No. 16-6514

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GARY J. SMITH
Defendant-Appellant,

v.

CALLIDUS CAPITAL CORPORATION
Plaintiff-Appellee.

On appeal from the Judgment
of the United States District Court
for the Eastern District of Kentucky
Case No. 5:15-cv-00365-DCR

BRIEF OF APPELLANT

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Defendant-Appellant Gary J. Smith states that he is neither a subsidiary nor an affiliate of any publicly owned corporation not named in this appeal. He further states that there is no publicly owned corporation, not a party to this appeal, that has a financial interest in the outcome of this appeal.

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STATEMENT CONCERNING JURISDICTION

The United States District Court for the Eastern District of Kentucky (the "District Court") had jurisdiction of the action below under 28 U.S.C. § 1332. Plaintiff-Appellee Callidus Capital Corporation ("Callidus"), a corporation incorporated under the laws of Ontario, Canada, filed an action against Gary J. Smith, a citizen of Virginia, seeking over $75,000. This Court has appellate jurisdiction over the decision of the District Court under 28 U.S.C. § 1291. The Memorandum Opinion and Order (the "Opinion") granting Callidus summary judgment was entered on September 7, 2016. *See* Doc #: 36, Page ID #: 1016–39. Judgment in favor of Callidus was entered on September 8, 2016 (the "Judgment"). *See* Doc #: 37, Page ID #: 1040–41. Smith timely filed his notice of appeal on October 7, 2016. *See* Doc #: 38, Page ID #: 1042–1043. The Opinion and Judgment are both "final order[s] or judgment[s]" within the meaning of Fed. R. App. P. 28(a)(4)(D) in that they disposed of all parties' claims.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This appeal raises four issues with respect to the District Court's entry of summary judgment in Callidus' favor:

First, whether the District Court erred in holding Smith liable under his personal guaranty of his employer's secured debt to Callidus, over Smith's objection that Callidus failed to give him notice of its disposing of its collateral in a bankruptcy

sale of his employer's assets that Callidus controlled, by erroneously finding that Callidus objected to that sale, rather than—as the bankruptcy record makes plain—giving its statutorily required consent to the sale and structuring its terms.

Second, whether the District Court erred in holding that under Kentucky law and Article 9 of the U.C.C. generally, that "even if a creditor behaves in a commercially unreasonably [sic] manner in disposing of collateral, such actions do not affect whether the creditor is entitled to a judgment for the amount of the debt," but rather that such a creditor is at most liable to a guarantor in "a subsequent proceeding [brought by the guarantor] for any unreasonableness in the disposition." Doc #: 36, Page ID #: 1029.

Third, whether the District Court erred in rejecting Smith's fraudulent-inducement defense by ignoring Smith's argument that Callidus' false contractual promise to exercise discretion on whether to release his guaranty, if his employer met certain conditions, fraudulently induced him to reaffirm his guaranty, and holding that Smith could neither reasonably rely upon Callidus' contemporaneous oral promise to exercise its discretion in favor of release, nor a prior written conditional promise to release the guaranty that induced Smith to initially execute it, given the later promise to only exercise discretion.

Fourth, whether the District Court erred in granting summary judgment before any discovery had been taken, over Smith's request for additional time to take discovery on multiple defenses under Fed. R. Civ. P. 56(d), without addressing that request.

STATEMENT OF THE CASE

This appeal arises out of Callidus' action under Smith's personal guaranty of his employer's $21 million debt to Callidus. Smith, a resident of Wise, Virginia, was formerly an officer of Fortress Resources, LLC ("Fortress"), a small coal company that he and two business associates formed in 2014 to purchase the assets of another small coal company in a bankruptcy sale. *See* Declaration of Gary J. Smith, Doc #: 22, Page ID #: 938–39 ¶¶ 1–4. Fortress needed capital to buy those assets, and initially sought and received a financing commitment from Huntington National Bank ("Huntington") in May of that year. *See id.*, Page ID #: 939 ¶ 6. Huntington, however, insisted on personal, irrevocable guaranties from Smith and his associates, a condition at which they wisely balked given the risk of guaranteeing the debts of a fledgling coal company. *See id.*, Page ID #: 939 ¶ 8. Due to Huntington's refusal to negotiate on this point, Smith and his associates turned to exploring less personally burdensome offers of financing. *See id.*, Page ID #: 939 ¶ 9.

In the spring of 2014, Fortress' leadership first met with Duane Morrison and Craig Boyer of Callidus, a Canadian lender. *See id.*, Page ID #: 939 ¶ 10. Those

representatives represented that Callidus was an asset-based lender that was disinterested in personal guaranties. *See id.* In August of that year, the same representatives again represented that Callidus was an asset-based lender whose sole concern in the way of security was the value of the assets Fortress was to purchase with Callidus' loan proceeds. *See id.*, Page ID #: 940 ¶ 11. On August 5, 2014, Callidus furnished Fortress with a term sheet (Doc #: 21-1, Page ID #: 480–84) providing for a combination of revolving and advance loans in a total amount of up to $20 million, the precise amount of which was tied to the value of Fortress' accounts receivable, machinery, and equipment. *See* Doc #: 22, Page ID #: 940 ¶ 12. Personal guaranties were not mentioned. *See id.*

After negotiations with Huntington foundered, Fortress settled on Callidus as its lender. *See id.*, Page ID #: 940 ¶ 13. On the evening of September 2, 2014, three days before Fortress' deadline to close on its bankruptcy purchase of its start-up assets, *see id.*, Page ID #: 942 ¶ 22, Morrison wrote to Smith and advised him that if Huntington had "already registered security," Callidus would have to "pose the personal guarantee route" to its credit committee. *Id.*, Page ID #: 940–41 ¶ 15. This was the first time that anyone from Callidus mentioned a possible need for personal guaranties. *See id.*

Though Smith explained to Callidus that Huntington had not recorded any security interests on Fortress assets, *see id.*, the following day, Boyer told Smith that

Callidus still required temporary personal guaranties. *See id.*, Page ID #: 941 ¶ 16. Callidus' new reason for demanding guaranties was a concern that Fortress' appraisal of the assets it was purchasing might be inaccurate. *See id.* Boyer assured Smith that the guaranties would be released once Callidus' appraiser verified Fortress' appraisal. *See id.*

Hours later, however, Callidus arrived at yet another position on guaranties. In a term sheet outlining its loan (Term Sheet, Doc #: 21-4, Page ID #: 501–05), Callidus took the position that Smith and his partners' guaranties would only be released upon satisfaction of the eight conditions precedent to the second stage of Callidus' financing (the "Stage Two Advance"), only one of which was a "satisfactory" appraisal. *Id.*, Page ID #: 504. The others included, most notably, an additional $2 million in equity or debt subordinated to Callidus' loan. *See id.*

Smith realized the Term Sheet placed more conditions on his guaranty's release than Boyer had suggested it would hours before, but chose to sign it because Fortress was already in advanced negotiations with another coal company, Big Sandy Coal Company ("Big Sandy"), to obtain the necessary subordinated debt for Callidus to release its guaranties. *See* Doc #: 22, Page ID #: 942 ¶ 21. He signed it on September 4, 2014 in his capacity as an officer of Fortress, and on September 5, 2014 in his capacity as guarantor. *See id.*

On September 4, 2014, Smith received drafts of Fortress' loan agreement and his guaranty. *See id.*, Page ID: 943 ¶¶ 27–28. Though the Term Sheet Callidus sent him the day before provided for the release of his guaranty on several conditions precedent, neither the loan agreement nor guaranty addressed the terms of its release. *See id.*, Page ID: 943 ¶ 29. However, because the draft loan agreement only addressed the first stage of Callidus' loan, not the Stage Two Advance or the conditions precedent thereon, which were also conditions on the release of his guaranty, Smith believed the loan agreement only controlled the first tranche of Callidus' financing and that the Term Sheet was a binding contract on the second tranche and the conditions for the release of his guaranty. *See id.* Because of this belief, and because Huntington continued to insist on irrevocable guaranties, Smith and his associates executed the loan agreement with Callidus and signed their personal guaranties. *See id.*, Page ID #: 944 ¶¶ 31–33.

After receiving the first stage of financing from Callidus, Fortress immediately spent nearly a third of it on the purchase of its start-up assets and quickly spent most of the balance on necessary start-up expenses, e.g., statutorily required reclamation bonds, insurance, and workers' compensation. *See id.* Fortress could not survive for long on what was left over, and quickly moved to satisfying the Term Sheet's conditions precedent for Callidus' Stage Two Advance. *See id.*, Page ID #:

944–45 ¶¶ 34, 38. While it waited for a satisfactory appraisal from Callidus' appraiser, which it would ultimately obtain in October 2014, *see id.*, Page ID #: 945 ¶ 36, it moved to get Callidus' consent to third-party subordinated debt, which was the other critical condition precedent to Callidus' second advance and the release of the personal guaranties. *See id.*, Page ID #: 945 ¶¶ 36–38. Though Callidus initially represented that it would consent to junior debt, that consent was never given.

On September 8, 2014, Morrison of Callidus told Fortress that Callidus would agree to $2 million in subordinated debt from Big Sandy pending review of terms. *See id.*, Page ID #: 945 ¶¶ 39–40. On October 3, 2014, shortly after Callidus sent Big Sandy a draft subordination agreement, counsel for Big Sandy sent a revised draft back. *See id.*, Page ID #: 945 ¶ 41. Several weeks later, Callidus' counsel replied in a brief email taking issue with several of Big Sandy's revisions—particularly its proposal to only subordinate to the amount of debt that Callidus' Term Sheet contemplated advancing Fortress. *See id.*, Page ID #: 946 ¶ 42. Instead, Boyer subsequently explained, because Fortress required more debt than Callidus had already agreed to potentially lend, Callidus would only consent to Big Sandy's potential loan if it would be willing to subordinate its debt to *150* percent of the maximum amount of financing Callidus had already agreed to offer. *See id.*, Page ID #: 946 ¶ 44.

As it turned out, however, Callidus was unwilling to consent to subordination even to 150 percent of its potential debt. At a meeting on November 13, 2014, Big

Sandy offered to subordinate its proposed $2 million loan to Callidus debt of at least $28 million, or 171% of the financing the Term Sheet contemplated. *See id.*, Page ID #: 947 ¶ 49. Instead of consenting to this proposal, Boyer threatened to veto Big Sandy's proposed loan if it would not raise the cap on senior Callidus debt still further, while encouraging Fortress to reject Big Sandy's loan offer by claiming Callidus was willing to lend much more than what Big Sandy was willing to be subordinated to. *See id.*, Page ID #: 947 ¶ 50.

Though Boyer's assurances of ramped-up financing were welcome, they did not address Fortress' problem: how to get the additional $2,000,000 of equity or subordinated debt needed to actually tap Callidus' Stage Two Advance. After the November 13 meeting, Darryl Levitt of Fortress repeatedly asked Boyer whether Callidus would consent to the Big Sandy loan or waive the $2,000,000 condition precedent. *See id.*, Page ID #: 948 ¶¶ 51–53. Finally on December 10, 2014, after Levitt again put that question to Boyer, Boyer replied that "[w]e waived the need for Fortress to put inthe [sic] additional 2 MM that was to come from Big Sandy" and that he was "[n]ot getting what else you are looking for." *Id.*, Page ID #: 949 ¶ 55.

Fortress' management was puzzled by the claim that Callidus previously waived the $2 million equity/debt condition, as Callidus had not previously informed Fortress of a waiver. *See id.*, Page ID #: 949 ¶ 56. Once Fortress learned, however,

that the last remaining obstacle to the Stage Two Advance had been waived, it proceeded to close on the revolver loan that it desperately needed for working capital. *See id.*, Page ID #: 949 ¶ 57.

The first draft of an amended loan agreement, which included the Stage Two Advance, had been circulated by counsel for Callidus two months prior; negotiations on the agreement had been on hold pending satisfaction of the equity/subordinated-debt condition to that advance. *See id.*, Page ID #: 950 ¶ 60. On December 11, 2014, the morning after Boyer advised Fortress that the condition had been waived, Fortress' counsel wrote to Callidus' counsel to ask why the draft amended loan agreement contained guaranties, noting that Fortress' principals had understood that their personal guaranties would be released upon Callidus' Stage Two Advance. *See id.*, Page ID: 950 ¶ 62. Callidus' counsel replied that "the personal guarantees stay in." E-mail from Kristi A. Katsma to John Rhorer, Doc #: 21-15, Page ID #: 608. Later that day, Boyer explained that that the guaranties' release was "based on the equity coming in"–the very condition to their release that he had waived the day before. Doc #: 22, Page ID #: 950 ¶ 63.

Going forward on the understanding that Callidus' waiver of the junior-debt condition had been retracted as to the guaranties' release, though not as to the Stage Two Advance, Fortress logically proceeded to suggest that the amended loan agreement be revised to release the guaranties upon Fortress' obtaining junior financing.

After Smith made this suggestion to Boyer of Callidus in several emails, all of which were ignored, *see id.*, Page ID #: 951 ¶¶ 65–66, Smith finally was given an opportunity to discuss the terms of the guaranties' release with Boyer in a telephone conversation on January 6, 2015. *See id.*, Page ID: 951 ¶ 67.

In that conversation, Boyer told Smith that the guaranties would be released if—but only if—Fortress received an additional equity infusion of $2 million. *See id.* He explained that additional equity continued to be a condition on the guaranties' release, though not the revolver loan, because of Callidus' concern that some of the leases Fortress had acquired in the bankruptcy sale were assigned to Fortress' parent, Opes Resources, Inc., rather than Fortress itself. *See id.* Smith viewed this as a red herring because Callidus' counsel had previously raised this issue prior to closing on the initial loan agreement, and had been assured by bankruptcy counsel to its apparent satisfaction that the leases could be transferred to Fortress. *See id.* Nevertheless, Smith conveyed Boyer's conditions to Fortress' counsel, who proceeded to revise the amended loan agreement in accord with those conditions. *See id.*

The next day, Fortress' counsel sent a redline of Callidus' draft of the amended loan agreement to Callidus' counsel. *See id.*, Page ID #: 952 ¶ 68. The redline addressed the guaranties in accordance with the terms Boyer stated the day before, providing that they "*shall* be released, at the reasonable discretion of [Callidus], at such time as [Fortress] provide[d] evidence satisfactory to [Callidus] of its

receipt of cash proceeds of an additional equity infusion in the amount of no less than $2 million." Amended and Restated Loan Agreement Draft, Doc #: 21-18**,** Page ID #: 641 ¶ 13(d) (emphasis added).[1]

On January 9, 2015, two days later, Callidus' counsel replied with a blackline of Fortress' redline, stating that "I believe it contains all of [Fortress'] requested changes" with one exception unrelated to the guaranties. E-mail from Kristi A. Katsma to John Rhorer, Doc #: 21-19, Page ID #: 676. However, Callidus' blackline had critically altered the language regarding the guaranties' release in Fortress' redline. The relevant section as revised read in full:

> The personal guaranties granted by Levitt, Smith and Molyneux pursuant to Paragraph 13(a)(iii), *may be released, at the discretion of the Lender*, at such time as the Borrower provides evidence satisfactory to Lender of its receipt of cash proceeds of an additional equity infusion in the amount of no less than $2 million.

Amended and Restated Loan Agreement Draft, Doc #: 21-20, Page ID #: 701 ¶ 13(e) (emphasis added). Smith, however, based on Boyer's representations three days prior that his guaranty would be released if Fortress obtained the requisite equity infusion, fully expected that Callidus would exercise its discretion to release his guaranty if Fortress obtained a $2,000,000 investment, and executed the Amended and Restated Loan Agreement ("ARLA") on that ground. *See* Doc #: 22, Page ID

[1] Read in context of the mandatory "shall," the "reasonable discretion" language appears to have been a reference to Callidus' reasonable discretion in deciding whether the evidence of an equity infusion was satisfactory.

#: 952–53 ¶ 70. On January 9, 2015, Fortress accepted the changes in Callidus' blackline and executed the ARLA (Doc #: 16-6, Page ID #: 218–273), and Smith executed the Reaffirmation of Credit Documents (Doc #: 16-8, Page ID #: 282–87), by which he reaffirmed and extended his guaranty to cover the new debts under the ARLA. *See* Doc #: 22, Page ID #: 953 ¶ 71.

In March 2015, Fortress began to explore a number of avenues to replace Callidus' loan, any one of which would have afforded Fortress the equity infusion necessary to obtain the release of Smith's guaranty. *See id.*, Page ID #: 953 ¶ 72. However, on June 17, 2015, Hilco, Callidus' appraiser, appraised Fortress' equipment and surprisingly found that its orderly liquidation value had increased by $7,451,550, or 45.8%. *See id.*, Page ID #: 953 ¶ 73. Hilco explained the equipment's value had "substantially increased mainly because the equipment is operating," as "buyers of this type equipment want to see the equipment in operation and 'functioning as intended.'" Hilco Appraisal of Fortress Resources LLC, Doc #: 21-21, Page ID #: 729. On the basis of this remarkable appreciation in the value of Fortress' equipment, Boyer and Morrison told Smith shortly thereafter that they would be willing to extend Fortress' loan for another nine months, loan Fortress an additional $2,000,000, and to recommend to their credit committee that Fortress' interest rate be reduced by 2%. *See* Doc #: 22, Page ID #: 953 ¶ 74. Based on these representations, Fortress abandoned its search for alternative financing. *See id.*

Boyer and Morrison's promises, however, were never realized. Fortress never heard back from Callidus on an extension until September 2015. *See id.*, Page ID #: 953–54 ¶ 75. On November 1, 2015, Fortress principals met with Callidus representatives, who claimed that Callidus was willing to extend an additional $2,000,000, reduce Fortress' interest rate by 2%, and extend the term of Fortress' loan nine months. *See id.* But later that day, Callidus reneged and said it was no longer willing to extend Fortress' loan. *See id.* In the following three days, Fortress made draw requests on its revolver for funds it needed to make payroll; those requests were rejected. *See id.* On November 5, 2015, Fortress filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code in the Bankruptcy Court for the Eastern District of Kentucky (the "Bankruptcy Court"). *See* Docket of *In re Fortress Res., LLC*, No. 15-70730 (Bankr. E.D. Ky.), Doc #: 21-22, Page ID #: 775, dkt. entry no. 1.

Callidus heavily litigated Fortress' bankruptcy; Callidus objected to any number of Fortress requests for relief, moved both for stay relief and the appointment of a trustee, and was generally highly active throughout the case. *See generally* Doc #: 21-22, Page ID #: 773–811. Among Callidus' many objections to Fortress' requests for relief were its objections to Fortress' motions to use Callidus' cash collateral. (Callidus' liens covered Fortress' cash.) *See id.*, Page ID #: 779, 789, dkt. entry nos. 39, 130. Those objections were finally resolved on December 16, 2015 by an agreed

order tendered by counsel for Callidus. *See id.*, Page ID #: 794, dkt. entry nos. 172, 176.

In that agreed order, Callidus negotiated for a provision that, "[a]s a condition to [Fortress'] continued use of Cash Collateral," Fortress would bring certain mining equipment that collateralized Callidus' loans "to the surface (and adequately stored and secured on the surface . . .) for potential sale." Final Order Regarding Debtor's Use of Cash Collateral, Doc #: 21-23, Page ID #: 821 ¶ 17. The effect of moving the equipment in the winter from Fortress' underground mines to the surface was, as Callidus itself would later acknowledge, *see* Limited Objection to Debtor's Proposed Sale, Doc #: 21-33, Page ID #: 911 ¶ 3, to severely damage it. *See* Doc #: 22, Page ID #: 954 ¶ 77. Fortress lacked the capital to winterize the equipment, and Callidus refused to provide funds for winterization; Fortress had no warehouses in which to warehouse the equipment, and Callidus refused to provide funds to transport and warehouse the equipment. *See id.* Absent those protective measures, bringing Callidus' collateral from the stable temperature of Fortress' underground mines to the freezing temperatures of the winter surface damaged that collateral, and in Smith's opinion, substantially reduced its value. *See id.*

In the next act of Fortress' bankruptcy that is relevant here, on January 15, 2016, Fortress moved for leave to auction its assets, free and clear of liens (including Callidus'), under 11 U.S.C. § 363(f). *See* Sale Motion, Doc #: 21-24, Page ID

#: 829–37. Section 363(f) authorizes such sales if one of five enumerated conditions is met, one of which is the consent of lienholders. *See* 11 U.S.C. § 363(f)(2). Fortress vaguely suggested it could satisfy one or more of those conditions; the only condition, however, it specifically said it "believe[d]" its proposed sale satisfied was Callidus' consent to the sale. Doc #: 21-24, Page ID #: 835 ¶ 12.

Callidus refused to consent. On January 21, 2016, it filed an objection to Fortress' sale motion, stating that it would not consent to a sale on Fortress' terms, and arguing that Fortress could satisfy none of the other statutory conditions to a free-and-clear sale. *See* Callidus Capital Corporation's Objection to Debtor's Sale Motion, Doc #: 21-25, Page ID #: 842–45. Shortly thereafter it moved for relief from the automatic stay, seeking leave to liquidate its collateral. *See* Doc #: 22, Page ID #: 955 ¶ 80.

On January 29, 2016, after a hearing on Fortress' sale motion and Callidus' stay-relief motion earlier that day, Fortress and Callidus jointly filed a stipulated order disposing of both. *See* Proposed Stipulated Order, Doc #: 21-27, Page ID #: 864. The stipulated order lifted the stay as to some of Callidus' collateral, and authorized a consensual sale free and clear of Callidus' liens as to the balance. Specifically, the stipulated order lifted the stay for Callidus to repossess Fortress' mobile equipment—including the equipment which Callidus required Fortress to bring to the surface—coal stockpiles, cash and accounts receivable. *See id.*, Page ID #: 859–

60 ¶ 1. Before the Fortress bankruptcy, Callidus' appraiser had assigned a forced liquidation value of $11,737,000 to this mobile equipment; the coal stockpiles were worth approximately $7,089,410 at the time the bankruptcy was filed, and Fortress' cash on hand at the time was approximately $100,000. *See* Doc #: 22, Page ID #: 955 ¶ 82.

The stipulated order did not, however, lift the stay on Fortress' real property, lease rights, mining permits, and non-mobile equipment—on which Callidus also had a lien. It provided that Callidus "agree[d] to consent" to the sale of these assets, but that any proceeds would be immediately turned over to Callidus. Doc #: 21-27, Page ID #: 861 ¶ 8. Minutes prior to Fortress and Callidus' joint filing of the stipulated order, Fortress filed a proposed order providing the bidding procedures of the auction to which Callidus had consented. *See* Doc #: 21-22, Page ID #: 802, dkt. entry no. 245.

On February 1, 2016, the Bankruptcy Court approved both the stipulated order and the bidding procedures order without a hearing, subject to slight modifications to the stipulated order, which was modified as ordered and re-tendered by Callidus and Fortress. *See id.*, Page ID #: 802–03, dkt. entry nos. 247–48, 251–52. Callidus

gave Smith notice of neither order, nor of the auction those orders contemplated. Doc #: 22, Page ID #: 956 ¶ 85.[2]

On February 9, 2016, Fortress reported on the auction to the Bankruptcy Court, stating that it received three bids. *See* Report of Auction of Debtor's Assets, Doc #: 21-32, Page ID #: 902–08. The first was a $20,000 bid for five tracts of land, which Fortress rejected "in consultation with Callidus." *Id.*, Page ID #: 904. The second was a $100,000 credit bid by Callidus for the same five tracts, all of Fortress' fixtures and inventory, and all equipment Callidus was not given leave to repossess in the stipulated order. *See id.*, Page ID #: 904–05. The third was a bid by Quest Energy, Inc. ("Quest"), of $100, plus the assumption of all of Fortress' reclamation obligations and environmental liabilities, which amounted to approximately $19 million, for essentially all Fortress' assets still protected by the stay. *See id.*, Page ID #: 905. Fortress selected the Quest bid as highest and best and rejected Callidus' bid. *See id.*, Page ID #: 905–06. On February 12, 2016, after a hearing the day before, the Bankruptcy Court approved the sale to Quest. *See* Order Authorizing Sale of Assets, Doc #: 21-34, Page ID #: 916–33.

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[2] Fortress, however, did serve the approved stipulated order on Smith seven days before the bidding deadline and eight days before the auction itself. Fortress also served a notice of the Bankruptcy Court's approval of bidding procedures on Smith; it did not serve the bidding procedures themselves. *See* Certificates of Service and Notice of Approval of Bidding Procedures, Docs #: 21-29 to 21-31, Page ID #: 871–901.

On April 18, 2016, counsel for Callidus sent Smith a notification of its intent to sell several items of the equipment it had repossessed. *See* Doc #: 21-35, Page ID #: 934–36. The value of these items, according to Hilco's second appraisal for Callidus, was $48,000. *See* Doc #: 22, Page ID #: 957 ¶ 91. None of the items were among the equipment that the cash collateral order required Fortress to remove from the mines to the surface. *Compare* Doc #: 21-23**,** Page ID #: 821 ¶ 17, 828, *with* Doc #: 21-35. This was the only notification of a sale Smith received from Callidus before the District Court took Callidus' summary-judgment motion under submission. *See* Doc #: 22, Page ID #: 958 ¶ 92. Prior to entry of judgment, Smith received a notification of a sale of another piece of equipment for $27,500, and since the entry of the Judgment, Smith has received notifications of sales totaling $575,000.

On December 11, 2015, Callidus sued Smith under his guaranty for the full amount of Fortress' unpaid debt. *See* Complaint, Doc #: 1, Page ID #: 1–5. On April 6, 2016, the District Court entered a scheduling order setting a discovery deadline of November 4, 2016 and a dispositive-motion deadline of December 5, 2016. *See* Doc #: 12, Page ID #: 134–35. Callidus moved for summary judgment on May 18, 2016. *See* Doc #: 16, Page ID #: 143–44.

Smith filed his opposition to that motion on June 27, 2016, arguing that summary judgment should be denied on the record as it existed, and that, in the alternative, he should be given time under Rule 56(d) to take discovery in support of his

opposition to summary judgment. *See* Doc #: 21, Page ID #: 439–79. A portion of his declaration filed in support of his opposition to summary judgment also addressed his need for discovery. *See* Doc #: 22, Page ID #: 958–60 ¶¶ 95–101. At the time, no discovery whatsoever had been taken in the action, *see id.*, Page ID #: 958 ¶ 93; Smith served his first discovery requests the day he filed his opposition. *See id.*, Page ID #: 958 ¶ 94.

On September 7, 2016, the District Court entered the Opinion granting Callidus summary judgment in the amount of $21,475,254.23—the amount of Fortress' indebtedness to Callidus. *See* Doc #: 36, Page ID #: 1039. The Opinion implicitly denied, but did not explicitly address, Smith's request for additional time to take discovery. The Judgment entered the next day. *See* Doc #: 37, Page ID #: 1040–41.

STANDARD OF REVIEW

This Court reviews grants of summary judgment de novo, *see Horton v. Potter*, 369 F.3d 906, 909 (6th Cir. 2004), and reviews denials of a non-movant's request for additional discovery prior to the entry of summary judgment for abuse of discretion. *See Alspaugh v. McConnell*, 643 F.3d 162, 166 (6th Cir. 2011).

SUMMARY OF ARGUMENT

Smith offered three defenses to Callidus' action on his guaranty below. The District Court rejected the first defense by overlooking the key piece of evidence

supporting it, rejected the second defense by overlooking the key statute supporting it, and rejected the third defense by overlooking the best third of the defense.

Under Kentucky law, a secured creditor that fails to notify its guarantor of its disposition of collateral is barred from recovering a deficiency judgment against him, even if the guarantor had actual notice of the disposition. Under the U.C.C. as interpreted in other states, and according to Smith, as it would be interpreted in Kentucky, a sale for a secured party by its primary obligor is deemed the secured party's own disposition of collateral if the secured party has the leverage to block the sale and allows it. The District Court agreed or assumed that all this was the law. Smith argued that under this law, when Callidus gave its legally necessary consent to Fortress' bankruptcy sale of its collateral, Callidus disposed of that collateral, and that its failure to give him notice of the sale barred it from recovery. The District Court's response was to overlook Callidus' tendering of the very order that authorized the sale and to insist that the Bankruptcy Court allowed the sale over Callidus' objection. That clear error requires reversal.

Next, it is Kentucky law, *see* KRS § 355.9-626, that a secured party's unreasonable disposition of collateral reduces its debtors' and guarantors' liability to the deficiency that would have obtained had it disposed of its collateral reasonably, and that it is rebuttably presumed that deficiency would have been zero absent proof to

the contrary. The District Court, acknowledging that Callidus might well have unreasonably disposed of its collateral, ignored § 355.9-626 and held commercial reasonableness was not a defense to liability under Kentucky law but only the basis for a subsequent countersuit by Smith. That clear legal error requires reversal.

Next, Smith argued that his execution and reaffirmation of his guaranty was fraudulently induced by three promises that a reasonable jury could find Callidus had no intention of performing, one of which was its contractual promise to exercise discretion regarding his guaranty's release upon the satisfaction of a condition precedent. The District Court ignored that third of Smith's fraudulent-inducement defense and held, as to the other two thirds, that Smith could not reasonably rely on representations contrary to the contractual representation on which he said he relied, though one of the two representations actually addressed *how* Callidus would exercise the discretion it promised to exercise. That too merits reversal.

Finally, the District Court denied, without comment, Smith's well-supported request for discovery as to the latter two of his three defenses, of which he had none, before consideration of summary judgment. If that discovery could have been material, the District Court's denial of it was an abuse of discretion.

ARGUMENT

I. Callidus' Failure to Notify Smith of Its Disposition of Its Collateral Through the Bankruptcy Sale It Authorized Barred It From Recovering Against Smith; The District Court's Finding that Callidus Objected to That Sale Was Mistaken.

When a secured creditor sells its collateral upon its borrower's default, it is essential that the borrower and any guarantors of the borrower's debt receive notice of the sale, in order that they can ensure the sale is conducted in a reasonable fashion that maximizes the secured creditor's proceeds and minimizes their liability for any remaining deficiency. To that end, Article 9 of the U.C.C., as adopted in Kentucky (whose law controls this appeal), requires secured parties to notify debtors and guarantors of collateral sales before they happen. Kentucky's codification of U.C.C. § 9-611 requires "a secured party that disposes of collateral under KRS 355.9-610 . . . to send to the persons specified in subsection (3) of this section a reasonable authenticated notification of disposition." KRS § 355.9-611(2). Subsection (3) requires the secured party to "send an authenticated notification of disposition to," inter alia, "[a]ny secondary obligor"—Article 9 parlance for a guarantor.[3] KRS § 355.9-611(3). And § 355.9-610, cross-referenced in § 355.9-611(2), permits a secured party, upon default, to "sell, lease, license, or otherwise dispose of any or all of the

[3] *See* KRS §§ 355.9-102(1)(b)(g), (b)(t) (defining "obligor" and "secondary obligor").

collateral[.]" KRS § 355.9-610(1). In sum, a secured party that sells its collateral post-default must notify any guarantor of the intended sale in advance.[4]

The appropriate consequences for a secured party's failure to notify a debtor or obligor of disposition of collateral have long been a matter of debate. *See Bank of Guam v. Del Priore*, 2001 Guam 10 ¶¶ 10–14 (cataloguing the various lines of authority on this issue). In Kentucky, however, the question is settled. As the District Court correctly acknowledged, under Kentucky law, "[i]f a secured creditor disposes of collateral and fails to provide the requisite notice, the creditor is estopped from collecting a deficiency judgment against the secondary obligor." Doc #: 36, Page ID #: 1025 (citing *Holt v. Peoples Bank of Mount Washington*, 814 S.W.2d 568, 570 (Ky. 1991)); *see also Holt*, 814 S.W.2d at 571 ("When notice is omitted, the principle of estoppel heretofore recognized by the courts of this Commonwealth prevents recovery of any deficiency judgment.").

Below, Smith argued that by negotiating and giving its legally necessary consent to the sale of its collateral in Fortress' bankruptcy, Callidus disposed of its collateral, that it was therefore required to give Smith notice of that disposition, and that, because it failed to do so, it was barred from recovering a deficiency judgment

[4] *See* KRS § 355.9-612 (entitled "Timeliness of notification before disposition of collateral"); KRS § 355.9-613(1)(b)–(c), (e) (providing that a notification of disposition should address the collateral's "intended" disposition and the time when "disposition is to be made").

against him. The bankruptcy sale of Callidus' collateral should be deemed *Callidus'* disposition of its collateral for three reasons.

First, the sale was conducted for Callidus' benefit. The order controlling the sale provided that the automatic stay, which otherwise would have protected the sale proceeds from Callidus, was lifted as to those proceeds, and that they would be "immediately turned over to Callidus . . . ." Doc #: 21-27, Page ID #: 861 ¶ 8.

Second, Callidus consented to the sale and its consent was legally necessary to the sale. "Callidus agree[d] to consent to the 363 sale or sales of [its collateral], free and clear of Callidus' liens," on certain conditions, *id.*, and but for that consent, the sale never could have occurred. Under 11 U.S.C. § 363(f), Fortress could only have sold Callidus' collateral free and clear of Callidus' liens by showing it could satisfy one of five conditions, one of which was Callidus' consent. *See* 11 U.S.C. § 363(f)(2). As Callidus accurately wrote in its initial objection to Fortress' sale motion, Fortress made no attempt to "demonstrate that the proposed asset sale satisfie[d] any of the conditions of 363(f)," Doc #: 21-25, Page ID #: 842 ¶ 12, but rather "assume[d] (and [wa]s hoping) that Callidus w[ould] consent to the proposed sale, thereby satisfying Section 363(f)(2)." *Id.*, Page ID #: 843 ¶ 13. Indeed, Fortress' sale motion did not even identify a single § 363(f) condition it could possibly meet besides Callidus' consent. *See* Doc #: 21-24, Page ID #: 835 ¶ 12 (vaguely suggesting that Fortress "believe[d] that a sale by auction satisfie[d] one or more of the[]

[§363(f)] conditions . . . including the consent of Callidus to the sale of the Assets.”). And as Callidus persuasively argued prior to renegotiating and consenting to the sale, it would have been impossible for Fortress to satisfy any of the other § 363(f) conditions.[5] *See* Doc #: 21-25, Page ID #: 843–44 ¶¶ 14–16.

Third, Callidus negotiated the terms of the sale. Callidus itself prepared and tendered the order approving the sale to the Bankruptcy Court. *See id.*, Page ID: 864. As a condition to Callidus’ consenting to the sale of half of its collateral and releasing its request for stay relief as to that half, Fortress waived the protections of the automatic stay and allowed Callidus to repossess the other, more valuable half—including most of Fortress’ equipment and all its coal stockpiles, cash and accounts receivable. *See id.*, Page ID #: 859–61 ¶¶ 1–3. Callidus also put conditions on its consent specifically regarding the conduct of the sale, stating that it “agree[d] to consent . . . so long as . . . [Fortress] . . . ma[de] good faith efforts to obtain cash proceeds,” as opposed to the mere assumption of liabilities—a check on Fortress’ discretion that would not otherwise have applied. *Id.*, Page ID #: 861 ¶ 8.

[5] The other four conditions were a sale for value greater than the aggregate value of Callidus’ liens, *see* 11 U.S.C. § 363(f)(3), which was not the outcome at auction, a bona fide dispute about Callidus’ liens, *see* 11 U.S.C. § 363(f)(4), which did not exist, or a circumstance where nonbankruptcy law would permit a free-and-clear sale or allow Fortress to compel Callidus to accept a money satisfaction of its liens, which was not present. *See* 11 U.S.C. §§ 363(f)(1), (5).

Under these special circumstances, Smith argued that Callidus' consent to Fortress' sale of its collateral constituted a disposition of that collateral *by Callidus*, and that Callidus was required to give him notification of that disposition, which it failed to do. *See* KRS § 355.9-611(2) (requiring "a secured party that disposes of collateral under KRS 355.9-610 . . . [to] send . . . a reasonable authenticated notification of disposition" to guarantors). In so arguing, Smith relied on the sole published case addressing when, if ever, a debtor's sale of collateral constitutes a secured party's disposition of collateral of which the secured party must give guarantors notice.

In that case, the Tennessee Court of Appeals held that whether a sale of collateral is deemed a disposition by the secured party under U.C.C. § 9-610 does not turn on "[w]hether a creditor has possession of collateral," but rather on "whether the creditor has the control or leverage to approve or disapprove the transaction, *i.e.*, whether the secured party's participation in the disposition is necessary for its effectuation." *Regions Bank v. Trailer Source*, No. M2008-01167-COA-R3-CV, 2010 WL 2074950, at *8 (Tenn. Ct. App. May 21, 2010). In a case where a secured party has such leverage over a debtor's sale, the court held, a secondary obligor or junior creditor can challenge that sale for compliance with the provisions of the U.C.C. governing secured parties' disposition of collateral just as much as if the secured party sold the collateral itself. *See id.*

In the case of the bankruptcy sale of Callidus' collateral, Smith argued, nothing less than the Bankruptcy Code gave Callidus the leverage to approve or disapprove the sale; under § 363(f), given Fortress' failure and inability to meet any of the other statutory conditions for a sale, Callidus' consent was legally "necessary for its effectuation." Further, Smith argued, there was no reason to think Kentucky would reject its neighboring state's interpretation of what counts as a secured party's disposition under § 9-610. When a secured party agrees to let its debtor sell its collateral on its behalf and dictates the manner in which its collateral will be sold, and where the sale could not occur but for its agreement, it has surely "disposed" of its collateral. And the reasons for requiring secured parties to give notice of their own sales apply with equal force to sales for secured parties that they control. Because the U.C.C. only regulates notice by secured parties, not debtors, a contrary interpretation would leave guarantors powerless to oppose or participate in sales that will determine the amount of the deficiencies for which they will be held liable.

The District Court could have rejected this argument in a number of ways. It might have predicted that Kentucky would not adopt *Regions Bank*'s interpretation of § 9-610; it could have held (contrary to considerable authority, including a deci-

sion of this Court interpreting the Kentucky U.C.C.[6]) that Smith's actual notice of the bankruptcy sale from *Fortress* excused Callidus' violation of § 355.9-611. While neither line of reasoning would have been correct in Smith's view, both would at least have been colorable. The District Court, however, took a much stranger path to rejecting Smith's notice argument. In spite of Callidus' concession below that "it is true that Callidus eventually provided its consent to the sale," Callidus Reply in Support of Summary Judgment, Doc #: 29, Page ID #: 990, the District Court somehow concluded that "Callidus did *not* consent to the sale in any meaningful sense." Doc #: 36, Page ID #: 1027 (emphasis added). The District Court reached this conclusion by way of a tortured reading of the bankruptcy record that ignored all the evidence of Callidus' consent in favor of an alternate reality in which Fortress illegally obtained leave from the Bankruptcy Court to sell Callidus' collateral without its consent.

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[6] In *Chrysler Credit Corp. v. H & H Chrysler-Plymouth Dodge, Inc.*, 927 F.2d 270 (6th Cir. 1991), this Court held that the fact a guarantor was present at a collateral sale and had knowledge of the negotiations leading up to it did not "satisfy the requirements of [Kentucky's predecessor statute to § 355.9-611] that [the secured creditor] *notify* [the guarantor] of a *time* after which the collateral could be sold." *Id.* at 274 (first emphasis added). As Smith further argued below, courts have even held that written notice by the wrong party does not cure a § 9-611 violation, *see* Doc #: 21, Page ID #: 461 (citing *Stoppi v. Wilmington Tr. Co.*, 518 A.2d 82 (Del. 1986)); moreover, the notice of the sale that *Fortress* gave Smith was both lacking in statutorily required content and, under Kentucky law, likely not sent within a reasonable time of the sale. *See id.*, Page ID #: 461–62.

The District Court's argument that Callidus did not consent to or control the sale began with a close reading of the events leading up to Callidus' ultimate consent to the sale: Fortress' sale motion that said Fortress merely "'believe[d]' that it had Callidus' support for the sale," *id.*, and Callidus' initial objection to that motion. The District Court drew the conclusion from these filings that "Callidus did not consent to the sale in any meaningful sense. Instead, Callidus objected to the sale." *Id.* This completely misses the point. Callidus objected to the sale as initially proposed by Fortress; it consented to the sale as it actually occurred. The District Court glossed over the only important point about Fortress' sale motion and Callidus' initial objection—that because the only § 363(f) condition Fortress claimed it could satisfy (or could possibly have satisfied) was Callidus' consent, Callidus' consent was legally necessary to the sale—responding that "[t]he fact that Fortress *attempted* to show Callidus' consent does not mean that Callidus gave its consent." *Id.* True—if not for the fact that the Bankruptcy Court approved the sale. Given that Fortress only attempted to satisfy § 363(f) by Callidus' consent, and that the Bankruptcy Court ultimately allowed the sale under § 363(f), Callidus' consent was not only a legal certainty, but a legal necessity. How else could the sale have been allowed? The District Court did not (and could not) explain.

Then, in an unaccountable flight of fancy, the District Court, completely skipping over the fact that after Callidus objected to a sale on Fortress' terms, it tendered

the order "agree[ing] to consent to the 363 sale" on its terms that the Bankruptcy Court granted,[7] claimed that "[t]he Bankruptcy Court ultimately approved the sale *over Callidus' objections*." Doc #: 36, Page ID #: 1028 (emphasis added). That is flatly false. It is also, given Fortress' failure to argue any § 363(f) condition but consent, legally impossible.

Having skipped over the circumstances of the sale's approval and turned to the conduct of the sale, the District Court dwelled on the irrelevant point that Callidus' $100,000 credit bid was rejected in favor of Quest's vastly superior bid to assume $19 million in reclamation liabilities, claiming that the rejection of Callidus' bid "demonstrates Callidus' lack of control[.]" *Id.* This is a complete non sequitur. When a secured party *itself* sells its collateral at auction and credit-bids on that collateral, the sale is still the secured party's sale even if (as happens often) the secured party's auctioneer sells the collateral to a higher bidder. Control of sale *outcomes*, therefore, cannot be the test for whether a sale is deemed a secured party's; control of whether and on what terms a sale occurs is the only test that would not transform what are undeniably U.C.C. sales into non-U.C.C. sales. It is also the only workable test; the outcome of a sale cannot determine whether a secured party must give *pre*-sale notice of the sale. A rule for whether a secured party must give pre-sale notice

[7] Doc #: 21-27, Page ID #: 861 ¶ 8. Strangely, the District Court cited virtually every document in the record of the history of the sale *but* the order Callidus tendered to the Bankruptcy Court allowing it.

must turn on pre-sale facts—like whether the secured party controls whether or not the sale takes place. Hence, the fact that Callidus did not *win* the sale does not show that it did not control it in the relevant sense, any more than the fact a secured party does not win its own auction shows that its auction was not its sale.

Finally, the District Court bizarrely concluded that "[w]hile the Bankruptcy Court ultimately approved the sale and stated that Callidus is deemed to have consented to for purposes of § 363"—an accurate statement, *see* Doc #: 21-34, Page ID #: 921 ¶ L.—"the record establishes that Callidus did not consent to the sale in any meaningful sense." Doc #: 36, Page ID #: 1028–29. How the Bankruptcy Court could have so grievously erred as to find phantom consent and approve a sale solely on that basis, how this disturbing reading of the bankruptcy record could be squared with Callidus' admission to the District Court that it consented, *see* Doc #: 29, Page ID #: 990, or how, in any event, the Bankruptcy Court's necessary finding would not be preclusive as to Callidus, the District Court did not explain.

Besides its fantasy of an illegal sale founded on phantom consent, the District Court gave virtually no alternative reasoning for rejecting Smith's notice defense. The District Court generally "assum[ed] there are circumstances in which a secured creditor can be deemed to have disposed of its collateral when the debtor sells it." Doc #: 36, Page ID #: 1028; *see also id.*, Page ID #: 1026 (assuming "consenting

and negotiating [a sale] were sufficient to establish control of the sale"). There are but a couple sentences of ipse dixit in the District Court's opinion to the contrary.

First, immediately before assuming that consent and negotiation did amount to control and extensively arguing that Callidus did not consent, the District Court tersely asserted that "[a]s an initial matter, consenting to a sale and negotiating its terms does not rise to the level of actively controlling the sale, and Smith fails to cite contrary authority." *Id.* (The District Court cited no authority of its own for this proposition.) As the District Court's own opinion shows, this is incorrect. Smith relied on *Regions Bank*'s holding, which the District Court quoted and accurately described a page before, that "when a debtor sells the secured creditor's collateral, the creditor is nonetheless deemed to have disposed of the collateral if the creditor had 'the control or leverage to approve or disapprove the transaction, i.e., [if] the secured party's participation in the disposition is necessary for its effectuation.'" *Id.*, Page ID #: 1025 (quoting *Regions Bank*, 2010 WL 2074590, at *8). In other words, if a sale cannot happen without the secured party's approval and the secured party gives its approval, the sale is deemed the secured party's.

One might assume, given its terse rejection of *Regions Bank*'s rule, that the District Court rejected *Regions Bank* as a matter of predicting Kentucky law, or at least rejected Smith's interpretation of it. In fact, the District Court's sole discussion of *Regions Bank* consists of a misguided attempt to distinguish it by pointing to facts

in *Regions Bank* that are also the facts of this case. Writing of *Regions Bank*, the District Court claimed that "[u]nlike Callidus, the creditor directed the third party to sell the collateral, and it immediately received the proceeds from the sale." *Id.*, Page ID #: 1026. In reality, Callidus, if it did not "direct" Fortress to sell its collateral, tendered an order directing Fortress to do so on various conditions for how it was to do it—one of which was that "[a]ny cash generated from the sale . . . w[ould] be immediately turned over to Callidus[.]" Doc #: 21-27, Page ID #: 861 ¶ 8 (emphasis added). So much for *Regions Bank* being a different case.

The balance of the District Court's alternative reasoning is limited to two densely packed sentences. Approaching its conclusion that "Smith cannot hide behind [the notice] requirement," the District Court reasoned that "[i]t would be unfair to impose forfeiture on a party for failing to provide notice of a sale that it was legally prohibiting [sic] from conducting and had little to no ability to control while receiving little or no benefit. This is particularly true where, as here, the guarantor is so closely affiliated with the debtor that the protections of notice are unnecessary and requiring notice would be superfluous." Doc #: 36, Page ID #: 1029.

These sentences contain four unreasoned ideas. The first is that secured parties need not give notice of a sale they are "legally prohibit[ed] from conducting," which is just to say that a sale is only the secured party's if it conducts it, notwithstanding the District Court's assumption just five lines before and throughout its

opinion that debtor sales could be deemed secured-party dispositions given consent. *See id.*, Page ID #: 1028. The second idea seems to be that a disposition is only the secured party's if it "controls" who buys the collateral; as explained above, this is a self-refuting proposition. The third idea is that a secured party must receive more than a "little" benefit from a sale in order to be required to give notice; for similar reasons, this is also a self-refuting proposition. (Not all secured-party sales are successful, and sale price is not a workable nor remotely plausible test for when a secured party must give *pre*-sale notice.) Fourth, notice to Smith was superfluous because of close affiliations that merely rendered actual notice from Fortress probable. Smith does not dispute that he *did* receive notice of the sale from Fortress, and in an abundance of candor filed those notices in the record below. However, this Court has held that under the Kentucky U.C.C. actual notice is immaterial to the existence of or appropriate remedy for notice violations, as have other courts interpreting other states' enactments of the U.C.C. *See ante* at 28 n.6, discussing *Chrysler Credit Corp. v. H & H Chrysler-Plymouth Dodge, Inc.*, 927 F.2d 270 (6th Cir. 1991), *supra*.

In sum, the District Court's rejection of Smith's notice defense cannot be affirmed on the grounds the District Court gave. If *Regions Bank*'s test for when a third-party sale is a secured party's disposition is correct, which Smith submits it is, it is indisputable that Fortress' consensual sale meets that test. As for the District Court's fleeting suggestion that Smith's actual notice rendered notice by Callidus

superfluous, to embrace it this Court would have to overrule its precedent on Kentucky secured-transactions law and predict that Kentucky would become an outlier among jurisdictions that have addressed that issue. Callidus' failure to notify Smith of its disposing of its collateral by consenting to its sale on Callidus' behalf bars Callidus, under Kentucky law, from recovering against him.

II. Genuine Issues of Fact as to Whether Callidus' Disposition of Its Collateral Was Commercially Reasonable Bar Entry of Summary Judgment in Callidus' Favor; The District Court's Holding That Commercial Reasonableness Does Not Affect Whether or in What Amount a Creditor Is Entitled to a Deficiency Judgment Is Incorrect.

Having ignored the key piece of evidence to Smith's notice defense, the District Court ignored the key statute to Smith's commercial-reasonableness defense, namely, KRS § 355.9-626, which dictates the consequences for a commercially unreasonable disposition of collateral.

As an initial matter, Kentucky's U.C.C. provides that "[e]very aspect of a disposition of collateral, including the method, manner, *time*, place, and other terms, must be commercially reasonable." KRS § 355.9-610(2) (emphasis added). The official U.C.C. comment on this section elaborates that "if a secured party . . . holds collateral for a long period of time without disposing of it, and if there is no good reason for not making a prompt disposition, the secured party may be determined not to have acted in a 'commercially reasonable' manner." U.C.C. § 9-610 cmt. 3. Courts agree that a creditor that has "unreasonably 'sat'" on its collateral has not

reasonably disposed of it. *Solfanelli v. Corestates Bank, N.A.*, 203 F.3d 197, 202 (3d Cir. 2000); *see also In re King*, 305 B.R. 152, 172 (Bankr. S.D.N.Y. 2004) (holding that simply failing to sell "collateral at a public or private sale, or show[] a 'good reason' for not making a prompt disposition," is itself an unreasonable disposition). And Kentucky courts hold that a creditor that does not properly "safeguard [its] collateral" and "allow[s] [it] to deteriorate" prior to selling it has not reasonably disposed of its collateral. *Bank Josephine v. Conn*, 599 S.W.2d 773, 775 (Ky. Ct. App. 1980).

In light of § 355.9-610 and these interpretations of it, Smith argued that there were genuine disputes of fact as to whether Callidus had acted commercially reasonably in demanding, as a condition of Fortress' use of Callidus' cash collateral, that Fortress bring Callidus' collateral equipment out of Fortress' underground mines to the surface in winter, significantly damaging that equipment and decreasing the value Callidus could realize from it, *see ante* at 14, and whether that damage had prevented Callidus from making a reasonably timely sale of virtually all the equipment. And the District Court did not deny that these disputes were real. *See* Doc #: 36, Page ID #: 1034 (instead reasoning that "the issue of whether Callidus has dealt with its collateral in a commercially unreasonable manner is irrelevant.").

Of course, these genuine disputes of fact would not be genuine disputes of *material* fact unless the reasonableness of Callidus' disposition of its collateral bore

in some way on Smith's liability to Callidus. Kentucky's U.C.C., however, plainly provides that whether a secured party has acted commercially reasonably in disposing of its collateral *does* control whether and to what extent its debtors and guarantors are liable to it, in the following way.

"[I]n an action arising from a transaction, [excepting] consumer transaction[s], in which the amount of a deficiency or surplus is in issue, the following rules apply[.]" KRS § 355.9-626(1). If a debtor or secondary obligor puts its secured party's compliance with Article 9's provisions on disposition of collateral at issue—including § 355.9-610's requirement of commercial reasonableness—"the secured party has the burden of establishing that the . . . disposition . . . was conducted in accordance" with those provisions. KRS § 355.9-626(1)(b). If the secured party "fails to prove that the . . . disposition . . . was conducted in accordance with th[os]e provisions . . . the liability of a debtor or a secondary obligor for a deficiency is limited" to the difference between the secured obligation plus expenses and attorney's fees, and "the greater of: 1. The proceeds of the . . . disposition . . . ; or 2. The amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with the provisions of [Article 9] relating to . . . disposition[.]" KRS § 355.9-626(c). Finally, "[f]or purposes of paragraph (c)2. . . . the amount of proceeds that would have been realized is [deemed] equal to the sum

of the secured obligation, expenses, and attorney's fees unless the secured party proves that the amount is less than that sum." KRS § 355.9-626(d).

In sum, what this complex but not ambiguous statute means, as applied to the commercial-reasonableness requirement of § 355.9-610, is this. If a debtor or guarantor raises commercial reasonableness as a defense, the secured party has the burden to prove it disposed of its collateral reasonably. If that secured party fails to meet its burden, the debtor or guarantor is only liable for the deficiency the secured party would have been left with had it disposed of its collateral reasonably. However, if the secured party acted unreasonably, it is rebuttably presumed that its deficiency would have been reduced to zero had it not acted unreasonably, and that its debtor or guarantor's *deficiency liability* is therefore zero, unless it proves that a commercially reasonable disposition would have left some deficiency. If it proves the deficiency it *would have* had if it had acted commercially reasonably is greater than zero, then its debtor or secured party is liable for *that* deficiency, and only that deficiency.

This rule, or set of rules, is known as the rebuttable presumption rule, *see* U.C.C. § 9-626 cmt. 3, and it has been Kentucky law since 1991, a decade before § 355.9-626 was enacted, when the Kentucky Supreme Court adopted the position that won out in the revision of Article 9. *See Holt*, 814 S.W.2d at 571 (adopting "a

presumption that the collateral is worth at least the amount of debt it secures," holding that "the burden is cast upon the secured party to prove that the commercial unreasonableness did not result in diminished proceeds, or if it did, by what amount," and that "[u]pon failure of the secured party to prove that its conduct did not diminish the proceeds, the presumption that the collateral is of sufficient value to satisfy the debt would control and the claim for deficiency would be forfeited."). Courts, including the District Court's colleagues, have had no difficulty in discerning what § 355.9-626 commands. *See, e.g.*, *Fifth Third Bank v. Miller*, 767 F. Supp. 2d 735, 738 (E.D. Ky. 2011) (holding that "[a] secured party that fails to establish the commercial reasonableness of its action in holding and disposing of the collateral in question may be estopped from obtaining a deficiency judgment against the debtor" and denying a secured party summary judgment on the ground that it might have disposed of its collateral unreasonably) (citing § 355.9-626(1)(c)).

In spite of this statutory clarity and over a quarter-century of Kentucky law, the District Court reached the astonishing conclusion that "the issue of whether Callidus has dealt with its collateral in a commercially unreasonable manner is irrelevant," Doc #: 36, Page ID #: 1034, on the theory that "even if a creditor behaves in a commercially unreasonably [sic] manner in disposing of collateral, such actions do not affect whether the creditor is entitled to a judgment for the amount of the debt," but merely allow a debtor or guarantor to "initiate a subsequent proceeding

against the creditor for any unreasonableness in the disposition." *Id.*, Page ID #: 1029. That is, even if the reason Callidus has a $21 million deficiency were its unreasonable disposition of its collateral—indeed, even if the entire deficiency were a result of Callidus' unreasonable disposition—it is entitled to a judgment for the full amount of that deficiency against Smith, on which it can proceed to collect. Smith, should he mind being held liable for Callidus' $21 million deficiency that resulted from Callidus' own unreasonableness, could then sue Callidus in a *subsequent* action to get the money back.

How did the District Court reach this conclusion? The District Court reached it by ignoring § 355.9-626 (which is never cited in its opinion) and indeed any Kentucky law on deficiency judgments whatsoever, while tortuously misconstruing the secured-transactions law of various other states. According to the District Court, "Kentucky courts have not addressed the issue" of whether creditors are "required to dispose of collateral before obtaining a judgment on [a] financing document[.]" Doc #: 36, Page ID #: 1030. However, other courts have held that creditors may elect to sue *before* disposing of collateral. *See id.*, Page ID #: 1030–31. And because a creditor is permitted to simply pursue judgment for the full secured obligation without disposing of its collateral, it logically follows (according, purportedly, to

intermediate appellate courts in Georgia and Oregon[8]) that a creditor can also seek its full secured obligation, or at least its full deficiency, "regardless of whether it has disposed of its collateral or has done so reasonably." *Id.*, Page ID #: 1033. As the District Court put it, "[g]iven that the UCC permits a creditor to pursue a judgment on a note while retaining possession of collateral . . . any commercial unreasonableness relating to a creditor's disposition of collateral has no impact on its entitlement to a judgment for the amount of the indebtedness pursuant to the financing documents." *Id.*, Page ID #: 1032. If a creditor is entitled to a judgment for its full debt without disposing of its collateral at all, the argument seems to go, it cannot be entitled to less because it disposes of its collateral unreasonably.

Whether or not this logically follows (it doesn't, for the obvious reason that once a creditor sells its collateral it can only seek its deficiency), it is not Kentucky law, or even, in reality, Georgia or Oregon law. It is true that a secured creditor may simply sue its debtor or guarantor for their full indebtedness without disposing of its collateral. In such a case, commercial unreasonableness of disposition cannot be an issue, because there is no disposition to *be* unreasonable, and in such an action, U.C.C. § 9-626 is inapplicable because the action is not one "in which the amount

[8] *See id.*, Page ID #: 1031–32 (citing *Okefenokee Aircraft, Inc. v. PrimeSouth Bank*, 676 S.E.2d 394 (Ga. Ct. App. 2009); *VFS Fin., Inc. v. Shilo Mgmt. Corp.*, 372 P.3d 582 (Or. Ct. App. 2016)).

of a deficiency . . . is in issue." KRS § 355.9-626(1). As there has been no disposition, the secured obligation has not yet been reduced to a post-disposition deficiency. *See* U.C.C. § 9-626 cmt. 2 (explaining that § 9-626 applies to "situations in which the secured party *has* . . . disposed of . . . the collateral.") (emphasis added). This is what the Georgia case relied upon so heavily by the District Court holds; it held that the reasonableness of a secured party's *non*-disposition of collateral was a confusion in terms, as the secured party there was "attempting to reduce its claim to judgment . . . not seeking to recover a deficiency" left over from a disposition that had yet to take place.[9] *Okefonokee Aircraft*, 676 S.E.2d at 396.

What does not follow, or at least what is not the law in Kentucky or anywhere else, is that if a secured party *does* dispose of its collateral, either by action or protracted inaction, *see* U.C.C. § 9-610 cmt. 3, the amount of its deficiency is unaffected by how it does it. Section 355.9-626 does not apply in all cases to reduce

[9] The Oregon case the District Court relied upon held that "as a matter of law, it is *not* commercially unreasonable for a secured party to litigate damage claims on a debt while continuing to hold the secured property" indefinitely, U.C.C. § 9-610 comment 3 and the cases following its lead notwithstanding—not that a deficiency judgment cannot be reduced by virtue of commercial unreasonableness. *VFS Fin., Inc.*, 372 P.3d at 585. To the contrary, the court wrote that "a debtor may argue in the deficiency action that [a] *sale* was not commercially reasonable" and thereby reduce its liability. *Id.* at 585 n.3 (emphasis added). The District Court never addressed whether Callidus' sitting on its collateral because it had damaged it was commercially unreasonable.

debtor/guarantor liability, but it does unambiguously apply by its terms "[i]n an action arising from a transaction . . . in which the amount of a deficiency or surplus is in issue." KRS § 355.9-626(1). The question, then, in deciding whether § 355.9-626 is applicable here is simply whether this is an action in which the amount of a deficiency is at issue. It undeniably is for three reasons.

First, in the bankruptcy sale of its collateral that Callidus helped structure and to which it acquiesced, the assets Callidus did not repossess were sold for $100, plus the assumption of reclamation liabilities; the $100 was remitted to Callidus. This sum, however miniscule, reduced the debt owed Callidus to a deficiency. Second, several weeks before moving for summary judgment, Callidus itself sold six pieces of its repossessed collateral, *see* Doc #: 21-35; days before summary judgment was entered, Callidus disclosed in discovery that it sold these items for $46,500.[10] Presumably, this amount (like the $100) was credited against Fortress' debt when Callidus calculated the deficiency it was still owed in support of its motion for summary judgment. *See* Affidavit of Craig Boyer, Doc #: 16-11, Page ID #: 408 ¶ 3. Third, as Kentucky law deems the unreasonable pre-sale handling of collateral or the failure to sell it because it has been destroyed an unreasonable *disposition* of it, *see Bank Josephine*, 599 S.W.2d at 775; U.C.C. § 9-610 cmt. 3, allegations that a secured

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[10] Callidus also disclosed sales for Callidus by Fortress of Fortress coal inventory, as to which the stay was lifted, for unspecified amounts. These sales presumably were also applied to reduce Fortress' and Smith's liability.

party has so acted trigger § 355.9-626. For wherever there is a disposition, even for no proceeds, there is a deficiency. *See* U.C.C. § 9-626 cmt. 2 ("This section addresses situations in which the amount of a deficiency . . . is in issue, *i.e., situations in which the secured party has . . . disposed of . . . the collateral*.") (emphasis added).

The District Court's error, then, was fundamental. Ignoring the whole of Kentucky law on commercial reasonableness and deficiency judgments, it constructed an alternate reality of secured-transactions law that exists nowhere in America. Not every action on a secured debt is a deficiency action subject to commercial-reasonableness limits on liability, but by definition a case where a secured party unreasonably disposes of its collateral is one. In the District Court's world, not only is commercial unreasonableness not a defense to deficiency liability, § 355.9-626 notwithstanding, but *the fact of disposition itself* does not reduce deficiency liability—or in other words, there is no such thing as deficiency liability, at least when it comes to absolute guaranties. *See* Doc #: 36, Page ID #: 1032 (claiming that absolute guaranties entitle a creditor "to the full amount of a judgment . . . regardless of whether the creditor . . . disposes of the collateral or does so in a commercially reasonable manner."); *but see United States v. Willis*, 593 F.2d 247, 254 (6th Cir. 1979) (explaining that absolute guaranties are only "absolute" in the sense that creditors may proceed against the guarantor before proceeding against the principal). In this world, a secured creditor can recover the full amount of its obligation *twice*—once from the

sale of its collateral and once from its guarantor. That is not—could not—be the law. The Court should reverse the District Court's entry of summary judgment and remand for it to decide if Callidus disposed of its collateral reasonably and to what extent its disposition reduces Smith's liability.

III. The District Court Erred in Rejecting Smith's Fraudulent-Inducement Defense; Smith Could Reasonably Rely on Callidus' Representations Regarding the Release of His Guaranty.

Smith's fraudulent-inducement defense below was simple. Smith and his associates executed and subsequently reaffirmed and extended their guaranties, and indeed opted for Callidus' financing in the first place, because of Callidus' repeated promises that it would release or consider releasing their guaranties upon the satisfaction of attainable conditions. Specifically, Smith relied on three Callidus representations: first, its representation in the Term Sheet that it would release Smith's guaranty if Fortress satisfied certain conditions, which induced Smith to sign his guaranty; second, its representation in the ARLA (the Amended and Restated Loan Agreement) that it would consider releasing the guaranty if Fortress obtained a $2 million equity infusion; and third, Craig Boyer's representation three days earlier that Fortress *would* release the guaranty if Fortress obtained such an infusion, which in tandem with the ARLA induced Smith to reaffirm and extend his guaranty.

Smith argued that a reasonable jury could conclude Callidus never had any intention of keeping these promises. Under Kentucky law, that's fraudulent inducement. "'One may commit fraud in the inducement by making misrepresentations as to his future intentions when in fact he knew at the time the representations were made he had no intent of carrying them out.'" *Bear, Inc. v. Smith*, 303 S.W.3d 137, 142 (Ky. Ct. App. 2010) (quoting *Major v. Christian Cnty. Livestock Mkt.*, 300 S.W.2d 246, 249 (Ky. 1957)). Smith argued that Callidus' remarkable series of continuously shifting representations about whether it was interested in guaranties, why it wanted guaranties, and on what terms it would release them could allow a reasonable jury to conclude Callidus never intended to release Smith's guaranty.[11] Likewise, Smith argued, Callidus' aggressive efforts to frustrate Fortress from satisfying the equity condition for his guaranty's release, including refusing to subordinate *hypothetical* debt it had never seriously contemplated advancing, and luring Fortress away from alternative financing by claiming that its used mining equipment had *appreciated* 45% in eight months and would open the door to additional financing that

[11] To recap, first Callidus had no interest whatsoever in guaranties, then it needed them in case another creditor had recorded a lien, then needed them temporarily pending an appraisal in case an existing appraisal of Fortress' assets was inaccurate, then pending a positive appraisal *and* an equity infusion, then irrespective of equity, then conditioned on equity, then because of a fear that leases were mis-assigned to Fortress' parent, and finally, needed them pending an equity infusion and might not release them even if the equity infusion had been obtained. *See ante* at 3–11.

never materialized, could lead a reasonable jury to conclude Callidus never intended to let Smith escape from his guaranty.

The District Court did not deny that, or even address whether, a reasonable jury could conclude Callidus never had any intention of releasing Smith's guaranty. Instead, the District Court rejected Smith's defense by ignoring his claim that the ARLA itself fraudulently induced his reaffirmation of his guaranty, and reasoning that he could not reasonably rely on the Term Sheet or Boyer's promise because they were contradicted by the ARLA. Neither half of the District Court's reasoning adds up.

First, as to the Term Sheet, the District Court largely focused on the fact that it was too indefinite in various respects, e.g., as to loan amount, to be the parties' final agreement. It is obviously true that the Term Sheet was not their final or complete *loan* agreement. But until the ARLA, the Term Sheet was the only writing between the parties on the terms of Smith's guaranty's release, and the District Court pointed to no respect in which *those* detailed terms were indefinite. *See* Doc #: 36, Page ID #: 1038. And while "the Term Sheet was directly contradicted by the final agreement [the ARLA] that he later signed," *id.*, that is immaterial to whether it fraudulently induced Smith to sign his guaranty in the first place, which long predated the ARLA. It could not be unreasonable for Smith to rely on the Term Sheet in signing the guaranty because of a contrary agreement that did not yet exist.

Second, as to Boyer's representation three days before Smith signed the ARLA that Callidus would release Smith's guaranty upon an equity infusion, the District Court held it was "directly contradict[ed]" by the provision of the ARLA that it would only exercise discretion on release upon an equity infusion. *Id.*, Page ID #: 1036. The two do not contradict. The ARLA promised discretion would be exercised; Boyer represented how it would be done. After all, the duty of good faith alone would have required Callidus to exercise its discretion reasonably; "[w]here [a] contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion." *Dalton v. Educ. Testing Serv.*, 663 N.E.2d 289, 291 (N.Y. 1995) (citation omitted); *see also RAM Eng'g & Const., Inc. v. Univ. of Louisville*, 127 S.W.3d 579, 585 (Ky. 2003) (holding that a contractual provision giving a party seemingly plenary discretion to terminate for convenience is limited by the duty of good faith to reasonable terminations for change of circumstances, in order to avoid an illusory reading of the contract); *Kaplan v. First Options of Chicago, Inc. (In re Kaplan)*, 143 F.3d 807, 818–19 (3d Cir. 1998) (contractual "discretion . . . is subject to the requirement that [one] exercise that discretion in good faith."). Smith could reasonably rely on a representation days before contract formation concerning how Callidus would reasonably exercise its discretion under that contract.

Finally, for much the same reasons, Smith could reasonably rely on Callidus' *contractual* promise to exercise discretion concerning his guaranty's release if Fortress received a sufficient equity infusion. The District Court completely ignored this iteration of Smith's fraudulent-inducement defense, though it was perhaps the strongest part of it. Callidus may argue that Smith could not reasonably rely on a promise to merely think about release, but if that promise were meaningless, why condition it on an equity infusion of a specific amount? Moreover, as discussed, Callidus was under a duty of good faith to exercise its discretion reasonably and not to arbitrarily deny release if the equity-infusion condition was satisfied, and in the context of Boyer's representation that Callidus *would* exercise its discretion to release Smith's guaranty upon that condition's satisfaction, Callidus' promise to consider release takes on greater meaning. In sum, there is a genuine issue of fact as to whether Callidus ever intended to consider releasing Smith's guaranty, and Smith could reasonably rely on Callidus' promises that it would do so. The District Court's entry of summary judgment should be reversed for trial on Smith's fraudulent-inducement defense.

IV. The District Court's Denial of Smith's Request for Additional Time to Take Discovery Was an Abuse of Discretion.

Below, Smith, having taken no discovery at all when Callidus moved for summary judgment, requested additional time under Fed. R. Civ. P. 56(d) to take dis-

covery on his commercial-reasonableness and fraudulent-inducement defenses before the District Court ruled on summary judgment. It cannot seriously be disputed—Callidus certainly did not below—that Smith's declaration explained with the specificity Rule 56(d) requires what discovery he intended to take and what he expected discovery to show: namely, evidence that Callidus lacked reasonable grounds for failing to sell most of its collateral, that it damaged its collateral equipment, and internal documents showing it had always intended to lock Smith into his guaranty. *See* Doc #: 22, Page ID #: 958–60 ¶¶ 95–101. The District Court denied Smith's request without even a comment on the fact it had been made and granted summary judgment without discovery.

"[I]t is generally an abuse of discretion to deny a Rule 56[(d)] motion in the absence of *any* opportunity for discovery," though this Court has "noted some limited exceptions to that rule." *CenTra, Inc. v. Estrin*, 538 F.3d 402, 420–21 (6th Cir. 2008). Besides failing to explain the need for discovery with the necessary specificity, denial of a Rule 56(d) request is also permissible if discovery would be immaterial to the outcome. *See id.* at 420. If the District Court were correct that Smith's commercial-reasonableness and fraudulent-inducement defenses would fail as a matter of law no matter what evidence Smith might find of Callidus' commercial unreasonableness or its intent to dishonor its promises concerning Smith's guaranty, the District Court's denial of his request would be proper. Smith submits that, as

argued above, evidence of commercial unreasonableness or Callidus' intent not to release his guaranty *is* material on summary judgment, and that, while genuine disputes of fact exist on those points already, discovery would or at least might avoid any doubt on whether those points genuinely are disputed. If the Court holds that evidence on either point is material, the District Court's denial of Smith's request for additional time to take discovery was an abuse of discretion and must be reversed.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's Judgment and remand for further proceedings.

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CERTIFICATE OF COMPLIANCE REQUIRED
BY 6 CIR. R. 32(a) AND FED. R. APP. P. 32(a)(7)(C)(i)

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman at 14 point.

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DATED: May 1, 2017

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2017, the above **Brief of Appellant** was electronically filed and served via the Court's ECF System on:

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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS REQUIRED BY 6 CIR. R. 30(g)(1)(A)-(C)

RECORD ENTRY NO.	DESCRIPTION OF DOCUMENT
1	Complaint, filed on December 1, 2015 (Page ID #: 1–5).
12	Scheduling Order, entered on April 6, 2016 (Page ID #: 133–37).
16	Plaintiff's Motion for Summary Judgment, filed on May 18, 2016 (Page ID #: 143–44).
16-6	Exhibit E to Plaintiff's Motion for Summary Judgment, Amended and Restated Loan Agreement, filed on May 18, 2016 (Page ID #: 217–73).
16-8	Exhibit G to Plaintiff's Motion for Summary Judgment, Reaffirmation of Credit Documents, filed on May 18, 2016 (Page ID #: 281–87).
16-11	Exhibit J to Plaintiff's Motion for Summary Judgment, Affidavit of Craig Boyer, filed on May 18, 2016 (Page ID #: 407–18).
21	Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, filed on June 27, 2016 (Page ID #: 439–79).
21-1	Exhibit 1 to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Term Sheet (Aug. 5, 2014), filed on June 27, 2016 (Page ID #: 480–84).

RECORD ENTRY NO.	DESCRIPTION OF DOCUMENT
21-4	Exhibit 4 to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Term Sheet (Sept. 3, 2014), filed on June 27, 2016 (Page ID #: 500–05).
21-15	Exhibit 15 to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, E-mail from Kristi A. Katsma to John Rhorer (Dec. 11, 2014), filed on June 27, 2016 (Page ID #: 608).
21-18	Exhibit 18 to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Amended and Restated Loan Agreement Draft (Jan. 7, 2016), filed on June 27, 2016 (Page ID #: 619–72).
21-19	Exhibit 19 to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, E-mail from Kristi A. Katsma to John Rhorer (Jan. 9, 2015), filed on June 27, 2016 (Page ID #: 676).
21-20	Exhibit 20 to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Amended and Restated Loan Agreement Draft (Jan. 9, 2016), filed on June 27, 2016 (Page ID #: 679–725).
21-21	Exhibit 21 to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Hilco Appraisal of Fortress Resources LLC, filed on June 27, 2016 (Page ID #: 726–72).
21-22	Exhibit 22 to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Docket of *In re Fortress Res., LLC*, No. 15-70730 (Bankr. E.D. Ky.), filed on June 27, 2016 (Page ID #: 773–811).

RECORD ENTRY NO.	DESCRIPTION OF DOCUMENT
21-23	Exhibit 23 to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Final Order Regarding Debtor's Use of Cash Collateral, filed on June 27, 2016 (Page ID #: 812–28).
21-24	Exhibit 24 to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Debtor's Motion for an Order (A) Authorizing Sale of Substantially All Debtor's Assets Free and Clear of Liens, Claims and Encumbrances Pursuant to Code Section 363(b) and (f); (B) Waiving the Stay Imposed by Fed.R.Bankr.P. 6004(h); and (C) Assumption and Assignment of Contracts & Leases Under § 365, filed on June 27, 2016 (Page ID #: 829–37).
21-25	Exhibit 25 to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Callidus Capital Corporation's Objection to Debtor's Final Sale Budget and Pending Sale Motions, filed on June 27, 2016 (Page ID #: 838–46).
21-27	Exhibit 27 to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Stipulated Order, filed on June 27, 2016 (Page ID #: 858–64).
21-29	Exhibit 29 to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Certificate of Service of Stipulated Order, filed on June 27, 2016 (Page ID #: 871–84).
21-30	Exhibit 30 to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Certificate of Service of Exhibit B to Bidding Procedures Order, filed on June 27, 2016 (Page ID #: 885–98).

RECORD ENTRY NO.	DESCRIPTION OF DOCUMENT
21-31	Exhibit 31 to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Notice of Approval of Bidding Procedures for Sale of the Assets of the Debtor and Scheduling of Sale Hearing and Objection Deadlines, filed on June 27, 2016 (Page ID #: 899–901).
21-32	Exhibit 32 to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Report of Auction of Debtor's Assets, filed on June 27, 2016 (Page ID #: 902–08).
21-33	Exhibit 33 to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Callidus Capital Corporation's Limited Objection to Debtor's Proposed Sale to Quest Energy, Inc., filed on June 27, 2016 (Page ID #: 909–15).
21-34	Exhibit 34 to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Order (A) Authorizing Sale of Assets of Debtor to Quest Energy Inc., Free and Clear of Liens, Claims and Encumbrances Pursuant to 11 U.S.C. Sections 363(b) and (f); (B) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Pursuant to 11 U.S.C. Section 365; (C) Establishing Cure Amounts; and (D) Waiving the Stay Imposed by Fed. R. Bankr. P. 6004(h) and 6006(d), filed on June 27, 2016 (Page ID #: 916–333).
21-35	Exhibit 35 to Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Letter from Doron Yitzchaki to Opes Resources Inc., Darryl Levitt, Gary J. Smith, and Richard Molyneux (Apr. 18, 2016), filed on June 27, 2016 (Page ID #: 934–36).

RECORD ENTRY NO.	DESCRIPTION OF DOCUMENT
22	Declaration of Gary J. Smith, filed on June 27, 2016 (Page ID #: 938–60).
29	Plaintiff's Reply in Further Support of Its Motion for Summary Judgment, filed on July 18, 2016 (Page ID #: 985–1001).
36	Memorandum Opinion and Order, entered on September 7, 2016 (Page ID #: 1016–39).
37	Judgment, entered on September 8, 2016 (Page ID #: 1040–41).
38	Notice of Appeal to the United States Court of Appeals for the Sixth Circuit Filed by the Defendant, Gary J. Smith, filed on October 7, 2016 (Page ID #: 1042–43).