances of a particular case.

And another thing, Your Honor, that the objecting parties have not sought to credit bid. That would

typically be new course that a secured creditor would have under Section 363(j). It did not do that. They did not come up with any alternative that would allow the debtor to pay for ongoing maintenance and security of the property, while hoping that the market might turn around. And the fact that the debtor and Hall, the lender here, continue to fund the property without any real prospect that there would be a return on that expenditure.

We've also heard testimony that the objecting parties do have other recourse. We have seven different parties with a litany of claims. We've also heard testimony that there's only $40 million of bonds that could be an additional source of recourse. And, Your Honor, the debtor does not like the fact that these liens don't have value. But it doesn't change the fact that the liens do not have value. And based on the evidence that's been presented in this hearing, we would ask the Court to approve the sale proposed to Hall on its credit bid free and clear of liens, claims, and encumbrances under subsection 363(f)(3). And, Your Honor, also that the sale order include approval of the proposed assumption and assignment of certain statutory contracts which has been completed uncontested.

THE COURT: On the executory contracts, I can't remember what they are. I know you said there were no requests for cure claims in connection with assumption.

MS. WALL: Your Honor, we filed a schedule on September 29th. It was an amended version of what we filed on September 28th. It's at docket number 166. And it's a list of all the agencies that appear on the debtor's Schedule G. Then there are, as I mentioned and also identified, the debtor in possession has been

staying current on many of these. Many of them are storage type leases. There's a communications -- Frontier Communications. I think that might be some type of internet. And then some storage containers. Many of them are listed as new buyer input. We produced and we got input from Hall before attaching this to the proposed order for the Court. And my understanding is that Hall is undertaking that (indecipherable word) to determine which of those it intends to take. But all of them are current and in the position to be assumed and assigned. And then all of the parties listed on that schedule received notice back in September. The deadline to objections was October 30th. And then (indecipherable two words).

THE COURT: All right. You said 166. I'm pulling it up --

MS. WALL: Yes.

THE COURT: -- just to make sure I -- okay.

I think this is -- I think this is probably what I'm looking for. There was a Ry -- I don't know how you say it, Rael Development Brand, Rael, you're rejecting that contract. Is that that profit -- profit (indecipherable word due to someone making noise on recording) agreement?

MS. WALL: Yes, Your Honor.

THE COURT: All right.

I'll hear other closing arguments. Mr. Wright, do you want to go next?

MR. WRIGHT: Sure, Judge.

Just to kind of capsulate what we've heard in the last two days. On the business judgment side. The CRO has testified that it's his reasoned business

judgment that he should sell the hotel. That he has no other recourse and no other options. He is an independent CRO. He's been in the business for over 30 years. He's been involved in dozens of bankruptcy cases, including plans and sales. His testimony is the estate cannot afford the cost to maintain and secure this property after the DIP loan money runs out at the end of this year.

He does also testify that he doesn't believe that waiting will change the outcome. We've heard that from the broker, as well, that there was no alternative to a sale of the property. The only alternative to that would be just letting the property sit. And, again, sitting with no one funding its cost. The only alternatives that have been suggested by the opponents have been a dismissal of this case, which puts everything back to square one, back in state court in litigation. It does nothing for the property. Or an appointment of a Chapter 11 Trustee, or transferring the case to California. An issue that was previously addressed and denied.

None of those are good outcomes for this property. And at some point in time you have to look at the property itself and completion of the property. And that's what is of benefit -- I mean, there are more people at stake here than just the creditors in this case. It's the consumers. It's the people in Palm Springs that have to live with an eye sore, a property that's been under construction for five years. So getting it completed is in the best interest of the public.

On the fair sales process. SWE testified they are a recognized hospitality broker. They ran a fair and thorough sales process. They had the sufficient amount of time to run that process, under the

circumstances. That time was even extended by order of this Court by a couple of weeks. They canvassed thousands of potential purchasers. They had a record number of NDAs signed with respect to this property, over 250. So there's no question there was demonstrated interest in looking at the property.

They testified -- he testified that multiple parties had visited the site in person. And that several had visited more than once. And one had visited he site five times. He also testified that Hall did not in any way interfere with the sale process. And, in fact, helped and encouraged the process not only through providing all documents that he needed, all information that he needed access to, but also offering to provide financing in order to encourage and help other bidders to be involved in the process knowing that obtaining loans in the hospitality world right now are very difficult. Despite all of those efforts, no other qualified bids were produced and the highest bid obtained was the credit bid of Hall.

On the sale free and clear under 363(f)(3). The value of the property was determined by a sale process. That is the best way to determine value of any property. The stalking horse bid was in the 35 million range. The broker testified that LOIs were in the low 30s. He had no actual bids in those amounts, but that was the closest he came in. And then the credit bid of Hall was $37 million, which was in excess of the stalking horse bid and in excess of any other bids or LOIs that were received by the broker.

The appraisal that we just heard from CBRE really has no merit. It's not a full appraisal. It's a condensed appraisal. The documents necessary to evaluate that appraisal were not before us. No comps were used of partially completed hotels. Only comps of finished

hotels. And more importantly, the appraiser backed into a value based on information that he was given, which was inaccurate. He backed into a valuation trying to assume that the amount of the Hall debt was the cost to finish this hotel. And that just simply is not true. As the Court knows from the testimony, not only was Hall's intended $54 million loan, but also over $40 million that was funded by equity. So the appraiser was working off of inaccurate and incomplete information in trying to come to a valuation. He assumed that if 54 million was the original loan cost, that you could subtract from that what was actually funded. He used a $36.8 million number. And actually the testimony of Mr. Brawn was that it was 32 million and the rest was interest accumulation. Actually, no, it was 31 million and then interest accumulation.

And so when you start running those numbers, it changes everything in his valuation. He assumed a cost to complete of around $18 million when the actual cost to complete, based on the evidence, is over $31 million. That would drop his valuation down to the low 40s, if not down into the 30s. And certainly once you take into account a 31 versus a 36.8, that's a $5 million swing. And then when you take into account the difference between 18 and 31, that's a $13 million swing. So $18 million lower valuation than his projected valuation of 50 something million dollars.

All that says to us is that, one, the appraisal should not be relied upon. But, two, that if you worked it -- ran it with an accurate, completed, or cost to complete, the valuation would come in right where we're talking in the $37 million range, which was offered by Hall.

The U.S. Bankruptcy Court from the Western District of Texas has ruled that a 363(f)(3) only requires the sale price exceed the value of the

property. Under the economic value approach, each secured claim is valued only to the extent of its actual realizable interest in the estate property.

If we were to accept the objecting parties' arguments, they say they'll have to generate proceeds in excess of all lien claims, very few sales would ever get accomplished. And, effectively, the Bankruptcy Court would be in a worst position than State Courts, which can approve a judicial foreclosure sale. They can do exactly the same thing. They can sell free and clear of liens.

With respect to the objectors' burden of proof on establishing their lien validity and priority. They haven't done that. As we cited in our brief, there's an obligation under California law to give a preliminary notice of claim. It has to begin to be given within 20 days of the work performed. And there is nothing in the record, not one single piece of paper in this record that is a notice of claim that was given by any subcontractor or SR Construction. So not one of them has complied with their obligations under California law. We only have in the record two mechanic's liens that were filed. Both of those were filed two years after Hall filed its lien; both the one by Encore Steel, which was filed in October of 2019 and the SR's which I believe also was filed in October of 2019. Almost two years after Hall filed its lien of record on November 1, 2017. The evidence is clear that --

THE COURT: Let me stop –

MR. WRIGHT: Yes.

THE COURT: Let me stop you there.

MR. WRIGHT: Yes. Okay.

THE COURT: But don't we relate back to the time of commencement of work with regard to the filing of the mechanic's lien?

MR. WRIGHT: No. Only if they gave notice. And they didn't give notice.

THE COURT: Okay.

MR. WRIGHT: One, it has to actually have been work that was done prior to the date of recording of Hall's lien.

THE COURT: Right.

MR. WRIGHT: If you go to the exhibit that was offered by SR, the -- let me see if I have it handy.

SR's Exhibit 18, Judge. When you look at that payment application, without turning to it at this moment, the -- the invoice that we're talking about that was raised, this Aluma (phonetic) invoice, actually was put on that -- on that payment application and it was listed for November 2, 2017, which would be one day after Hall filed its lien. What we don't know and what was not put into evidence is that anything was done prior to -- while work had been done previously, as we put in the record, 20 parties filed and signed lien releases with respect to that prior work. So were shoring up in place prior to the closing? Sure it was. But it related to prior work. There is no evidence before the Court that anything was done recently, just before the work was done. And, in fact, the payment application of SR suggests to the contrary. Not only did SR represent that no work had performed and no materials had been put on the site prior to October 31, but they also subordinated their liens and they also signed a lien release with respect to this payment application. And they acknowledged they had been paid. We have no evidence from Aluma

that they didn't receive payment and they did not submit a payment notice, nor did they file a lien.

California Code provides that under California law, a contractor or claimant may enforce a lien only if they have given a preliminary notice under Section 8200. And such notice is a necessary prerequisite to the validity of a lien claim. That's 8200 in parenthesis c of the California Civil Code. The California Code provides that a preliminary notice of claim must be given within 20 days of the work performed. If the notice is given later than 20 days after work is performed, the claimant shall only be entitled to record a lien only for work performed within 20 days prior to the service of the preliminary notice. So they're out on the ability to assert any kind of lien rights prior to October 31. A subcontractor only has a lien right if its work on a project has been authorized by the contractor. And as we already heard from the contractor, the contractor in written statements testified that no work had been performed. So if they've testified and if they signed a document saying that no work had been performed, then they could not have authorized work prior to that date.

The recordation of a mechanic's lien must be made 90 days after completion of a work of improvement, or 30 days after the owner records a notice of completion or succession. That's California Civil Code 8414. After recordation of a mechanic's lien, the claimant must commence an action to enforce the lien within 90 days after its recordation. If there is no action to enforce a lien, then it expires and is unenforceable. That's California Civil Code 8460.

So as I've already noted from the SR subordination, they did subordinate their lien rights, even though they now say that they didn't understand

that's what they were doing. They also on October 31, 2017 signed a contractor's agreement and consent to assignment of construction documents in which they stated that no work of any kind, including the destruction or removal of any existing improvements, site work, clearing, grubbing, draining or fencing has been commended or performed on the property. And no equipment or materials have been delivered to the property described in the agreement for nay purpose whatsoever, as of the date of the consent. And they again subordinated their liens. And they also committed that all subcontractors would have subordination provisions in their contracts.

Under 363(f)(5) the Court can also order a sale free and clear in this context. And that is that SR and the subs could be compelled to accept a monetary satisfaction through a foreclosure sale. A foreclosure under state law would likewise be a sale a free and clear. Under 363(f)(5) the Court can also approve the sale to Hall. As a senior lienholder, Hall has the ability to force a foreclosure sale. But as the Court heard in prior testimony, a foreclosure sale in California can take a significant amount of time. And that was the basis -- one of the basis for retention of the proceedings in this court.

This is not a sub rosa plan. There has been some argument made by several of the objectors that this is a sub rosa plan. It just simply doesn't fit that line of case law. This is a sale where there is no other option for the debtor. There is no option of doing a plan and reorganizing. The debtor has no money. The debtor is incurring costs they cannot pay without access to a DIP loan.

Thank you, Judge.

THE COURT: Thank you.

All right. Closing arguments from SRC, Mr. Amin.

MR. AMIN: Thank you, Your Honor. Hopefully you can hear me okay.

THE COURT: I can.

MR. AMIN: Both the debtor and Hall have failed to provide this Court with admissible evidence allowing any (indecipherable few words due to audio cutting out) granting of the motion before the Court today. The record is bereft of any evidence from either Hall or the debtor as to the actual value of the property as of today. Moreover, both Hall and the debtor failed to present evidence establishing that Hall constitutes a good-faith purchaser within the ambit of 363(m).

However, what the record and the evidence before this Court has demonstrated is that the property is worth significantly more than the $37 million being offered by Hall. That there are substantial unresolved issues involving the validity and priority of Hall's lien altogether which have to be resolved. That there are four pending adversary complaints that must be resolved that are pending before this Court.

(Indecipherable beginning of statement due to audio cutting out). CBRE's recent appraisal, SRC Exhibit 9, established that the price, the purchase price being offered by Hall is not greater than the aggregate value of all liens within the ambit of 363(f)(3), as evidenced by the recent appraisal performed by Mr. Baker and CBRE on August 21st, 2020, which determined an as-is value of the property of 56,600,000 and a fully completed value of 80,800,000.

Putting Mr. Wright's comments aside for a moment. It should be noted that the debtor also undertook an appraisal of the property in January of this year. And it's telling that they haven't shared it with the Court or the parties. The debtor did reference its appraisal results in the sale motion itself and it articulated that the property had an as-is value of $72 million and (indecipherable few words due to audio cutting out) in its completed state. And for the record, that's the sale motion, docket number 6, paragraph 9. The question is, why hasn't the debtor or Hall shared the appraisal or the underlying documents in this case? And the reason is is because this case, the entire filing from start to finish has been evidence of bad faith.

The evidence has established that the bidding process was not fulsome and fair and certainly did not result in fair market value -- in a fair market value purchase price. And why is that? First, the due diligence period was simply too short. There wasn't enough time for parties to line up financing on a deal of this magnitude or size. The debtor and Hall appear to rely on the testimony of Mr. Bourret. Mr. Bourret, respectfully, Your Honor, is not an authorized (indecipherable few words due to audio cutting out) in the State of California. And to come here to sell property in a state that he's never successfully consummated a deal in. His testimony should not -- I'm sorry. Mr. Bourret is not licensed appraiser in the State of California. And he cannot opine as to value.

Putting aside the illegality of Mr. Bourret's conduct under California law for a moment. The evidence stems from that he is woefully unqualified to sell a project of this magnitude in Palm Springs. This Court simply cannot rely on Mr. Bourret's testimony.

And it was telling that neither the debtor or Hall attempted to qualify Mr. Bourret as an expert, as set forth in Federal Rule of Evidence 702, or the Daubert Standard. Pursuant to FLE 104-A, this Court has discretion to strike Mr. Bourret's testimony, to the extent it's being offered to provide opinions or conclusions as to value, or to the extent that he's being offered to provide opinions as an expert witness.

Your Honor, SRC requests that this Court exercise it's discretion to do just that. However, in the event that the Court elects to consider Mr. Bourret's testimony, it should be afforded appropriately, which is next to nothing. Mr. Bourret, the only credible thing I think he said was what he acknowledged in Debtor's Exhibit 26, the marketing update dated October 5th, 2020, that one of his concerns was the timeline with the significant amount of up-front work due to the 363 bankruptcy sale process. That was particularly illuminating. And those were his own words.

Mr. Bourret further testified that there were three LOIs, none of which have been produced in this case, despite SRC serving a subpoena on the debtor from prospective buyers all of whom, apparently, declined to move forward with the consummation of this deal because of a patently unrealistic (indecipherable few words due to audio cutting out) by the debtor and by its lender, Hall.

As demonstrated by the (indecipherable few words due to audio skipping) time to secure appropriate financing. It's also relevant, Your Honor, that the debtor's own CRO testified that he didn't bother to undertake any efforts to seek an independent appraisal of the property. In fact, Mr. Kim acknowledged that he didn't even obtain an inventory or valuation of the debtor's personal property,

furniture, fixtures, inventory, which is potentially worth millions of dollars.

The third reason regarding the fact that the bidding process was not fulsome and fair is that the California lockdown has adversely affected marketing efforts for everyone. As set forth in SRC Exhibit 10, there is an ongoing lockdown in California. Palm Springs, in particular, has been impacted by it. Real estate is (indecipherable few words due to audio skipping). This invariably impacts the ability to market the property and Mr. Baker just testified to it. (Indecipherable few words due to audio skipping) not forever, but a sufficient amount of time to appropriately market a property of this magnitude.

The goal is not on the property, it's maximizing value to the creditors in this case. There is substantial equity in the property adequately protecting Hall, assuming it is the senior lending priority. And there's enough equity to protect the other lienholders in this case. Assuming a fair market value of $57 million and Hall's claim that (indecipherable word) is 37 million, there's $20 million in their equity cushion. And there's no evidence in the record to contradict this.

I heard Ms. Wall's closing and Mr. Wright's references in his closing that the debtor made a reasonable business decision. There's evidence otherwise. Mr. Kim testified that he failed to conduct (indecipherable few words due to audio skipping) of due diligence in this case. He testified that he relied on operating budgets prepared by Hall. He's testified that he failed to contact insurance companies, or brokers in connection with procuring insurance for the property (indecipherable word) protecting it. He had no evidence or personal knowledge of any waste, or

alleged, waste, or deterioration of the property. And certainly he's not a general contractor.

As a matter of fact, Your Honor, that's what's been missing from both Hall and the debtor. We have seen no evidence from a licensed general contractor (indecipherable few words), which contests what exactly is the cost to construct this property, to finish it, or what is the cost of maintaining it. We've heard and seen nothing throughout the inception of this case.

Finally, Your Honor, as to the 363 issue. Hall is not a good-faith purchaser within the meaning of 363(f). Hall is (indecipherable few words due to audio skipping) controlling of the component of the sale process intimately. The evidence and testimony have established that Hall recently formed the debtor and received title for the property from Palm Springs, LLC on March 27th, 2020 with absolutely no consideration whatsoever. That's SRC Exhibit 1. Mr. Braun corroborated this fact on Tuesday. Mr. Kim, the debtor's CRO, was hired by Hall and has been regularly reporting to Mr. Wright, among others, at Hall. Mr. Kim testified that he never bothered to reach out to the other creditors in this case, despite having a fiduciary duty to all of the creditors in these proceedings.

More egregiously to me, Mr. Kim failed to audit, verify, or validate Hall's underlying claim. In fact, there is no evidence on the record which establishes Hall's actual disbursement of funds to the debtor or its predecessor Palm Springs. Hall's (indecipherable word due to audio skipping) records, which have been admitted as SRC Exhibit 8, establish a multitude of what I would generously describe as accounting irregularities in this case. Mr. Kim also testified that

the purchase and sale agreement in this case was revised by Hall, but he didn't bother to negotiate better terms for the estate or the creditors in this case. He simply took the McWhinney purchase and sale agreement, gave it to Hall, and Hall red lined it and he approved it.

Mr. Braun testified that Hall received $32 million in EB5 funding from the prior owner's affiliated entity. Hall then received $11 million from the owner in the form of an equity cushion. There was no testimony from Mr. Braun as to whether Hall ever verified or validated the legality of (indecipherable few words due to audio skipping) in connection with this project, or how the prior owner's equity cushion was calculated, or was even correct. That being said, Hall's record has established that its own numbers don't add up and something is wrong.

For instance, why is Hall still holding over $3 million of SRC's retainage monies? Mr. Braun couldn't explain the $5 million in operating expenses, FF&E, and engineer and architect fees, all of which were unsubstantiated, grossly over stated, and irreconcilable. The debtor claims that HPS possess a secured interest in the property in the amount of $36,844,340.64. However, Hall's own accounting records reflect that the outstanding balance is actually $32,983,781.22, a difference of nearly $4 million.

Hall is now asking to buy the property without demonstrating that it actually disbursed any monies to the debtor predicated on numbers it has concocted without any evidentiary support. Hall claims that the entirety of the alleged $43 million in subordinated funds, as well as almost $33 million of its own funds were disbursed in the development of the property. However, that also doesn't make sense, because the

property was only 60 percent completed, and yet, based on Mr. Wright's representation to you, Hall would have disbursed $76 million, which is 78 percent of the total budget for the project. So Hall's own records warrant denial of the pending motion.

Hall does stand, however, if you grant the motion, to make a significant windfall to the detriment of the other creditors in this case, despite Mr. Braun's testimony that he had knowledge of both the pending Riverside County action in California against all of the prior (indecipherable word), and the adversary proceedings before this Court.

I should also make -- I heard references (indecipherable few word) evidence of waste. There has been no credible evidence either Tuesday or today, or Thursday (indecipherable few words due to audio skipping) property is a wasted asset. The record does reflect that the property has been sitting unfinished well before the petition was filed in this case. The debtor's own timeline references a November 28th closing date. So there should be no rush to sell an assets, especially at a fire sale price, to the detriment of all of the creditors in this case.

Neither Hall nor the debtor is a general contractor. And they've provided no evidence, no admissible evidence to (indecipherable word) a cost of completion for this hotel. And we've heard no testimony from a GC, a (indecipherable word) or appraiser, either, from either the debtor or Hall. According to the TMT (indecipherable few words due to audio skipping) case in 2014, the proponent of good faith bears the burden of proof. And that case was actually cited, surprisingly, by Mr. Wright in his last minute brief that he filed with this Court on Wednesday -- no, actually Thursday. And what's interesting is that case

involved a DIP lender having knowledge of adverse claims and the 5th Circuit holding that that DIP lender was not a good-faith purchaser under the ambit 363(m) and 364(e). And we believe that the facts of TMT are exactly on point to this case. Mr. Braun was aware of payment of claims before he filed the petition in this case, or authorized the filing of the petition in this case by the debtor. He was also on notice those would be the adversary claims that have been brought in this action. However, in SRC's adversary complaint, it should be noted that Hall has been identified as a defendant (indecipherable word) conveyance action.

Now, Mr. Wright brought up (indecipherable few words due to audio skipping). Let's talk about that. I happen to be a licensed attorney in the State of California. I don't know if Mr. Wright is. And I can tell you, Your Honor, that his representations to you are grossly inaccurate. Let's start with the evidence on the record. The evidence has established that SRC started work as early as September 2017. See Exhibit 17 and 18 of SRC's, 18 is the Aluma systems invoices. And then 19, which was the picture taken on October 2nd, 2017. SRC subsequently timely perfected its mechanic's lien as set forth in Exhibit 2. SRC filed its state court action to foreclose on its mechanic lien (indecipherable few words due to audio skipping) action against the previous owner and Hall. (Indecipherable words due to audio skipping) and filed its adversary complaint here, as well.

Those -- these inquiry issues have to be resolved by virtue of those adversary proceedings. And here's why. SRC's position is that it was fraudulently induced into signing any subordination agreement, because it was promised it would be paid by signing that document.

But putting aside Mr. Loughridge's testimony for a moment on that issue.

California Civil Code Section 8122 renders a subordination agreement unenforceable and void, as a matter of law. And the reason why is because that statute actually prohibits the impairment of another claimant's lien rights. You can only waive your own rights, not the rights of another. The subordination agreement (indecipherable word) is void on its face and constitutes an (indecipherable few words due to audio skipping.)

THE COURT: Let me stop -- let me stop you right now.

MR. AMIN: And that's one of the critical issues in the adversary proceedings that must be resolved.

THE COURT: Let me stop you. You were garbly.

The language you just mentioned, I understand, I have heard arguments that this California statute doesn't give a contractor the ability to basically effect subordination of subcontractors. I mean, that's what I think I hear you saying. There has to be a specific subordination or waiver by subcontractors. The contractor can't bind and impose the subordination itself.

Is that what you're saying the California statute provides?

MR. AMIN: That's correct, Your Honor.

THE COURT: All right. Let's focus on your client, though. Your client has signed a subordination agreement. That's my evidence.

MR. AMIN: Yes, Your Honor, that's correct. And what I'm telling you is that --

THE COURT: Go ahead.

MR. AMIN: Sorry. There's a delay for some reason in the feed. I don't know why. I apologize.

My client -- my client's position is that it was, first of all, fraudulently induced into signing the subordination agreement. My client's other argument is that in light of the violation of California Code Civil -- California Civil Code Section 8122, that the subordination agreement is void and unenforceable. Not only (indecipherable few words due to audio skipping), but to SRC, as well. And that's the basis --

THE COURT: Well, what is your statute for that?

MR. AMIN: -- for setting aside --

THE COURT: What is your statute for that proposition?

MR. AMIN: Well, there's not a statute.

THE COURT: Okay.

MR. AMIN: But, Your Honor, there's not a statute, per say, on that issue because it's never really been codified in state law. There is case law, however, that supports that. And I'd be happy to, you know, provide that case law to the Court.

THE COURT: Well, what -- what would your response be to this? 363(p), which I dangled out there a couple of times yesterday, provides that in any hearing under this statute, 363; one, Trustee has burden of proof on the issue of adequate protection, if that's a contested issue. But, two, the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

All right. So I'm a little fixated on that. If, you know, you haven't argued for adequate protection. But I still think the analysis might be relevant for purposes of 363(f)(3) or (4) or (5). You had the burden of proof on the issue of the validity, priority, and extent of your interest.

What evidence do I have that sort of overcomes the documents on their face that there was a subordination agreement?

MR. AMIN: Your Honor, you have several pieces of evidence. You have Exhibit 17 and 18, which are the Pinta invoices demonstrating work performed prior to Hall, you know, giving a loan to the former owner. That's number one. You have the mechanic's lien that was recorded by SR Construction subsequent to that, which perfected its security interest in the property. Third, you have a picture from October 2nd demonstrating that they performed substantial work on the project, prior to (indecipherable few word due to audio skipping).

Additionally, Your Honor, the -- Mr. Wright raised an issue whether or not the preliminary notice was necessary for my client. And he read California Civil Code Section 8200. Well, that was incorrect, because my client was a direct contractor (indecipherable word). It didn't require a preliminary notice.

THE COURT: I'm fixated on the subordination agreement and what evidence I have to get me past the little wording of the subordination agreement.

MR. AMIN: Well, Your Honor, I think it's hard for me to articulate evidence at this stage in the proceedings, considering that the adversary proceedings have not been litigated at all. There's been no (indecipherable few words) in the Riverside

case. I do know that SRC, as Mr. Loughridge testified yesterday, thinks he was fraudulently induced. I do know that SRC's conduct was contrary to what the document said. It was actually performing work and it was owed money before it signed the subordination agreement. Which, as I articulated earlier, was void on its face as a matter of law any way. If we were applying California law --

THE COURT: Well, you didn't give me any authority for that.

MR. AMIN: -- we don't believe that --

THE COURT: You did not give me any authority for that void on its face legal argument. And I am struggling with your evidentiary burden of proof under 363(p)(2) here. I know there's an adversary proceeding. And that will be maybe tried another day. But it feels like to me that you have the duty to put on some evidence to overcome Mr. Wright's evidence that SRC is subordinated. They're subordinated. And your client -- what you're telling me is your client feels he was defrauded. But I remember his words being something to the effect of, yeah, I signed it, but I didn't understand it. Yeah, we always have to sign these things. I paraphrase.

But is that really evidence of a fraudulent inducement in the very high legal bar that one has to reach for that?

MR. AMIN: Your Honor, if I may?

All of this assumes that Hall actually lent this money and disbursed it. And Hall never -- first, it has no priority over SRC or any of the subcontractors in this case. And I have -- so I cannot respond to you with a negative. All I can tell you is that the evidence is

bereft of any record that Hall actually disbursed the monies in this case.

THE COURT: Mr. Braun testified on Tuesday -- are you saying that Mr. Braun committed perjury, I should find him not credible? He said he disbursed the money, that Hall disbursed the money.

MR. AMIN: Your Honor, I asked him for proof of disbursement and he couldn't point to any. He said he had no personal knowledge of it.

THE COURT: Mr. Braun?

MR. AMIN: Your Honor, it may be surprising, but that is his testimony, sir -- ma'am.

THE COURT: No. You're getting Mr. Kim's testimony confused with Mr. Braun. Mr. Braun, the officer of the secured lender, testified under oath about $32 million had been advanced by Hall at the time of default. That's evidence. I mean, no one challenged that. I found him to be credible. I don't think he committed perjury. I'm just saying, I have evidence of the funding.

Mr. Kim, on the other hand, on cross he -- when asked did he audit this and, you know, double check bank account records, that kind of thing, he said, no. I forget the exact wording of what he said he did look at. Funding requests or something of that nature. But Mr. Braun testified that that money was lent.

MR. AMIN: Mr. Braun did not have personal knowledge of whether the money was actually disbursed. He did read from --

THE COURT: He's the president of the organization.

MR. AMIN: -- financial records that Hall –

THE COURT: He's the president of the organization. Am I to assume he doesn't have that information?

MR. AMIN: Your Honor, all I know is I have Hall's accounting records that were produced in this case. And I believe Mr. Braun did not testify to having specific knowledge of the disbursements.

I have an authority. You asked for an authority, Your Honor. I can give you one, if you'd like.

THE COURT: Okay. This is going to be authority on which point?

MR. AMIN: This is regarding the Civil Code Section (indecipherable few words due to audio skipping) and the agreement, the subordination agreement.

THE COURT: Okay.

MR. AMIN: Moorefield Construction, Inc., versus Intervest-Mortgage Investment Co., 230 Cal.App.4th at 126. It's a 2014 case.

THE COURT: And tell me what it holds.

MR. AMIN: Your Honor, I don't have – bear with me, Your Honor. I'm sorry, I had the case up. Just give me one moment, please.

THE COURT: All right. Let's move on. We've really gone so many hours in this hearing. If you find it before closing arguments are finished, you can tell me then.

What else did you want to say, Mr. Amin?

MR. AMIN: Your Honor, just finally regarding the argument from Mr. Wright that SRC is required to (indecipherable few words due to audio cutting out)

prior to recording its mechanic's lien. And that's simply not the case. Preliminary notice (indecipherable rest of sentence due to audio cutting out), which is 222 Cal.App.431. And the reason it's abundantly clear and (indecipherable word) understands the purpose of a preliminary notice. And that notice is required so an owner or a lender is aware that the work is being performed or the materials are being supplied. So clearly the evidence has shown that the prior owner and Hall were intimately aware of SRC's involvement in the construction of the project. And Hall's characterization of the legal effect of the California statutory waiver release scheme is also incorrect and misleading. California actually has four different types of waivers and releases, each applicable to a different stage of construction. (Indecipherable sentence due to audio cutting out).

Hall Palm Springs has not, and I don't think they can, present any evidence that such an (indecipherable word) waiver and release on final payment was ever issued by SRC. And that's simply because no such document exists. SRC did not receive final payment and, in fact, is owed more than 14 million for the work that it completed at the project. And that 14 million includes almost $3 million in retainage which was earned beginning in September or October of 2017, about a month before Hall recorded its deed of trust. Under California law, specifically Civil Code Section 8450 -- excuse me, 8450(a) that provides that where a mechanic's lien includes cost for works performed prior to the recordation of a deed of trust, that mechanic's lien has priority.

So, Your Honor, in terms of the final two components, I heard Ms. Wall and Mr. Wright discuss

alternatives to the sale to Hall. This case warrants the appointment of a Chapter 11 Trustee to make an independent determination as to what to do with the property.

This is a case of the proverbial fox guarding the hen house and the appointment of a Chapter 11 Trustee is warranted. Any approval of the sale should not release any personal claims against the purchaser and the liens should remain on title. Section 363 allows for the sale of the property free and clear, but it does not allow for the release of in personam claims against any party. So to the extent the Court grants the motion, we would ask that the title be preserved in its as-is condition, which is the attachment of our liens. (Indecipherable sentence due to audio cutting out) and allow the lienholders to litigate the adversary complaint.

And finally, (indecipherable few words due to audio cutting out) approving the sale, SRC contests that the order should be stayed pending an appeal.

With that, I'd submit, Your Honor. Thank you.

THE COURT: All right. Who wants to go next? Mr. Mang?

MR. MANG: Your Honor, I am happy to go next.

The question here, which I said in my opening argument, the overriding question is for whose benefit is this sale being conducted? For whose benefit? The purpose of bankruptcy is to benefit the creditors of the estate, not to benefit a single secured creditor.

Firstly, I have to address the comments by Mr. Wright regarding the brief that he filed on behalf of Hall Palm Springs one hour before the hearing yesterday, which we addressed with the Court prior to

opening statements yesterday. Mr. Wright in his closing raised a number of arguments that were presented for the first time in a brief by ambush and there was no opportunity by objecting parties to adequately respond to his brief. Mr. Wright strenuously argues, based on those arguments presented by ambush, that there is a lack of evidence to respond to his arguments, which were never presented in any other context, other than that brief and his closing arguments after all evidence was closed. Mr. Wright didn't even mention his arguments in his opening statement. The Court should disregard these arguments.

THE COURT: I've still not read the brief. I've been in court pretty much non-stop since the brief was filed. So, again, I mentioned that yesterday. To the extent there's a concern about prejudice, that I've been influenced by that brief, I've not read the brief. Okay?

MR. MANG: Yes. And just to reiterate, those arguments made in the brief were also raised for the first time in Mr. Wright's closing argument. So they track, in terms of some of his California statutory citations and the like. But if Your Honor deems appropriate, we can address those via supplemental briefing, or whatever is appropriate.

Turning to the standards for sale under Section 363(b). The initial burden of proof is on the debtor to establish cause to sell this property outside the ordinary course of business under Section 363(b) of the Bankruptcy Code. Under the 5th Circuit's Continental Airlines decision, the debtor must articulate a reasonable business justification for the sale. While this debtor requests that the Court defer to its business judgment in this case, the 5th Circuit in Richmond Leasing, Co., v. Capital Bank, NA, 762

F.2d. 1303, plainly states that as long as the exercise of business judgment appears to enhance a debtor's estate, Court approval should only be withheld if the debtor's judgment is clearly erroneous, too speculative, or contrary to the provisions of the Bankruptcy Code.

There's no value coming into this estate as a result of this sale. So, facially, the exercise of business judgment does not enhance the value of this estate. In fact, the evidence shows that the debtor did not appropriately exercise business judgment in seeking the sale. Quoting from In re Pilgrims Price Corp., which is 403 B.R. 413, it's a Northern District of Texas Bankruptcy case from 2009, the Court must ensure that the decision-making process used by a debtor in possession in exercising its powers under the Code is a sensible one. The sole business justification articulated by the debtor is that this property must be immediately placed back into the stream of commerce, via a sale, because it is a wasting or diminishing asset that's costing money every day that it's not being constructed. No evidence, other than conjecture, was adduced as to whether the property's value continues to deteriorate, as it sits today, and the rate at which it is deteriorating.

In fact, the testimony from Mr. Bourret, who's been to the property multiple times and done multiple showings, is that when he gave tours to interested parties in the past few months, that they informed him that the condition of the project was already a bad condition and that a large or significant portion of the existing project would have to be ripped out and rebuilt. The damage has already been done. The only waste that remains is the continuing cost to the owner and to the DIP lender, who is an affiliate of owner and

the debtor, of the continuing cost of maintaining and securing the property with security services and paying fees and taxes. These are fees and taxes that anybody would have to incur as a holder in possession of the property.

THE COURT: Who is going to pay it? Who is going to pay it? If I do not approve this sale, the DIP lien runs out December 31st. Who's going to pay to maintain that 50 to $70,000 a month?

MR. MANG: The person who should be responsible for paying the maintenance cost is the person with the most at stake, the owner. The owner, the debtor in this case, is a shell company of Hall and its related entities.

THE COURT: Tell me what authority permits me to force someone to make a loan.

MR. MANG: That's not what I'm arguing, Your Honor.

THE COURT: What are you arguing?

MR. MANG: I'm saying --

THE COURT: My question was, who is going to pay for the maintenance? If I don't approve this sale and the DIP funding expires in December, who's going to pay the 50 to 70,000 a month? This debtor has no money and Hall is under no legal obligation to do it.

MR. MANG: That's correct, Your Honor. But the ongoing --

THE COURT: What is a bankruptcy judge to do, is what I'm getting at? I guess, bottom line, what am I to do here? I have no DIP loan. I have no one offering to make a DIP loan. This case is not wildly different from so many other bankruptcy cases, even though we're in

COVID and even though there's a half-built hotel, half-built property not making any revenue, it's not that different in that the debtor had no money when it filed bankruptcy, almost no money. Okay? And so in order to solve the problem, in order to come up with a plan to pay creditors, or in order to effectuate a sale to maximize value, you have to fund the process. Okay? There's -- forget about legal fees for a minute. There's the cost at the property. You've got to keep it insured. You've got to keep it secure. What do we do?

I know of cases where vendors have gotten together to provide a DIP loan, because they want to save the business. They want to, you know, fund it until a plan can be formulated, or a sale can be effectuated. Heck, in J.C. Penney's, we're hearing about the landlords, the landlords, for crying out loud, trying to cobble together a purchase offer, because they don't want to lose their tenants. I know of oil and gas cases where, guess what, M&M lien claimants, subordinate M&M lien claimants who are worried if there's going to be a quick sale, the senior secured lender is the only one who is going to get paid. So they're stepping up and doing a DIP loan. These are -- these are terrible times, we all know.

What -- what is my -- what is my Plan B, if I don't approve this sale? I'm just cutting to the chase here. Who's going to --

MS. CLARK: Your Honor, may I be heard on that?

THE COURT: Okay. Sure, Ms. Clark. I'll come back to you, Mr. Mang.

MS. CLARK: I just -- Your Honor, that is actually part of what I was going to talk with the Court about as part of my closing, which is to say that there is a DIP in place until December. This case has been on a

fast track. And I think that at a minimum, the M&M lienholders should be able to have an opportunity to go out and shop for DIP financing. Mr. Kim testified he did not shop for that.

THE COURT: 100 days, 100 days, has this case been pending 100 days? 100 days.

MS. CLARK: But, Your Honor, we were told that the debtors believed they could get more than the liens on the property, based on their own sale process. And so if it's -- if it's -- I think all of the parties believe that they would be more interested in the projects than they ended up being. So we are where we are today. And I don't see where it prejudices Hall to wait another whatever the deadline the Court would give us to at least give us a shot to allow us to have due process, but also take on some risks, potentially either self-fund or find third-party financing. That is what I think makes the most practical sense here. And I completely understand where the Court's coming from. I know that that's a concern from the beginning. But that is what I think my offer to the Court would be today.

THE COURT: And, again, are you saying you have a DIP loan source to present today, or what?

MS. CLARK: No, Your Honor. I'm saying that given the outcome of the marketing process, we know that the property could bring in as much as 30, you know, million dollars, $32 million in its current state. And if we are correct on the priority dispute, that would make --

THE COURT: We don't really know –

MS. CLARK: -- that --

THE COURT: Can I stop? We don't really know that, do we?

Our evidence was we had some non-conforming offers, or letters of intent at that price range. But they wanted to do a lot of due diligence. And, you know, there would be a lengthy time period that, you know, who knows what, they might make out like McWhinney, you know. So --

MS. CLARK: Understood, Your Honor. But I guess what I'm saying is there is some level of interest more than just with letters of intent, non-conforming as they may have been. But suggests that it's worth M&M lienholders' time and effort to at least try to get DIP financing or provide it on their own. There are more parties involved, than have been participating in this bankruptcy, at the California state level. So I just -- I don't think that it prejudices any party to give at least two weeks for us to take a shot at it, given all that we've learned through the process of marketing.

It's also -- and I hear the Court saying that it's not uncommon to do these sales. I completely agree with that. But in a sudden economic downturn, it's also not uncommon for a property to be held to get to economic stability. So we'd like that opportunity. It may be for nothing. But I don't think a few weeks of delay on that point will prejudice anyone and, instead, it will preserve an opportunity to have true due process on these lien issues.

THE COURT: All right. Mr. Mang, I'll go back to you. You were not finished, so you may finish.

MR. MANG: Thank you, Your Honor.

And I would say that I do agree with the comments by Ms. Clark. And I was going to get to the

alternatives for the Court, more towards the latter part of my closing.

The damage has already been done. The property, as we just discussed, has ongoing costs which are the primary driving motivation for the sale to close immediately. There is DIP financing until the end of December. There is, as of today's date, approximately 7 weeks before DIP financing runs out. Moreover --

THE COURT: And by the way, I'm taking you at face value on that, that they don't have a default or drop dead in there, or any grounds to terminate that. I guess I'll about that from Ms. Wall or Mr. Wright. But I'll assume that you're true that your facts are correct that they have to keep financing through the end of December.

Okay. Continue.

MR. MANG: Thank you, Your Honor.

The evidence from Mr. Kim was also that there is insurance for the property through June 2021. And there are multiple policies of insurance through June 2021.

So what is the exigency for the sale? Who does that benefit? That benefits the credit bidder. That benefits Hall Palm Springs, who's the only bidder standing before this Court today with a credit bid in the approximate amount of $37 million. There are zero cash dollars that are coming into this estate to pay creditors. The only cash under their DIP financing is going to be used likely to pay -- I don't even know what it's going to pay. I think it will pay the cost of preserving and securing the project. And I'm not sure if it will really go to pay anything else.

Again, the credit bid is by Hall Palm Springs, an affiliate of the debtor. The debtor's name was originally Hall Palm Springs II formed by a Hall affiliate, formed by Hall Management and it took title to the property proposed to be sold today as a result of a transaction between the prior owner, which is named Palm Springs, LLC, and Hall Palm Springs.

California Code of Civil Procedures Section 726 provides that there can only be one form of action for the recovery of any debt, or the enforcement of any rights secured by real property. This is a rule that Mr. John Braun, the principal for Hall Palm Springs, testified that he is familiar with. Hall has already exercised this remedy to take possession of the property in lieu of foreclosure and seeks to sanitize the transfer using a Bankruptcy Court order. Ms. Wall in her closing statement told the Court that a foreclosure in California would take up to 12 months. That's, therefore, a good reason to allow the sale to go through. But this case has been open for less than five months. It seems like a pretty good deal for Hall to in one fail swoop take possession to the property free and clear of liens in less time than a state court foreclosure. And getting rid of the pending M&M lien litigation by over one dozen unpaid contractors and subcontractors with the protection of a Federal Court order and a good-faith determination under 363(m).

In other words, Hall Palm Springs stands to reap enormous benefits, if this sale is approved, and all other creditors are left with nothing. It's no secret that SR Construction would be holding the bag. Subcontractors have claims against SRC as the general contractor. This is an undisputed fact. This does not mean that the Court must approve the proposed sale. It's axiomatic that bankruptcy sales

must provide a benefit to the estate outside of the benefit to secured creditors. Here, there is none.

THE COURT: What is your authority for that? What is your authority for that, that the --

MR. MANG: For the statement that I just made?

THE COURT: Yes.

MR. MANG: The purpose and intent of the Bankruptcy Code was to provide benefit to creditors of the estate at large. There are multiple sections of the Bankruptcy Code --

THE COURT: I want authority -- I want authority, okay. I'm asking for specific authority.

MR. MANG: Section 554 of the Bankruptcy Code provides that property which is burdensome or has inconsequential value and benefit to the estate must be abandoned. Section 506(c) states that a secured creditor may be charged with the actual necessary expenses of preserving the value of its collateral. Synthesizing various Code provisions, it is clear that the intention of bankruptcy is not to administer assets for the benefit of secured creditors, because nothing flows to the estate as a result of that. If secured creditors want to receive --

THE COURT: Okay. With all respect, I don't want bankruptcy theory from Mr. Mang. I want authority. Because the fact is, it happens every day. Okay? The fact is that asset-base lending has been a reality in the commercial business world for decades now. And most of our cases we come in with a senior secured lender with a lien in substantially all of the assets. We try like heck to come up with a strategy in the case so that creditors, other than that senior secured lender, might

get paid. And so many times there just isn't value. Okay?

I don't know what authority says there must be abandonment in the context that no one -- there's no value beyond the senior secured lender. I really am wanting to know any authority you think supports your statement.

MR. MANG: Your Honor, in the 5th Circuit, I do not have any binding authority on this Court regarding those specific facts.

THE COURT: Okay.

MR. MANG: I will note, however, that the 5th Circuit in Southwest Securities FSB v. Segner, that's 811 F.3d 691 it states, a Trustee's fiduciary duty means that any cost to preserve -- and I'm bracketing this --- to preserve secured collateral incurred prior to abandonment must be undertaking with at least some hope that the estate will benefit. And that's a 5th Circuit case in 2015.

THE COURT: Okay. All right.

MR. MANG: So by implication, I would say, from that case that property that has no benefit to the estate at large should be abandoned. That's the inference I draw from that case. That wasn't the -- that wasn't what the case turned on. But I do have that citation for you, Your Honor.

THE COURT: That's okay. Go ahead.

MR. MANG: Secondly, this transaction constitutes an impermissible sub rosa reorganization without satisfying all of the requirements in a Chapter 11 plan. The characteristics of a sub rosa sale are set forth by the 5th Circuit in In re Braniff Airways and the Cajun Electric cases. Moreover, the case cited by

the debtor, the Terrace Gardens case, cautions that although an under secured property might be sold in a Section 363 asset sale, the Court must carefully scrutinize the benefit to the estate and consider whether it is, in fact, a sub rosa sale.

According to Mr. Kim's testimony yesterday, this transaction will effectuate a transfer of substantially all known assets of this estate to a secured lender. Mr. Kim has not spent any meaningful time on analyzing any claims of the estate, was his testimony.

THE COURT: Let me cut to the chase on this one.

What are all -- what are the bells and whistles added on to this proposed sale that make it rise to the level of a sub rosa plan?

MR. MANG: Your Honor, my understanding is, the case law on the sub rosa plan is that it is an end run around the confirmation process of Chapter 11. There is no disclosure associated with a sub rosa plan.

THE COURT: Let me -- let me back up. This happens every day in bankruptcy courts, 363 sales of substantially all the assets. The Braniff case from 1980 something, which I have to say was decades before this became a prevailing strategy in Chapter 11, 363 sales of substantially all the assets. The Braniff case was addressing a proposed sale that had a lot of bells and whistles on it, besides just a transfer of property for X price free and clear of liens, right? It had compromises. It had -- it had special provisions about how sale proceeds would be disbursed, cash proceeds. And wasn't it those extra bells and whistles that made it rise to so much more than simply a sale of assets and that's what the 5th Circuit found problematic?

MR. MANG: YOur Honor, while there may have been bells and whistles -- and I believe that in Braniff, the facts of the case were slightly different, so we don't necessarily need to try and compare apples to oranges. The underlying (indecipherable word), essentially is that in this case, we have a Section 363(b) asset sale which the purchaser seeks a good-faith determination for. And this is not fairly characterized as a bell and whistle, but I don't thin bell and whistle is the standard for sub rosa reorganization. I think it's where a good-faith determination is so all encompassing that it will essentially end all of the litigation regarding reversing the sale where there would be a Court order that authorizes Hall Palm Springs to receive the property, despite all of these pending claims. That as a result of the sale, there's no Chapter 11 case any more. I think it's fairly obvious from the record that there will no longer be a Chapter 11 case.

And whether or not this is --

THE COURT: There might be Chapter 5s, or other causes of action. Those aren't being purchased.

MR. MANG: Your Honor, there's nothing in the debtor's schedules that indicates that there's any Chapter 5 or other claim that may exist. If there were, Mr. Kin would know about it. And he testified that he is not aware of any such claims. So any suggestion that this Chapter 11 case would turn into a litigation --

THE COURT: Okay, understood. We don't know if there's anything there or not.

Okay. Continue.

MR. MANG: I was saying, Mr. Kim has not spent any meaningful time on analyzing any claims of the estate.

THE COURT: Got it.

MR. MANG: And he is not aware of any. In fact, Mr. Kim testified that the intention of the debtor all along has been to pursue an asset sale. And despite the looming expiration of the debtor's exclusivity period to file a plan before the end of this month, there's no draft of a Chapter 11 plan or disclosure statement. Mr. Wright argued that there is no option other than a sale. But the debtor didn't even try. The reason that it did not try to sell in the context of a Chapter 11 liquidating plan was that a transaction which provides 100 percent of the benefit to an affiliated secured creditor of the debtor and no benefit to unsecured or allegedly junior creditors. And I don't believe this estate actually has any unsecured creditors listed on the schedules.

The debtor complains that it had no other option, other than to pursue a sale, because otherwise, it would continue to incur expenses. This is not true. The obvious course of action is for the debtor to abandon an over encumbered, wasting asset. And we've previously discussed that, so I won't belabor the point.

Turning to the free and clear analysis. There is a spirit of authority regarding the interpretation of 363(f)(3).

THE COURT: Right.

MR. MANG: And that provision reads, a sale may be free and clear, quote, if such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on the property,

end quote. The debtor cited three cases which tend to support its side of the split.

THE COURT: Right.

MR. MANG: As explained by Collier's, the interpretation that (f)(3) authorizes a sale price less than the face value of liens appears to contravene legislative intent. Because otherwise, a sale at any price could be approved free and clear, regardless of the face value of the liens. The word value, therefore, should not be conflated with the term secured claim in Section 506(a). And there has been no valuation hearing under 506(a). So, therefore, the sale should not be approved free and clear under Section (f)(3).

As for Section (f)(5). The debtor did not identify any hypothetical proceeding whereby other claimants could be compelled to accept a monetary satisfaction of their interest. So we submit that the debtor has not met their burden of proof under (f)(5).

Mr. Wright also made a number of arguments which, again, he raised for the first time in his brief one hour before the scheduled hearing. This Court should disregard those hearings -- those arguments as untimely and violative of due process.

Finally as for the good-faith prong. Hall Palm Springs seeks a good-faith determination under Section 363(m) as set forth in the asset purchase agreement. This Bankruptcy Court in In re Hereford Biofuels, that's 466 B.R. 841 from 2012, explained that good faith speaks to the integrity of the purchaser's conduct in the course of the sale proceedings. And a good-faith determination should not be made where there is misconduct, including fraud, collusion, or attempt to take grossly unfair advantage of other bidders. The proponent of good faith bears the burden

of proof. In fact, this Bankruptcy Court has also found that whether or not a purchaser is an insider of the debtor is relevant for the consideration of a good faith. And that case is In re Ondova Limited. And that's an unpublished case from 2012.

Here, the proposed credit bid purchaser is an insider of the debtor. It's a DIP financer of the debtor with a veto right against other bidders. And the testimony from earlier this week showed that Hall Palm Springs actually rejected term sheets and cash bids for the property for two reasons. The cash amount was too low. And, two, the timing was too long. Now, there's an intent where you (indecipherable two words) rejected a cash bid of $30 million would actually be a great result for this estate. It would provide an amount of money available to pay creditors. And there are, as Your Honor knows, a number of pending lien priority adversary proceedings that have been filed to which those proceeds could attach.

THE COURT: All right. Mr. Hall -- Mr. Wright says Hall would get all of those proceeds, because it's first in time on --

MR. MANG: And that may be true at the end of the day, Your Honor. But the due process concern from the subcontractor and M&M lien claimants is that if this sale is approved, the proceeds would hypothetically attach to the credit bid, which is nothing really at all. It would be a better result for the estate and for the other creditors, if there were a cash amount to which the proceeds could attach. And if it --

THE COURT: And that assumes that the people after 90 days of due diligence don't back out, don't

reduce their bid, and you -- you prevail, other people prevail in their priority of lien disputes.

MR. MANG: Now, there's a lot of assumptions, Your Honor. And it is going to be a decision, at the end of the day, what the best interest of each individual subcontractor is. But at the same time, there's no guarantee that they will drop out either. And Hall can very well be a backup bidder, if it so chooses. There --

THE COURT: Okay. Let me -- let me cut to another point that was brought up.

We had evidence, through the testimony of Mr. Lof -- the SRC --

MR. MANG: Loughridge?

THE COURT: Loughridge -- that there are payment and performance bonds that you, your client, and other subcontractors can look to. As a Court of equity, should that matter to me?

MR. MANG: Yes, Your Honor, it absolutely should matter to a Court of equity. Because a Court of equity must consider all of the possible results for creditors. Obviously if this were the case that this is the only and end all recovery for all creditors, that would weigh heavily in favor of denying the sale. I cannot stand before you today, or sit before you today in my chair at home, that -- and represent to you that that is the case. Because it clearly is not. Our client has also claims against other entities. And that is true.

THE COURT: Okay. Anything else? We're running kind of long on time?

MR. MANG: Briefly on the fulsome and fair marketing process. I would note that the testimony from Mr. Bourret, (indecipherable few words) Bourret, is that he received a large amount of interest in the

property, but he received no bids which were able to conform with the bid procedures of this Court. He testified that traditionally a bidder for a project of this size would submit a bid and the prospective purchasers would be narrowed down through a preliminary proceeding where a price would be fixed, and then it would be traditional for them to have an extended due diligence period afterwards in order to finalize their diligence and finalize their bid. And this may have been one of the reasons that no conforming bids were received. It simply isn't a business practice for investors to bid (indecipherable word) proposed by the debtor.

We didn't have any evidence from any interested bidders, probably because they lost interest. There's nobody with sufficient interest to try and overcome all of the hurdles that it would take to get this sale.

And, Your Honor, as for how to move forward. There is still some time left, I would submit, on the contemplated term of the DIP financing agreement. My recollection of the DIP loan is that it terminates on the earlier of the following occurrences; a sale, or December 31st of this year. And, Your Honor, there has been approximately $200,000 of funds contributed by the DIP lender to date in this case. My understanding is, those are ordinary costs that would be associated with the maintenance of this property by any entity. My understanding is that you need security in order to prevent people from stealing all of the copper wiring out of your property.

But the lienholders and the other claimants should be given an opportunity to propose an alternative. And as Your Honor notes, this case has been pending for 100 days. But the sale, the credit bid proposed has only been on the table for less than a month. It

appears that the debtor's sale process simply did not work. And now if all benefit goes to Hall Palm Springs, the case is over and the other creditors will be left to their own devices. I submit that the sale motion should be denied, or, alternatively, it should be continued for a period of weeks so that an alternative may be proposed. If one is not proposed, the same may close. But the sale should also be subject to a later determination that a lien is senior to the credit bidder, based on the adversary proceedings.

With that, I submit to the Court.

THE COURT: All right. Other closing? Ms. Clark, you provided some closing. Anything else you wanted to say?

MS. CLARK: Just a few things.

The case that we cited in our (indecipherable word) is In re Gulf Coast Oil Corporation. And it is at 404 B.R. 407. It's a case out of the Southern District of Texas in 2009. It's a Judge Steen opinion. And Judge Steen actually does recite in that opinion that, and I quote, bankruptcy is, at its essence, a collected remedy intended to benefit all creditors, not just a secured lender. So that has been decided, at least by Judge Steen.

The issue that we have is that -- at least from my perspective -- is that Encore Steel filed a lien that has not been challenged. And it has the due process right to have that priority determined. And if the sale is allowed free and clear, it is going to be deprived of its due process. And that's unfortunate, because the California law and how it applies has not, I don't think, fully been adjudicated in this court. There was a brief by ambush. We haven't responded. And if we did, we believe we have a very strong response based

on the evidence submitted and then tying it back out to the California case law.

THE COURT: Okay. Ms. Clark, let me stop you. Here is something that I have been struggling with and I have not heard anyone respond in a way yet that gets me comfortable.

You know, we have these 363 sales often where, you know, we either have a credit bid of a senior secured lender, or we have a cash bid that is less than the amount owed to the senior secured lender. The senior secured lender is okay with it. The junior lender -- lienholders are not. Maybe the junior lienholders have arguments, we're not really junior. We've got an adversary.

Okay. Isn't 363(p) the way a Court is supposed to deal with this situation where if you all put in evidence, someone puts in evidence, we think we're going to prevail one day when we have our adversary proceeding. And here is our evidence showing we might actually come ahead. And if you make an evidentiary showing under 363(p)(2), then maybe I offer you some sort of adequate protection in the sale. Right? You know, I say it's not going ot be free and clear of this lien, or, purchaser, you have to put up an escrow, or letter of credit, or some little fund, in case they're right.

Wasn't this sale an opportunity -- this sale hearing an opportunity for the M&M lien claimants to put on some evidence to convince me, you might be not subordinated, you must deserve adequate protection, and you might -- your situation might require me to order some sort of adequate protection. So that's where I'm coming from. What is your response to that?

MS. CLARK: I have two responses, Your Honor.

One is, it's unclear to me how 363(p) and a deadline to challenge lien claims that is set and the parties followed in good faith, how those two things true up. But setting that aside and hearing what Your Honor is saying, we would assert that we have made that prima facie showing through the evidence that has been presented. And that is that we filed a valid lien. We also brought suit in California, which is not disputed, which is required under California lien law. You have to file the lien and then file suit to enforce. That's been done.

The other thing, Your Honor, is that we have presented evidence that work began on the property before Hall Palm Springs recorded its deed of trust. And so I'd like to recite to the Court some authority out of California --

THE COURT: Okay. Rather than that, I would like you to point me to the evidence in the record.

MS. CLARK: Your Honor, the evidence in the record is, first, the -- Encore Steel's Exhibit 3, its mechanic's lien. We move over to SR Construction's Exhibit list, we have the Exhibit 17, 18, 19, which show the date of first work on the property. As well as, you know, the testimony of Mr. Loughridge with respect to when the work began, which is shown in these documents that I just referenced.

THE COURT: So without me pouring through the documents, where is my evidence that Encore started work before November 1st, 2017, the date that the evidence shows Hall recorded its deed of trust?

MS. CLARK: Your Honor, I don't know why that's relevant, respectfully. The way that the California lien law works is that your lien, no matter when its filed, relates back to the first date of work on the

project, no matter whether liens come in between, no matter whether those liens are actually satisfied and removed, it is a relation back to first work. It's a pure first in time, first in right statute. And so what happens in --

THE COURT: Okay. Maybe -- maybe I didn't say it the right way. Maybe I mis-spoke.

The evidence shows Hall recorded its lien November 1st, 2017. So I acknowledge the relationship back concept. Encore's M&M lien is in evidence, was recorded October 28th, 2019. So you would relate back to the time -- let's throw subordination agreements and waivers out the window for a minute. Relation back, where is my evidence that Encore started work before November 1st, 2017, the day that Hall recorded its deed of trust? That would be the relation back date.

MS. CLARK: Again, Your Honor, respectfully, I don't think that the question impacts the legal analysis. The relation back is as to any work by any party, not Encore. So maybe I'm misunderstanding the Court's question. But it doesn't have to be Encore that begins work before Hall Palm Springs files its deed of trust. Rather, it's any work by any party that's performed at the site.

THE COURT: Okay.

MS. CLARK: And as Mr. Amin referenced facts, there's case law that I was just about to cite and I will cite, and there's California Civil Code Section 8450, which talks about lien priority.

Just to quote briefly, Your Honor, from Santa Clara Land Title Company versus Nowack & Associates, which is at 226 Cal.App.3d 1558. When work has started on a project before the construction

loan trust deed is recorded, the lien of the deed of trust is junior to the mechanic's liens, even though all of the mechanic who have performed or supplied materials prior to the recordation of the trust deed have been paid and the unpaid mechanic's liens are for work performed after the deed of trust is recorded. And so that is just one example of a Court that is commenting on this issue of lien priority and the first in time, first in line concept.

THE COURT: Okay.

MS. CLARK: And so, Your Honor, just one brief point with respect to Hall Palm Springs' evidence, I believe it's their Exhibit J, it's a -- it's an unconditional waiver release. Hall wanted to talk about that in part of its closing today, Your Honor. I would just submit that that release on its face is with respect to a prior contract with Pinta, the prior sub -- the prior general contractor. And it's wholly irrelevant to any analysis as to priority with respect to SR Construction and the work that began in 2017 which is after that lien release was signed in 2016.

THE COURT: Let me clarify one thing. There was a statement that 20 parties signed lien releases. Your client was not one of those 20 parties?

MS. CLARK: No, it was not. The only thing that I'm aware of, Your Honor, is this lien release that was for the benefit of Pinta under a prior contract in 2016, not with respect to the work performed and for which the lien was filed in 2019.

THE COURT: Okay.

MS. CLARK: I'm just looking at Hall's exhibit list to double check -- they have a lot of exhibits -- to make sure I'm fully responding to the Court. But I don't see anything else related to Encore.

THE COURT: Okay.

MS. CLARK: Your Honor, I don't repeat the points that the other lawyers have made. We adopt them. We rely on our papers. And at the end of the day, I think the practical (indecipherable few words due to audio cutting out) is to give a little bit of time. But you are a Court of equity and we'll, of course, respect the Court's decision. But that's what we would ask, is that the Court allow some time for the lienholder -- the mechanic's lienholders to determine what they might be able to get done to allow the case to remain in bankruptcy. And also, Your Honor, to the point of 363(p), we do believe we've shown a prima facie case that our lien should be considered prima facie valid and that there should be some adequate protection to protect Encore's lien rights.

THE COURT: Okay. Thank you.

All right. Ms. Lowe, any closing argument?

MS. LOWE: Yes, Your Honor. And I will try to be very brief, as I know we've going a while and, like I said in my opening, pretty much everything I would say has been said by one of the other objecting parties.

Obviously we echo those concerns regarding the sale process, the sale in general. Just one note I wanted to make was that the lack of alternatives, although I believe there are relevant alternatives that have been discussed, but the lack of alternatives is not the standard here today. We're looking at a sale motion where the standard is whether the sale is a sound exercise of the debtor's business judgment. And as stated by the other objecting parties, we don't believe the debtor has met that burden.

Looking and going to Your Honor's point to get into my client a little more specifically. Our real issue here,

obviously, is the sale being free and clear of their interests. We don't believe 363(f)(3) is proper, because using the economic value test just does not seem -- it's not proper here. It should be looked at using a face value (indecipherable word). And there's no question that obviously the sales price is less than the total value.

There really has been no evidence presented that my clients could be compelled in (indecipherable word) equitable proceeding to accept a money satisfaction judgment outside of this. They have, as people have discussed, mechanic's liens. And in the case of Beltmann a warehouseman lien, which is automatic and has super priority under California law. And so to sell this property free and clear of their liens, there's no evidence and no reason for doing that, evidence by the debtor under 363(f).

THE COURT: Let me stop you there.

Where is my evidence of your client's warehouseman's lien?

MS. LOWE: Well, I was just going to get to that, Your Honor.

I, frankly, don't believe that we've included it. I didn't believe there was -- the debtor first has to get through 363(f). We don't believe that the debtor has done that. I know Your Honor has brought up 363(p). We were not aware that was an issue. It wasn't anything brought up by the debtor, because we believe the debtor does not get through 363(f). I'm not aware of the debtor challenging the liens of my clients. And so, frankly, we believe 363(p) was irrelevant and not coming into play. So I can't tell you anything other than I don't believe it's in front of this Court, other then there's been no challenge to it and my client is

holding a number of items in storage for the debtor. And the warehouseman's lien under California Commercial Code, there's a few sections, but 7209 and 7210, as well as Section 9312 makes the lien automatic when it is storing those materials. And Commercial Code Section 9333 provides that the possessory lien has priority over a security interest.

Again, I apologize for not putting that information in front of you. I just did not know this was going to be an issue. It was not raised. And I can't -- I just can't point you to it anywhere in the record.

THE COURT: All right. Thank you. Anything else?

MS. LOWE: No, Your Honor, I think that's it. I think you understand where our position lies. And, again, our main issue being that we do not believe the sale, if it's approved at all, should be free and clear of liens.

THE COURT: All right. Ms. Wall, any last words in rebuttal?

MS. WALL: Your Honor, I have two points.

First, regarding the request for more time to (indecipherable few words). As you mentioned, the case has been filed 100 days. The sale update notifying everyone of McWhinney's termination has been on file about 30 days. That was at the very beginning of October. It seems like that could have and should have been a reasonable indication that maybe it's going to be harder than we thought to sell this property. That may have been a good time to start (indecipherable word), if the M&M lienholders wanted to be (indecipherable word) on that particular day.

And, Your Honor, during discussion of benefit (indecipherable few words) estate and creditors. And I

just want to point out that consistent with the debtor's schedules, the objecting parties have liens on property owned by the debtor. They don't have a separate independent claim against the debtor. Whatever claim they have is completely non-recourse against the debtor. The claims are against third parties secured by their lien against property owned by the debtor. I just wanted to clarify that point.

That's all I have.

THE COURT: Let me ask about this. Are there any liens out there that the debtor and Hall would acknowledge are senior? For example, property taxes. They've been conspicuously absent, although, you know, property taxes are a huge deal in Texas. But in California, they have all kinds of different taxes. Maybe their property tax bill on this one is not as large as one might expect from a property in Texas.

What do we have in the way of property liens on this, or tax liens?

MS. WALL: Your Honor, I believe that there was nothing owed at the time of filing. But there might (indecipherable few words due to background noise). It's always been my understanding that the property taxes are current. And that's thanks to Hall, no doubt.

THE COURT: Okay. But does it work the same way in California where the 2020 taxes technically would not be due until January of 2021, so there might be unpaid January -- unpaid 2020 taxes?

MS. WALL: I'm not sure exactly how it works, Your Honor. If it works the way it does in Texas, then, yes, that would be true.

THE COURT: All right. So the debtor is not requesting that this be free and clear of any property taxes that by law would be --

MS. WALL: No.

THE COURT: -- lenders, right, or M&M –

MS. WALL: No, Your Honor.

THE COURT: Okay. With regard to Ms. Lowe's client that asserts a warehouse lien of some amount I'm not sure of, is there a 365 contract that might apply to her client that's being assumed?

MS. WALL: Your Honor, not that I know of. I don't believe I've seen it, if there is.

THE COURT: When I asked what some of these contracts were, I think I heard there might be some storage.

MS. WALL: Some are for storage containers, Your Honor. The debtor has been in touch with Ms. Lowe about taking over the storage for what we assert is property of the estate, but in Ms. Lowe's client's possession. But the debtor, I don't believe is a party to an executory contract with Ms. Lowe's client.

MS. LOWE: Your Honor, I believe the contract was with the prior owner of the property. So we are not in direct (indecipherable word) with the debtor, because of the change in ownership. There is a contract with the prior owner of the property.

THE COURT: Okay. Well, I'm not seeing -- I'm not seeing on the list of executory contracts --

MS. LOWE: I don't believe it was listed in the contracts to be assumed and assigned. I, frankly, don't think that's alleged anywhere in the schedules.

THE COURT: All right. Well, again, this isn't evidence, but do you have a dollar amount that you can give me for what your client says is its warehouse lien?

MS. LOWE: Yes, Your Honor, if you can give me just a minute. It's in the approximate amount of $330,000. But just one minute.

Thank you, Your Honor. The number is $338,460.43.

THE COURT: All right.

Mr. Wright, any closing argument from you? Do you know anything about this warehouse lien?

MR. WRIGHT: Judge, all I know about it is that there is significant FF&E that's been stored with Beltmann. I think there's other parties, like SR, that also have some property that they're holding that was purchased by the debtor. That's all I know about it. And I know that there obviously would have been monies owed by the original borrower to Beltmann for those storage costs.

THE COURT: Okay. Anything else by way of closing argument?

MR. WRIGHT: No, Judge.

THE COURT: All right. The Court is going to go ahead and rule on this motion to sell of the debtor, RE Palm Springs II, LLC.

I'll start by saying that the statutory predicate for the relief requested is Section 363 of the Bankruptcy Code, 365, as to the executory contracts the debtor seeks to assume, and then the bankruptcy rules that apply are Bankruptcy Rule 6004, as well as 2002.

I find that notice of the motion has been consistent with the bankruptcy rules. Turning in more detail to Section 363 of the Bankruptcy Code. We start with 363(b)(1) here. And it authorizes a debtor in possession or a Trustee to sell assets of the estate, other than in the ordinary course of business, after notice and a hearing. We've had that here, notice and a hearing. And then we turn to Court authority, because there's not much in the statute itself regarding the legal standard, much less the manner of a sale.

Courts have articulated that there must be a business justification for selling property of the estate, a sound business justification. And then Courts evaluate whether there's a sound business justification under the Business Judgment Rule. And Courts have said there's a presumption that in making a business decision, the directors or officers of an entity acted on an informed basis in good faith and an honest belief that the action was in the best interest of the company. Courts have made clear in the bankruptcy context that the debtor's business judgment is entitled to substantial deference with respect to the procedures to be used in selling the assets. Courts have further articulated that the, quote, business justification standard is not formidable. Generally speaking, a debtor in possession can satisfy the business justification standard by showing that a proposed sale of property appears to enhance the debtor's estate and is not speculative or contrary to provisions of the Bankruptcy Code.

Here, looking at the evidence, the Court finds that the debtor in possession, through Mr. Kim, its CRO, has exercised reasonable business judgment. I believe

that it is beyond any reasonable dispute that we have a wasting asset. And there was a comment here or there in closing argument that I didn't really have any evidence of that, or that all the damage has been done. I don't think it is a stretch at all for this Court to use common sense and judicial notice of reality, for lack of a better way of saying it, that if you've got a half constructed building, roughly half, 55 percent, whatever it is, that is outside in the elements, there's going to be deterioration. That's just, I think, an indisputable fact. And that cannot be good for its long-term value, if it continues in that half constructed state.

There was certainly evidence that -- I can't remember now which tower it was -- here it is. Mr. Bourret talked about the South Tower, in particular, being in poor shape. Lots of exposure. Completely exposed in contrast to the North Tower that has doors and windows. So I think there is evidence from that testimony, plus just common sense that we have a wasting asset.

There's also evidence that there are -- there's no funds, there are no funds to preserve value long term, beyond December 31st when the DIP loan expires. The debtor has no cash or other options here and certainly does not have funds to finish the hotel, which evidence suggested would be over $30 million. Had no contrary evidence to that.

So this Court finds that at this juncture, based on the evidence presented, a sale is really the only option that has been presented. Again, no objectors has presented any alternative option, other than maybe we should wait and see what we can come up with before the DIP loan expires on December 31st.

The paramount goal in any proposed sale of property is, of course, to maximize the proceeds received by the estate, maximize value for the estate. Courts have often recognized, this Court and other Courts, that procedures such as the ones in this case tend to enhance value, enhance a competitive bidding process, and are consistent with the goal of maximizing the value of the estate and, therefore, are appropriate in bankruptcy transactions.

To be clear here, the bid procedures that this Court earlier approved contained typical terms designed to increase the likelihood that the estate would receive the greatest possible consideration in value. They contemplated and ensured, in this Court's view, a competitive and fair bidding process. Unfortunately, despite these typical terms in a fulsome process, from this Court's perspective, there was no cash bidder, no outside third-party bidder. That sometimes happens. Unfortunately, it sometimes happens in bankruptcy. This is not the first time. It's not going to be the last. During unusual times like this, a pandemic, and devastating impacts on the hospitality industry, I guess we should not be completely shocked, disappointed, but not shocked. But this Court believes we did have a fair and fulsome marketing process.

Mr. Baker, of CBRE, said that HWE was well qualified. We had evidence of Mr. Bourret reaching out to a target base of 1 or 2,000 potential bidders. He received 250 confidentiality agreements. He set up a data room. He set up site visits. He said seven groups visited the property. These groups were offered a construction loan from Hall to finish the property. One interested bidder visited five times. But at the end of the day, we didn't have a bid, even after extending the bid deadline. We heard that there were three LOIs

that had non-conforming bids, but significant to me was the fact that they still wanted to do due diligence that was going to take quite some time. So they were nowhere close to a firm bid after many weeks of this process. So I believe there is a sound business justification for the proposed sale. And it's reasonable business judgment for the debtor to propose this sale via the credit bid of Hall.

The Court must next turn to 363(f), because the Bankruptcy Code authorizes not only a sale of property outside the ordinary course of the estate, but it also authorizes in 363(f) a sale of assets free and clear of liens, claims, interests, and encumbrances if any one of five possible factors exist. One, if applicable non-bankruptcy law permits a sale of such property free and clear of such interest. Two, such entity consents. Three, such interest is a lien and the price at which property is to be -- price at which such property is to be sold is greater than the aggregate value of all liens on such property. Four, such interest is in bona fide dispute. Or, five, such entity could be compelled in a legal or equitable proceeding to accept a money satisfaction of such interest.

With regard to the proposed sale here. The debtor has argued that at least a couple of the tests in 363(f) are satisfied, in particular 363(f)(3) and (f)(5) are satisfied. Focusing on (f)(3). This Court in the past has followed the line of cases -- although I don't recall if I have a published opinion, apparently not since no one cited it. But I have followed the Terrace Gardens case of Judge Leif Clark in the Western District of Texas, 96 B.R. 707. He interpreted 363(f)(3) as requiring that the sale price equal or exceed the value of the property. And under this viewpoint, each secured claim is valued only to the extent of its actual

realizable interest in the property. So, therefore, so long as the hotel is sold for a price that equal or exceeds its fair market value as determined by this Court, the sale may proceed.

I want to talk about a case that no one argued that I found significant, I know, in the case that I had to rule on this issue once before. It's the In re Boston Generating, LLC case out of the Southern District of New York Bankruptcy Court in 2010. It was Judge Shelley Chapman. The cite is 440 B.R. 302. I have no idea if this was cited in Hall's brief that was, I'm told, filed an hour or two before the hearing Tuesday. Again, I've not looked at that brief. But this is a case that I have found persuasive in the past, so I'm going to talk about it just a moment.

The Boston Generating case involved a 363 sale of substantially all of the debtor's assets. And there was both a first and second lienholder. The Court approved the sale free and clear of the junior -- of the liens, including the junior liens, because the price at which the assets were being sold the Court found was greater than the value of the property -- the value of the aggregate liens on the property. And then she also approved the sale under 363(f)(5) finding that under -- that there were grounds to compel the second lienholders to accept money satisfaction of their interest.

The facts there were that the debtor's power plant operators had two tranches of secured debt. First, a $1.45 billion first lien credit facility on which 1.13 billion was outstanding secured by substantially all of the assets of the debtors. And then second, a second tranche of junior debt a $350 million second lien loan secured by second priority liens and the very same

collateral. There was also a lot of unsecured debt, 422 million.

So the debtor had undertaken a marketing process, so the debtors had actually started it pre-petition and ultimately entered into an asset purchase agreement with an entity for 1.1 billion. So it was slightly less than the amount under -- outstanding and due on the first lien credit facility. But nothing would go to the second lienholders.

Interestingly in this case, and this is the reason I've chosen to talk about this case, the second lienholders who were objecting to the sale had an expert witness who testified that the market was wrong about the value of the assets being sold. In other words, the auction process that had yielded the $1.1 billion sale price, it was wrong. They thought the value was higher. The expert testified that the value was higher. Judge Chapman noted that, quote, absent a showing that there has been a clear market failure, the behavior in the marketplace is the best indicator of enterprise value. And she cited Judge Gonzales from the Chrysler case where there was, of course, a very fast bankruptcy auction. And Judge Gonzales had said, quote, the true test of value is the sale process itself, closed quote.

I agree with this reasoning. And we say in the bankruptcy courts frequently something that I think we learned in business classes, that the greatest indication of value is what a willing and able purchaser offers for a willing seller, or something to that affect.

So I would add, moreover, that as far as the expert, if you will, that presented evidence about the value here of this partially finished hotel, his testimony, to

be blunt, didn't seem to be very reliable to this Court. He had no construction budget to educate himself on the cost of finishing the project. And, in fact, the testimony reflected he had some wrong assumptions about the cost to finish. He had a flawed assumption, in my estimation, that the hotel would open November 2021, when at the same time he was making an assumption there should be, to achieve his valuation, a 6 to 12 month marketing process, which would make opening November 2021 impossible. So he had a couple of inconsistent assumptions that to me made his valuation very unreliable. He did not have comparables involving partially constructed hotels. Granted, I'm sure, it's very hard to come up with comparables on that. And I did not have very warm and fuzzy feelings about how he factored COVID into all of this. I know it's very hard to factor COVID with certainty. But I just found that 56 million as-is appraisal to be wholly unreliable.

You know, I always say facts matter. And there are all sorts of facts that really, really matter here today. 50 to 70,000 a month to maintain this property, nothing to contradict that. In fact, there were a couple of statements that made me think maybe it's going to be a little more than that in coming months. In two months the DIP facility expires without any other liquidity options proposed to the Court. Again, I think I can easily conclude there's deterioration on this property and that it's a wasting asset. You know, I should have mentioned on that point earlier that in addition to Mr. Bourret's comments about one of the towers being completely exposed, Mr. Kim testified about construction materials lying around deteriorating. So we had evidence of that, besides my own common sense.

We have the fact here that the cost to complete is very large and we're in a challenging market, obviously, because of COVID. The hospitality construction financing is hard to obtain currently, we heard. And Hall offered financing, which I think should be inferred to be good faith. We heard testimony that getting insurance on this property is a challenge. And, you know, Courts debate whether they can consider the public interest in a context like this. We've had a little bit of authority in a different context from the 5th Circuit in the Mirant case that public interest sometimes is important to consider. And I think about the eye sore, you know, that's been out there for a very long time now and how frustrating it must be to the members of the community of Palm Springs. So that is a real issue here in making me think that what has been proposed here is an exercise of reasonable business judgment and the sale ought to be approved.

I believe, to be clear, that this sale can happen free and clear of liens, claims, and interests of the contractor and the subcontractors under 363(f)(3), as well as (f)(5), and maybe even (f)(4). You know, there are, I guess I should say remedies here that have been eluded to the past few days. Junior lienholders can, or any lienholders, for that matter, can credit bid. No one, besides Hall, moved to make a credit bid here. As I've eluded to, we could have had the subcontractors and contractor offer a DIP loan. There's been plenty of time and that hasn't happened. And then I've refer to 363(p) many times. I could have entertained a request for adequate protection. And the competing lienholders could have put on a prima facie showing. I, frankly, don't think anyone made a sufficient showing that they might have a lien here ahead of Hall that is entitled to adequate protection. You know,

I asked about taxing authorities. I asked about the warehouse lien. And then I hoped that maybe the contractor and subcontractor could connect the dots for me to get me to a prima facie position to say, ah, you're entitled to some sort of adequate protection in connection with a sale free and clear of liens under 363(p). But I just didn't have any of the lienholders meet their burden here.

A couple of additional points. 363(m) has been eluded to a couple of times. It, of course, provides that reversal or modification on appeal of an order authorizing a sale of property does not affect the validity of the sale to any purchaser in good faith. I do find good faith here under 363(m) for 363(m) purposes.

The evidence has not been refuted, in my mind, that showed we had a sophisticated seller and purchaser negotiating at arm's length. And that they acted in good faith. I know there's a lot of, I'll use the term mud slinging, for lack of a better term, about what happened, for example, March 13th, 2020. Rather than foreclose, go forward with a 12 or 18 month process to foreclose on the property, the borrower agreed to transfer the property to a Hall affiliated entity. That sometimes happens. We sometimes call that a deed in lieu of foreclosure. And in that Hall entity is the current debtor entity renamed RE Palm Springs II. But then, of course, the equity interest of Hall was given away to the CRO's firm to divest ownership interest.

You know, there's just nothing I've heard here that suggests there was something bad faith, sinister. In fact, the irony here to me is that the bankruptcy was then later filed after COVID hit and changed the Hall entity's desire to complete the project and they filed a bankruptcy where everything is, you know,

transparent, full disclosure, people's opportunity to take discovery, weigh in with their positions, put in their own evidence. So I do find good faith here for purposes of 363(m).

I am going to overrule the objection that we had a sub rosa plan -- we have a sub rosa plan. I don't find the Braniff facts to be similar, or the holding there to apply here. We have a sale free and clear. And in Braniff there were bells and whistles added, compromises and agreements about how proceeds would be distributed and other factors that just made it go too far, too far to make the Court think this all should have been done in a plan.

I do also want to add here that it mattered to me that there are payment and performance bonds here. I am a Court of equity and I think I can consider things like that. And while I know the subcontractors, the contractor would have loved to have seen a 50 something million dollar sale so that there would be proceeds from a sale to pay them and they wouldn't have to go through the trouble of, you know, state law procedures in California to pursue payment under those bonds, it still occurs to me is something in equity I should consider here. And I do.

So I also approve under 365 assumption and assignment of any of the contracts that the debtor has been assigned and wants to assume. There being no evidence that there's any cure payments or any other reason for it not to be reasonable business judgment on the part of the debtor.

The last thing -- and I think this is the last thing. I keep thinking of new things. As far as the 363(f) free and clear. I want to carve out taxes. Okay. I don't want to make this free and clear of any valid taxes and tax

liens that might exist. So, Mr. Wright, and, Ms. Wall, I know sometimes purchasers and sellers do this different ways with the taxing authorities. Sometimes you call them up or negotiate with them, you know, what is the amount? And you just pay them, or you escrow. You know, it may be that you want to do something that in your order. So I'm open to the way the order is worded in that regard. Whether it says it's not free and clear of the 2020 taxes or whether you say it is going to be free and clear, but here's an escrow because, you know, maybe there's a disputed amount, for example. So, again, I'm opened to the way that's phrased, as long as you -- well, you know, I don't know. Have they reached out to you all at all, the taxing authorities? They've been noticed and no one has reached out?

MS. WALL: (Indecipherable few words).

MR. WRIGHT: Yeah, Judge, we have not heard from the taxing authorities. We have paid them current, as far as -- so they're timely on payment. And we did anticipate that we would still be paying the taxes.

THE COURT: All right. So, again, it's either got to say not free and clear of, you know, validly existing property, unpaid property taxes. Or if you don't want it to be worded that broadly, then there's going to have to be some sort of escrow and I think a discussion with them about whether the escrow is sufficient.

The other thing is this. I'm struggling with the warehouse lien. I mean, without studying the statute that was cited to me -- I mean, I know that is, of course, very common for a possessory warehouse lien to come ahead. You know, that was what I would expect the answer to be. It would come ahead of a

consensual lien like this. So I feel like we need some adequate protection for whatever valid warehouse lien there might be. I think this would be a personal property issue, though, right? It wouldn't be a lien on the real property. It's just a personal property issue.

MS. LOWE: That's right, Your Honor.

THE COURT: So, again, I am looking for input here. I've seen it done different ways. We could either say the sale of the personal property is not free and clear of any valid existing warehouse liens with the Court reserving jurisdiction to decide those amounts at a later date, or you could propose an escrow, or what? What say you on that? And I don't know if it's just Ms. Lowe's client. Someone said something about SRC also having some personal property.

MS. LOWE: Thank you, Your Honor.

I don't really care either way. I guess my preference would be to set up an escrow where a certain amount is set aside, subject to further settlement or an order of the Court determining the validity and priority of that lien. So that would be my request. And that the amount set aside be the number that I gave the Court earlier, around 338,000. But, again, I'm open to what the Court would like, or what the debtor or the buyer would like in response to that.

THE COURT: All right. Well, Mr. Wright, or, Ms. Wall, do you all want to talk off-line about what mechanism you might be able to agree to here? And then if you can't come to some resolution, maybe we can come back with a status conference on that?

MR. WRIGHT: I think clearly we can agree to reserve in the order their lien rights as to the personal property that they have in their possession. You know, there's other personal property. But as to what

Beltman has in its possession, we could reserve those lien rights. And we understand that either there's going to have to be a resolution of that lien claim, or we're going to have to pay them in order to get the FF&E released.

THE COURT: Now that you've said that, it makes sense. You've got the property. That's really your adequate protection, right, Ms. Lowe? And so if your lien rights are preserved in the order, then if you can't agree that it's 338 or whatever, you all can come back and we can --

MS. LOWE: I'm fine with that, Your Honor.

THE COURT: Okay.

MS. LOWE: I think that's (indecipherable word). Thank you.

THE COURT: All right. Well, again, I reserve the right to supplement in the written form of order. Ms. Wall, will you be uploading a form of order? And let me know, is it going to be today? I'm about to get on a conference call and I don't know if you can have it today.

MS. WALL: Yes, Your Honor. I will be uploading one. I don't expect it to be today. I also have a call, a later appointment this afternoon. I think Mr. Wright and I need to talk about drafting it, as well, supplementing our previous draft, based on your ruling.

MS. LOWE: Your Honor –

MR. AMIN: -- Your Honor --

THE COURT: Okay. I thought of one thing I did not address and that was 6004 waiver.

I'm not sure I really have cause here to waive that. I don't -- I don't see any sort of evidence or argument before me that you've got to close on this in 14 days. So I'm not going to grant that waiver.

All right. Anyone else? I thought I heard someone say --

MS. LOWE: Your Honor, this is Ms. Lowe.

I was just going to request that Ms. Wall or Mr. Wright send me a draft of the order, or the particular language regarding the warehouse lien before it's uploaded. If they would please do that.

THE COURT: Okay. I think that's a fair request. Please do that.

All right. Anything else?

MR. AMIN: Your Honor -- Your Honor, yes. This is Ismail Amin. Thank you for addressing the 6004 issue. I also asked in my closing for a stay pending appeal on the (indecipherable two words).

THE COURT: All right. Well, do you have any evidence to put on today, other than what I've already heard?

MR. AMIN: No, Your Honor, I do not.

THE COURT: Okay. So that request is denied.

If you want to go to the District Court, you can represent you've already requested one from the Bankruptcy Court and it's been denied.

All right. Thank you.

MR. AMIN: Thank you, Your Honor.

(End of Proceedings.)

C E R T I F I C A T E

I, CINDY SUMNER, do hereby certify that the foregoing constitutes a full, true, and complete transcription of the proceedings as heretofore set forth in the above-captioned and numbered cause in typewriting before me.

/s/ Cindy Sumner

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