

**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF SOUTH DAKOTA**

**ROOM 211**

**FEDERAL BUILDING AND U.S. POST OFFICE**

**225 SOUTH PIERRE STREET**

**PIERRE, SOUTH DAKOTA 57501-2463**

**IRVIN N. HOYT**

**BANKRUPTCY JUDGE**

**TELEPHONE (605) 224-0560**

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June 29, 1989

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Re: Norman L. and Cindy J. Schafer  
Chapter 7 88-10208

Dear Counsel:

Chapter 7 Trustee Buttaro gave notice under §363(b) (1) of intent to sell a 3,830 bushel grain bin for \$850.00. The Court construes this as a motion for sale free and clear of liens under §363(f), which incorporates §363(b). ASCS claims a security interest in the bin. Attorney Thomas Lloyd, on behalf of ASCS, objected to the proposed sale, stating that the property should be abandoned to the agency as burdensome to the estate. This would allow ASCS to sell the bin at harvest time when its value would allegedly be higher, and would avoid costs of a trustee sale.

Two issues are before the Court. The first is whether ASCS's objection was untimely and therefore waived. If the ASCS objection is valid, I must next decide whether to sustain the objection and grant the ASCS motion for abandonment.

A sale in the ordinary course requires no notice. §363(c) (1). However, the Trustee has made no claim that this sale would be in the debtors' ordinary course. Furthermore, in Chapter 7 the §363(c)

(1) exception applies only where the Trustee has been authorized to operate the debtor's business under §721. See Id. No such authority has been requested or ordered in this case. The Trustee therefore correctly treated this sale as one outside the ordinary course of the debtors' business and provided parties in interest with notice.

Rule 6004(a) provides that Rule 2002(a)(2) governs notice requirements for sales outside the ordinary course. Consistent with these rules the Trustee gave over twenty days notice of the proposed sale. The notice provided that any objection must have been filed within twenty days of the date the notice was mailed. Attorney Lloyd's objection came after the twenty day notice had passed.

Bankruptcy Rule 6004(c), which specifically governs sales of property free and clear of liens, provides:

The notice required by subdivision (a) of this rule shall include the date of the hearing on the motion and the time within objections may be filed and served on the debtor in possession or trustee.

In this regard, I note that §363(f), which authorizes sales free and clear of liens, applies to sales both within and without the debtor's ordinary course. See 2 Collier on Bankruptcy ¶363.07 (15th Ed. 1989). It follows that 6004(c) applies to both types of sales free and clear of liens also, and governs the sale in this case. Compare B.R. 6004(b) (excluding applicability of subpart (b) when subpart (c) applies.)

As noted above, the Trustee utilized the notice of proposed action procedure in placing this matter before the Court. Generally, this is an appropriate procedure for exercising rights under the Bankruptcy Code. See §102(1) (b) (1). An exception to this general rule is Bankruptcy Rule 6004(c),<sup>1</sup> which requires that the notice set a hearing date on the motion. The Trustee's notice in this case was therefore defective.

I will not allow the Trustee to default the ASCS based upon a defective notice. I have in the past expressed from the bench my disdain for holding against parties simply because they have failed to unerringly follow the often maze like technicalities of the Code, Rules and Local Rules. However, it is no more a technicality to point out the deficiency in the Trustee's notice than it would be to default Attorney Lloyd for filing an objection six days tardy

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<sup>1</sup> The Trustee has not argued by motion or orally at the hearing on this motion that Bankruptcy Rule 6004(d) applies to this proposed sale.

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according to the notice.

I now progress to the merits of the U.S. Trustee's objections. I note that the ACSC objection contains a request that the property be abandoned under §554. The Trustee's proposed sale price of \$850.00 is an admission that there is no equity in the bin for the debtor. Nor is the ASCS lien disputed. Accordingly, the U.S. Trustee should abandon the bin to the ASCS as burdensome to the estate, and because it is of inconsequential value and benefit to the estate. §554(b).

Because no relevant facts are in dispute in this case, the Court shall not issue findings of fact. This opinion shall stand as the Court's conclusions of law. This matter constitutes a core proceeding under 28 U.S.C. §157(b). The Court shall enter an appropriate order.

Very truly yours,

Irvin N. Hoyt  
Chief Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA

IN RE:	)	CASE NO. 88-10208
	)	
NORMAN L. SCHAFER and	)	CHAPTER 7
CINDY J. SCHAFER,	)	
	)	ORDER REQUIRING
	)	ABANDONMENT
Debtors.	)	

Pursuant to the Court's letter opinion dated this same date, IT IS HEREBY ORDERED that the Chapter 7 Trustee, Peter J. Buttaro, shall abandon to the ASCS the Chapter 7 bankruptcy estate's 3830 bushel grain bin described in the Trustee's notice of proposed action filed January 12, 1989.

Dated this 29th day of June, 1989.

BY THE COURT:

Irvin N. Hoyt  
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By: \_\_\_\_\_  
Deputy Clerk

(SEAL)

(SEAL)