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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STEVEN D. MAERO, Plaintiff / Appellee, -vs- MERRILL K. BUNKER, TOPAZ ENTERPRISES, INC., a Utah Corporation, and WESTLAND II INVESTMENTS, a Utah Limited Partnership, Defendants / Appellants.	**BRIEF OF APPELLEE STEVEN D. MAERO** Appellate Case No. 2008-0627

APPEAL FROM ORDER OF THE THIRD DISTRICT COURT, SALT LAKE COUNTY, JUDGE JOSEPH C. FRATTO

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ORAL ARGUMENT IS REQUESTED

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STATEMENT OF JURISDICTION

As explained more fully below, Appellee Steven D. Maero disagrees that this Court has jurisdiction over the appellants' assertions that the Trustee's sale of a partnership interest to Maero was invalid.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue No. 1: Does the Appellants' challenge to an order of the bankruptcy court approving a trustee's sale of assets constitute an improper collateral attack over which the trial court and this Court have no subject matter jurisdiction?

Standard of Review: This issue is raised for the first time on appeal. "Questions of subject matter jurisdiction, because they are threshold issues, may be raised at any time and are addressed before resolving other claims." State v. Sun Sur. Ins. Co., 2004 UT 74, ¶ 7, 99 P.3d 818; Utah R. Civ. P. 12(h)(2). "The determination of whether a court has subject matter jurisdiction is a question of law." Beaver v. Qwest, Inc., 2001 UT 81, ¶ 8, 31 P.3d 1147.

Issue No. 2: Is this appeal made moot by 11 U.S.C. § 363(m) because the Westland II Defendants failed to seek a stay of the Trustee's sale?

Standard of Review: "Ordinarily, [an appellate court] will not adjudicate issues when the underlying case is moot. A case is deemed moot when the requested judicial relief cannot affect the rights of the litigants." Brookside Mobile Home Park, Ltd. v. Peebles, 2002 UT 48, ¶ 16, 48 P.3d 968 (citation omitted). "Because mootness is a matter of judicial policy, the ultimate determination of whether to address an issue that is

technically moot rests in the discretion of this court." Ellis v. Swensen, 2000 UT 101, ¶ 26, 16 P.3d 1233.

Issue No. 3: Did the trial court correctly find that the right-of-first-refusal provisions in the Partnership Agreement were ineffective post-dissolution and that therefore, the Trustee's sale was valid?

Standard of Review: The interpretation of the terms of an agreement is a question of law that is reviewed for correctness. Pack v. Case, 2001 UT App 232, ¶ 16, 30 P.3d 436.

Issue No. 4: In any event, were the right-of-first refusal provisions inapplicable because, at the time of the Trustee's sale, there was no legitimate General Partner of Westland II?

Standard of Review: This was not decided by the court below, but can serve as alternate grounds for affirming this case. See Dipoma v. McPhie, 2001 UT 61, ¶ 18, 29 P.3d 1225 ("[I]t is well settled that an appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action.").

Preserved: R. at 362:27, 200–205.

Issue No. 5: In any event, were the right-of-first refusal provisions inapplicable to the Trustee because she was not a "Limited Partner" under the Partnership Agreement?

Standard of Review: This was not decided by the court below, but can serve as

alternate grounds for affirming this case. <u>See</u> <u>Dipoma v. McPhie</u>, 2001 UT 61, ¶ 18

<u>Preserved</u>: R. at 362:22, 138.

<u>Issue No. 6</u>: Assuming that the right-of-first refusal provisions applied to the Trustee, did she substantially comply with those provisions?

<u>Standard of Review</u>: This was not decided by the court below, but can serve as alternate grounds for affirming this case. <u>See</u> <u>Dipoma</u>, 2001 UT 61, at ¶ 18.

<u>Preserved</u>: R. at 111–13; 363:25.

<u>STATEMENT OF THE CASE</u>

I. THE NATURE OF THE CASE.

The Appellee in this case is Steven Maero ("Maero"). The Appellants in this case, Merrill Bunker ("Bunker"), Topaz Enterprises, Inc. ("Topaz"), and Westland II Investments ("Westland II") (collectively, "Westland II Defendants"), are appealing an order of the trial court, which found that Maero was the owner of a 2.5% interest in Westland II, a limited partnership, and awarded him a judgment in the amount of $45,000.00 plus interest.

The dispute in this case stems from the separate 1987 bankruptcies of Granada, Inc., which was the general partner of Westland II, and C. Dean Larsen, the president of Granada and a limited partner (owning a 2.5% interest) of Westland II. In 1994, the trustee of Larsen's bankruptcy case sold his interest in Westland II to Maero at auction. The bankruptcy court approved the auction and sale. Several years later, Maero attempted to obtain an accounting from Bunker, who was purportedly the new general

partner of Westland II, but was unsuccessful.

The proceeding below was commenced when Maero brought an action for an accounting and a declaration of his rights and interest in Westland II. The Westland II Defendants counterclaimed, seeking a determination that the trustee's sale to Maero was invalid because it failed to comply with the Westland II partnership agreement. After a trial, the court below found that (1) Westland II was dissolved at the time of the trustee's sale and therefore the sale was not governed by the partnership agreement; and (2) Maero was the owner of a 2.5% interest in Westland II. The trial court awarded Maero a judgment in the amount of $45,000.00 plus interest. This appeal arises from that ruling.

II. THE COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

On **March 30, 1998**, Maero commenced the proceeding below by filing a Complaint in the court below, seeking a declaration and an accounting of his ownership interest in Westland II. [R. at 1–4.]

On **April 13, 1998**, the Westland II Defendants filed an Answer and Counterclaim, seeking, among other things, to invalidate the 1994 trustee's sale. [R. at 5–42.]

On **November 6, 2002**, the trial court held a bench trial on the matter, at the conclusion of which the judge made a ruling on the record, finding in favor of Maero and asking Maero's former counsel to prepare findings and a judgment.

On **July 1, 2008**, successor counsel for Maero filed findings of fact and conclusions of law, and a judgment, which were entered by the trial court on **July 3,**

2008. [R. at 370–77.]

On **July 18, 2008**, the Westland II Defendants filed a Notice of Appeal. [R. at 378–79.]

STATEMENT OF FACTS

Formation of Westland II

1. Defendant/Appellant Westland II is a Utah limited partnership established on April 12, 1978 by Granada, Inc. ("Granada"), its general partner, through Granada's president, C. Dean Larsen ("Larsen"). [Def.'s Ex. 1, at 000001.][1]

2. The Westland II Certificate and Agreement of Limited Partnership ("the Partnership Agreement") stated that the purpose of the business was to acquire approximately 220 acres of undeveloped land in Salt Lake County for investment and/or development. [Id. at 000002.]

3. The Partnership Agreement contained the following provisions regarding termination and dissolution:

> 21.1 Termination and Dissolution of the Partnership. The Partnership shall be terminated and dissolved upon the happening of any of the following events:
>
> A. The retirement, adjudication of bankruptcy, or insolvency of the General Partner, unless within a period of six (6) months from the date of such event, a successor General Partner is elected by a vote of all Limited Partners.
>
> ...
>
> 21.2 Upon a dissolution and termination of the Partnership, the net profits

[1]The Defendants' exhibits were not numbered with the rest of the record, but can be found in the manila envelope with the record.

and losses shall continue to be divided among or borne by the Partners during the period of liquidation in accordance with the Provisions of Section 8 above. The proceeds of liquidation shall be distributed as realized in the following order:

A. To the creditors of the Partnership (other than secured creditors whose obligations will be assumed or otherwise transferred on the sale or distribution of partnership assets);
B. To the General Partner in respect of any loans or advances made by him to the Partnership;
C. To the Partners (in equal priority) in respect of their shares of any undrawn profits; and
D. To the Partners (in equal priority) in respect of their capital accounts in the Partnership.

[Id. at 000014.]

4. The Partnership Agreement contained the following provisions regarding the transfer of limited partnership interests:

18.1 Right of First Refusal. No Limited Partner may sell, assign or transfer all or any part of his interest herein or any part of his interest in the Limited Partnership without first complying with the terms of this paragraph. Any sale made without so first complying shall not be a sale of any interest herein or in this Limited Partnership.

18.2 If any Limited Partner desires to sell his interest in the Partnership (other than a sale permitted hereunder), he shall first deliver to the General Partner a written notice of the proposed sale setting forth the name and address of the proposed purchaser, the purchase price (which must be an amount specified in dollars, but which may be paid either in a lump sum or in installments over an extended period of time) and the terms of the proposed sale. The General Partner will have the option, which may be exercised at any time within thirty (30) days after the delivery of the notice of proposed sale. If such option is exercised, the purchase price shall be paid in accordance with the terms of the notice of proposed sale, and within ten (10) days after delivery of the notice of exercise, an appropriate assignment of the interest shall be executed and delivered to the General Partner. If the General Partner fails to exercise such option, such Limited Partner shall have the right to sell his interest in the

> Partnership to the person named in the notice of proposed sale at the price and pursuant to the provisions set forth therein. However, if such Limited Partner fails to exercise such right within sixty (60) days after delivery of the notice of proposed sale, such right shall terminate, and such Limited Partner shall not thereafter sell to any person such interest without again complying with the foregoing procedure.

[Id. at 000011–000012.]

5. The Partnership Agreement contained the following provisions regarding the requirement for a transferee of a limited partnership interest to become a substituted "Limited Partner":

- From subsection 18.2: No person who purchases the interest of any limited partner in the Partnership shall have the right to become a substituted Limited Partner within the meaning of the Act without the written consent of the General Partner. [Def.'s Ex. 1, at 000012.]
- From subsection 18.3: Any Limited Partner shall have the right to give, transfer, assign or convey all or part of his interest as a Limited Partner, but the donor, assignee or transferree [sic] shall only have the right to become a Substituted Limited Partner after obtaining the prior written consent of General Partner. [Def.'s Ex. 1, at 000012.]

Bankruptcies of Granada and Larsen

6. On February 13, 1987, Granada filed bankruptcy under Chapter 11 in the United States Bankruptcy Court for the District of Utah, Case No. 87-20693. [Def.'s Ex. **2.]**

7. On June 10, 1987, Granada, through Larsen, sent a letter to all Limited Partners of Westland II, resigning as General Partner. [Def.'s Ex. 4.]

8. On May 26, 1987, Larsen filed bankruptcy individually under Chapter 7 in the United States Bankruptcy Court for the District of Utah, Case No. 87-22615. [Def.'s

Ex. 3.]

9. Mary Ellen Sloan ("the Trustee") was appointed as the trustee for Larsen's bankruptcy estate. [Id.]

Bunker Begins Holding Himself Out as General Partner

10. On June 18, 1987, the Limited Partners of Westland II held a meeting to elect a new General Partner. Bunker was invited to the meeting. [R. at 362:155–56.]

11. The Limited Partners at the meeting voted for Bunker to become the new General Partner. [R. at 362:156–58.]

12. Not all of the Limited Partners attended the meeting or cast votes in the purported election, as required by section 21.1(A) of the Partnership Agreement. [R. at 362:80–81, 156–58.]

13. Because no new General Partner was properly elected within six months of Granada's bankruptcy, the bankruptcy dissolved Westland II. [Def.'s Ex. 1, at 000014; R. at 362:81.]

14. Nevertheless, after the June 18, 1987 meeting, Bunker began holding himself out as the General Partner of Westland II and exercising powers and rights given to the General Partner under the Partnership Agreement. [R. at 362:128–36.]

16. On January 20, 1988, over 11 months after Granada's bankruptcy, Bunker filed with the Salt Lake County Clerk a document entitled "Amendment of the Certificate and Agreement of Limited Partnership ("the Amendment"). [Pltf. Ex. K; R. at 362:88–89.]

17. The Amendment purported to appoint Bunker as the "New General Partner" of the partnership on behalf of the Limited Partners. However, the Amendment is only signed by Bunker. [Pltf.'s Ex. K.]

18. At trial, Bunker testified that, although he signed the document on behalf of the Limited Partners, he had no knowledge of whether the Amendment had been unanimously approved by the Limited Partners, but did not think that it had been. [R. at 362:90.]

19. Bunker was unable to explain how he was able to sign, as attorney-in-fact for all of the Limited Partners, the document that appointed him the General Partner and gave him attorney-in-fact powers. [R. at 362:90–92.]

20. In acting as General Partner, Bunker did not liquidate the assets of the limited partnership as required under section 21.2 of the Partnership Agreement; rather, he took action to acquire real property for the partnership and continued to operate the partnership for more than 14 years. [R. at 362:130–35; Brief of Appellants, at 9.]

Trustee's Sale to Maero

21. On or about August 29, 1994, over seven years after the filing of Granada's bankruptcy, the Trustee filed with the bankruptcy court in the Larsen bankruptcy a "Notice of Auction of Remaining Estate Assets" (hereinafter, "Notice of Auction"), which proposed to sell at auction assets of the Larsen bankruptcy estate, including Larsen's 2.5% in Westland II. The Notice of Auction set forth a minimum bid of $2,500.00 for the interest. The Notice of Auction also set forth the terms of the sale: "The

terms of the sale shall be **all cash or cashier's or certified check, payable by 5:00 p.m. the day after the sale**. [Pltf.'s Ex. M.][2]

22. The Notice of Auction was sent to all persons of interest on file with the bankruptcy court in the Larsen bankruptcy case, including:

BUNKER MERRILL 5282 SOUTH 320 WEST SALT LAKE CITY UT 84107	WESTLAND II INVESTMENTS 200 NORTH MAIN SALT LAKE CITY UT 84103

[Pltf.'s Ex. L.]

23. The Notice of Auction provided that "**OBJECTIONS AND REQUESTS FOR HEARING,** if any, shall be in writing and filed with the Clerk of the United States District Court, 350 South Main Street, First Floor, Salt Lake City, Utah 84101." [Pltf.'s Ex. M.]

24. Neither Bunker nor Westland II filed an objection to the Notice of Auction.

25. On September 27, 1994, the bankruptcy court entered an "Order Approving Auction of Estate Assets" ("the Bankruptcy Court Order") which specifically found that "notice of the proposed auction was properly given and that no objections ha[d] been received" and ordered "that the trustee be . . . authorized to auction the remaining assets of the estate on the terms and conditions outlined in [her] motion and notice of proposed auction." [Pltf.'s Ex. N.]

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[2]The Plaintiff's exhibits were not numbered with the rest of the record, but can be found in the white binder with the record.

26. There were no timely appeals from the Bankruptcy Court Order.

27. On October 4, 1994, Maero attended the scheduled auction and submitted a winning bid for the 2.5% interest in Westland II. [R. at 362:161–62.]

28. Pursuant to the Bankruptcy Court Order, the Trustee assigned to Maero the 2.5% interest in Westland II in exchange for payment of $2,500.00. [Id.; Pltf.'s Ex. A.]

Maero's Attempt to Obtain Partnership Information

29. On May 28, 1997, Maero sent a letter to Bunker requesting information and reports on the status of Westland II and its property. [Pltf.'s Ex. B.]

30. Bunker replied by letter dated June 13, 1997, indicating that he was the General Partner of Westland II and stating, "I was aware that someone had purchased the 2.5% interest." [Pltf.'s Ex. C.] The letter further advised that Bunker would not provide the requested information because Maero was not a limited partner, and would not be a limited partner until such time as Bunker so decided. The letter also stated that Bunker had a right of first refusal. [Id.]

31. On December 8, 1997, counsel for Maero sent a letter to Bunker again demanding the requested information about Westland II. [Pltf.'s Ex. D.]

32. Bunker replied by letter, again refusing to provide the requested information and stating, "As General Partner of Westland II, I hereby exercise my right of first refusal under section 18, page 10 of the Westland II limited partnership agreement to purchase the ownership of C. Dean Larsen (Steven Maero)." Bunker enclosed a check for the $2,500 purchase price, plus interest, for a total of $3,300.00. [Pltf.'s Ex. E.]

33. Maero did not cash the tendered check. [Id.]

This Lawsuit

34. On March 26, 1998, Maero commenced this case by filing a complaint with the court below, seeking a determination of his rights in Westland II and an accounting. [R. at 1–4.]

35. On April 13, 1998, the Westland II Defendants filed an Answer and Counterclaim, seeking a determination that the Trustee's sale was invalid. [R. at 5–42.]

Sale of Partnership Property

36. In January of 2001, while the case was still pending, Bunker sold the partnership real property for $38,500.00 an acre. [R. at 362:131.]

37. Proceeds from the sale in the amount of $44,430.24, corresponding to the 2.5% interest at issue here, were deposited into a segregated account pending resolution of this case. [Def.'s Ex. 13, at 4.]

38. According to the Westland II Defendants, the amount in the account currently is approximately $53,600.00. [Brief of Appellants, at 6.]

SUMMARY OF ARGUMENT

1. This appeal should be dismissed on jurisdictional grounds. Before the trial court below, and before this Court, the Westland II Defendants are challenging the validity of a trustee's auction and sale that was approved by an order of the United States Bankruptcy Court for the District of Utah. The Westland II Defendants failed to appeal the Bankruptcy Court Order, but rather filed a counterclaim against Maero in state court

when he sought an accounting of his ownership interest in the limited partnership. This constitutes an improper collateral attack on the Bankruptcy Court Order, over which the trial court and this Court have no subject matter jurisdiction.

2. Even if this Court assumes jurisdiction over this appeal, it should nevertheless find that the appeal is moot under section 363(m) of the Bankruptcy Code, which prevents the reversal on appeal of an order authorizing a trustee's sale from affecting the validity of the sale where a party failed to obtain a stay of the sale pending appeal and the property was sold to a good faith purchaser.

3. In the event that the Court determines to reach the merits of the appeal, it should affirm the decision of the trial court, finding that Granada's bankruptcy triggered dissolution and termination of the partnership, which in turn rendered the right-of-first-refusal provisions in the Partnership Agreement ineffectual. Therefore, the Trustee's sale to Maero was valid. The plain language of the Partnership Agreement and governing law support that conclusion. Moreover, even assuming that the partnership was dissolved, but still "in existence" at the time of the Trustee's sale, the right-of-first refusal provisions were nevertheless ineffective as they conflict with the liquidation scheme set forth in section 21.

4. Alternatively, this Court may affirm on grounds not reached by the court below. Specifically, this Court can uphold the validity of the Trustee's sale to Maero by finding that either (1) at the time of the sale, there was no legitimate General Partner with right-of-first-refusal rights; (2) section 18 of the Partnership Agreement did not apply to

the Trustee; or (3) even if the section did apply to the Trustee, she substantially complied with its requirements.

ARGUMENT

I. THE APPELLANTS' CHALLENGE TO THE BANKRUPTCY COURT'S ORDER APPROVING THE TRUSTEE'S AUCTION SALE, HERE AND IN THE COURT BELOW, CONSTITUTES AN IMPROPER COLLATERAL ATTACK OVER WHICH THE TRIAL COURT AND THIS COURT HAVE NO SUBJECT MATTER JURISDICTION.

This appeal should be dismissed on jurisdictional grounds. Before the trial court below, and before this Court, the Westland II Defendants are challenging the validity of a trustee's auction and sale that was approved by an order of the United States Bankruptcy Court for the District of Utah ("the Bankruptcy Court Order"). The Westland II Defendants failed to appeal the Bankruptcy Court Order, but rather filed a counterclaim against Maero in state court when he sought an accounting of his ownership interest in the limited partnership. This constitutes an improper collateral attack on the Bankruptcy Court Order, over which the trial court and this Court have no subject matter jurisdiction.

Although the issue of jurisdiction was not raised below, "[q]uestions of subject matter jurisdiction, because they are threshold issues, may be raised at any time and are addressed before resolving other claims." State v. Sun Sur. Ins. Co., 2004 UT 74, ¶ 7, 99 P.3d 818; Utah R. Civ. P. 12(h)(2). "The determination of whether a court has subject matter jurisdiction is a question of law." Beaver v. Qwest, Inc., 2001 UT 81, ¶ 8, 31 P.3d 1147.

"[B]ankruptcy courts have plenary jurisdiction over 'core' bankruptcy

proceedings," including "orders approving the sale of property." Plotner v. AT & T Corp., 224 F.3d 1161, 1172–73 (10th Cir. 2000) (citing 28 U.S.C. § 157(b)(2)(N)). Only the bankruptcy court that approved a trustee's sale of assets of the estate has subject matter jurisdiction to void the sale. In re Allnutt, 220 B.R. 871, 884–85 (Bankr. D. Md. 1998). See also In re Bragg, 2000 WL 33710886, at *2 (Bankr. D. S.C. 2000) ("[I]t is the bankruptcy court, which approved the sale in the first place, that has the exclusive jurisdiction to determine what interest in the debtor's property was sold, and has, theoretically, the power to set aside that sale or afford other relief in proper circumstances.").

As the Utah Supreme Court has held, "the appropriate method to challenge [a bankruptcy trustee sale] is by appeal, not collateral attack." Warner v. DMG Color, Inc., 2000 UT 102, ¶ 9, 20 P.3d 868. In the Warner case, a party brought an action in state court on a claim that had been previously sold by a bankruptcy trustee. The Court held:

> [The plaintiff's] appropriate course of action would have been . . . if not satisfied with the sale, to challenge it through an appeal. Instead, plaintiff has in essence attempted to challenge the sale through this suit in state trial court. This he cannot do. To hold otherwise would defeat the intent behind the bankruptcy system.

Id. at ¶ 18.[3]

---

[3]This Court has also recognized this principle in an analogous context. See Utah State Tax Commission v. Echols, 2006 WL 147599, at *1 (Utah Ct. App. 2006) (finding that state court attack on Tax Commission judgment, in response to garnishment proceedings, was improper and that the district court had no subject matter jurisdiction).

As in Warner, the Westland II Defendants did not appeal the Bankruptcy Court Order approving the Trustee's sale; rather, they have attempted to challenge the sale through their counterclaim before the lower court. However, if the Westland II Defendants have any dispute over the validity of the sale, their dispute is with the Trustee and/or the bankruptcy court, not Maero. Neither the lower court nor this Court have subject matter jurisdiction over the Westland II Defendants' collateral attack of the Bankruptcy Court Order.[4]

Maero anticipates that the Westland II Defendants will claim that they had no notice of the auction or sale, and therefore, could not have appealed it. [See Brief of Appellants, at 28 n.39.] This argument is without merit.

First, the Bankruptcy Court Order specifically found that notice of the auction and sale was proper and was given to all parties in interest. Any challenge to the sale based on the Westland II Defendants' alleged failure to receive notice should have been brought to the attention of the bankruptcy court. One state appellate court faced with a similar challenge stated as follows:

> If the [appellants] were deprived of due process in this case, then the bankruptcy court would have been the proper forum in which they should have challenged their lack of notice of the proposed sale. We will not now revisit the bankruptcy court's 1991 order, an order that specifically concluded that all notices had been properly given.

---

[4]Maero believes that the lower court, and this Court, do have jurisdiction over his claim asserted below, which sought an accounting of his interest in Westland II. Thus, this Court can affirm the lower court's ruling on that limited claim, but should not address the arguments set forth by the Westland II Defendants, attacking the Trustee's sale.

Glenn v. Steelox Bldg. Systems, Inc., 698 So.2d 142, 144 (Ala. Civ. App. 1997).

Second, the record does not support the Westland II Defendants' claim that they had no notice of the auction or sale. The Westland II Defendants claim that the addresses on the bankruptcy court matrix were incorrect because they had moved. However, the burden is on parties in interest to maintain current addresses with the bankruptcy court. See In re Eagle Bus Mfg., Inc., 62 F.3d 730, 736 (5th Cir. 1995) ("The creditor is responsible for notifying the debtor, trustee, or the court of any changes in her mailing address to guarantee that she be given reasonable notice."). Moreover, it is clear that Bunker had actual notice of the sale prior to June 13, 1997 and yet took no action. [Pltf.'s Ex. C.]

In sum, the Westland II Defendants' appeal is nothing more than a collateral attack on a final, non-appealable order of the United States Bankruptcy Court for the District of Utah. As such, this Court has no subject matter jurisdiction and should dismiss the appeal.[5]

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[5]Interestingly, the lower court came close to identifying the jurisdictional problem during closing argument:

> I presume that if—that if—if this bankruptcy was still an ongoing bankruptcy, there hadn't been a discharge, that this matter would properly be in front of a bankruptcy court to determine whether—because it seems to me that what your argument is and the thrust of the matter is . . . **whether this sale was a valid sale or not.**

[R. at 362:195 (emphasis added).]

II. THIS APPEAL IS MOOT UNDER 11 U.S.C. § 363(m) BECAUSE THE WESTLAND II DEFENDANTS FAILED TO SEEK A STAY OF THE TRUSTEE'S SALE.

Even if this Court assumes jurisdiction over this appeal, it should nevertheless find that the appeal is moot under section 363(m) of the Bankruptcy Code. "A case is deemed moot when the requested judicial relief cannot affect the rights of the litigants " Ellis v. Swensen, 2000 UT 101, ¶ 25, 16 P.3d 1233.

Section 363(m) provides that

> [t]he reversal or modification on appeal of an authorization [of a trustee's sale of estate property] does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith . . . **unless such authorization and such sale or lease were stayed** pending appeal.

11 U.S.C. 363(m) (emphasis added). In other words, if a party fails to obtain a stay of a trustee's sale of estate property, and the trustee sells the property to a good faith purchaser, then an appellate court has no power to later invalidate that sale. Section 363(m) will moot an appeal where the remedy being sought by the appellant affects the validity of a bankruptcy sale. Raskin v. Malloy, 231 B.R. 809, 813–14 (N.D. Okla. 1997).

The policy behind section 363(m) is clear. As one court has noted, "sale orders in bankruptcy cases are accorded a high level of finality." In re CHC Industries, Inc., 389 B.R. 767, 774 (Bankr. M.D. Fla. 2007). "Section 363(m) protects the reasonable expectations of good faith third-party purchasers by preventing the overturning of a completed sale, absent a stay, and it safeguards the finality of the bankruptcy sale." Id.

"Once the sale has gone forward, the positions of the interested parties have changed, and even if it may yet be possible to undo the transaction, the court is faced with the unwelcome prospect of 'unscrambl[ing] an egg.'" In re CGI Indus., Inc., 27 F.3d 296, 299 (7th Cir.1994) (citations omitted).

The Westland II Defendants did not object to the Trustee's Notice of Auction and they did not appeal from, or seek a stay of, the Bankruptcy Court Order authorizing the auction and sale. The sale went through. The Trustee assigned the 2.5% partnership interest in Westland II to Maero. There is no evidence in the record that Maero was anything other than a good faith purchaser.

Importantly, **ALL** of the arguments set forth by the Westland II Defendants in their opening brief, which Maero addresses below, ask this Court to set aside the Trustee's sale, which occurred over 14 years ago and was approved by a final order of the bankruptcy court. The bankruptcy case has long since been closed. Because any relief that this Court grants cannot affect the validity of the Trustee's sale, the Westland II Defendants' arguments are moot under section 363(m) of the Bankruptcy Code and should not be heard.

Moreover, even if this Court were to "undo" the sale, no benefit would be conferred on the Westland II Defendants; rather, the limited partnership interest would merely return to the bankruptcy estate. It would not go to the Westland II Defendants.

For these and the foregoing reasons, this Court need not reach any of the arguments that the Westland II Defendants are asserting in this appeal. The Court is

without jurisdiction to hear the arguments, and even if the Court assumes jurisdiction, section 363(m) of the Bankruptcy Code renders the issues moot. This Court cannot grant the appellants any relief. However, in the event that the Court disagrees, it should nevertheless affirm the decision of the trial court for the reasons set forth below.

III. THE TRIAL COURT CORRECTLY HELD THAT DISSOLUTION OF WESTLAND II RENDERED THE RIGHT-OF-FIRST-REFUSAL PROVISIONS WITHOUT EFFECT.

"Utah law provides that the parties to a partnership may, through agreement, designate those events upon which dissolution or termination shall occur." Arndt v. First Interstate Bank of Utah, N.A., 1999 UT 91, ¶ 9, 991 P.2d 584. The trial court correctly found that the bankruptcy of Granada, the general partner of Westland II, triggered section 21 of the Partnership Agreement, which states in relevant part:

> 21.1 Termination and Dissolution of the Partnership. The Partnership shall be terminated and dissolved upon the happening of any of the following events:
>
> A. The retirement, adjudication of bankruptcy, or insolvency of the General partner, unless within a period of six (6) months from the date of such event, a successor General Partner is elected by a vote of all Limited Partners.
>
> ...

[Def.'s Ex. 1, at 000014.]

Based on section 21.1, the trial court found as follows:

> And so consequently, the partnership is dissolved and that's the status of the partnership and this agreement, consequently, has no further effect, except to the extent that provisions in the agreement anticipate a bankruptcy of the general partner or of the limited partner in this case also.
>
> And that would lead us then to provisions in 18.1, which is the first right of refusal on the sale. That provision does not seem to anticipate the

> effectiveness of that provision in the event there is a bankruptcy and a dissolution, and so consequently, I would find that 18.1 has no effect.

[R. at 362:227–28.]

The Westland II Defendants concede that dissolution of the limited partnership was triggered because no successor General Partner was elected by a vote of all the Limited Partners within six months of Granada's bankruptcy. [Brief of Appellants, at 15–16.] However, they argue that the partnership was not "terminated" at this time and was therefore still "in existence" seven years later at the time of the Trustee's sale to Maero. [Id. at 16.]

The Westland II Defendants assume, without setting forth any authority, that if the partnership were dissolved, but still "in existence" in 1994, then all provisions of the Partnership Agreement were still controlling and enforceable. [Brief of Appellants, at 16.] However, even assuming that the partnership was still "in existence" at the time of the Trustee's sale, which Maero disputes, that does not mean that the right-of-first refusal provisions were still in effect.

A. Under the Plain Language of the Partnership Agreement and Governing Law, Granada's Bankruptcy Effectively Terminated the Partnership.

The Westland II Defendants argue that under the Uniform Partnership Act, a partnership is not terminated on dissolution. [Brief of Appellants, at 19.] However, the Uniform Partnership Act is a gap-filler act that governs only when a partnership agreement is silent on an issue. Thomas v. Price, 718 F. Supp. 598, 605 (S.D. Tex. 1989).

Furthermore, it applies to *limited* partnerships "except in so far as the statutes relating to such partnerships are inconsistent" with it. Utah Code Ann. § 48-1-3 (now § 48-1-3(3)).

The Uniform Partnership Act does not apply in this case. The Partnership Agreement is not silent on when termination of the partnership (and therefore, the Agreement) shall occur. [See Def.'s Ex. 1, at 000014.] Furthermore, even if it were silent, at the time the Partnership Agreement was executed, the Utah *Limited* Partnership Act provided, in relevant part, that a partnership certificate filed with the state "shall be **canceled** when the partnership is dissolved." Utah Code Ann. § 48-2-24 (1953) (repealed in 1990) (emphasis added). Thus, the Westland II Defendants' argument that Westland II continued "in existence," even after the bankruptcy of Granada, is without merit.

It follows that the provisions of the Partnership Agreement, except those specifically incorporated into the dissolution and termination scheme, were rendered ineffective and unenforceable when Westland II ceased to exist.

B. Even Assuming the Partnership Continued in Existence Post-Dissolution, the Right-of-First Refusal Provisions Were Ineffectual.

Even assuming that the partnership continued "in existence" post-dissolution, the right-of-first-refusal provisions were ineffectual.

As noted above, the Partnership Agreement contains a section governing dissolution and termination of the partnership. Specifically, subsection 21.1 sets forth the triggering events for dissolution; subsection 21.2 details how the winding up and liquidation of the partnership is to proceed; and subsection 21.3 makes it clear that

partnership property will be liquidated in order to return to each Limited Partner his investment. [Def.'s Ex. 1, at 000014.]

Once this section is triggered, the validity and enforceability of the remaining sections of the Partnership Agreement is not clear. However, it is apparent that sections that are not consistent with dissolution and "winding up" are ineffectual. For example, section 15 of the Partnership Agreement sets forth rights and powers of the General Partner. However, it is clear that the General Partner does not have some of those rights and powers in the post-dissolution "winding up" phase (e.g., acquiring new property, borrowing money, entering into new agreements). In short, those subsections were rendered ineffectual by the dissolution. See Parduhn v. Bennett, 2002 UT 93, ¶ 15, 61 P.3d 982 (finding that buy-sell provisions of partnership agreement did not survive dissolution and were ineffective where partners had not expressly agreed that provisions would survive dissolution).

Section 18, containing the right-of-first-refusal provisions, was likewise rendered ineffectual by the dissolution. One of the primary purposes of transfer restrictions on interests in business entities is to limit the participation of outsiders in the business. See Salt Lake Tribune Pub. Co., LLC v. AT & T Corp., 320 F.3d 1081, 1088 (10th Cir. 2003). Where a partnership has been dissolved, and ongoing business ceases, the justification for a transfer restriction is no longer present. In addition, the activities detailed in section 18 are not part of the winding-up activities that should occur during the "period of liquidation" found in section 21. Furthermore, section 18 does not specifically state that

it will continue to be effective post-dissolution.

Thus, even assuming that the partnership continued "in existence" post-dissolution, the right-of-first refusal provisions in section 18 were trumped by section 21's dissolution and termination scheme. The trial court correctly found that, at the time of the Trustee's sale, section 18 was not in effect and therefore did not apply to the Trustee. This Court should affirm.

IV. ALTERNATIVELY, THIS COURT MAY AFFIRM THE DECISION OF THE TRIAL COURT ON OTHER GROUNDS.

Alternatively, this Court can affirm the trial court on other grounds. "[I]t is well settled that an appellate court may affirm the judgment appealed from if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action." Dipoma v. McPhie, 2001 UT 61, ¶ 18, 29 P.3d 1225 (internal quotations omitted).

This Court can uphold the Trustee's sale as valid by finding that either (1) at the time of the sale, there was no legitimate General Partner with right-of-first-refusal rights; (2) section 18 of the Partnership Agreement did not apply to the Trustee; or (3) even if the section did apply to the Trustee, she substantially complied with its requirements.[6]

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[6]These arguments further highlight the jurisdictional problems in this case. Maero, a third-party purchaser, is in the strange position of having to essentially defend the actions and/or inactions of the Trustee, who is not a party in this case.

A. At the Time of the Trustee's Sale, There Was No Legitimate General Partner with Right-of-First-Refusal Rights.

Section 18.2 of the Partnership Agreement requires a Limited Partner, before selling his interest, to "first deliver to the General Partner a written notice of the proposed sale setting forth the name and address of the proposed purchaser, the purchase price . . . and the terms of the proposed sale. [Def.'s Ex. 1, at 000011.]

Technically, Westland II did not have a legitimate General Partner at the time of the Trustee's sale, and therefore, there was no one for the Trustee to send a notice to. Granada had filed bankruptcy and resigned as General Partner seven years earlier, and no successor General Partner had properly been elected by a vote of all of the Limited Partners, as required by the Partnership Agreement. [See R. at 362:80–81, 156–58; Def.'s Ex. 1, at 000014.] Indeed, the Westland II Defendants concede in their brief that Westland II was dissolved when an election for a new General Partner failed. [Brief of Appellants, at 15–16.]

Despite not receiving ballots from all Limited Partners within six months, Bunker began holding himself out as General Partner and proceeded to continue operating the partnership. However, merely acting as General Partner was not enough to give him the General Partner's rights under the Partnership Agreement. Because there was no legitimate General Partner, no one held right-of-first refusal rights under section 18, and therefore, no action was required on the Trustee's part in order to comply with the Partnership Agreement. This Court should therefore uphold the validity of the Trustee's

sale and affirm the decision of the court below.

B. The Right-of-First-Refusal Provisions of the Partnership Agreement Did Not Apply to the Trustee Because, Although She Held All of the Rights of a Limited Partner, She Was Not a Substituted "Limited Partner" Under the Partnership Agreement.

Alternatively, this Court should find that the right-of-first-refusal provisions of the Partnership Agreement did not apply to the Trustee.

Pursuant to section 541 of the Bankruptcy Code, Larsen's bankruptcy estate consisted of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). There is no dispute that the Trustee stepped into Larsen's shoes and became the owner of a limited partnership interest in Westland II.

But critically, assuming the partnership was even in existence, she did not become a substituted "Limited Partner" under the Partnership Agreement. The Partnership Agreement specifically states that "[n]o person who purchases **the interest of any limited partner** in the Partnership shall have the right to become a **substituted Limited Partner** within the meaning of the Act without the written consent of the General Partner." [Def.'s Ex. 1, at 000012 (emphasis added).] This requirement was not met. The Trustee merely held, on behalf of the bankruptcy estate, a limited partnership interest and corresponding rights.

Section 18 of the Partnership Agreement states:

> 18.1 Right of First Refusal. No **Limited Partner** may sell, assign or transfer all or any part of his interest herein or any part of his interest

> in the Limited Partnership without first complying with the terms of this paragraph.
>
> ...
>
> 18.2 If any **Limited Partner** desires to sell his interest in the Partnership (other than a sale permitted hereunder), he shall first...

[Def.'s Ex. 1, at 000011.] The transfer restrictions in the Partnership Agreement are placed only on "Limited Partners."

The Trustee was not a "Limited Partner." She merely held a limited partnership interest. The Partnership Agreement draws a distinction between the two, and does not place any transfer restrictions on mere holders of limited partnership rights and interests. This Court should find that section 18 of the Partnership Agreement did not apply to the Trustee and affirm the decision of the trial court below.

C. Even Assuming that the Right-of-First Refusal Provisions Applied to the Trustee, She Substantially Complied with Them.

Alternatively, even assuming that the right-of-first refusal provisions applied to the Trustee, this Court should nevertheless affirm the decision of the trial court and uphold the validity of the Trustee's sale because the Trustee substantially complied with section 18 of the Partnership Agreement.

Section 18.2 requires a Limited Partner, before selling his interest, to "first deliver to the General Partner a written notice of the proposed sale setting forth the name and address of the proposed purchaser, the purchase price . . . and the terms of the proposed sale.

The Trustee did send both Bunker and Westland II notice of the proposed sale.

[Pltf.'s Ex. L, M.] The Notice of Auction gave the time and place set for a sale by auction, identified the proposed purchaser as the highest bidder, and set forth a minimum purchase price of $2,500.00. Furthermore, the Notice of Auction set forth the terms of sale: "The terms of the sale shall be all cash or cashier's or certified check, payable by 5:00 p.m. the day after the sale. [Pltf.'s Ex. M.]

The Westland II Defendants attempt to draw great distinctions between a "pending sale" and a "pending auction," and a "purchase price" and a "minimum bid." But ultimately, these distinctions are irrelevant. The notice was sufficient to accomplish its purpose, which was to notify the alleged General Partner of a pending sale so that he could take steps to exercise any rights he claimed. Because the notice was sufficient in that regard, the Trustee substantially complied with section 18 of the Partnership Agreement.

CONCLUSION

Based on the foregoing, Maero respectfully requests that this Court dismiss this appeal because the Court lacks subject matter jurisdiction and/or because the appeal is moot under section 363(m) of the Bankruptcy Code. If the Court determines to reach the merits of the arguments presented, then Maero requests that the Court affirm the trial court's July 3, 2008 Findings of Fact and Conclusions of Law, and Judgment. In the alternative, Maero requests that the Court affirm on other grounds, detailed above, not relied on by the trial court.

DATED this 23 day of January, 2009.

McKAY, BURTON & THURMAN

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of January, 2009, I caused two true and correct copies of the foregoing **BRIEF OF APPELLEE STEVEN D. MAERO**, together with a compact disk containing a PDF version of the same, to be sent, via U.S. Mail, to the following:

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