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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

6 In re: ) BAP No. CC-11-1144-KiMkH  
7 )  
8 FIRST YORKSHIRE HOLDINGS, ) Bk. No. SV 10-26058-AA  
9 INC., )  
10 Debtor. )  
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FIRST YORKSHIRE HOLDINGS,  
INC.,  
Appellant,

v. O P I N I O N

PACIFICA L 22, LLC.,  
Appellee.

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Argued and Submitted on October 21, 2011  
at Pasadena, California

Filed - May 10, 2012

Appeal from the United States Bankruptcy Court  
for the Central District of California

Hon. Alan M. Ahart, Bankruptcy Judge, Presiding

Appearances: Moses S. Bardavid of the Law Offices of Moses S. Bardavid, for Appellant First Yorkshire Holdings, Inc.; Martin W. Phillips of the Law Offices of Martin W. Phillips, argued for Appellee Pacifica L 22, LLC.

Before: KIRSCHER, MARKELL, and HOLLOWELL, Bankruptcy Judges.

1 KIRSCHER, Bankruptcy Judge:  
2

3 Appellant, debtor First Yorkshire Holdings, Inc. ("First  
4 Yorkshire"), appeals an order from the bankruptcy court granting  
5 appellee, Pacifica L 22, LLC ("Pacifica"), relief from the  
6 automatic stay under 11 U.S.C. § 362(d)(2) and (d)(4).<sup>1</sup> As we  
7 find the bankruptcy court abused its discretion by failing to  
8 make any findings on the equity and value of First Yorkshire's  
9 property interest in its junior deed of trust under § 362(d)(2),  
10 We VACATE and REMAND with instructions to enter findings. We  
11 also find the bankruptcy court abused its discretion in granting  
12 relief under § 362(d)(4), when relief under § 362(d)(2)  
13 potentially could affect other non-debtor parties, and because  
14 the bankruptcy court failed to make any findings on that matter.  
15 We VACATE that portion of the order granting relief under  
16 § 364(d)(4) and REMAND with instructions to enter findings.

17 **I. FACTUAL AND PROCEDURAL BACKGROUND**

18 **A. Prepetition events.**

19 First Yorkshire is a Delaware corporation formed for the  
20 sole purpose of acquiring and thereafter selling interests in  
21 real property. Since its inception, First Yorkshire obtained an  
22 interest in three separate parcels of real property in Southern  
23 California. This encumbered real property is located on Tryon  
24 Road in Los Angeles, California (the "Real Property").  
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26 <sup>1</sup> Unless otherwise indicated, all chapter, section and rule  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.  
The Federal Rules of Civil Procedure will be referred to as  
"FRCP."

1           On January 22, 2009, non-debtor borrower Alejandro Elias  
2 Weissmann ("Weissmann") obtained a purchase money loan in the  
3 amount of \$1.32 million from East West Bank to purchase the Real  
4 Property. In exchange for the loan, Weissmann executed a note  
5 and a first deed of trust in favor of East West Bank. On January  
6 26, 2009, Weissmann executed a grant deed gifting the Real  
7 Property to Serron Investments, Inc. ("Serron"), which took the  
8 Real Property subject to the note and East West Bank's first deed  
9 of trust. East West Bank's first deed of trust was recorded in  
10 Los Angeles County on January 30, 2009. Weissmann's grant deed  
11 to Serron was recorded in Los Angeles County on September 22,  
12 2009.

13           On April 9, 2010, Serron executed two more deeds of trust on  
14 the Real Property: a second deed of trust in favor of First  
15 Yorkshire ("FY's Lien Interest") in the amount of \$265,000, and a  
16 third deed of trust in favor of Durham Development, Inc. in the  
17 amount of \$245,000. The second and third deeds of trust were  
18 recorded in Los Angeles County several months later on November  
19 30, 2010. Meanwhile, on September 15, 2010, East West Bank  
20 assigned its interest in the note and first deed of trust to  
21 Pacifica. The Assignment of Deed of Trust was recorded in Los  
22 Angeles County on September 22, 2010.

23           On December 22, 2010, Serron executed a grant deed granting  
24 back to Weissmann a 25% interest in the Real Property, thereby  
25 making them co-owners. First Yorkshire filed a chapter 11  
26 petition for relief on December 23, 2010, just 23 days after  
27 recording its FY's Lien Interest.

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1 **B. Pacifica's motion for relief from stay.<sup>2</sup>**

2 FY's Lien Interest on the Real Property is listed in  
3 Schedule A. On January 31, 2011, Pacifica moved for relief from  
4 stay under § 362(d)(1), (d)(2)(A) and (B), and (d)(4) (the "Stay  
5 Relief Motion"). To support its motion, Pacifica offered the  
6 note, the deeds of trust, the assignment, a declaration from a  
7 real estate broker opining on the Real Property's fair market  
8 value, and a declaration from Manoj Chawla ("Chawla"), Pacifica's  
9 general manager.

10 According to Pacifica, a Notice of Default had been recorded  
11 on the Real Property on August 23, 2010, a Notice of Sale had  
12 been recorded on November 30, 2010, and a foreclosure sale was  
13 scheduled for February 28, 2011. As of January 19, 2011, the  
14 total debt owed to Pacifica on the Real Property was  
15 \$1,386,326.40. First Yorkshire was owed at least \$265,000.  
16 Based solely on an exterior inspection conducted on January 14,  
17 2011, Pacifica's real estate broker valued the Real Property at  
18 \$1.5 million. Assuming estimated costs of sale at \$120,000,  
19 Pacifica asserted that the debt on the Real Property exceeded its  
20 interest, thus leaving no "equity" in the Real Property for FY's  
21 Lien Interest.

22 Pacifica further contended that the transfer or issuance of  
23 the grant deed from Weissmann to Serron (and then partially back  
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25 <sup>2</sup> Pacifica moved for relief from stay in First Yorkshire's  
26 bankruptcy because FY's Lien Interest in the Real Property (and  
27 the rights contained therein) is considered property of the  
28 estate, which would invoke the stay under § 362(a). See First  
Fed. Bank of Cal. v. Cogar (In re Cogar), 210 B.R. 803, 809 (9th  
Cir. BAP 1997) (property is defined broadly under § 541 and  
includes liens held by the debtor on property of a third party).

1 to Weissmann), and the issuance of junior trust deeds by Serron  
2 to First Yorkshire and Durham Development, Inc., manifested acts  
3 of fraud and bad faith supporting the extraordinary relief  
4 allowed under § 362(d)(4). Pacifica asserted in an affidavit  
5 attached in support of its Stay Relief Motion that "it appear[ed]  
6 [First Yorkshire] and other parties claiming fractional interests  
7 in the [P]roperty [were] preparing a series of [bankruptcy]  
8 filings based on these recent transfers of interest."

9 First Yorkshire's opposition to the Stay Relief Motion  
10 included a declaration from its principal, Oscar Broederlow  
11 ("Broederlow"), and a certified appraisal valuing the Real  
12 Property at \$2 million. First Yorkshire argued that Pacifica's  
13 claim under § 362(d)(1) failed because Pacifica made no clear  
14 argument as to why it was not adequately protected, and lack of  
15 payments did not automatically entitle it to relief from stay.  
16 In any event, First Yorkshire offered to pay Pacifica 5%  
17 interest-only payments on Pacifica's loan as a good faith  
18 adequate protection payment.<sup>3</sup>

19 First Yorkshire contended that Pacifica's claim under  
20 § 362(d)(2)(A) and (B) also failed because, based on the Real  
21 Property's value of \$2 million, First Yorkshire had equity in the  
22 Real Property and, according to Broederlow, the Real Property was  
23 "an essential piece of an effective reorganization that [was] in  
24 prospect."

25 Finally, First Yorkshire rejected Pacifica's allegations of  
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27 <sup>3</sup> Because the bankruptcy court did not grant Pacifica  
28 relief under § 362(d)(1), we need not address that issue any  
further.

1 fraud and bad faith under § 362(d)(4). First Yorkshire asserted  
2 that it did not promptly record its second deed of trust only  
3 because the Real Property owners were in continuous negotiations  
4 with East West Bank for a loan modification, and a recorded  
5 second deed of trust could have been detrimental to that process.  
6 First Yorkshire further asserted that the Real Property owners  
7 were negotiating with potential buyers and hoped to secure an  
8 offer that would pay off in full the debt to Pacifica and First  
9 Yorkshire.

10 In its tentative ruling dated March 1, 2011, the bankruptcy  
11 court expressed its inclination to grant the Stay Relief Motion  
12 under § 362(d)(2) because "this debtor has no equity in the  
13 [Real] [P]roperty and this debtor has not demonstrated that the  
14 [Real] [P]roperty is necessary for this debtor's reorganization."  
15 (Emphasis in original). The court was also inclined to grant  
16 relief under § 362(d)(4), but the tentative ruling did not  
17 articulate the basis for that inclination.

18 The bankruptcy court held a hearing on the Stay Relief  
19 Motion on March 2, 2011. Both parties were given the opportunity  
20 to argue their positions. First Yorkshire asserted that its note  
21 and second deed of trust were property of the estate, and that it  
22 had equity in the Real Property based on its valuation of \$2  
23 million. Pacifica contended that no equity could exist for First  
24 Yorkshire because it did not have an ownership interest in the  
25 Real Property. Pacifica also asserted what it believed were  
26 facts supporting its claim under § 362(d)(4). First Yorkshire  
27 rejected Pacifica's § 362(d)(4) claim, contending that none of  
28 the underlying actions by the Real Property owners or First

1 Yorkshire were unlawful, nor did they support such a claim.  
2 First Yorkshire further noted that its Schedule A disclosed a  
3 security interest in a second property, as well as a fee interest  
4 in a third.

5 After hearing argument from the parties, the bankruptcy  
6 court granted the Stay Relief Motion under § 362(d)(2) for the  
7 reasons stated in its tentative ruling, but it declined to grant  
8 relief under § 362(d)(4). In seeking clarification of the  
9 ruling, counsel for First Yorkshire inquired:

10 COUNSEL: All right. And so no 362(d)(4)?

11 COURT: But no 362(d)(4) relief. Otherwise, my tentative  
12 stands.

13 Hr'g Tr. 9:13-15, Mar. 2, 2011. The court instructed Pacifica's  
14 counsel to prepare the order. Hr'g Tr. 9:19-20.

15 Shortly thereafter, Pacifica lodged its proposed order  
16 granting the Stay Relief Motion under § 362(d)(2). First  
17 Yorkshire thereafter objected to Pacifica's lodged order and  
18 submitted its own proposed order. Two weeks later, on March 28,  
19 2011, the bankruptcy court entered its own order granting the  
20 Stay Relief Motion under both § 362(d)(2) and (d)(4) (the "Stay  
21 Relief Order"). The top portion of the order read: "CHANGES MADE  
22 BY COURT." First Yorkshire timely appealed the Stay Relief Order  
23 on April 1, 2011.<sup>4</sup>

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24  
25 <sup>4</sup> On October 3, 2011, First Yorkshire filed an emergency  
26 motion for stay pending appeal due to an October 4 foreclosure  
27 sale of the Real Property. The Panel entered an order on October  
28 4, 2011, granting the stay to maintain the status quo on appeal,  
which will remain in effect until entry of our written  
disposition. The stay will be vacated by separate order  
effective upon the date the mandate is issued to the bankruptcy

(continued...)

1 **II. JURISDICTION**

2 The bankruptcy court had jurisdiction under 28 U.S.C.  
3 §§ 1334 and 157(b) (2) (G). We have jurisdiction under 28 U.S.C.  
4 § 158.

5 **III. ISSUES**

6 1. Did the bankruptcy court abuse its discretion in granting  
7 the Stay Relief Motion under § 362(d) (2)?

8 2. Did the bankruptcy court abuse its discretion in granting  
9 the Stay Relief Motion under § 362(d) (4)?

10 **IV. STANDARD OF REVIEW**

11 We review a bankruptcy court's order granting relief from  
12 the automatic stay for an abuse of discretion. Arneson v.  
13 Farmers Ins. Exch. (In re Arneson), 282 B.R. 883, 887 (9th Cir.  
14 BAP 2002). To determine whether the bankruptcy court abused its  
15 discretion, we conduct a two-step inquiry: (1) we review de novo  
16 whether the bankruptcy court "identified the correct legal rule  
17 to apply to the relief requested" and (2) if it did, whether the  
18 bankruptcy court's application of the legal standard was  
19 illogical, implausible or "without support in inferences that may  
20 be drawn from the facts in the record." United States v.  
21 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).

22 **V. DISCUSSION**

23 **A. The bankruptcy court abused its discretion when it granted**  
24 **the Stay Relief Motion under § 362(d) (2).**

25 Equity, for purposes of § 362(d) (2) (A), is the difference

26 <sup>4</sup>(...continued)  
27 court; however, given that the Panel is vacating and remanding  
28 in accordance with our opinion, the automatic stay under § 362 will  
remain in effect.



1 between the value of the property and all encumbrances on it.  
2 Sun Valley Newspapers, Inc. v. Sun World Corp. (In re Sun Valley  
3 Newspapers, Inc.), 171 B.R. 71, 75 (9th Cir. BAP 1994) (citing  
4 Stewart v. Gurley, 745 F.2d 1194, 1196 (9th Cir. 1984)). "The  
5 concept of 'equity' in property is based on the premise that the  
6 property itself has some economic value to its owner." Scripps  
7 GSB I, LLC, v A Partners, LLC (In re A Partners, LLC), 344 B.R.  
8 114, 121 (Bankr. E.D. Cal. 2006) (emphasis added). Such  
9 conclusion is further supported by the definition of equity: "An  
10 ownership interest" determined by "the amount by which the value  
11 of or an interest in property exceeds secured claims or liens."  
12 Black's Law Dictionary 560 (7th ed. 1999).

13 No doubt exists, however, that FY's Lien Interest on a third  
14 party's real property constitutes property of First Yorkshire's  
15 bankruptcy estate under § 541. First Fed. Bank of Cal. v. Cogar  
16 (In re Cogar), 210 B.R. 803, 809 (9th Cir. BAP 1997) (property is  
17 defined broadly under § 541 and includes a lien held by the  
18 debtor on property of a third party; however, such lien does not  
19 allow debtor to restructure the terms of a priority lien held by  
20 a creditor of the third party).

21 First Yorkshire contends the bankruptcy court erred in  
22 granting relief under § 362(d)(2) because, based on a valuation  
23 of the Real Property at \$2 million and the prospect of a sale, it  
24 was clear that First Yorkshire had equity in the Real Property,  
25 and that its secured lien had value, thus proving its necessity  
26 for an effective reorganization. The bankruptcy court issued no  
27 findings as to what value it considered in granting the Stay  
28 Relief Motion. We can not decipher from the record what

1 methodology was used in determining value and consequently equity  
2 or the lack of equity in FY's Lien Interest. Did the bankruptcy  
3 court use Pacifica's proffered value of \$1,500,000 or First  
4 Yorkshire's value of \$2,000,000, or some other value? What costs  
5 or expenses of sale may have decreased the value remaining to  
6 secure the several liens on the property? Other alternative  
7 valuations may also be available to determine the value of FY's  
8 Lien Interest, such as soliciting opinions from mortgage brokers  
9 as to the value of FY's Lien Interest depending on whether it is  
10 secured or unsecured. Other factors may also impact value such  
11 as statutory rights of the lien holder, i.e., the right to  
12 collect rents on default; the right to foreclose on default; the  
13 right to receive notice of the default in a senior lien; the  
14 right to purchase the property at a foreclosure sale; the right  
15 to redeem; the right to take title to the property in lieu of  
16 foreclosure with the consent of the owners; and the right to cure  
17 defaults owed to senior creditors. See Cal. Civ. Code §§ 2924,  
18 2927.

19 Section 362(d)(2) requires the bankruptcy court, on request  
20 of a party in interest, to grant relief from the automatic stay  
21 when debtor has no equity in the property, and the property is  
22 not necessary to debtor's effective reorganization. Pursuant to  
23 § 362(g), the moving party has the burden of proof on the issue  
24 of debtor's equity; the debtor has the burden of proof on all  
25 other issues. Pacifica had the burden to establish that First  
26 Yorkshire did not have equity in FY's Lien Interest, and as  
27 noted, we are unable to determine what value the bankruptcy court  
28 used in determining the lack of equity.

1 First Yorkshire contends on appeal that it provided evidence  
2 of its financial ability to exert its rights as a junior lien  
3 holder to either redeem or reinstate the loan. This issue was  
4 never specifically raised before the bankruptcy court. We  
5 generally will not consider issues raised for the first time on  
6 appeal. United States v. Pimentel-Flores, 339 F.3d 959, 967 (9th  
7 Cir. 2003) and will not do so here. Such assertions by First  
8 Yorkshire were unnecessary as Pacifica failed to carry its burden  
9 in clearly establishing that First Yorkshire did not have equity  
10 in FY's Lien Interest. The requirements of § 362(d)(2) are  
11 conjunctive and with Pacifica failing to carry its burden, First  
12 Yorkshire was not required to go forward on whether FY's Lien  
13 Interest was necessary to an effective reorganization. See In re  
14 A Partners, LLC, 344 B.R. at 126 (If debtor has no equity in  
15 property then debtor must establish that property is necessary to  
16 an effective reorganization.).

17 The Stay Relief Motion is a contested motion under Rule 9014  
18 and is subject to FRCP 52(a), which requires the bankruptcy court  
19 to find the facts specifically and state its conclusions of law  
20 separately. In the absence of complete findings, we may vacate a  
21 judgment and remand the case to the bankruptcy court to make the  
22 required findings. See United States. v. Ameline, 409 F.3d 1073  
23 (9th Cir. 2005).

24 Accordingly, the bankruptcy court abused its discretion by  
25 failing to make findings establishing value and determining that  
26 First Yorkshire did not have equity in FY's Lien Interest. We  
27 VACATE and REMAND for further proceedings in accordance with this  
28 decision.

1 **B. The bankruptcy court abused its discretion when in granted**  
2 **the Stay Relief Motion under § 362(d) (4) .**

3 The special relief afforded creditors in § 362(d) (4)<sup>5</sup> was  
4 added in 2005 under BAPCPA. It permits the bankruptcy court to  
5 grant in rem relief from the automatic stay in order to address  
6 schemes using bankruptcy to thwart legitimate foreclosure efforts  
7 through one or more transfers of interest in real property. If  
8 the court's order granting relief under § 362(d) (4) is recorded  
9 in compliance with applicable state law, it is binding in any  
10 other bankruptcy case filed in the next two years purporting to  
11 affect the same real property. See § 362(d) (4), § 362(b) (20).

12 To obtain relief under § 362(d) (4), the court must find  
13 three elements to be present. First, debtor's bankruptcy filing  
14 must have been part of a scheme. Second, the object of the

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15 <sup>5</sup> Until December 22, 2010, § 362(d) (4) read as follows:

16 (d) On request of a party in interest and after notice and a  
17 hearing, the court shall grant relief from the stay . . . such as  
18 by terminating, annulling, modifying, or conditioning such stay--

19 (4)with respect to a stay of an act against real property  
20 under subsection (a), by a creditor whose claim is secured  
21 by an interest in such real property, if the court finds  
22 that the filing of the petition was part of a scheme to  
23 delay, hinder, and defraud creditors that involved either--

24 (A) transfer of all or part ownership of, or other  
25 interest in, such real property without the consent of  
26 the secured creditor or court approval; or

27 (B) multiple bankruptcy filings affecting such real  
28 property (emphasis added).

29 The revised statute, as amended by the Bankruptcy Technical  
30 Corrections Act of 2010, Pub. L. No. 111-327, 124 Stat. 3557  
31 (2010) (effective December 22, 2010) eliminated the conjunctive  
32 "and" in paragraph (4) and replaced it with the disjunctive "or."  
33 Therefore, the party seeking relief from stay under § 362(d) (4)  
34 must show only a scheme by debtor to delay, hinder, or defraud,  
35 just as in § 727(a) (2).

36 In the stay Relief Order entered on March 28, 2011, the  
37 bankruptcy court erroneously applied the older version of  
38 paragraph (4). Upon remand, it should apply the amended statute.

1 scheme must be to delay, hinder, or defraud creditors. Third,  
2 the scheme must involve either (a) the transfer of some interest  
3 in the real property without the secured creditor's consent or  
4 court approval, or (b) multiple bankruptcy filings affecting the  
5 property.<sup>6</sup> For the court to grant relief under § 362(d)(4), and  
6 thus trigger two years of prospective relief as to the subject  
7 real property, it must affirmatively find that the three elements  
8 above are present. In re Abdul Muhaimin, 343 B.R. at 169 ("The  
9 precise language is: 'if the court finds . . . .' For the court  
10 to make such an affirmative finding, it must have proof of the  
11 elements required to justify such relief.").

12 As recognized by the bankruptcy court in In re Abdul  
13 Muhaimin, relief under § 362(d)(4) has serious implications. By  
14 seeking relief under § 362(d)(4), the creditor requests specific  
15 prospective protection against not only the debtor, but also  
16 every non-debtor, co-owner, and subsequent owner of the property.  
17 Id. If granted, such relief nullifies the ability of the debtor  
18 and any other third party with an interest in the property to  
19 obtain the benefits of the automatic stay in future bankruptcy  
20 cases for a period of two years. Id.

21 First Yorkshire contends that the bankruptcy court violated  
22 its due process rights when it entered relief under § 362(d)(4)  
23 despite stating at the hearing that such relief was not justified  
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25 <sup>6</sup> As noted by one bankruptcy court, § 362(g) would appear  
26 to put the burden of proof of these elements on the debtor as the  
27 opposing party. In re Abdul Muhaimin, 343 B.R. 159, 169 (Bankr.  
28 D. Md. 2006). However, the court concluded that such a result is  
nonsensical. We agree. In any event, Pacifica has never  
contended that it did not have the burden of proof on this issue.

1 on the record. While we disagree that First Yorkshire was denied  
2 due process since it had ample opportunity to defend the Stay  
3 Relief Motion, we do note that the Stay Relief Order contains no  
4 findings whatsoever establishing why Pacifica was entitled to  
5 such relief. Because the Stay Relief Motion is a contested  
6 matter under Rule 9014 it is subject to FRCP 52(a), which  
7 requires the bankruptcy court to find the facts specifically and  
8 state its conclusions of law separately.

9 In the absence of complete findings, we may vacate a  
10 judgment and remand the case to the bankruptcy court to make the  
11 required findings. See United States. v. Ameline, 409 F.3d 1073  
12 (9th Cir. 2005). We note that a bankruptcy court's failure to  
13 make factual findings as required by FRCP 52(a) does not require  
14 reversal and remand unless a full understanding of the issues  
15 under review is not possible without aid of the findings. See  
16 Simeonoff v. Hiner, 249 F.3d 883, 891 (9th Cir. 2001). Here, it  
17 is not clear without further findings from the bankruptcy court  
18 that Pacifica carried its burden of proof on all of the elements  
19 for relief from stay under § 362(d)(4). Findings are  
20 particularly important here because of the in rem nature of the  
21 Stay Relief Order and the detrimental effect it has on parties  
22 besides First Yorkshire.

23 Accordingly, we VACATE the portion of the Stay Relief Order  
24 granting relief under § 362(d)(4) and REMAND with instructions  
25 that the bankruptcy court make the required findings supporting  
26 such relief.

## 27 VI. CONCLUSION

28 For the foregoing reasons, we VACATE the order granting the

1 Stay Relief Order under § 362(d)(2) and granting relief under  
2 § 362(d)(4) and REMAND these matters to the bankruptcy court to  
3 enter findings and to conduct other matters in accordance with  
4 our opinion.

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