IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

In re EUROGAS, INC., Debtor.	**No. 17-4197** BAP No. UT-16-033 Bankruptcy Case No. 04-28075
THE SLOVAK REPUBLIC, Appellant, vs. ELIZABETH LOVERIDGE, Chapter 7 Trustee; and EUROGAS, INC. Appellees.	(Chapter 7) **JOINT BRIEF OF APPELLEES ELIZABETH LOVERIDGE AND EUROGAS, INC.**

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STATEMENT OF JURISDICTION

EuroGas, Inc. ("**EuroGas**"),[1] the successor to the Debtor, and Elizabeth R. Loveridge, the Chapter 7 Trustee (the "**Trustee**"), incorporate by reference EuroGas's Motion to Dismiss Appeal for Lack of Jurisdiction and the Trustee's Joinder (collectively, the "**Motion to Dismiss**") filed on January 3, 2018 [Docket No. 01019919808] and January 16, 2018 [Docket No. 01019931045], respectively, and EuroGas's Reply on the Motion to Dismiss Appeal ("**Reply**") filed on January 24, 2018 [Docket No. 01019935577]. As described more fully in the Motion to Dismiss and Reply, the Slovak Republic is not an aggrieved party, and thus does not have standing to appeal the Bankruptcy Court's Orders entered on October 28, 2016 [Appellant's Appendix ("App.") at 407 and 430] or the Bankruptcy Appellate Panel's Judgment and Published Opinion issued on November 21, 2017 [App. at 65]. EuroGas and the Trustee renew and incorporate their request that the Court dismiss the appeal because the Slovak Republic lacks standing.

If the Court determines the Slovak Republic has standing to appeal the Bankruptcy Court's Orders and the Bankruptcy Appellate Panel's Opinion, the Trustee and EuroGas are satisfied with the Slovak Republic's statement of this Court's jurisdiction.

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[1] EuroGas is a Utah corporation incorporated on November 15, 2005 as Entity No. 6050868-0142, and is a separate entity from the Debtor.

STATEMENT OF THE ISSUES PRESENTED

I. EuroGas and the Trustee object to the Slovak Republic's Issue I because it mischaracterizes the Bankruptcy Appellate Panel of the Tenth Circuit's (the "**BAP**") Published Opinion (the "**BAP Opinion**"). EuroGas and the Trustee would restate the Slovak Republic's Issue I as follows:

> Does the BAP correctly conclude that the Slovak Republic lacked standing to pursue an appeal of the bankruptcy court order (a) as a creditor, where the appeal, if successful, would result in a less favorable outcome for creditors; or (b) as a litigant in an unrelated arbitration case, where the bankruptcy court decision did not address the merits of the claims at issue?

Standard of Review: Questions of standing are reviewed *de novo*. *Smith v. Rockett*, 522 F.3d 1080, 1081 (10th Cir. 2008).

II. EuroGas and the Trustee object to the Slovak Republic's Issue II because, in the event the Court finds that it has jurisdiction, it will review the decision of the Bankruptcy Court directly, and review the BAP's decision as an intermediary appellate court in reaching the merits of the case.

III. The Trustee and EuroGas object to the Slovak Republic's Issue III because it fails to acknowledge the bankruptcy court's finding that, despite the Republic's $250,000 offer made on a quitclaim basis (the "**Quitclaim Offer**"), the Talc Claims were burdensome or had inconsequential value and benefit to the estate. The Slovak Republic frames the issue with the assumption that the

Quitclaim Offer dictated a conclusion that the Talc Claims had value, but the Bankruptcy Court and BAP addressed and rejected that argument in the Memorandum Decision and Opinion, respectively. App. at 423–24, 81–82. The issue should be framed as follows:

> Did the Bankruptcy Court properly conclude that the Trustee exercised reasonable business judgment in determining that the Talc Claims were burdensome or of inconsequential value and benefit to the estate?

Standard of Review: Findings of fact are reviewed for clear error. *In re Pepper*, 339 B.R. 756, 759 (B.A.P. 10th Cir. 2006). When a court makes a factual finding that an asset is of inconsequential value and burdensome to the estate based on a trustee's exercise of her business judgment and discretion, the factual finding is reviewed for an abuse of discretion. Approval of a trustee's abandonment of property of the estate is reviewed for abuse of discretion. *See In re Mailman Steam Carpet Cleaning Corp.*, 212 F.3d 632, 634–35 (1st Cir. 2000); *Miller v. Generale Bank Nederland, N.V. (In re Interpictures Inc.)*, 217 F.3d 74, 76 (2d Cir. 2000); *Prime Lending II, LLC v. Buerge (In re Buerger),* Nos. KS-12-074, 11-20325, KS-12-077, KS-12-078, KS-13-022, KS-13-023, KS-13-024, KS-13-025, 2014 WL 1309694, at *19 (B.A.P. 10th Cir. Apr. 2, 2014).

IV. The Trustee and EuroGas would add a fourth issue as follows:

> Did the Bankruptcy Court properly approve an Agreement under Fed. R. Bankr. P. 9019 based on evidence presented at the hearing, including the Trustee's testimony, that the agreement would resolve complex and uncertain disputes, avoid substantial delays and litigation costs, and result in the most favorable outcome possible for creditors under the circumstances.

Standard of Review: Findings of fact are reviewed for clear error. *In re Pepper*, 339 B.R. 756, 759 (B.A.P. 10th Cir. 2006). When a court's decision to approve a settlement agreement is based on a factual record, it is reviewed for an abuse of discretion. *Reiss v. Hagmann*, 881 F.2d 890, 891–92 (10th Cir.1989).

STATEMENT OF THE CASE

A. Background and Parties.

The subject of this reopened bankruptcy case and this appeal is an asset referred to by the Parties as the Talc Claims. The Talc Claims consist of indirect interests in talc deposits in the Slovak Republic, and more particularly, to claims against the Slovak Republic relating to those talc deposits. The Talc Claims were the subject of an on-going arbitration proceeding in the International Centre for Settlement of Investment Disputes in Paris, France (the "**Arbitration**

Proceeding").[2] The Debtor was incorporated in Utah on October 7, 1985, and was the owner of the Talc Claims prior to its bankruptcy in 2004. App. at 411.

In June of 2004, Steve Smith, a trustee in a Texas bankruptcy (the "**Trustee Smith**"), obtained a ruling against the Debtor and others awarding judgment in the amount of $113,371,837.65 (the "**Smith Judgment**"). App. at 409. On May 18, 2004, Trustee Smith filed an involuntary bankruptcy petition on behalf of the Debtor. An Order for Relief was entered on October 20, 2004, and Joel Marker ("**Trustee Marker**") was appointed to serve as chapter 7 trustee. *Id*. Trustee Marker liquidated some assets, filed a final report, made a distribution (approximately 0.57% of allowed, unsecured claims at that time), and ultimately, closed the case in 2007. *Id*.[3]

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[2] The Arbitration Tribunal issued its ruling in the Arbitration Proceeding before the BAP issued its Published Opinion, App. at 79, n. 47, finding that EuroGas did not have standing to bring the arbitration. Footnote 3 of the Appellee's Brief references a website where one of EuroGas's principals allegedly indicated a new arbitration will commence. The veracity of this statement is irrelevant, and whether this speculative, phantom litigation is to go forward is not in the record before the Court and should be disregarded. *See Fogle v. Gonzales*, 570 F. App'x 795, 797 (10th Cir. 2014) ("And just as we don't entertain new arguments presented for the first time on appeal, neither do we entertain 'non-record evidence presented for the first time on appeal.'") (citing *Glenn v. Kane*, 494 Fed. Appx. 916, 919 (10th Cir. 2012).

[3] On January 28, 2005, at the insistence of the Former Trustee, the Bankruptcy Court entered an order directing Wolfgang Rauball, Reinhard Rauball, and Hank Blankenstein, as responsible individuals for the Debtor, to file accurate and

The largest creditor in the bankruptcy case is Texas Eurogas, Inc. ("**TEG**"). TEG acquired the Smith Judgment from Trustee Smith and became the real party in interest on Proof of Claim No. 1-1 in the bankruptcy case, in the principal amount of $113,371,837.65. App. at 409. When Trustee Marker made his distribution in 2007, that Proof of Claim constituted approximately 99.25 percent of the unsecured claims in the case. App. at 410.

EuroGas was formed on November 15, 2005, with the same name, officers, directors, and shareholders as the Debtor. App. at 411. EuroGas claims to be the successor in interest to the Debtor, having acquired all residual property of the Debtor by a post-bankruptcy merger in July of 2008 (the "**2008 Merger**"). *Id*. EuroGas claims that the Talc Claims were abandoned when the Bankruptcy Case was closed in 2007, and thus became property of EuroGas in the 2008 Merger. *Id*. EuroGas instituted the Arbitration Proceeding against the Slovak Republic on June 25, 2014. *Id*. While the Arbitration Proceeding was pending, TEG notified the Trustee's office that EuroGas was pursuing the Talc Claims in the Arbitration Proceeding. App. at 410. The U.S. Trustee's office moved to reopen the

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complete statements and schedules and to deliver all books and records of the Debtor to the Former Trustee. App. at 409. Although the Debtor provided a draft of its statements and schedules to the Former Trustee, the Debtor did not file its statements and schedules with the Court until October 13, 2016. *Id*.

bankruptcy case, and on December 21, 2015, the Bankruptcy Court granted the motion, including in its Order a directive to appoint a chapter 7 trustee to investigate the bankruptcy estate's interest in the Talc Claims. *Id*.

The final player in the case is the Appellant, the Slovak Republic (the "**Republic**"). The Republic was the respondent in the Arbitration Proceeding, and first appeared in the bankruptcy case in 2015 when it appeared in support of the motion to reopen the case. Bankruptcy Court Docket No. 183. The Republic first became a creditor in the bankruptcy case when it purchased the duplicative claims of an existing creditor in August of 2016. Bankruptcy Court Docket No. 217.

B. <u>The Settlement Agreement.</u>

After the Trustee's appointment, she conducted a substantial investigation of the Talc Claims and EuroGas's claim that it owned the Talc Claims. App. at 413. The Trustee reviewed substantial materials, including documents and argument from the Republic, and opposing expert witness reports that had been submitted to the tribunal in the Arbitration Proceeding addressing, among other things, the ownership of the Talc Claims. *Id*. The Trustee also solicited offers from both EuroGas and the Republic and negotiated at length with each of them seeking a resolution of the matter. *Id*. The Trustee ultimately entered into the Settlement Agreement

("**Agreement**") with EuroGas which is the subject of this appeal. App. at 414. Under the Agreement, EuroGas would pay the Trustee $250,000.00 for the benefit of the estate and deliver a waiver of the TEG Proof of Claim. *Id*. EuroGas would also acknowledge its continuing liability to all creditors of the Debtor. *Id*. In turn, the Trustee agreed that, to whatever extent the Talc Claims were not abandoned by the Former Trustee, she would abandon them as part of the Agreement. *Id*.

C. Procedural History.

1. The Motion to Approve the Agreement and Notice of Intent to Abandon.

The Trustee filed a Motion to Approve the Agreement and a Notice of Intent to Abandon the estate's interest, if any, in the Talc Claims. App. at 127–150. The Court conducted an evidentiary hearing on September 8, September 26, and October 17, 2016. Notably, at the hearing, the Slovak Republic admitted that the Agreement was a better deal for parties in interest and would provide a greater return to creditors. *See* Supplemental App. at 133–34 ("[T]he only difference between our deal and their deal is then [the Trustee] would have the [TEG] claim hanging out there. Well, what would that mean? Well, if the [TEG] claim is valid, that means that other creditors, like my client – my client's claim would receive a smaller distribution. That's all that means."); *see also id.* at 135 ("[U]nder our deal, the trustee has to either figure out how to resolve the [TEG] claim, or she simply

makes a distribution and creditors other than [TEG] receive a smaller distribution than they would under her proposal. That's the only difference.").

After the hearing, the Court made substantial findings of fact, and relied on those facts in granting the Motion to Approve the Agreement and approving the Notice of Intent to Abandon in a Memorandum Decision and Order, both dated October 28, 2016. App. at 407–427.

2. The Memorandum Decision.

In the Memorandum Decision, the Court prefaced its findings and conclusions with an observation that the positions of both EuroGas and the Republic in the Bankruptcy Case were motivated primarily by each party's agenda in the Arbitration Proceeding. The Court wrote as follows:

> The Court is aware that the matters in this bankruptcy case are important to the Slovak Republic and Eurogas not on their own account, but because the parties hope to gain an advantage in the Arbitration Proceeding . . . . This matter is not the ordinary debtor-creditor setting in which a debtor seeks to restructure debt or obtain a discharge and a creditor seeks payment; instead, the real dispute is about the ownership of the Talc Claims and how that may affect the Arbitration Proceeding. The payment of money to the Trustee appears to be a secondary matter for all of the parties except the Trustee. It is very important to the Trustee and the estate however.
>
> . . . Further, the Trustee has no current funds and no other known assets in the estate other than the possible Talc Claims or some leverage to abandon the same.

App. at 412–13. Later in the Memorandum Decision, the Court added the following:

> . . . the parties involved are not motivated by ordinary concerns of debtors and creditors. The Slovak Republic is objecting, not because it believes it will be paid more as a creditor if the Agreement is rejected, but because it stands to benefit in the Arbitration Proceeding if the Court denies the Trustee's Motion.

In that context, the Court then applied the four-prong test set forth in *In re Kopexa Realty Venture Co.*, 213 B.R. 1020, 1022 (B.A.P. 10th Cir. 1997), both to the underlying Talc Claims themselves and to the claims of ownership in the Talc Claims disputed before the Bankruptcy Court. Based on that review, the Court concluded as follows:

> Accordingly, the Court finds and concludes (1) that the Trustee has adequately explained the business reasons for entering into this Agreement; (2) that the business reason is business judgment discretion allocated to a trustee and not an abuse of that discretion; and (3) that the Agreement is acceptable under the *Kopexa* factors. The Court will approve the Agreement.

In Part C of the Memorandum Decision, the Court addressed the Trustee's Notice of Intent to Abandon the Talc Claims.[4] The Court acknowledged and agreed

[4] The Trustee concluded that the Talc Claims were burdensome to the estate because (1) a determination of whether any interest in the Talc Claims had been abandoned by the bankruptcy estate upon the closing of the case in March 2007 would require extensive and costly litigation, and (2) at the reopening of the case, prior to the Settlement with EuroGas, the estate had no money to litigate the pending arbitration, to begin its own arbitration, or to pursue a lawsuit in Slovakia,

with the Trustee's determination that the Talc Claims were burdensome to the estate, and concluded that "the Talc Claims are of inconsequential value to the estate outside of an arrangement with [the Republic or EuroGas]." App. at 424. The Court then noted that, while the Republic objected to the abandonment, it failed to show "how denying the motion to abandon will benefit the bankruptcy estate." *Id*. The Court noted the Republic's claim that the Talc Claims had value based on its offer to purchase the claims for $250,000.00 on a quitclaim basis (the "**Quitclaim Offer**"), but found that the Trustee properly rejected that offer based on sound business reasons. App. at 425. The Court expressly refused to second guess "the Trustee's business judgment when she has so credibly explained her grounds for decision." *Id*.

Further, the Court addressed the Slovak Republic's pending objection to TEG's claim in the Bankruptcy Case. At the hearing, TEG's representative appeared and testified regarding its claim, and based on the testimony, the Bankruptcy Court found that "TEG's claim is not clearly objectionable, but has some basis for it." App. at 417. The Republic did not present any evidence that it would prevail on the objection to TEG's claim, and the Trustee testified that in her

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and to do so now would be impractical in light of the estimated litigation costs and uncertainty. App. at 418–19.

business judgment the waiver of the TEG claim was very valuable to the Bankruptcy Estate. App. at 416–17. In approving the Agreement, the Court noted that the Former Trustee distributed over $600,000 before the case was closed in 2007, which with the TEG claim resulted in an approximately 0.56 percent distribution to unsecured creditors. App. at 423. With the waiver of the TEG claim, unsecured creditors could receive approximately 15% to 20% on their claims. *Id.* The Court found that the waiver of the TEG claim weighed in favor of approving the Agreement. *Id.*

Finally, the Court addressed the Trustee and EuroGas's request that the abandonment be expressly entered *nunc pro tunc*. The Court cited *In re Land*, 943 F.2d 1265, 1268 (10th Cir. 1991), for the proposition that *nunc pro tunc* application of an Order is generally available only in "extraordinary circumstances," but also noted that "[t]he legal effect of abandonment is determined as a matter of law." App. 425 and n. 19. The Court cited authority for the proposition that abandonment of an asset is "retroactive to the petition date as if the debtor were its owner during the pendency of [the] bankruptcy." App. at 425, n. 20. The Court declined to make a further express ruling, except to state that "whatever interest the bankruptcy estate had or has in the Talc Claims is authorized to be abandoned by the Trustee." App. at 426.

D. BAP's Opinion.

As a threshold issue in the BAP Opinion, the BAP addressed whether the Slovak Republic had standing to appeal the Bankruptcy Court Orders. Citing *In re Paige*, No. UT-08-062, 2010 WL 3699747, at *11 (B.A.P. 10th Cir. Sept. 15, 2010), the BAP explained that "where there are 'multiple layers of intertwined contingencies that must occur in order for [an appellant] to arguably claim any pecuniary benefit from the appeal,' the party's 'interest in the appeal [is] too remote and indirect to confer standing.'" App. at 78–79. The BAP held:

> As an unsecured creditor, the Slovak Republic offers no explanation to suggest how the Decision diminishes its property, increases its burdens, or impairs its rights. Because the Agreement results in a significant increase in the distribution to unsecured creditors, the only logical reason the Slovak Republic could have to appeal the Decision is to better its position in the Arbitration. Such reasons are insufficient to confer standing to appeal the Decision and the Slovak Republic has not met its burden of establishing appellate jurisdiction.

App. at 79.

The BAP found the Slovak Republic did not have standing; however, to exercise judicial economy, it continued its analysis on the merits to find that even if the Slovak Republic had standing, it would affirm the Bankruptcy Court Orders. *Id.*. It explained that the Bankruptcy Court (1) properly exercised its discretion by analyzing whether the Agreement should be governed by a § 363 sale; (2) properly applied the *Kopexa* factors; and (3) properly found that pursuing the litigation to

determine ownership of the Talc Mining Claims would place a burden on the estate and the Talc Claims were of inconsequential value without an arrangement with either EuroGas or the Slovak Republic. App. at 79–82.

SUMMARY OF ARGUMENT

The Slovak Republic correctly states that, despite the complicated facts of the underlying dispute between the parties, the legal issues are relatively simple. First, the BAP correctly found that the Slovak Republic, which admitted that it received a greater distribution as a creditor of the estate through the approval of the Agreement, is not an aggrieved party and does not have standing to appeal the Bankruptcy Court's Orders. Similarly, the Slovak Republic does not now have standing to appeal the BAP's Opinion to this Court – it is not a person aggrieved.

As to the merits of the case, the BAP correctly affirmed the decision of the Bankruptcy Court. In reaching its decision, the Bankruptcy Court properly exercised its discretion in granting the Trustee's Motion and Notice of Abandonment pursuant to Rule 9019 and 11 U.S.C. § 554(a). The Bankruptcy Court, although not required to conduct a mini-trial, held an evidentiary hearing over the course of three days where the Trustee testified that, in her business judgment, the Agreement was in the best interest of creditors and the estate. The Trustee exercised her business judgment in good faith, upon a reasonable basis,

and within the scope of her authority, and the Bankruptcy Court properly used its discretion in approving the Agreement and authorizing the abandonment.

Despite receiving a greater return on its purchased claims through the approval of the Agreement, the Slovak Republic argues that the BAP erred in affirming the Bankruptcy Court's Orders because (1) the Bankruptcy Court should not have approved the abandonment because the Talc Claims had value and were not burdensome to the estate; (2) the Bankruptcy Court focused on the wrong dispute in addressing the *Kopexa* factors; and (3) the Bankruptcy Court should have applied 11 U.S.C. § 363. To the first and third arguments, the Slovak Republic attempts to ignore the law in arguing that the Bankruptcy Court should not have approved the Agreement or abandonment of the Talc Claims. As the BAP explained, despite the Slovak Republic's claims, the law gives the Trustee deference when properly exercising her business judgment, and the Bankruptcy Court, in reviewing the Trustee's business decision, has broad discretion in approving a settlement or compromise, determining whether an asset can be abandoned, and determining whether to impose formal sale procedures. The Slovak Republic cites no factual basis for its assertion that the abandonment was improper because the Talc Claims had value. It only relies on the Quitclaim Offer, which it concedes would be less favorable for creditors than the Agreement. The

Trustee, after extensive investigation and negotiations, determined, in her business judgment, that the Agreement was in the best interest of creditors and the estate, and the Bankruptcy Court properly applied the law and exercised its discretion in approving the Agreement and authorizing the abandonment.

Slovak Republic's second argument is based on a misreading of the Bankruptcy Court's ruling. It argues that the Bankruptcy Court treated the Agreement as a settlement, but only addressed the Arbitration Proceeding, which was not the underlying dispute. However, the Bankruptcy Court, in characterizing the Agreement as a settlement, addressed both the substance of the Talc Claims and the dispute regarding ownership of the Talc Claims, both of which were finally resolved as to the estate by the Agreement. Further, the Bankruptcy Court did not err in addressing the Arbitration Proceeding and whether the Trustee could have pursued the Talc Claims herself because, as evidenced on the record, to pursue the Talc Claims, the Trustee could not have intervened in the Arbitration Proceeding, but would have had to commence an entirely new proceeding at great cost.

The Trustee and EuroGas file this brief jointly pursuant to Local Rule 31.3(A), and respectfully request the Court affirm the BAP Opinion that the Slovak Republic does not have standing, and if the Court finds the Slovak Republic has standing, affirm the Bankruptcy Court's Orders.

ARGUMENT

I. THE SLOVAK REPUBLIC DOES NOT HAVE STANDING TO APPEAL, AND THE BAP CORRECTLY DISMISSED THE APPEAL FOR LACK OF STANDING.[5]

The Slovak Republic's appeals from the Bankruptcy Court's Orders and the BAP's Opinion, when such appeals are admittedly contrary to its interest as a creditor of the bankruptcy estate, are a misuse of the bankruptcy forum and exactly why the "person aggrieved" standard was developed. The Trustee and EuroGas again incorporate the Motion to Dismiss and Reply in responding to the Slovak Republic's argument regarding standing. The Slovak Republic's argument that it has standing because it could be paid more money if the Talc Claims were sold rather than abandoned is without any factual support in the record. Further, citing to *Ernie Haire Ford, Inc.*, 764 F.3d 1321, 1325–26 (11th Cir. 2014), the Slovak Republic claims that its substantive rights in the Arbitration Proceeding were impacted, but this argument is without merit. First, the Bankruptcy Court expressly provided that "[w]hether the Talc Claims passed to Eurogas II in the Merger or remained with the Eurogas I will be a matter for the Arbitration Tribunal to

[5] At no point since entry of the Bankruptcy Court's Orders has the Slovak Republic confirmed that the Quitclaim Offer is still on the table. Further, no stay pending appeal was sought and the Trustee received and disbursed the funds pursuant to the Agreement. Accordingly, this appeal is moot and should be dismissed. *See Rindlesbach v. Jones*, 532 B.R. 850, 857 (D. Utah 2015).

decide." App. at 426. Second, the ownership of the Talc Claims addressed a standing issue in the Arbitration Proceeding, not the underlying merits of the case regarding whether the Slovak Republic properly stripped Eurogas of its mining rights. Lastly, the argument that the Slovak Republic has standing because of some phantom litigation to be brought in the future is speculative, without merit, and not in the record before this Court. *See Fogle v. Gonzales*, 570 F. App'x 795, 797 (10th Cir. 2014) ("And just as we don't entertain new arguments presented for the first time on appeal, neither do we entertain 'non-record evidence presented for the first time on appeal.'") (citing *Glenn v. Kane*, 494 Fed. Appx. 916, 919 (10th Cir. 2012). The Slovak Republic is not a person aggrieved, and the appeal should be dismissed for Slovak Republic's lack of standing.

II. THE BAP DID NOT ERR IN ADDRESSING THE MERITS OF THE CASE.

The BAP did not err in addressing the merits of the case. The BAP properly addressed the threshold issue of jurisdiction before reaching the merits of the case, and then, likely for judicial economy, addressed the merits. *See In re Petroleum Prod. Man., Inc.*, 282 B.R. 9, 15 (B.A.P. 10th Cir. 2002) (addressing standing as a threshold issue). After determining the Slovak Republic lacked standing, the BAP did not err by further discussing that even if the Slovak Republic had standing, it would affirm the Bankruptcy Court Orders. *See, e.g. In re Winslow*, 956 F.2d 279,

1992 WL 19837, at *2 (10th Cir. Feb. 5, 1992) ("In the alternative, however, if we did have jurisdiction over this appeal, and we reached the merits of the sanctions issue, we would affirm the district court on the grounds and for the reasons stated in the district court's Memorandum Opinion and Order dated April 22, 1991."). Regardless, if this Court finds the Slovak Republic has standing, the Court will review the Bankruptcy Court's Orders and only review the BAP's Opinion as a subordinate appellate tribunal, which may be persuasive. *See Barney v. Bank of America (In re Gifford)*, 651 Fed. Appx. 792, 795 (10th Cir. 2016).

III. THE BANKRUPTCY COURT PROPERLY EXERCISED ITS DISCRETION IN APPROVING THE AGREEMENT AND AUTHORIZING THE ABANDONMENT OF THE TALC CLAIMS.

The Bankruptcy Court properly exercised its discretion in approving the Agreement and authorizing the abandonment of the Talc Claims. Pursuant to Rule 9019, "[o]n motion by the Trustee and after notice and a hearing, the court may approve a compromise or settlement." In determining whether a settlement or compromise is in the best interest of the estate, courts consider the *Kopexa* factors: (1) the probable success of the underlying litigation on the merits; (2) the difficulty in collection on a judgment; (3) the complexity and expense of the litigation; and (4) the best interest of creditors and the estate. *In re Kopexa*, 213 B.R. at 1022. In reviewing a proposed settlement or compromise under Rule 9019, it is the

bankruptcy court's obligation to "canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness." *In re Dennett*, 449 B.R. 139, 145 (Bankr. D. Utah 2011). Further, the trustee is authorized to use her business judgment in determining whether an asset is burdensome to the estate, and the Bankruptcy Court has discretion in approving the proposed abandonment. *See, e.g.*, *Frostbaum v. Ochs*, 277 B.R. 470, 475 (E.D.N.Y. 2002) ("[T]he trustee is allowed to use his best business judgment in deciding when 'to use valuable property of the estate and [when] to renounce title to and abandon burdensome property.'").

Here, the Debtor's bankruptcy case was reopened for the Trustee to investigate the Talc Claims, and it is hotly disputed what interest, if any, the estate has in the Talc Claims. Over three days, the Bankruptcy Court conducted an evidentiary hearing. The Trustee testified that, in her business judgment, the Talc Claims would cost more to administer than to abandon, and that entering into the Agreement and abandoning the Talc Claims was in the best interest of creditors and the estate. The Bankruptcy Court found her testimony credible, and applying the *Kopexa* factors and 11 U.S.C. § 554(a), the Bankruptcy Court properly exercised its discretion and approved the Agreement and Notice of Abandonment.

There was no abuse of discretion, and EuroGas and the Trustee request the Court affirm the Bankruptcy Court's Orders.

Despite receiving a greater return through the Agreement on its claims than it would have received with its own proposed agreement, the Slovak Republic again argues that the Bankruptcy Court erred in authorizing the abandonment of the Talc Claims because (1) the Talc Claims were valuable and not burdensome to the estate; (2) the Bankruptcy Court evaluated the wrong dispute in applying the *Kopexa* factors; and (3) the Bankruptcy Court should have required the Trustee conduct a sale of the Talc Claims. EuroGas and the Trustee address each argument in turn.

A. The Bankruptcy Court properly exercised its discretion in approving the Trustee's abandonment of the Talc Claims because the claims are burdensome to the estate and of inconsequential value and benefit to the estate.

In her business judgment, the Trustee determined the Talc Claims were burdensome and of inconsequential value and benefit to the estate, and the Bankruptcy Court properly exercised its discretion in examining the Trustee's decision and authorizing the abandonment. Pursuant to 11 U.S.C. § 554(a), a trustee may abandon estate property that (1) is burdensome, or (2) of inconsequential value and benefit to the estate. 11 U.S.C. § 554(a). In determining whether to abandon an estate asset or administer it, a trustee has discretion and

uses her best business judgment. *See In re Dilley*, 378 B.R. 1, 7 (Bankr. D. Me. 2007) ("A decision to abandon falls within a trustee's discretion under the business judgment test."); *see also Frostbaum v. Ochs*, 277 B.R. 470, 475 (E.D.N.Y. 2002) ("[T]he trustee is allowed to use his best business judgment in deciding when 'to use valuable property of the estate and [when] to renounce title to and abandon burdensome property.'") (citation omitted). As explained in *Morgan v. K.C. Machine & Tool Co. (In re K.C. Machine & Tool Co.)*, 816 F.2d 238, 246 (6th Cir. 1987) (citing to *Midlantic Nat. Bank v. N.J. Dep't. of Envir. Prot.*, 474 U.S. 494 (1896) (Rehnquist, J., dissenting)), a case relied on by the Slovak Republic, "courts [ ] developed a rule permitting the trustee to abandon property that was worthless or not expected to sell for a price sufficiently in excess of encumbrances to offset the cost of administration . . . . Forcing the trustee to administer burdensome property would contradict this purpose, slowing the administration of the estate and draining its assets."

In assessing a contested abandonment, courts "focus . . . upon the reasons underlying the trustee's determination and affirm a decision which reflects a business judgment made in good faith, upon a reasonable basis, and within the scope of his authority under the Code." *In re Moore*, 110 B.R. 924, 927 (C.D. Cal. 1990) (quoting *In re Wilson*, 94 B.R. 886, 888 (Bankr. E.D. Va. 1989); *see also In*

re Curlew Valley Assoc., 14 B.R. 506, 513–14 (Bankr. D. Utah 1981) ("[T]he court will not entertain objections to a trustee's conduct of the estate where that conduct involves a business judgment made in good faith, upon a reasonable basis, and within the scope of his authority under the Code."). The party moving for abandonment has the initial burden. Once met, the party opposing the abandonment "needs to demonstrate some likely benefit to the estate," and "mere speculation will not suffice." *In re Dilley*, 378 B.R. at 7.

The Bankruptcy Court conducted an evidentiary hearing on the Motion and Notice to Abandon, where the Trustee testified and was cross-examined on her decision to abandon the Talc Claims. In granting the requested relief, the Bankruptcy Court appropriately applied 11 U.S.C. § 554(a), finding that the Trustee, in determining that the Talc Claims were both a burden to the estate and of inconsequential value to the estate, exercised her business judgment in good faith, upon a reasonable basis, and within the scope of her authority under the Code. Specifically, the Bankruptcy Court found that the Trustee provided credible testimony, and that her decision to abandon the Talc Claims was greatly assisted by expert reports.

The Trustee explained that a dispute existed as to whether the Talc Claims were property of the estate or if the claims were abandoned when the case was first

closed in 2007, and to resolve the dispute, the Trustee would have to commence litigation, which she believed would be both costly and time-consuming. Accordingly, she determined, in her business judgment, that the Talc Claims were burdensome to the estate. She also testified that the Talc Claims are of inconsequential value to the bankruptcy estate because the claims are not liquid or easily administered, and the only parties that valued the Talc Claims were the parties to the Arbitration Proceeding. The Trustee further testified that, in her business judgment, she rejected the Quitclaim Offer and the speculative benefit contained therein. The Bankruptcy Court explained that "[t]he Court will not second-guess the Trustee's business judgment when she has so credibly explained her grounds for decision." App. at 425. The Slovak Republic did not and does not now present any evidence that would justify overriding the well-supported, sound business judgment of the Trustee. The Slovak Republic's assertion that the Quitclaim Offer itself proves the Talc Claims had value, made without reference to any evidence in the record, is legally insufficient to demonstrate that the Bankruptcy Court abused its discretion when it found, based on evidence at the hearing, that the Trustee's judgment to the contrary was proper. Therefore, the Trustee reasonably and in good faith exercised her business judgment, and the Bankruptcy Court properly used its discretion in approving the abandonment.

The Slovak Republic attempts to undermine the Bankruptcy Court's ruling by claiming that because the Slovak Republic made an offer to purchase the Talc Claims, the claims cannot be burdensome or of inconsequential value to the estate. It further argues that the Bankruptcy Court "created a hybrid approval process" in authorizing the abandonment. In making its argument, the Slovak Republic relies, in part, on *In re Sullivan & Lodge, Inc.*, No. C03-00588 CRB, 2003 WL 22037724 (N.D. Cal. Aug. 20, 2003). In *Sullivan*, a trustee ignored an offer of $30,000 for an asset of the estate and did not oppose a creditor's motion to compel abandonment of the same. *Id.* at *1. In granting the motion to compel abandonment, the bankruptcy court relied on the trustee's non-opposition to the motion to abandon without any evidence of the trustee's business judgment. *Id.* at *5. The appellate court reversed, explaining that the trustee was "under no obligation to accept" the offer but needed "sound reasons supporting the [] decision to abandon." *Id*.

Unlike in *Sullivan* and unlike what the Slovak Republic claims in this case, the Trustee testified that in her business judgment, relying on an extensive investigation, the Talc Claims were burdensome to the estate and of inconsequential value. The Trustee examined the Quitclaim Offer from the Slovak Republic, and explained that the offer did not make the Talc Claims less burdensome to the estate. Rather, accepting the Quitclaim Offer would simply lead

to additional litigation, thus costing the estate more than any benefit it would receive. *See Sullivan*, 2003 WL 22037724, at *4 ("Charged with the duty of maximizing the value of the estate, . . . a trustee may abandon a cause of action only when he deems its value to be less than the cost of asserting it."). In ruling as it did, the Bankruptcy Court did not create a "hybrid test," but properly addressed the factors set forth in 11 U.S.C. § 554(a) and appropriately used its discretion in approving the abandonment. *See also In re Wilson*, 94 B.R. 886, 892 (Bankr. E.D. Va. 1989) (authorizing abandonment where trustee conditioned abandonment on estate receiving 35% of profits from assets abandoned); *In re Mailman Steam Carpet Cleaning Corp.*, 212 F.3d 632, 635 (1st Cir. 2000) (affirming abandonment of estate asset where trustee accepted $100,000 settlement).

B. The Bankruptcy Court correctly applied the Kopexa factors and properly exercised its discretion in approving the Agreement.

A bankruptcy court has discretion in determining whether to approve a settlement or compromise pursuant to Rule 9019. *In re Kopexa Realty Venture Co.*, 213 B.R. at 1022. A bankruptcy court also has discretion in determining whether to apply formal sale proceedings to a particular situation. *In re Rich Global, LLC*, 652 Fed. App'x. at 632. Here, the Bankruptcy Court properly exercised its discretion, and EuroGas and the Trustee will address each of the Slovak Republic's remaining arguments in turn.

1. In addressing the Kopexa factors, the Bankruptcy Court correctly addressed the Arbitration Proceeding and a potential adversary proceeding to determine the estate's ownership interest in the Talc Claims.

The Slovak Republic argues that the Bankruptcy Court failed to address the dispute regarding the estate's ownership interest in the Talc Claims and only focused on the Arbitration Proceeding. However, in considering whether to approve the Agreement, the Bankruptcy Court properly assessed the Arbitration Proceeding and a potential adversary proceeding to determine the estate's ownership interest in the Talc Claims. Under the first *Kopexa* factor, a court considers "the probable success of the underlying litigation on the merits." If a court finds the probability of success to be uncertain, this can weigh in favor of approving the settlement or compromise. *See In re Augé*, 559 B.R. 223, 227 (Bankr. D.N.M. 2016) ("If the outcome of litigation is uncertain, compromise may be an appropriate solution."). The remaining factors are the difficulty in collection of a judgment, complexity and expense of litigation, and the best interest of creditors and the estate. *See In re Kopexa Realty Venture Co.*, 213 B.R. at 1022.

Here, the Bankruptcy Court properly applied the *Kopexa* factors in approving the Agreement. To the first factor, the bankruptcy case was reopened to investigate the Talc Claims. To pursue the Talc Claims, the Trustee concluded that she would need to commence an adversary proceeding to determine the estate's

interest in the same and commence a new Arbitration Proceeding. Both the Arbitration Proceeding and potential adversary proceeding have uncertain outcomes, and, in its discretion, the Bankruptcy Court properly found that this factor weighed in favor of approving the Agreement. The Bankruptcy Court found that the difficulty in collection of judgment was a neutral factor. To the third factor, the Bankruptcy Court found that the cost and complexity in either the Arbitration Proceeding or a potential adversary proceeding weighed in favor of approving the Agreement. Lastly, the Bankruptcy Court found that the Agreement provided the greatest return to creditors because it included the waiver of TEG's $113 million claim without further litigation. Accordingly, the Bankruptcy Court properly applied the *Kopexa* factors and used its discretion in approving the Agreement.

The Slovak Republic argues that the Bankruptcy Court did not correctly address the *Kopexa* factors because (1) no disputes related to the Talc Claims were resolved; (2) the Bankruptcy Court only focused on the Arbitration Proceeding in conducting its analysis; and (3) the Agreement is not in the best interest of the estate and creditors. The Slovak Republic again misreads the Bankruptcy Court's Memorandum Decision. First, the dispute regarding the estate's ownership in the Talc Claims is resolved: the Trustee does not need to expend additional estate

resources in pursuing an adversary proceeding or involving the estate in the Arbitration Proceeding. Second, the Bankruptcy Court addressed both the Arbitration Proceeding and the potential adversary proceeding in reviewing the underlying disputes and costs and expense of litigation. Third, the Slovak Republic's argument that the Agreement is not in the best interest of the estate and creditors is unsupported. The best interest of the estate and creditors is made in deference to the creditors' reasonable views. *See Kopexa*, 213 B.R. at 1022. The Agreement requires the waiver of the TEG claim, which, with the payment from EuroGas, will result in a distribution of approximately 15% to 20% on the remaining claims. The Slovak Republic's Quitclaim Offer, although the same amount as EuroGas, did not include the waiver of TEG's $113 million claim. In fact, the Slovak Republic's counsel at the hearing acknowledged that creditors of the bankruptcy estate will receive a greater distribution under the Agreement than under the Quitclaim Offer. Previously, the Former Trustee disbursed approximately $700,000, including a disbursement on TEG's claim, which resulted in an approximate return of only 0.56%. Pursuant to the Agreement, the unsecured creditors could receive distribution of 15% - 20% on their unsecured claims. Accordingly, the best interest of the estate and creditors, including the interest of Slovak Republic in this case, is to approve the Agreement. Weighing these factors,

the Bankruptcy Court properly applied Rule 9019 and appropriately used its discretion in approving the Agreement.

2. The Bankruptcy Court properly exercised its discretion in addressing the Motion under Rule 9019.

The Bankruptcy Court properly approved the Motion pursuant to Rule 9019.[6] This Court recently explained that "whether to impose formal sale procedures is ultimately a matter of discretion that depends upon the dynamics of the particular situation." *In re Rich Global, LLC*, 652 Fed. App'x. 625, 630 (10th Cir. 2016) (quotations and citations omitted). In *Rich Global, LLC*, the Court affirmed the bankruptcy court's order approving a settlement pursuant to Rule 9019. *Id.* at 632. On appeal, the creditor argued that the bankruptcy court erred in not applying 11 U.S.C. § 363 instead of Rule 9019. *Id.* at 630. In affirming the bankruptcy court's application of Rule 9019, the Court emphasized that no other person or entity had offered more for the asset and the parties had demonstrated an auction would be futile. *Id.* Here, the Agreement involves the abandonment of whatever interest the estate has in the Talc Claims, and the Trustee testified at length that the only parties interested in the Talc Claims are the parties to the Arbitration Proceeding. Accordingly, the Bankruptcy Court found that "formal sale

[6] The Slovak Republic raises multiple arguments regarding § 363(m). However, the Bankruptcy Court made no findings under § 363(m), and EuroGas and the Trustee do not address these improperly raised arguments.

procedures under § 363 would be a lengthy and litigious process, increasing administrative expenses and delaying distribution to creditors without offering any compensating benefit to the bankruptcy estate." App. 418. Further, it found the Trustee engaged in good faith negotiations with both parties, and there is no "advantage to be gained for creditors by applying the procedures and standards of § 363 in lieu of treating [the Agreement] under Rule 9019." App. 418.

Despite the Slovak Republic's representations that a higher and better offer could be made, neither it nor another entity has made a better offer. The Trustee testified that she conducted an extensive investigation into the Talc Claims and there are no better offers, specifically with the waiver of the $113 TEG claim. As described in *In re Mailman Steam Carpet Cleaning Corp.*, 212 F.3d at 636, in which the Court approved the settlement and abandonment of an estate asset, the review of a bankruptcy court's determination "should not occur in a vacuum," and a bankruptcy court does not "exceed the wide boundaries of its discretion in determining that a bird in the hand [is] worth more than continued shaking of a potentially barren bush."

The Bankruptcy Court properly exercised its discretion in applying Rule 9019 rather than 11 U.S.C. § 363 when approving the Agreement.

CONCLUSION

For the reasons stated above, EuroGas and the Trustee respectfully request this Court affirm the BAP Decision and dismiss the appeal for lack of standing, or, if the Court finds the Slovak Republic has appellate standing, affirm the Bankruptcy Court Orders approving the Motion and Notice of Abandonment.

Dated: May 14, 2018.

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CERTIFICATES OF COMPLIANCE

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing JOINT BRIEF OF APPELLEES ELIZABETH LOVERIDGE, CHAPTER 7 TRUSTEE, AND EUROGAS, INC. were served via the Court's ECF service on May 14, 2018 to:

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