SO ORDERED.

SIGNED this 26 day of February, 2010.

JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

OPINION DESIGNATED FOR ON - LINE PUBLICATION
BUT NOT PRINT PUBLICATION

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:
NORMA JEAN BINGHAM,

Debtor.

Case No. 06-40990
Chapter 7

DARCY D. WILLIAMSON, Trustee and NORMA JEAN BINGHAM,

Plaintiffs,

vs.

FRANK D. TAFF,

Defendant.

Adversary No. 08-7071

MEMORANDUM AND ORDER DENYING ADVERSARY PROCEEDING DEFENDANT'S MOTION TO ABANDON AND GRANTING TRUSTEE'S MOTION TO SELL

Before the Court are two motions. The first is the Motion for the Trustee to Abandon Certain Property,[1] filed by Frank D. Taff, who is the defendant in the above-captioned Adversary Proceeding. The second is the Trustee's Motion for Authority to Sell Real Property Free and Clear of Liens.[2] Both motions concern the home of Debtor, Norma Jean Bingham, located in Topeka, Kansas. In addition, both motions appear to be strategic filings, intended to improve the respective parties' positions in the pending Adversary Proceeding.

That Adversary Proceeding is a professional negligence action brought by the Chapter 7 Trustee against Debtor's former attorney, Frank Taff.[3] The Trustee alleges that pre-petition, Taff "breached his fiduciary responsibilities and negligently and carelessly performed said duties" when he failed to advise Debtor that because she had only lived in the State of Kansas for 4 months prior to filing, she would be unable to claim the full value of her home as exempt because of the new 730-day domicile rule added to the Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[4] The Trustee claims that Debtor suffered damages exceeding $60,000, which damages she claims are property of the estate.

Taff has admitted under oath that when he advised Debtor, he forgot about the significant changes in the homestead exemption laws enacted approximately 18 months

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[1]Doc. 96 in main case (all document references are to the main bankruptcy case unless unless otherwise noted).

[2]Doc. 117.

[3]Doc. 1 in the Adversary Proceeding.

[4]Pub. L. 109-8. Specifically, the Trustee relied on 11 U.S.C. § 522(b)(3)(A).

before the date he filed her petition.[5] Taff also elected not to include as a defense, in the Pretrial Order, the issue of whether he breached his duty to her, so he essentially concedes the fact of his liability (but does argue that Plaintiff cannot prevail on the liability issue at trial because she failed to endorse a liability expert witness).[6]

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (N) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(a).

I. Findings of Facts.

Debtor, Norma Bingham, filed her voluntary Chapter 7 Bankruptcy Petition on October 10, 2006, less than four months after she had moved to Kansas from Missouri. Frank Taff was her bankruptcy lawyer, and prepared her Petition, Bankruptcy Schedules, Statement of Financial Affairs, and all other related documents necessary to file the case after first meeting with Debtor. On the date of filing, Debtor owned a condominium in Topeka that she had purchased only four months earlier, in May 2006, for $60,000. At closing, she made a $31,272 down payment, which was derived from the sale proceeds from her Missouri home. That sale had closed in March 2006. She executed a note and mortgage to secure repayment of the remainder. The Trustee contends that a similar property has recently sold

[5]Doc. 48, Pretrial Order, Stipulation 6(M).

[6]Doc. 48. Highly summarized, Defendant's defenses are 1) whether the breach was the proximate cause of the **alleged damages**, 2) **whether Debtor incurred damages as a result of the breach**, 3) **whether Debtor has failed to mitigate her damages**; 4) whether the Court will in essence be rendering an advisory opinion **since damages cannot be determined until Debtor's condo is sold,** 5) whether failure to endorse an expert witness regarding liability will prevent Plaintiff from prevailing; and 6) whether Trustee can prevail on her claim that Debtor suffered emotional damages because Taff's conduct was not intentional or outrageous. As the bolded words demonstrate, Taff is using the Trustee's decision to not earlier sell the property—so that the Debtor would not be further harmed by the decision to file bankruptcy at a time when she was ineligible for the Kansas homestead exemption—to his tactical advantage in the Adversary Proceeding.

for $68,000, and that Debtor owes $29,000 on the first mortgage. Neither Debtor nor Taff dispute those numbers, and no one has asked for an evidentiary hearing on the abandonment or sale motions.

When Taff filed Debtor's bankruptcy petition, he knew that Debtor had recently moved to Kansas. Evidence of this is found in the information he placed in her schedules about her prior homes and their addresses. Taff properly included information about her prior homes on Questions 2, 11 and 15 in Debtor's Statement of Financial Affairs. Notwithstanding that knowledge, he nevertheless relied on K.S.A. 60-2301, claiming the entire $60,000 exempt, when he filed Debtor's Schedule C (Property Claimed as Exempt).[7]

On January 3, 2007, the Trustee filed an Objection to Debtor's Homestead Exemption and all Other Exemptions,[8] relying on the 730-day domicile rule contained in 11 U.S.C. § 522(b)(3)(A).[9] Taff then moved to withdraw, which motion was granted on April 11, 2007.[10] After obtaining substitute counsel, Debtor ultimately admitted that she could not claim exemptions under Kansas law because she had not lived in Kansas for the requisite two years prior to filing. The Court then issued an Order on January 18, 2008,[11] sustaining the

[7]These facts have been admitted by the Trustee and Taff in the final Pretrial Order filed in the Adversary Proceeding.

[8]Doc. 19.

[9]All future statutory references are to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C. §§ 101 - 1532 (2005), unless otherwise specifically noted.

[10]Doc. 44.

[11]Doc. 66.

Trustee's objection to exemptions claimed under Kansas law. The Court gave Debtor 20 days to amend Schedule C.[12]

Through substitute counsel, Debtor and the Trustee compromised their dispute. Debtor filed an Amended Schedule C,[13] claiming the federal homestead exemption of $18,450, and the Trustee did not object to that amendment.[14] Four months later, the Trustee filed an Adversary Proceeding against Mr. Taff alleging malpractice in his representation of Debtor, and seven months after that, Taff filed a Motion for Trustee to Abandon Certain Property.[15] Taff claims that pursuant to § 554(b), a "party in interest" may request the court order a trustee to abandon property that is "burdensome to the estate or that is of inconsequential value and benefit to the estate," and that he is such a party in interest.

The Trustee objected,[16] claiming Taff lacked standing to make the motion because he is not a party in interest (i.e., not a debtor, creditor or trustee), that the pending Adversary Proceeding provided the proper forum to litigate his damage defenses, and that the home (and negligence suit) have a value to the estate. The Trustee also argued that Taff was attempting

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[12]Although the Court determined Kansas law did not apply, it was unclear (because of a gap in the stipulated facts) whether Texas law (where Debtor resided prior to moving to Missouri) or Missouri law would apply in this case. If Texas law applied, Debtor was likely limited to the $18,450 exemption allowed under the federal exemption (§ 522(d)) because of the lack of extraterritorial effect of the Texas exemptions, and if Missouri law applied, Debtor could be limited to $15,000. *See* Memorandum and Decision, Doc. 66 (January 18, 2008). Accordingly, the Trustee agreed to allow Debtor the higher of the two possible exemption amounts, without making her put on evidence about domicile.

[13]Doc. 75.

[14]Doc. 83.

[15]Doc. 96. The property he is seeking the Trustee to abandon is Debtor's home.

[16]Doc. 98.

to contrive an unrealistically low damage amount for the purpose of reducing his exposure to damages in the malpractice suit were the Court to grant Taff's Motion. Finally, the Trustee noted that in arguing that the house is a burden on, or of inconsequential value to, the estate, "Mr. Taff fails to consider a direct sale of the entire property by the Trustee, a reverse mortgage, and/or a sale of a partial interest."

Soon after the Motion to Abandon was filed, the Trustee and Taff were required to finalize the Pretrial Order for the legal negligence proceeding. In that Pretrial Order, Taff essentially contended that because the Trustee had not previously sought to sell the real property, and because the Debtor had not filed her own Motion to Abandon or joined in his motion,[17] that both Plaintiffs in that proceeding would be unable to demonstrate any damages flowing from his negligence or breach of fiduciary duty. He also argued Plaintiffs had failed to mitigate their damages.[18]

Apparently feeling whipsawed between not wanting to force Debtor to move away from her home until it is determined if she prevailed in the claim against Taff in an amount that would pay off the claims in the estate,[19] and not wanting to risk losing the Adversary

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[17]The Court ordered Debtor to formally file a pleading joining in Taff's Motion to Abandon, within 7 days of June 10, 2009, if she wished to support that motion. She elected not to do so, as the docket sheet reflects no such filing. (Doc. 100). Given her position that there is $30,000 equity in the property, the Court certainly understands why her new counsel could not, in good faith, join the motion, the factual predicate of which is that there is no equity.

[18]*See* Doc. 48, paragraphs 7.4, 7.5, 7.6 and 7.7.

[19]The claims register in this case, of which this Court can and does take judicial notice, shows claims filed totaling $30,054.30, and the bar date has expired. Accordingly, and hypothetically, if Plaintiffs received a jury verdict in the amount of their prayer ($60,000), it is possible that the Trustee could satisfy all claims without needing to force the sale of Debtor's home.

Proceeding because of the damage and mitigation arguments raised by Taff, the Trustee then filed a Motion to Sell.[20] She seeks to sell the house for not less than $60,000. Debtor responded, arguing that the Trustee should have to, effectively, marshal assets by trying the Adversary Proceeding first. She argues that if the Trustee obtains a sufficient verdict against Taff to enable all claims in the estate to be paid, she might never be forced to vacate her home. She further argues that Kansas case law favors such a result that is protective of a debtor's homestead.[21]

Although Taff is basing a major part of his defense in the Adversary on the fact that the Trustee and Debtor have no damages or have not mitigated damages because the Trustee has not sold the real property, when the Trustee then filed the motion to sell, Taff objected. He forthrightly admits that he does not want the property sold, because so long as it is not sold, Debtor and the Trustee cannot prove damages against him. He argues that because the Trustee must show a "causal connection between breach of duty and any resulting injury or loss," if the Trustee is not allowed to sell the real estate, then she has no damages, and he will prevail.[22]

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[20]Doc. 117. Although the motion was filed October 23, 2009, which is prior to docketing of the Pretrial Order on November 9, 2009, the Court had conducted one pretrial conference on September 9, 2009, at which time Defendant Taff raised these arguments.

[21]Doc. 125.

[22]Taff's pleading states "[i]f the Trustee is allowed to sell the Debtor's Property, the Debtor may lose her home and the Defendant may be subject to damages arising from the underlying adversarial suit." *See* Doc. 127, page 7.

Taff also argues that the Motion to Sell should be denied "for equitable reasons," noting that forcing Debtor from her home at this point in her life would be "unjust and cruel." He then suggests that the only reason the Trustee has filed the motion at this time is to "create" damages in the underlying Adversary Proceeding, by evicting a poor, elderly woman from her home. In making this argument, Taff apparently has forgotten about his own role in precipitating the Motion to Sell due to the defenses he has raised in the Pretrial Order (and according to the Trustee in the Adversary, his role in failing to advise Debtor, in the first instance, of these potential consequences of filing the petition in light of the existing homestead law).

In response, the Trustee claims that she can likely sell the real estate for $60,000 to 68,000, that the property has equity in the estimated amount of $12,550 to $20,550, and that "even after costs of sale and the Trustee's commission are paid, there would be significant excess funds to distribute to the estate." She also notes that although she has resisted selling the house because it would be unfortunate for the Debtor, who has done nothing other than trust her bankruptcy lawyer's advice, that she (the Trustee) has essentially been forced into this position because of Taff's defenses, that there is equity for the estate, and that whether the sale is convenient for Debtor is, in the final analysis, not an appropriate part of the analysis. Again, neither the Debtor nor the Defendant Taff have disputed the Trustee's numbers, or asked for an evidentiary hearing on value.[23]

[23]If Debtor decides, after reviewing this Memorandum and Order, that she does dispute these facts about potential equity in the property that form the basis for the Trustee's Motion to Sell, she shall ask for a hearing within 14 days. The Court will then hear the parties' evidence regarding potential equity in the property on it **March 30-**

III. CONCLUSIONS OF LAW

A. Standing

Trustee argues that Taff neither has standing to file the Motion to Abandon or to oppose her Motion to Sell. Taff responds that pursuant to 11 U.S.C. § 554(b), he does have standing because he is a "party in interest." That section provides, in pertinent part, that "[o]n request of a party in interest . . . the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."

The Tenth Circuit Court of Appeals has carefully considered the definition of "party in interest" in the context of a motion to reopen a case under Rule 5010 of the Federal Rules of Bankruptcy Procedure, which uses the same "party in interest" language at issue here.[24] The question it needed to decide was whether a party other than parties who obviously have an interest—debtors, creditors or trustees—have the right to seek to reopen a case to interpret a confirmed plan.

31/April 1, 2010 stacked docket. The Court does note that in the Pretrial Order, the parties stipulated that Debtor paid $31,272.56 at closing, and that she "continues to pay the mortgage payment on her condo." In addition, in Debtor's Response to Motion for Authority to Sell Real Property (Doc. 125), she admits "she has equity in excess of $30,000," acknowledging that she is restricted to receipt of only $18,450 of that equity.

[24] *In re Alpex Computer Corp.*, 71 F.3d 353 (10th Cir. 1995). The Bankruptcy Appellate Panel for the Tenth Circuit has recently catalogued some of the places in the Bankruptcy Code where the term "party in interest" is used in *In re Fox*, 305 B.R. 912, 916 (10th Cir. BAP 2004): 11 U.S.C. §§ 105(a) and (d); 1104(a), (b), and (c); 1121(c), (d), and (e); 362(d); 1301(c); 704(7); 1102(a)(2) and (3); 1301(c); 1307(c) and (d); 502(a); 1126(e); 1328(e); 727(c)(2); 1112(b); 304(b); 1128(b); 1108; 1109(b); 1105; 554(b); and 303(g).

In *Alpex*, the debtor held pre-petition patent claims against Nintendo, among others, and the plan called for the liquidating trustee to pursue those claims. Five years after confirmation, hearing that settlement of other claims had left the estate with only $2.2 million in unpaid claims, Nintendo moved to reopen the plan to place a cap on the recovery of shareholders. The bankruptcy court denied Nintendo's motion, without addressing the standing issue. On appeal, the District Court found that Nintendo did have standing to reopen the plan as "a debtor of a debtor" with "sufficient stake in the proceeding to qualify as a party in interest."[25]

The Tenth Circuit Court of Appeals reversed. It noted that the term "party in interest" is broadly defined, at least in § 1109(b), to generally include all persons whose pecuniary interests are directly affected by the bankruptcy proceedings. It also noted that this phrase is prefaced with the term "including," which means that the cast of pertinent parties is potentially larger than the ones actually listed. Even with that expansive interpretation, the Court held that although Nintendo stood to save nearly $200 million if its interpretation of the plan was sustained upon reopening, it nevertheless did not fit within the class of persons—"parties in interest"—entitled to seek reopening under the Bankruptcy Code. The Court held that term is implicitly confined to debtors, creditors or trustees with a particular and direct stake in reopening. In denying standing, the Tenth Circuit specifically held that "[t]he standing requirement is more stringent in bankruptcy appeals 'than the 'case or

[25] *Id.* at 357, quoting the district court opinion.

controversy' standing requirement of Article III, which 'need not be financial and need only be fairly traceable to the alleged illegal action.'"[26]

The Bankruptcy Appellate Panel has had two opportunities to consider the "party in interest" conundrum since *Alpex* was decided. In *In re Miller*,[27] an involuntary debtor sought the return of some property the trustee had seized to various third parties, on the basis that he did not own the property, and thus the Trustee should not have taken it. After finding that the matter should have been brought as an adversary proceeding, the BAP further held that because Debtor was not an owner of the subject property, he had no standing to seek its return to third parties.

The second pertinent BAP decision is in *In re Riazuddin*.[28] Debtor Sada Riazuddin was injured, pre-petition, while riding an escalator maintained by Schindler Elevator. She retained an attorney to pursue a claim against Schindler, and he sent a demand letter. Three months later, Riazuddin filed a Chapter 7 petition, and did not list the claim as exempt, or attempt to exempt it. Debtor then sued Schindler in state court. Thereafter, her bankruptcy case was closed in May 2005. When Schindler later became aware of debtor's bankruptcy, it filed a motion to dismiss the state court tort action on the basis of judicial estoppel and standing, arguing that the chapter 7 trustee would be the only party with standing. In response, debtor and the trustee both moved to reopen the bankruptcy case. Schindler

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[26]*Id.* at 357 n.6.

[27]302 B.R. 705 (10th Cir. BAP 2003).

[28]363 B.R. 177 (10th Cir. BAP 2007).

objected, arguing the trustee was a successor in interest to, and bound by, the debtor's actions in failing to schedule the claim. The debtor responded that she had disclosed the claim to her bankruptcy attorney and relied on his advice about what should be listed on the schedules. She further argued that she did not intend to mislead the bankruptcy court.

The Trustee argued that Schindler lacked standing to oppose the motions to reopen because it was neither a debtor, a creditor nor a trustee, but the bankruptcy court nevertheless denied both motions to reopen. The BAP, relying on *Alpex*, reversed, finding that Schindler did not have standing to oppose the motions to reopen. The BAP held that Schindler

> is a defendant in a separate civil suit brought by the Debtors and is, at most, a potential "debtor of a debtor." As in *Alpex*, Appellee's liability to the Debtors or the Trustee will be affected by the civil suit, not by the bankruptcy. Under the analysis of *Alpex*, Appellee's claim that its defense in the personal injury case may be affected by the reopening is insufficient to give it a direct interest in the Debtors' bankruptcy case, and therefore, it lacked standing to oppose the motions to reopen. The bankruptcy court should have disallowed Appellee's objection to the motions to reopen on this basis.[29]

Likewise, Taff's liability to the Debtor or the Trustee, here, will be affected by the adversary proceeding, not by the bankruptcy.

Taff relies on a case outside the Tenth Circuit, which has somewhat similar facts to this one, in arguing that he does have standing. In *In re de Hertogh*,[30] a Chapter 7 trustee filed a notice of intent to abandon to debtors any interest they might have in a bankruptcy related malpractice claim by the debtors against their former bankruptcy attorney. The claim

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[29] *Id.* at 183.

[30] 412 B.R. 24 (Bankr. D. Conn. 2009).

in that case, like in this case, involved a cause of action for negligence arising out of the loss of $150,000 of their homestead exemption as a result of counsel's advice. The former attorney objected, claiming that he was willing to buy the asset from the estate, and thus by definition it had value and should not be abandoned. The bankruptcy court summarily held, with little analysis, that because he was willing to buy the asset, he was a party in interest with standing to object.

Although the facts in *Hertogh* are closer than the facts in *Alpex*, the reasoning in *Alpex* remains persuasive, and more importantly, is binding on this Court. Because Taff is not a "party in interest" pursuant to the reasoning of *Alpex*, the Court finds that Taff does not have standing to bring the Motion to Abandon, or to oppose the Motion to Sell. For that reason, his Motion to Abandon is denied, and his objection to the Trustee's Motion to Sell is overruled.

B. Standard for Evaluating a Trustee's Motion to Sell an Asset of the Estate

A trustee in bankruptcy is charged with the statutory duty to gather the assets of the estate and manage those assets to maximize their value to the estate.[31] Specifically, § 704(a)(1) requires that the trustee "collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the

[31] *In re Rubesh*, 2006 WL 1867678, 3 (10th Cir. BAP 2006).

best interests of parties in interest." It is within the trustee's discretion to determine which action should be taken regarding each asset to maximize the estate's interest.[32]

Section 363(b)(1) of the Bankruptcy Code provides that the trustee, after notice and a hearing, may sell property of the estate other than in the ordinary course of business. The trustee is given ample discretion to administer the estate, including authority to conduct public or private sales of estate property. "In fact, an order authorizing the sale is not required if the trustee gave proper notice and no party filed a timely objection.[33] If objections are filed, the court must first approve the proposed sale. The appropriate standard used by courts in reviewing a trustee's recommendation to sell estate property:

> has been enunciated in myriad ways. These variations all fall under the rubric of the business judgment test. The trustee's business judgment is to be given great judicial deference. Nevertheless, the court must always scrutinize whether the trustee has fulfilled his duty to maximize the value obtained from a sale, particularly in liquidation cases.[34]

C. Trustee's Motion to Sell Must be Granted

Although the Court has held that Taff does not have standing to object to the Motion to Sell Debtor's home, Debtor has also objected to the motion, and she clearly has standing. Accordingly, the Court must evaluate her objection under the business judgment test. The

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[32] *Id*. at 3.

[33] *In re Psychrometric Sys., Inc.*, 367 B.R. 670, 674 (Bankr. D. Colo.2007) (internal quotes and citations omitted).

[34] *In re C.W. Mining Co.*, 2010 WL 517583, 9 (Bankr. D. Utah 2010) (citing *In re Psychometric Systems, Inc*. and 3 Collier on Bankruptcy § 363.02[1][g], at 363-14 (Lawrence P. King, ed., 15th ed. Rev. 1997). *See also In re Krause*, 349 B.R. 255 (Bankr. D. Kan. 2006) (holding that under § 363(b) a debtor in possession or trustee must articulate a business justification for using or selling estate property outside the ordinary course of business, relying on *In re Continental Air Lines, Inc*., 780 F.2d 1223 (5th Cir. 1986) (listing relevant factors for judge to consider to decide whether use or sale of estate property furthers the diverse interests of debtors, creditors, and equity holders)).

Court does note, as a preliminary matter, that neither Debtor nor Taff claim that the Trustee isn't maximizing the value to be obtained from the sale when she proposes to sell it for not less than $60,000.[35]

Debtor's objection is basically that she cannot afford to cash out the equity in the home in excess of $18,450 that belongs to the estate, and that the Court should require the Trustee to marshal assets by pursuing the Adversary Proceeding first. She also has indicated she simply wishes this whole matter "would go away." Because of the unique posture of the case, and despite the sympathetic appeal of her argument, the Court cannot grant Debtor's wishes. First, the matter cannot go away, because the Trustee has a statutory obligation to maximize assets for the unsecured creditors. She holds property of the estate (the equity in excess of her $18,450 homestead interest), and she must turn it over so that it can be liquidated. Second, Defendant Taff has placed the Trustee into a "Catch-22" position.[36] If the Court defers the sale, instead waiting to see the outcome of the Adversary, and Taff is correct that the Trustee cannot show damages because she did not sell the house, then the Trustee will receive no award, and Debtor will be back where she is now, facing a Motion to Sell with no recovery to pay off the filed claims.

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[35]*In re Psychrometric Systems, Inc.*, 367 B.R. at 676. Further, since Taff argues that failure to sell the house is evidence of lack of mitigation, denying the Motion to Sell would, under his theory, be denying the Trustee the right to maximize the value of the Adversary Proceeding, a potential asset of the estate.

[36]*Catch-22* is a novel by Joseph Heller published in 1961. The phrase "Catch-22" is now commonly used to mean a "no-win" situation or a "double bind" of any type. Taff essentially proposes a "heads I win, tails you lose" proposition.

If it turns out by selling the house, the damages, if any, can then be calculated, Debtor might still stand a chance of getting a recovery that would enable her to buy another home. Again, the claims in this case are $30,054. If the Trustee sells the house and captures the equity over the homestead allowance, she can still prosecute the legal negligence action. To the extent there are assets collected in excess of administrative costs and claims filed, Debtor could receive any excess. Accordingly, the Court finds that the Trustee has demonstrated that she is entitled to sell the subject property, and overrules Debtor's objection to the sale.

D. Taff's Motion to Abandon an Estate Asset

Even if Taff had standing to pursue his Motion to Abandon, which the Court has held he does not, the Court would not grant the motion in any event. Pursuant to § 554, "[o]n request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." Accordingly, in order to approve a motion to abandon property, the bankruptcy court must find either that (1) the property is burdensome to the estate or (2) of inconsequential value and inconsequential benefit to the estate.[37] "An order compelling abandonment is the exception, not the rule. Abandonment should only be compelled in order to help **the creditors** by assuring some benefit in the administration of each asset."[38] "Congress only intended the abandonment proceeding to be

[37]*Morgan v. K.C. Mach. & Tool Co. (In re K.C. Mach. & Tool Co.)*, 816 F.2d 238, 245 (6th Cir. 1987).

[38]*Id*. at 246 (emphasis added to note that it is creditors who abandonment is supposed to protect, not a potential debtor of the debtor).

used where there is no question of facts or law involved and for a trustee or debtor in possession to hold assets for no benefit to the estate would be unconscionable."[39]

Because the Debtor admits there is at least $30,000 equity in the real property (minus the $18,450 Debtor can claim as exempt), and because Taff has presented no evidence, nor asked to do so, suggesting that number is untrue, or that there is no possible benefit to the estate, or that the property is in fact burdensome to the estate, he could not prevail even if he had standing. In addition, because Taff has tacitly admitted that he did not advise Debtor of the consequences of filing her bankruptcy in Kansas in light of her residency situation (by saying he forgot it mattered), the Court is inclined to allow a sale so that a trier of fact will be in a position to decide if Debtor has sustained damages as a result of those actions or failures to act. If Taff is correct in his argument that the property should not be sold so he cannot be subject to damages, such trier of fact will be deprived of the right to decide if Debtor sustained damages so long as the house has not been sold. The Court does not believe he is entitled to that advantage at this stage of the proceedings.

IV. CONCLUSION

This bankruptcy and adversary proceeding have made strange bedfellows. Debtor claims she was the victim of professional negligence by Taff. Debtor just wants the whole case to go away so she can keep her house—even the amount in excess of her statutory homestead exemption. Debtor may be able to keep her house if the Trustee finds another

[39]*In re Miller*, 302 B.R. at 710 (citing *In re Pepper Ridge Blueberry Farms*, 33 B.R. 696, 698 (Bankr. W. D. Mich. 1983).

way to pay the ever-increasing administrative costs PLUS the approximately $30,000 in creditor claims. Trustee might be able to do that if she wins the legal negligence claim. But she cannot (or so Taff claims) prevail unless she can demonstrate damages, and she cannot demonstrate damages, or prove that she mitigated those damages, unless she first sells the house. So Taff wants this Court to forbid her from selling the house.[40] The Court, for the reasons set forth above, grants the Motion to Sell and denies the Motion to Abandon.

IT IS, THEREFORE, BY THE COURT ORDERED that the Trustee's Motion to Sell is granted.

IT IS FURTHER ORDERED that Taff's Motion to Abandon is Denied.[41]

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[40]*Cf. In re Alpex Computer Corp.*, 71 F.3d 353, 357 n.8 (noting that given the stance of the litigation, the party's position is "remarkable. Attempting to enlist the bankruptcy court's imprimatur then is chutzpah," and adding this instance to the catalog documented in an article by A. Kozinski & E. Volokh, *Lawsuit, Shmawsuit*, 103 Yale Law Journal 468 (1993)).

[41]The Court reminds counsel that pursuant to paragraph 5 of the Pretrial Order (Doc. 48 in the Adversary Proceeding), the deadline for dispositive motions is 21 days after the date of the entry of this order. In addition, pursuant to paragraph 8 of that Pretrial Order, Plaintiff is required to supplement its prayer for damages within 14 days after this order is entered. Pursuant to paragraph 13.1 of the Pretrial Order, Defendant has 21 days from the date this order is entered to file a Motion and Memorandum regarding the alleged conflict issue, and Plaintiffs shall have 14 days thereafter to respond.