

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

IN RE:

) CHAPTER 7

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**DANIEL J. MILES,**

) CASE NO. **09-92601** - MHM

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Debtor.

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**ORDER APPROVING TRUSTEE'S ABANDONMENT**

Trustee filed an *Amended Notice of Proposed Abandonment* (Doc. No. 340) (the "Notice") seeking to abandon certain of Debtor's interests in LLC's and entities listed in the Notice. The Notice provided time for objections and Debtor filed a timely objection objecting to abandonment only to the interests in 21 LLC's. Of that 21, Trustee identified 11 that were not the subject of the Notice, leaving only ten LLC membership interests, as to which Debtor objected to Trustee's abandonment. Ten of the LLC's are a related group of cases consolidated under Chapter 11 case number 10-60797, Miles Properties, Inc., of which eight are referred to as the Wachovia Eight ; the other two are MPI

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Portfolio Holdings, LLC ("Portfolio") and MPI Cambridge, LLC ("Cambridge") (collectively, the "Interests").

The record in the Miles Properties, Inc. case shows that the parcels of real estate once owned by the Wachovia Eight have been sold pursuant to a confirmed Chapter 11 plan. Portfolio was listed in Debtor's schedules with a value of zero and had been inactive over the past six years. Cambridge was listed in Debtor's schedules as a membership interest in one of the entities currently in receivership.

The Wachovia Eight are MPI Portfolio I, Inc.; Miles-Cherry Hill, LLC; Miles-Oak Park, LLC;

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Debtor opposes Trustee's abandonment of the Interests because he alleges abandonment would unfairly shift the tax burden for these Interests from the estate to Debtor, thus impairing his "fresh start." Debtor also asserts that abandonment is premature because Trustee may be able to realize some value for the estate in 2011 or later and has not adequately established the fair market value of the Interests. Hearing was held June 22, 2011, and, following the parties' argument at the hearing, Debtor was accorded the opportunity to present evidence of the value of the Interests or to file a further brief. Debtor filed a brief but provided no evidence of value. Trustee filed a response brief in which he requested that, if abandonment is allowed, it be allowed *nunc pro tunc* to December 31, 2010, which is the date after which the proposed abandonment would have been deemed approved if no objection were filed. In addition to the contention that the proposed abandonment unfairly shifts a tax burden to Debtor, Debtor asserts Trustee has failed to satisfy his burden to show the fair market value of the Interests, and Debtor opposes Trustee's request for *nunc pro tunc* approval of abandonment.

Section 554 of the Bankruptcy Code provides:

- (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
- (b) On 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.
- (c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at

the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

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(d) Unless the court orders otherwise, property of the estate that is not abandoned under section (a) or (b) of this section and that is not administered in the case remains property of the estate.

Trustee does not dispute that the burden of proof to show the Interests are burdensome to the estate or of inconsequential value lies with him but Trustee asserts that he has satisfied that burden. Trustee shows that the values assigned to the Interests in Debtor's schedules, together with information obtained in meetings with Debtor and with accountants and others associated with the Interests confirm that the value of the Interests has not appreciated and will not likely appreciate significantly in the near future. That showing provides a reasonable basis for Trustee's exercise of his good faith business judgment to conclude the Interests should be abandoned.

The real focus of Debtor's objection is the assertion that Trustee's abandonment of the Interests should be denied because it may unfairly burden Debtor with capital gains tax liability, depriving Debtor of his fresh start. Debtor relies on the holding in *In re A.J. Lane & Co., Inc.* 133 B.R. 264 (Bankr. D. Mass. 1991). In *Lane*, the trustee sought to abandon the partnership interest of the individual debtor and the debtor objected that abandonment would impermissibly shift foreclosure tax consequences from the bankruptcy estates to Debtor. In concluding that the proposed abandonment would not

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be allowed, the court determined that §554 must be interpreted to incorporate the policy of promoting a fresh start for the debtor. The court found that taxing the debtor upon the In connection with the abandonment proceeding, Debtor in *Lane* had also filed an ancillary

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motion under §505(a) to determine whether he or the estate would bear the tax liability. Debtor in the instant case has filed no such motion and, although the IRS was served with the Notice, the IRS has made

no appearance in this dispute and has not been served with any pleading since the Notice. Therefore, any determination at this time regarding Debtor's or Trustee's tax liability would be inappropriate as premature.

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foreclosure following the proposed abandonment would burden Debtor's fresh start and that the possibly countervailing policy of maximizing the estate for the benefit of creditors did not override the policy of protecting Debtor's fresh start.

In opposition to Debtor's position, Trustee relies upon *Johnston v. Webster*, 49 F.3d 538 (9 Cir. 1995), in which that court expressly rejected the rationale in *Lane*, and

<sup>th</sup> concluded that abandonment under §554 is not conditioned on the possibility of tax-shifting consequences. In fact, as some of the underlying real property has already been sold at foreclosure, it is apparently unclear whether Trustee's proposed abandonment would, in fact, shift any real tax consequences to Debtor. That issue, however, is not yet ripe for decision.<sup>3</sup>

The undersigned finds the opinion of the Ninth Circuit Court of Appeals in *Johnston* persuasive. Given the facts shown and the present posture of this case, the possible shifting of tax consequences from the estate is not a compelling consideration in determining whether Trustee may abandon property of the estate. Trustee in this case has presented sufficient evidence to show that the Interests are of inconsequential value to the estate.

Trustee's request for entry of this order *nunc pro tunc* to December 31, 2010, however, is without merit. Entry of an order *nunc pro tunc* is appropriate to correct an error that prevented court actions previously taken but not properly recorded. No such error occurred in this case. *Cypress Barn, Inc. v. Western Electric Co., Inc.*, 812 F.2d

The possibility, however, that the estate may be liable for the taxes resulting from transfers that

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occurred before the date of any order approving abandonment is apparently the impetus for Trustee's

request for approval of abandonment *nunc pro tunc* to December 31, 2010.

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1363 (11 Cir. 1987); BLACK'S LAW DICTIONARY, Seventh Edition (1999). Accordingly,

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it is hereby

ORDERED that Trustee's proposed abandonment of property of the estate,

including the Interests, is *approved*.

**The Clerk, U.S. Bankruptcy Court, is directed to serve** a copy of this order

upon Debtor, Debtor's attorney, the Chapter 7 Trustee, and all creditors and parties in

interest.

IT IS SO ORDERED, this the \_\_\_\_ day of April, 2012.

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MARGARET H. MURPHY

UNITED STATES BANKRUPTCY JUDGE