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Feature

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Agent's Consent to Sale Bars Objections from Dissenting Lenders



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The U.S. Bankruptcy Court for the Southern District of Texas recently ruled in *In re Alta Mesa Resources Inc.* that an administrative agent's consent to a § 363 sale satisfied the consent requirement of § 363(f) of the Bankruptcy Code and barred the agent (and even dissenting lenders) from raising any other objections to the sale.² The court found that the loan documents gave the administrative agent sole authority to consent to the sale on behalf of the lenders and that allowing dissenting lenders to object would contravene that authority and violate the loan documents.³ Accordingly, the court exercised its equitable powers to enforce the credit agreement and prohibited the dissenting lenders from appearing and being heard at the sale hearing.⁴

The *Alta Mesa* decision appears to go a step further than previous decisions dealing with similar intra-lender issues. If followed in other cases, this decision would significantly limit the ability of individual lenders to capture holdup value in the context of a § 363 sale.

The *Alta Mesa* Decision

In *Alta Mesa*, certain minority lenders under the debtors' syndicated secured credit facilities objected to the sale of the debtors' assets, asserting that the debtors could not satisfy the requirements under § 363(f) to sell the assets free and clear of the lenders' liens because § 363(f)(2) requires *each* holder of a lien (*i.e.*, each lender) to consent to a sale, and the dissenting lenders did not consent.⁵

The dissenting lenders also raised objections to the sale under § 363(b) on business-judgment grounds. The debtors and administrative agent countered that the agent's consent to the sale bound the dissenting lenders and therefore not only satisfied § 363(f)(2), but deprived the dissenting minority lenders of standing to object to the sale in contravention of the express will of the majority lenders.

In support of standing, the dissenting lenders argued that absent an express delegation of authority to the agent to consent to the sale free and clear of their liens under § 363, that right was reserved to each lender.⁶ The dissenting lenders contrasted provisions of the credit agreements expressly delegating each lender's right to credit bid under § 363(k) to the administrative agent, and reserving each lender's right to vote on a reorganization plan⁷ with the absence of a provision addressing § 363 sales.⁸ The dissenting lenders also argued that even if the agent had the authority to *consent* on their behalf, as creditors of the debtors they were parties-in-interest under § 1109(b) of the Bankruptcy Code, with the right to be heard on the sale motion as a general matter.⁹

The agent and debtors argued that the lenders delegated to the agent sole authority over the exercise of remedies after a default, including remedies with respect to collateral.¹⁰ Those collateral-focused remedies broadly included taking any action that the agent deemed necessary to protect or preserve the collateral or to realize upon the collateral, including selling the collateral.¹¹

1 The authors are members of the firm's Restructuring and Special Situations Group and were part of a team that advised *Alta Mesa* with respect to its restructuring, which is discussed in this article.

2 *In re Alta Mesa Res. Inc.*, No. 19-35133 (Bankr. S.D. Tex. Sept. 11, 2019).

3 Tr. at 73, *In re Alta Mesa Res. Inc.*, No. 19-35133 (Bankr. S.D. Tex. Jan. 21, 2020).

4 *Id.*

5 11 U.S.C. § 363(f)(2) ("The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if ... such entity consents....").

6 See Brief by Bank of Texas Regarding Standing and Consent, No. 19-35133, Dkt. No. 920, ¶¶ 15-21 (Bankr. S.D. Tex. Jan. 17, 2020) (cited as "BOKF Br. ___"); Brief of PNC Bank NA, the Huntington National Bank and ABN Amro Capital USA LLC on Standing, No. 19-35133, Dkt. No. 919, ¶¶ 12-14 (Bankr. S.D. Tex. Jan. 17, 2020) (cited as "PNC Br. ___").

7 See BOKF Br. ¶¶ 21-22, 34-35.

8 See *id.* ¶¶ 21-22, 34-36; PNC Br. ¶¶ 15-17.

9 See BOKF Br. ¶¶ 4-10.

Thus, the agent and debtors argued, if the agent were delegated the power to *sell* the collateral on the lenders' behalf, the agent must also have been delegated the lesser power to *consent* to a sale — regardless of the absence of an express grant of authority to consent under § 363(f)(2).¹² The agent and debtors also pointed to the collective-action provisions of the credit agreement, which prohibited individual lenders from enforcing rights and remedies under the loan documents.¹³ Finally, the agent and debtors concluded that while the dissenting lenders fall within the definition of a “party-in-interest,” they lack authority to challenge the binding effect of the agent’s and requisite lenders’ consent in breach of the credit documents.¹⁴

The standing issue was considered at a Jan. 21, 2020, hearing on the debtors’ motion to approve the sale. The court held that it was exercising its equitable powers to bar the dissenting lenders from being heard in opposition to the sale. The court found that the credit documents authorized the agent “to take all the necessary actions” to “maximize their recovery of their secured claim,” and therefore only the agent had authority to raise issues regarding the sale of the assets free and clear.¹⁵ The court further explained that although the individual lenders “have standing in one narrow sense to raise objections that [do not] deal with collateral,” pursuing such objections would frustrate the agent’s exercise of its exclusive authority in violation of the contracts’ collective-action provisions.¹⁶ For that reason, the court exercised its equitable authority “to enforce [the credit documents] and to prohibit the dissenting lenders from making any argument[s] ... that would upset what the administrative agent has consented to.”¹⁷

Prior Case Law

The court’s finding in *Alta Mesa* is consistent with well-established case law.¹⁸ For example, in *In re Chrysler*, a minority lender holding less than

1 percent of the first-lien debt objected to a sale on the grounds that the debtors had not satisfied § 363(f)(2) with respect to the first-lien debt — despite the administrative agent’s consent to the sale with overwhelming lender support — because the minority lender withheld its consent.¹⁹ The bankruptcy court overruled the objection, explaining that, upon a default, the collateral trustee, at the direction of the administrative agent, had the power to take enforcement actions against the collateral and any actions it “deems necessary to protect and preserve the Collateral and to realize upon the Collateral,” including selling the collateral.²⁰

The court reasoned further that “[t]he right to consent to the sale of the Debtors’ assets that constitute Collateral” is a collateral-enforcement action within the administrative agent’s authority, and that the lenders had agreed to not object to the agent’s exercise of such authority.²¹ The Second Circuit Court of Appeals issued an opinion largely adopting the bankruptcy court’s reasoning, which was later vacated as moot.²² Arguments similar to those asserted by the dissenting lenders in *Alta Mesa* have also been rejected by other courts.²³

Although *Alta Mesa* was consistent with *Chrysler*, it went a step further. *Chrysler* permitted the dissenting lender to argue its objections to the sale,²⁴ but *Alta Mesa* prohibited the dissenting lender from participating at the sale hearing in support of its § 363(f)(2) objection or any other objection to the sale.²⁵

Consistent with *Chrysler*, the court in *Boston Generating* held that second-lien lenders had standing to object to a sale, despite the fact that the first-lien agent had consented to the sale and the second-lien lenders’ rights were subordinated under an intercreditor agreement.²⁶ The court found that, in the absence of an express provision in the intercreditor agreement waiving the second-lien lenders’ right to appear, the language granting the second-lien lenders the rights of an unsecured creditor was sufficient to establish standing.²⁷ In

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10 See Administrative Agent’s Response to the Brief by Bank of Texas Regarding Standing and Consent, No. 19-35133, Dkt. No. 943 (S.D. Tex. Jan. 20, 2020) (cited as “AMH Agent Br. ___”); Brief of Wells Fargo Bank NA as Agent (KFM Debtors) in Response to Lenders Seeking Standing to Object to Sale of KFM Debtors’ Assets, No. 19-35133, Dkt. No. 946 (Bankr. S.D. Tex. Jan. 20, 2020) (cited as “KFM Agent Br. ___”); Debtors’ Reply to (I) Objection of Bank of Texas to the Debtors’ Motion to Sell Substantially All of Their Assets and (II) Brief by Bank of Texas Regarding Standing and Consent, No. 19-35133, Dkt. No. 947 (Bankr. S.D. Tex. Jan. 20, 2020) (cited as “AMH Debtor Br. ___”); KFM Debtors’ Omnibus Reply Brief on Standing, No. 19-35133, Dkt. No. 945 (S.D. Tex. Jan. 20, 2020) (cited as “KFM Debtor Br. ___”).

11 See AMH Agent Br. ¶¶ 5-7; KFM Agent Br. ¶¶ 4-11; AMH Debtor Br. ¶¶ 7-10; KFM Debtor Br. ¶¶ 8-10.

12 See KFM Agent Br. ¶¶ 10-12; AMH Debtor Br. ¶ 10.

13 See KFM Agent Br. ¶¶ 7-8; AMH Debtor Br. ¶ 6; KFM Debtor Br. ¶ 10.

14 See KFM Agent Br. ¶ 2; AMH Debtor Br. ¶ 27.

15 *Id.* at 71.

16 *Id.* at 73.

17 *Id.*

18 See *In re Chrysler LLC*, 405 B.R. 84, 95 (Bankr. S.D.N.Y. 2009), *aff’d*, 576 F.3d 108 (2d Cir. 2009), *vacated as moot*, 558 U.S. 1087, 130 S. Ct. 1015, 175 L. Ed. 2d 614 (2009); see also *In re Metaldyne Corp.*, 409 B.R. 671, 677 (Bankr. S.D.N.Y. 2009); *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 834 N.Y.S.2d 44 (2007) (“Here, the supermajority vote is meant to protect all Lenders in the consortium from a disaffected Lender seeking financial benefits perhaps at the expenses of other debtholders.”); *In re Inn Keepers U.S.A. Trust*, 448 B.R. 131 (Bankr. S.D.N.Y. 2011) (securitization trust certificate-holder was contractually bound by no-action clause and could not assert individual objections to bidding procedures).

19 See *Chrysler*, 405 B.R. at 101-03.

20 *Id.* at 101.

21 *Id.* at 102.

22 See *Ind. State Police Pension Trust v. Chrysler LLC (In re Chrysler LLC)*, 576 F.3d 108, 119-20 (2d Cir. 2009) (“In the event of a bankruptcy, the trustee is empowered to take any action deemed necessary to protect, preserve, or realize upon the collateral.... When Chrysler went into bankruptcy, the trustee had power to take any action necessary to realize upon the collateral — including giving consent to the sale of the collateral free and clear of all interests under § 363. The trustee could take such action only at the direction of the lenders’ agent, and the agent could only direct the trustee at the request of lenders holding a majority of Chrysler’s debt. But if those conditions were met — as they were here — then under the terms of the various agreements, the minority lenders could not object to the trustee’s actions since they had given their authorization in the first place.”); *vacated as moot*, 558 U.S. 1087, 130 S. Ct. 1015, 175 L. Ed. 2d 614 (2009).

23 See *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 320 (N.Y. Ct. App. 2007) (“The agent was authorized to act on behalf of the lenders collectively by its own initiative or at the direction of a majority of lenders.”); *In re Metaldyne Corp.*, 409 B.R. 671, 676 (Bankr. S.D.N.Y. 2009) (holding that “the Credit Agreement and Security Agreement [are] correct and hold[ing] that the Agent may credit bid under § 363(k) up to the full amount of the debt and may release the lien on any collateral”).

24 *Chrysler*, 405 B.R. at 109, n.26 (explaining that dissenting lender is party-in-interest under § 1109 with right to be heard in contested matter and that lender was granted “a full and lengthy opportunity to cross-examine all the witnesses”).

25 See *Tr.* at 73, *In re Alta Mesa Res. Inc.*, No. 19-35133 (Bankr. S.D. Tex. Jan. 21, 2020).

26 *In re Boston Generating LLC*, 440 B.R. 302, 320 (Bankr. S.D.N.Y. 2010).

27 *Id.*

dicta, however, the court suggested that it may have concluded that the first-lien agent's consent to the sale was an exercise of remedies that deprived the junior lenders of standing to be heard under the intercreditor agreement had the parties not previously stipulated to the contrary.²⁸

The credit documents in *Alta Mesa* included language similar to that in *Boston Generating*. But where the *Boston Generating* court found that the provision granting lenders the rights of unsecured creditors conferred standing absent a specific agreement to the contrary, the *Alta Mesa* court found that the credit documents expressly authorized the administrative agent, at the direction of the requisite lenders, to consent to the sale as an exercise of remedies and that the dissenting lenders were thus prohibited from interfering with such exercise.

Conclusion

The *Alta Mesa* decision joins the weight of authority that has recognized administrative agents' power to act, with the consent or at the direction of requisite lenders, on behalf of all lenders with respect to collateral enforcement actions, including consenting to sales free and clear of liens, claims and interests under § 363(f). As seen in the divergent approaches of the *Alta Mesa* and *Chrysler* courts, there is, however, far less clarity about the consequences of a dissenting minority lender taking action to obstruct the administrative agent's chosen course. In barring the dissenting lenders from appearing at the sale hearing, *Alta Mesa* provides a road map for parties supportive of a sale to cut off intra-lender litigation by challenging the dissenting lenders' right to be heard.

To address the lack of clarity, parties drafting credit agreements could consider including a specific delegation of authority empowering the administrative agent, with requisite lender support, to consent to a sale of collateral under § 363 on behalf of all lenders, and clarifying that such consent constitutes an "exercise of remedies" for purposes of any collective-action provisions. While such an express delegation might not have forestalled litigation in *Alta Mesa* altogether, it would have certainly provided further clarity to the situation by blunting the dissenting minority lenders' primary argument in support of their right to veto the sale. **abi**

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²⁸ *Id.* at 316, 320.