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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP Nos. CC-07-1083-MoPaD  
 ) CC-07-1263-MoPaD  
 PETER T. MCCARTHY, )  
 )  
 Debtor. ) Bk. No. SV 05-18622-GM  
 )  
 )  
 )  
 PETER T. MCCARTHY, )  
 )  
 Appellant, )  
 )  
 v. ) **M E M O R A N D U M**<sup>1</sup>  
 )  
 )  
 AMY GOLDMAN, Chapter 7 )  
 Trustee; CHRIS SOMMERS; )  
 NATURE'S WING FIN DESIGN, )  
 LLC; NICHOLAS JENKINS,<sup>2</sup> )  
 )  
 Appellees. )  
 )

Argued and Submitted on January 25, 2008  
at Orange, California

Filed - February 19, 2008

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

Honorable Geraldine Mund, Bankruptcy Judge, Presiding

<sup>1</sup> This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> Appellee Amy Goldman is an appellee in both of these appeals (BAP Nos. CC-07-1083-MoPaD and CC-07-1263-MoPaD). The other entities were only named as appellees in the lower numbered appeal and they have not filed papers or appeared before us.

1 Before: MONTALI, PAPPAS and DUNN, Bankruptcy Judges.  
2

3 Debtor Peter T. McCarthy ("Debtor") is an inventor of scuba  
4 fin and wing technology. He claims that at least two patent  
5 applications he has filed (the "New Applications") result from  
6 his post-petition services, that they are not property of the  
7 bankruptcy estate, and that he should have the exclusive right to  
8 prosecute them. Debtor also claims an exemption in numerous  
9 patents and patent applications, including at least one of the  
10 New Applications (collectively, the "IP"), two limited liability  
11 companies associated with that IP, a pending action in California  
12 Superior Court, and other property.

13 Chapter 7<sup>3</sup> trustee Amy Goldman ("Trustee") moved for  
14 authority to sell the estate's rights and interests, if any, in  
15 the IP and other assets. She also filed objections to many of  
16 Debtor's claimed exemptions and moved to strike Debtor's (fourth)  
17 amended bankruptcy Schedule C and to bar further amendments  
18 without pre-filing authorization from the bankruptcy court. The  
19 bankruptcy court entered orders in Trustee's favor on these  
20 related issues (all on appeal in BAP No. CC-07-1083-MoPaD). We  
21 AFFIRM the orders regarding Debtor's exemptions and his  
22 bankruptcy Schedule C. We REVERSE the order regarding the sale  
23

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24 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
26 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as  
27 enacted and promulgated prior to the effective date of The  
28 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
Pub. L. 109-8, 119 Stat. 23, because the case from which this  
appeal arises was filed before its effective date (generally  
October 17, 2005).

1 of assets, and REMAND for reconsideration whether overbidders can  
2 be limited to all cash bids.

3 Trustee also filed a motion for authority to prosecute five  
4 patent applications, including the New Applications. The  
5 bankruptcy court entered an order granting that motion (at issue  
6 in BAP No. CC-07-1263-MoPaD) (the "Prosecution Order"). We  
7 REVERSE that order and REMAND for further consideration of how  
8 best to preserve the status quo pending a determination of who  
9 owns the relevant IP.

## 10 I. FACTS

### 11 A. Background

12 The parties distinguish conceptually between the fin IP and  
13 the wing IP, although as a practical matter the two categories  
14 apparently overlap. In general Debtor licensed fin IP to  
15 Nature's Wing Fin Design, LLC ("Fin LLC") and wing IP to Nature's  
16 Wing Aerospace, LLC ("Wing LLC").

17 Debtor was the managing director of Fin LLC and held 59.95%  
18 of its membership interests. Fin LLC owned 2% of Wing LLC and  
19 Debtor owned the remaining 98%. Debtor's bankruptcy Schedule B  
20 describes Wing LLC as a "[s]tart up company" without a "revenue  
21 stream."

22 In September of 2005 some of the minority members in Fin LLC  
23 brought a derivative action on behalf of that company against  
24 Debtor (Jenkins et al. v. McCarthy et al., Superior Court, Los  
25 Angeles, Central Dist., No. BC 309875). They obtained a judgment  
26 for several hundred thousand dollars. Debtor appealed from the  
27 judgment and the appeal is pending.

28

1           The judgment states that it is based on "improper  
2 'mandatory' distributions," "the improper taking of the Sommers  
3 investment," and attorneys' fees and costs. It is unclear  
4 whether the "Sommers investment" is an investment by Mr. Chris  
5 Sommers ("Sommers"). He leads one of two factions of minority  
6 members in Fin LLC and he attempted to make an overbid on behalf  
7 of those members for some or all of the assets that Trustee  
8 offered for sale. Although Debtor's notice of appeal named  
9 Sommers as a party to three of the orders on appeal (BAP No. CC-  
10 07-1083-MoPaD), he has not participated in this appeal.

11           Debtor filed a voluntary chapter 11 petition on October 12,  
12 2005 (the "Petition Date"). Debtor did not originally claim any  
13 exemption in the fin or wing IP.

14           Debtor did not remain in possession of the bankruptcy  
15 estate. Trustee was appointed in the chapter 11 case and  
16 continued to serve as trustee after the case was converted to  
17 chapter 7 on March 27, 2006. Fin LLC filed a timely proof of  
18 claim for \$810,456.12 and filed a nondischargeability complaint  
19 against Debtor (Adv. No. SV 06-01104-GM).

20           B.    The Sale Motion

21           On November 28, 2006, Trustee filed a motion (the "Sale  
22 Motion") for authority to sell (1) the estate's interest in the  
23 fin IP and its 59.95% majority interest in Fin LLC (the "Fin  
24 Assets"), (2) the estate's interest in the wing IP and its 98%  
25 interest in Wing LLC (the "Wing Assets"), and (3) all of Debtor's  
26 rights in the pending state court action (the "Appeal Rights").  
27 The proposed buyer is Fin LLC, now apparently under management of  
28 the non-Sommers faction of minority members. The Sale Motion

1 also sought approval of overbid procedures and a determination  
2 that Fin LLC is entitled to the protections of a buyer in good  
3 faith under Section 363(m).

4 Attached to the Sale Motion is a declaration of Trustee's  
5 accountant, David K. Gottlieb ("Gottlieb"), stating that based on  
6 his firm's and his own analysis of Fin LLC's books and records  
7 and an analysis of its "history of revenues, projected future  
8 revenues and certain risk and interest factors," he believes that  
9 the estimated value of the Fin Assets alone is "approximately  
10 \$1.2 million." Despite this valuation his declaration states  
11 that he believes the proposed "purchase price of \$900,000  
12 (comprised of both cash and non-cash consideration)" is  
13 "reasonable," even though the purchase included not just the Fin  
14 Assets but also the Wing Assets and the Appeal Rights.  
15 Gottlieb's declaration justifies this by stating that "there  
16 exist risk, time and general business condition components which  
17 may ultimately render the true value of the ownership interest in  
18 [the Fin Assets] substantially less than what I now believe them  
19 to be." It is unclear whether this is an allusion to Debtor's  
20 litigiousness or some other factor such as uncertainty in the  
21 market for scuba equipment or some combination thereof.

22 The proposed \$900,000 sales price consists of \$50,000 for  
23 the Wing Assets, \$100,000 for the Appeal Rights, and \$275,000 in  
24 cash plus \$475,000 in "non-cash consideration" for the Fin Assets  
25 (some of which is contingent on future earnings from the fins).  
26 The non-cash consideration is that Fin LLC can "'credit bid' or  
27 reduce the amount of [its unsecured] Claim against the Bankruptcy  
28 Estate and the Debtor . . . ." The Sale Motion justifies this

1 "credit bid" procedure on the basis that "the [Fin LLC] Claim  
2 would be the largest unsecured nonpriority claim against the  
3 Bankruptcy Estate . . . and [it] would receive the lion's share  
4 of the ultimate distribution to the Estate's creditors."

5 "All overbids (except those of [Fin LLC]) shall be 100% cash  
6 consideration . . ." according to the Sale Motion (emphasis  
7 added). Thus, any overbidder for the Fin Assets must start with  
8 a bid of \$760,000 in cash, whereas Fin LLC (under its current  
9 management) is allowed to bid just \$275,000 in cash, some of  
10 which is contingent, plus a credit bid of \$475,000. Moreover, if  
11 there are overbids for any of the assets being sold, then Fin LLC  
12 can credit bid for a portion of its competing overbid.<sup>4</sup>

13 On December 7, 2006, Debtor (acting pro se) filed an  
14 objection to the Sale Motion arguing among other things that  
15 (1) it is "unconscionable that [Fin LLC] is permitted to purchase  
16 assets with credit bids that can exceed \$800,000.00, but all  
17 other creditors are forbidden from making credit bids and are  
18 restricted to 'cash only' bids"; (2) the true value of the Assets  
19 is greater than the proposed sales price, as evidenced by  
20 Gottlieb's \$1.2 million valuation of just a portion of the  
21 Assets; and (3) Trustee had not adequately marketed the IP. The  
22

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23 <sup>4</sup> Fin LLC's overbids have the same ratio of cash to credit  
24 bidding as its initial \$900,000 bid. That ratio is calculated by  
25 taking \$425,000 (the proposed cash component for all Assets) and  
26 dividing it by the total consideration (\$425,000 cash + \$475,000  
credit bid), yielding a Cash/Non-Cash Ratio of 0.47.

27 The Sale Motion provides that Fin LLC may not credit bid  
28 more than \$810,456.12 total (the amount of Fin LLC's claim) but  
that allows it to overbid up to \$335,456.12 (\$810,456.12 -  
\$475,000 existing credit bid for Fin Assets = \$335,456.12  
available for overbidding).

1 Sale Motion describes Trustee's marketing efforts as advertising  
2 the IP on the website of the National Association of Bankruptcy  
3 Trustees ("NABT") starting August 25, 2006, and informing Debtor  
4 that he could endeavor to purchase the Assets if he wished.

5 The bankruptcy court issued the following tentative ruling:

6 The trustee needs to advertise more broadly. I  
7 would assume in one or more diving magazines.  
8 Solely using the NABT Website is no[t] likely to  
9 create a broad range of bidders. Continue for  
10 additional advertising.

11 As to the terms of the overbid, they cannot be  
12 limited to all cash. See [Simantob v. Claims  
13 Prosecutor, LLC] In re Lahijani, 325 B.R. 282 (9th  
14 Cir. BAP 2005).

15 As to the other objections, I do not find them  
16 persuasive. Once there is proper advertising, the  
17 value of the items is what someone will pay for  
18 them.

19 On December 21, 2006, the bankruptcy court held a hearing on  
20 the Sale Motion. Trustee represented that advertising would not  
21 be useful because (1) the fin IP has no value except to Fin LLC  
22 since it holds an exclusive license, and (2) the membership  
23 interests in Fin LLC have no value except to insiders because  
24 "the way the LLC was drafted" if those interests are "sold  
25 outside to a third party, that person has no voting rights and no  
26 say in this LLC" and would not receive any dividend until cash  
27 investors are repaid. Transcript, Dec. 21, 2006, pp. 4:8-5:17.  
28 Therefore the "universe of potential bidders," according to  
Trustee, is Debtor, Fin LLC, and Sommers. Id. p. 5:19-21.  
Trustee added that "over a year ago" she had started discussions  
with Debtor about whether "any of these people were interested,  
if he had any contacts, any white knights, any anyone who was  
willing to come forward to offer me for some of the patents, for

1 his [membership interests], for anything, if he could borrow  
2 money from anyone, you've told him from the bench that this was  
3 an option. So now for him to come forward at this, I think, late  
4 hour . . . to say that this wasn't properly advertised, I find to  
5 be a little disingenuous." Id. p. 6:3-13. Trustee justified the  
6 non-cash consideration by stating that, before she knew that  
7 Sommers was going to appear, she and her attorney and Gottlieb  
8 had asked themselves:

9 "Who else, other than a member of [Fin LLC] which  
10 owns this . . . humongous claim in the estate,  
11 could come up and provide the same type of non-  
12 cash benefit . . .?" And I admit to you, we  
13 couldn't come up with anyone, and I was quite  
14 surprised that [Sommers] appeared.

15 Transcript, Dec. 21, 2006, p. 11:16-23.

16 The bankruptcy court later asked, "Didn't your overbid  
17 require it be all cash?" and asked if Trustee would be "willing  
18 to change that?" Id. p. 13:21-24. Trustee responded, "Of  
19 course." Id. p. 13:25. Later, however, Trustee suggested that  
20 for two reasons it might not be possible for Sommers to exercise  
21 sufficient voting control over Fin LLC to waive its claim as part  
22 of a credit bid. First, she thought that even current investors  
23 might not "get voting rights" if they acquired Debtor's  
24 membership interests. Second:

25 There's another story which I told [Sommers'  
26 attorney] off the record about how her client  
27 became a minority [member]. I'm not sure I want  
28 to put that on the record right now. It's not  
beneficial to [Debtor] for me to do that. So  
there's all these issues, . . . whether or not  
[Sommers] would have to deal with the other  
minority [members] if they perceived that he was  
actually a real minority [member], having made  
cash contributions to [Fin LLC], or whether or not  
he would get [Debtor's] voting right and, as the



1 majority [member], could then make the decision to  
2 get the same credit back.

3 Transcript, Dec. 21, 2006, pp. 15:14-16:7.

4 The bankruptcy court later commented, "this information that  
5 you've told me, I don't have this in the record . . . [s]o I need  
6 some declarations or something." Id. p. 18:7-19. Trustee  
7 committed to file declarations and the hearing was continued to  
8 January 26, 2007.

9 Trustee filed supplemental declarations from her bankruptcy  
10 attorney and patent counsel. Her bankruptcy attorney had  
11 contacted a diving association recommended by Debtor but had been  
12 unable to interest it in advertising the assets for sale. The  
13 patent attorney, who declares that he has "practiced in all areas  
14 of intellectual property law for over 34 years," supports  
15 Trustee's view that advertising is unlikely to be effective and  
16 that the universe of likely bidders is probably limited to Debtor  
17 and other existing investors in Fin LLC.

18 Thereafter the bankruptcy court issued the following  
19 tentative ruling:

20 The supplemental declarations have dealt  
21 satisfactorily with the issue of advertising. But  
what about the form of overbid?

22 The Sale Motion was set for hearing on January 26, 2007.

23 C. Debtor's claimed exemptions

24 Meanwhile, on December 13, 2006, Debtor filed his (first)  
25 amended bankruptcy Schedule C, which still did not list the IP  
26 but did list his interest in the pending state court action. On  
27 December 15, 2006, Debtor filed his (second) amended bankruptcy  
28 Schedule C adding various interests in the IP. On December 27,

1 2006, Debtor filed his (third) amended bankruptcy Schedule C  
2 listing additional IP and citing additional statutes as the basis  
3 for his claims of exemption.

4 On January 3, 2007, Trustee filed an objection to Debtor's  
5 claimed exemptions (the "First Objection to Exemptions"). In  
6 response Debtor filed a 41-page opposition, a 62-page "amended  
7 supplemental" opposition, and a 7-page "second supplemental"  
8 opposition.

9 The bankruptcy court issued a tentative ruling that the  
10 patents and certain intangibles are protected from "the  
11 prejudgment remedy of attachment" under some of the statutes  
12 cited by Debtor, but holding that "[e]xemptions as applied in  
13 bankruptcy deal with post-judgment enforcement rather than  
14 prejudgment issues." As for post-judgment enforcement, the  
15 bankruptcy court stated:

16 Debtor looks to [Cal. Code Civ. Proc.] § 703.010  
17 which states that "the exemptions provided by this  
18 chapter or by any other statute apply to all  
19 procedures for enforcement of a money judgment."  
20 Thus, he says, the intangibles are exempt from  
21 post-judgment enforcement since they are exempt  
22 from prejudgment attachment. This is not a proper  
23 reading of the law.

21 D. Further proceedings on the exemptions, Schedule C, and  
22 the Sale Motion

23 A combined hearing on the First Objection to Exemptions and  
24 the Sale Motion was held on January 26, 2007. Debtor raises  
25 numerous objections to what transpired at the hearing.

26 1. The exemptions and the Assets to be sold

27 The bankruptcy court sustained the First Objection to  
28 Exemptions as to the IP and authorized the sale of the IP and

1 related assets. Regarding the patents it later stated:

2 Now, Mr. McCarthy, when I ruled on this about  
3 the patent, okay, that's over with. Now, you take  
4 appeals, but you don't just keep filing new claims  
5 of exemption and rephrase it another way, because  
6 I'm ruling under any way that you could think of  
7 that the patents are not exempt. So the appellate  
8 court is your way out on that one.

9 Transcript, Jan. 26, 2007, p. 60:4-9.

10 The Appeal Rights, however, troubled the bankruptcy court.  
11 It was "tremendously uncomfortable about selling those rights"  
12 and stated at one point, "I'm not going to let it happen."

13 Transcript, Jan. 26, 2007, pp. 48:23-24, 55:9-10. See also id.

14 at pp. 38:18-22, 47:10-13, 48:10-12, 60:13-15. Fin LLC agreed to  
15 modify its bid such that the Appeal Rights would not be included  
16 in the assets to be purchased. Id. p. 62:13-23.<sup>5</sup>

## 17 2. Sale of the Fin Assets

18 Sommers appeared at the hearing as a possible overbidder,  
19 apparently as representative of a faction of minority investors  
20 in Fin LLC (collectively, the "Sommers Overbidders").

21 Transcript, Jan. 26, 2007, p. 65:14-15, 66:17. Debtor was not  
22 qualified as a prospective overbidder (id. pp. 64:23-65:2) but he  
23 objected to the terms of the overbidding process. His objection  
24 is hard to understand but his essential point appears to be that

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25 <sup>5</sup> Removing the Appeal Rights from the proposed sale changed  
26 the Cash/Non-Cash Ratio for any overbid by Fin LLC (see  
27 footnote 4 above). Trustee's counsel stated "we have to sit down  
28 with a pencil and just literally figure it out." Transcript,  
Jan. 26, 2007, p. 63:8-9. Presumably the new Cash/Non-Cash Ratio  
would be calculated using the same formula as in the Sale Motion,  
except that the cash would be reduced by \$50,000 because the all-  
cash bid of \$50,000 for the Appeal Rights was being withdrawn.  
The formula would be  $\$375,000 \text{ cash} / \$375,000 \text{ cash} + \$475,000$   
credit bid = 0.44. In any event, regardless of the exact ratio  
the point is that Fin LLC could still partially credit bid.

1 the Sommers Overbidders should be able to make a credit bid. See  
2 id. pp. 65:3-66:7. The bankruptcy court stated, "I have no idea  
3 what you're talking about." Id. p. 66:8-9. The Sommers  
4 Overbidders' counsel then stated that "[t]hings have changed as  
5 the hearing has gone on" but that at one point the Sommers  
6 Overbidders had been willing to pay "more cash, sooner" than the  
7 current management of Fin LLC and "once they [the Sommers  
8 Overbidders] controlled the company, they were willing to waive  
9 the claim of the company entirely against [Debtor]." Id.  
10 p. 67:4-9. It appears that the Sommers Overbidders originally  
11 wanted to credit bid Fin LLC's claim in a bid for all of the  
12 Assets, on the theory that if it were the successful bidder then  
13 it would acquire Debtor's majority interest in Fin LLC and  
14 (unlike Debtor) be able to exercise that interest to control Fin  
15 LLC and release its claim against Debtor.

16 Trustee's counsel argued that "that can't happen" and the  
17 bankruptcy court stated, "I'm not saying that I would prevent the  
18 overbidder from saying that that is an appropriate overbid" and  
19 asked the Sommers Overbidders's counsel to "check with your  
20 client" and "[s]ee if that's something [the Sommers Overbidders]  
21 would like to pursue." Id. pp. 67:16-23, 68:18-20, 69:7-8. The  
22 Sommers Overbidders' counsel responded that her client was only  
23 interested in "going after the wing patents" and the equity  
24 interests in Wing LLC. Id. pp. 69:20-21, 70:9-12. The  
25 bankruptcy court concluded, "that takes care of the issue." Id.  
26 p. 69:23-24. The Fin Assets were then offered for auction and,  
27 there being no overbidders, the bankruptcy court approved the  
28 sale to Fin LLC for \$750,000 total in credit bid and cash. Id.,

1 pp. 70:19-71:2.

2 3. Sale of the Wing Assets

3 The bankruptcy court stated, "[n]ow let's deal with the  
4 [W]ing [Assets]," Debtor objected that part of the "package being  
5 sold is not property of the estate," and the bankruptcy court  
6 responded, "The estate is selling whatever it has. Whatever its  
7 right, title, and interest is, it's selling." Transcript, Jan.  
8 26, 2007, p. 71:8-16. Debtor objected that Trustee's Sale Motion  
9 lists "property that's mine, and it's post-petition . . . did not  
10 exist as of the commencement date." Id. p. 71:17-21. The  
11 bankruptcy court responded, "you're correct" that "[p]roperty  
12 that didn't exist as of the date of filing is not property of the  
13 estate" but "that's something you can fight out with the buyer,  
14 as to whether or not it truly existed at the time." Id.  
15 p. 72:2-6.

16 Trustee opened the bidding for the Wing Assets at \$50,000  
17 from Fin LLC. The Sommers Overbidders bid \$51,000, all cash.  
18 The bankruptcy court expressed some confusion about the  
19 overbidding rules, Trustee's counsel responded that any overbids  
20 by Fin LLC would have a cash component based on "the ratio that  
21 we're going to have to reconfigure" (see footnote 5 above), and  
22 the bankruptcy court stated:

23 I was a little uncomfortable with that. It seems  
24 to me the overbids should be all cash against all  
cash.

25 Transcript, Jan. 26, 2007, p. 77:14-16.

26 Trustee's counsel responded that "[i]t's an imperfect world"  
27 and that "no one has objected to that." Id. p. 77:17-22. The  
28 bankruptcy court responded, "[t]hat's true. Nobody has

1 objected." Id. p. 77:23. In fact, as we have noted above,  
2 Debtor's written objection argues that it is "unconscionable that  
3 [Fin LLC] is permitted to purchase assets with credit bids that  
4 can exceed \$800,000.00, but all other creditors are forbidden  
5 from making credit bids and are restricted to 'cash only' bids."  
6 Debtor also orally objected that "it's inequitable," but the  
7 bankruptcy court responded, "you're not bidding," and when Debtor  
8 answered that the sale structure deters overbidding the  
9 bankruptcy court responded, "You're not involved in this." Id.  
10 p. 78:6-12. Bidding continued and Fin LLC was ultimately the  
11 high bidder for the Wing Assets at \$78,000. Id. p. 80:6-7.  
12 Debtor asked the bankruptcy court for a stay of the sale pending  
13 appeal, which was denied. Id. p. 87:4.

14 4. Resolution of matters not decided at the hearing  
15 on January 26, 2007

16 On the same day as the hearing on the First Objection to  
17 Exemptions and the Sale Motion, but not in time to be considered  
18 at that hearing, Debtor filed another (fourth) amended bankruptcy  
19 Schedule C. The amendment cites additional statutes that, Debtor  
20 alleges, do not allow a monetary judgment to be enforced against  
21 his interests in the IP.

22 On February 2, 2007, Trustee filed "Trustee's (A) Second  
23 Objection to Debtor's Claimed Exemptions, (B) Request That Debtor  
24 Be Precluded from Filing Any Further Amendments to Exemptions  
25 Without Leave of Court, and (C) Request to Surcharge Debtor's  
26 Exemptions for the Expenses Incurred by the Bankruptcy Estate in  
27 Responding to Debtor's Pleadings" and supporting documents (the  
28 "Second Objection to Exemptions"). Trustee argues that Debtor's

1 latest amended Schedule C adds nothing to his prior amended  
2 schedules, that Debtor has "abused his general right to file  
3 amendments to exemptions" through his "reckless disregard for the  
4 applicability of the [statutes] cited in support of his claimed  
5 exemptions," and that "Debtor has put the estate in a repeated  
6 cycle of needless responses" requiring a "senseless utilization  
7 of estate resources." On February 13, 2007, Debtor filed an  
8 opposition to the Second Objection to Exemptions.

9 On February 15, 2007, the bankruptcy court issued an order  
10 sustaining Trustee's First Objection to Exemptions, except that  
11 it set a continued hearing to determine whether Debtor's interest  
12 in the Appeal Rights is exempt (the "First Exemption Order"). On  
13 February 16, 2007, the bankruptcy court entered an order stating  
14 that at the hearing on January 26, 2007, "I ordered that [Debtor]  
15 was to file no further amended claims of exemption (Schedule C)  
16 . . ." but "on that very day, [Debtor] filed another amended  
17 Schedule C, that is hereby STRICKEN" and Debtor "is not to file  
18 any further amended Schedule C or other claims of exemption in  
19 this case without prior order of the court" (the "Pre-Filing  
20 Order").

21 On February 23, 2007, Debtor filed a notice of appeal from  
22 the "Orders to deny & preclude exemptions (Docket # 157;159);  
23 Decree Selling Assets." These docket numbers correspond to the  
24 First Exemption Order and the Pre-Filing Order. The "Decree  
25 Selling Assets" is no doubt a reference to the bankruptcy court's  
26 announcement of its intended decision regarding Trustee's Sale  
27 Motion (pursuant to Fed. R. Bankr. P. 8002(a)).

28

1           Shortly afterwards Debtor filed a response to Trustee's  
2 Second Objection to Exemptions. The bankruptcy court issued a  
3 tentative ruling:

4           . . . debtor argues that because he exempted the  
5 appellate rights, those rights cannot be property  
6 of the estate. He supports his argument under CCP  
7 § 704.210 ("Property that is not subject to  
8 enforcement of a money judgment is exempt without  
9 making a claim."). . . . [Mozer v. Goldman] [In  
10 re] Mozer [302 B.R. 892 (C.D. Cal. 2003), cited by  
11 Trustee,] does not reach the exemption issue, but  
12 it does clearly hold that debtor's defensive  
13 appellate rights constitute property of the  
14 bankruptcy estate. 302 B.R. at 895. . . .  
15 [Trustee] points out that debtor is unable to  
16 point to any specific exemption for appellate  
17 rights and no such exemption exists under  
18 California law. Instead, the debtor makes an  
19 argument identical to that made in front of Judge  
20 Klein in the bankruptcy case of In re Petruzzelli,  
21 139 B.R. 241 (Bankr. E.D. Cal. 1992) . . . [Under  
22 Petruzzelli], § 704.210 cannot serve as a  
23 substitute for a specifically listed exemption.  
24 . . . [T]he trustee's objection to the debtor's  
25 exemption in defensive appellate rights must be  
26 sustained.

27           Having said this, . . . I will not approve a  
28 sale of the appeal rights even though they are  
property of the estate and not subject to  
exemption and will become worthless at the end of  
the appeal process.

Debtor also filed an emergency motion with the bankruptcy  
court for a stay pending appeal (not in the excerpts of record)  
and a supporting declaration of Sommers stating that the Sommers  
Overbidders had authorized him to make a bid at the hearing on  
December 21, 2006, consisting of

(i) more cash than the amount offered by the  
current management of [Fin LLC], (ii) paid in 30  
days with no performance component, and (iii) full  
satisfaction of the judgment against [Debtor] once  
we obtained the majority, controlling interest in  
[Fin LLC].



1 According to Sommers, after that hearing, Trustee "took the  
2 position that only the current management of [Fin LLC] would be  
3 allowed to include a reduction of the judgment against [Debtor]  
4 as a component of its bid" and as a result the investors decided  
5 to bid only on the Wing Assets. It is not clear from Sommers'  
6 declaration whether that decision was made at or before the  
7 hearing on January 26, 2007.

8 At a hearing on March 7, 2007, the bankruptcy court ruled,  
9 consistent with its tentative ruling, that Debtor does not have  
10 an exemption in the Appeal Rights but that the Trustee's motion  
11 to sell those rights would be denied without prejudice.  
12 Transcript, March 7, 2007, pp. 5:25-6:1, 25:13-18. An order was  
13 entered the next day sustaining all of Trustee's objections to  
14 Debtor's exemptions (the "Second Exemption Order"). On March 22,  
15 2007, the bankruptcy court issued an order denying the Sale  
16 Motion as to the Appeal Rights and otherwise granting that  
17 motion, including a finding of good faith pursuant to Section  
18 363(m) (the "Sale Order"). Neither the excerpts of record nor  
19 the bankruptcy court's docket entries (which we have reviewed  
20 online) appear to reflect any disposition of Trustee's request to  
21 surcharge Debtor's exemptions.

22 E. The Prosecution Order

23 In May of 2007 Trustee filed a motion for authority to  
24 "prosecute, apply for, obtain, maintain, issue, and enforce the  
25 five United States patent applications [specified in the motion],  
26 or any continuation, division, renewal, or substitute thereof,  
27 and as to letters patent, any reissue or re-examination thereof"  
28 (the "Prosecution Motion"). The five patent applications include

1 two of the New Applications, described as follows:

2	<u>Patent title</u>	<u>Application #</u>
3	Methods for creating large scale	11/363,562
4	focused blade deflections [the "562 Application"]	
5	High efficiency tip vortex	11/483,935
6	reversal and induced drag reduction [the "935 Application"]	

7 Trustee states (in a footnote to her motion and to her  
8 accompanying declaration),

9 It is my understanding that the next deadline  
10 for the Trustee to respond to the United States  
11 Patent & Trademark Office's action is June 29,  
2007. Therefore, the Trustee requests a walk-  
through of an order approving this Motion.

12 A walk-through is a local procedure for expediting the  
13 processing of orders. Apart from this statement of Trustee's  
14 understanding, there was no competent evidence suggesting why the  
15 matter might be urgent or what rights or interests the estate  
16 might lose without immediate relief.

17 Debtor filed an opposition objecting to Trustee's  
18 prosecution of the New Applications (and stating that he "does  
19 not object at this time to the Trustee prosecuting the three  
20 other patent applications . . ."). Debtor argues that post-  
21 petition patent applications resulting from his own post-petition  
22 services are not property of the bankruptcy estate under Sections  
23 541(a)(1), 541(a)(6), and 365(n). Trustee filed a reply,  
24 attached to which is a printout of two web pages of the United  
25 States Patent and Trademark Office ("USPTO") describing the 562  
26 Application and the 935 Application as "continuations" of patents  
27 already in existence on the petition date. According to Trustee,  
28 this "illustrates that there were no post-petition improvements

1 or modifications.”

2 The bankruptcy court issued a tentative ruling:

3 If they were improvements, modifications, or newly  
4 created items, debtor would be correct in regards  
5 to the two post-petition inventions in that  
6 something invented after the filing of chapter 11  
7 may not be estate property if it is an improvement  
8 or modification . . . . However, debtor’s  
9 assertions lack proper evidence and based on the  
10 evidence presented by [Trustee], the two [New  
11 Applications] are merely continuations of  
12 prepetition inventions and thus constitute estate  
13 property.

14 The day before the hearing Debtor filed a 19-page  
15 “Supplemental” to his opposition to the Prosecution Motion.  
16 Debtor’s declaration, included in the Supplemental, states that  
17 the 562 Application was filed on February 27, 2006, and the 935  
18 Application was filed on July 10, 2006, so that both applications  
19 were filed after the Petition Date. Debtor alleges that the New  
20 Applications are not mere continuations of the patent  
21 applications existing as of the Petition Date but are  
22 improvements or modifications. Debtor also alleges that by  
23 removing some of the specificity of earlier patents or patent  
24 applications he has eliminated a limitation and broadened the  
25 scope of patent protection, which can be an improvement or  
26 modification that is recognized as “patentably distinct” from the  
27 earlier Patents or Existing Applications.<sup>6</sup> Debtor concludes that  
28

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24 <sup>6</sup> Debtor cites Advanced Cardiovascular Sys., Inc. v.  
25 Medtronic, Inc., 265 F.3d 1294 (Fed. Cir. 2001) (patent had  
26 sufficiently general language to encompass both side-by-side or  
27 coaxial designs for a catheter). We need not determine whether  
28 Debtor’s New Applications were solely continuations or also  
included improvements or modifications. For purposes of this  
appeal it is enough that Debtor claims to have made some  
patentable improvements or modifications and that this issue has  
not yet been decided.

1 the USPTO is "clearly well suited" to make this determination and  
2 that he should be

3           allowed to finish prosecuting his own patent  
4           applications, so that he can remain in  
5           communication with the Patent Office and make  
6           further changes / amendments / modifications /  
7           improvements as needed to see his post-petition  
8           efforts through to either final rejection by the  
9           Patent Office or final approval as patentably  
10          distinct claims without interference or  
11          obstruction by the Trustee.

12           The Prosecution Motion came on for hearing on June 20, 2007.  
13           The bankruptcy court expressed the wish that Debtor had included  
14           in his original opposition the material in his supplemental  
15           papers, but it did not strike those papers and was initially  
16           inclined to continue the hearing as to the two New Applications.  
17           The bankruptcy court wanted "somebody who knows something not  
18           about the law of patent but about the technical thing of this  
19           type of patent" to compare the New Applications to the "original  
20           patent applications and see whether or not these fall into  
21           modifications or improvements, because I can't tell . . . ."  
22           Transcript, June 20, 2007, p. 2:3-8. Trustee's counsel responded  
23           that "we are apparently on a very short time string." Id.  
24           p. 2:11. The bankruptcy court asked why and he responded that  
25           "our patent counsel informed my client that we need to start  
26           dealing with the Patent Office very soon, within the next week to  
27           10 days" in order to "process the paperwork to make sure that  
28           these patents stay in effect and are not lost." Id. p. 2:12-20.  
Trustee interjected that "we're not trying to take -- this isn't  
a sale of [Debtor's] patents" and "we have very good intellectual  
property counsel" but "I didn't put the declaration in there  
. . . because I honestly didn't think that it was going to be

1 necessary" and "[w]e were given specific instructions by the  
2 Patent Office that they will let these patents lapse because they  
3 didn't have an order from a Bankruptcy Court that says I am the  
4 Trustee." Id. p. 3:5-19.

5 The bankruptcy court asked Debtor to explain how it would  
6 harm him if Trustee were allowed to prosecute the New  
7 Applications. Transcript, June 20, 2007, p. 6:22. He responded:

8 Now, if the Trustee takes over, she is the  
9 gatekeeper to my continued services and my  
10 continued modifications. The Patent Office may  
11 say "We like what you've done, but you haven't  
12 fully explained this one aspect. Please explain  
13 it more. Otherwise we won't approve it." I need  
14 to be able to have control of that and see it  
15 through to final prosecution of my claims.

16 \* \* \*

17 If she takes over, she can cancel my claims. She  
18 can submit new claims that are different. She can  
19 prevent me from continuing my work which I'm  
20 allowed to under 541(a)(6).

21 \* \* \*

22 There's a conflict of interest. If [Trustee]  
23 submit[s] my new patent claims and they get  
24 issued, [then Trustee does not] get a right to it.

25 \* \* \*

26 If they are in charge, I can't even call the  
27 patent examiner.

28 Transcript, June 20, 2007, pp. 8:12-9:5, 15:6-9, 16:10-11.

Debtor also disputed whether there was any urgency as to the  
two New Applications. He stated that he submitted changes  
recently so "it's not going to lapse in a week" and once the  
USPTO responds "then I get six months from there to reply" and  
"another six months" thereafter. Transcript, June 20, 2007,  
pp. 9:14-10:1. "And if they can show that those two applications

1 or anything that I start post-petition is going to lapse, we'll  
2 go into this Court -- shortened time is fine with me -- . . . and  
3 let's deal with it then." Id. p. 14:6-10.

4 The bankruptcy court suggested that the parties' rights and  
5 interests in the New Applications be determined by an adversary  
6 proceeding. Meanwhile it signed Trustee's proposed Prosecution  
7 Order in court. Trustee commenced an adversary proceeding  
8 shortly after the order was issued (Goldman v. McCarthy, Adv. No.  
9 SV07-01174-GM) (the "Patent Ownership Action").

10 Debtor filed a timely notice of appeal from the Patent  
11 Prosecution Order (BAP No. CC-07-1263-MoPaD). As noted above,  
12 Debtor also filed a single notice of appeal from the First  
13 Exemption Order, the Pre-Filing Order and, pursuant to Fed. R.  
14 Bankr. P. 8002(a), from the bankruptcy court's announced decision  
15 on the Sale Motion that was later entered as the Sale Order  
16 (collectively, BAP No. CC-07-1083-MoPaD). We elected not to  
17 require separate appeals from the latter three orders because  
18 they are related. Having been denied a stay by the bankruptcy  
19 court, Debtor filed a motion seeking a stay of those three orders  
20 from us. We denied that motion but granted a temporary stay  
21 pending further appeal to the Court of Appeals for the Ninth  
22 Circuit. On April 23, 2007, the Ninth Circuit issued an order  
23 granting a stay (9th Cir. No. 07-55501). We issued an order  
24 stating our understanding that the Ninth Circuit expects us to  
25 proceed and accordingly we issued a briefing schedule.

26 //

27 //

28 //

1 **II. ISSUES**

- 2 A. Do we have jurisdiction?
- 3 B. Has Debtor shown error in the First or Second Exemption  
4 Order?
- 5 C. Has Debtor shown error in the Pre-Filing Order?
- 6 D. Has Debtor shown error in the Sale Order?
- 7 E. Has Debtor shown error in the Prosecution Order?

8 **III. JURISDICTION**

9 A. Generally

10 The bankruptcy court had jurisdiction under 28 U.S.C.  
11 § 157(b) (2) (A), (M), (N) and (O) and § 1334. It is less clear  
12 whether we have jurisdiction under 28 U.S.C. § 158. The parties  
13 have not raised this issue but we have an independent duty to  
14 examine jurisdictional issues. Gen. Elec. Capital Auto Lease,  
15 Inc. v. Broach (In re Lucas Dallas, Inc.), 185 B.R. 801, 804 (9th  
16 Cir. BAP 1995).

17 B. The First and Second Exemption Orders

18 Debtor filed a timely notice of appeal from the First  
19 Exemption Order. That order is interlocutory but it merged with  
20 the Second Exemption Order, so ordinarily it would be final.  
21 Rains v. Flinn (In re Rains), 428 F.3d 893, 900 (9th Cir. 2005).  
22 Two problems arise. First, Trustee's Second Objection to  
23 Exemptions asks that Debtor's exemptions be surcharged and the  
24 excerpts of record do not show that the bankruptcy court ever  
25 ruled on the surcharge issue.<sup>7</sup> Nevertheless, the Second

---

26  
27 <sup>7</sup> Our order denying a stay pending appeal, on April 11,  
28 2007, states that the Interlocutory Exemption Order became final  
when the Exemption Order was issued, but the motions panel did

(continued...)

1 Exemption Order is final under the flexible finality standard  
2 because it (1) finally determines the discrete issue to which it  
3 is addressed, and (2) resolves and seriously affects substantive  
4 rights. Duckor Spradling & Metzger v. Baum Trust (In re  
5 P.R.T.C., Inc.), 177 F.3d 774, 779-80 (9th Cir. 1999). The  
6 surcharge request is a discrete issue because, among other  
7 things, Debtor has uncontested exemptions in his homestead and  
8 other property, and those exemptions could be surcharged (or not)  
9 regardless of the bankruptcy court's other rulings.

10 The second issue is whether Debtor's claimed exemption in  
11 the Appeal Rights is properly before us. That issue was not  
12 determined until the Second Exemption Order, but Debtor's notice  
13 of appeal mentions only the First Exemption Order. Nevertheless,  
14 Debtor believed that the bankruptcy court's oral ruling had fully  
15 resolved the Appeal Rights issues on January 26, 2007, and there  
16 was some ambiguity at that hearing. Therefore we hold that  
17 Debtor's notice of appeal after the oral ruling was intended to  
18 cover all of the bankruptcy court's rulings on the exemption  
19 issues and is effective to put the Second Exemption Order before  
20 us. See Fed. R. Bankr. P. 8002(a).

21 C. The Pre-Filing Order

22 The Pre-Filing Order (which prevents Debtor from filing any  
23 more amendments to his bankruptcy Schedule C without advance  
24 approval from the bankruptcy court) was also issued in response  
25 to Trustee's Second Objection to Exemptions. That order is final

26 \_\_\_\_\_  
27 <sup>7</sup>(...continued)  
28 not mention the surcharge issue and we are not bound by the  
decision of a motions panel. Bentley v. Bank of Coronado (In re  
Crystal Sands Prop.), 84 B.R. 665, 666 (9th Cir. BAP 1988).



1 under the above flexible finality analysis because, once again,  
2 the unresolved surcharge issue is discrete. Debtor's uncontested  
3 exemptions could be surcharged (or not) regardless of any  
4 restrictions on Debtor's ability to amend his bankruptcy  
5 Schedule C.

6 D. The Sale Order

7 At oral argument we asked Trustee's counsel whether the  
8 current managers of Fin LLC are still willing to close the  
9 transaction approved by the Sale Order. They are, so the sale  
10 order is not moot. See Omoto v. Ruggera (In re Omoto), 85 B.R.  
11 98, 99-100 (9th Cir. BAP 1988) (panel's duty to consider  
12 mootness).

13 Another issue is whether Debtor has standing to challenge  
14 the Sale Order. Standing is a jurisdictional issue that we are  
15 obliged to examine. Lucas Dallas, 185 B.R. at 804. A debtor in  
16 a Chapter 7 case ordinarily does not have standing to object to  
17 the proposed sale of the estate's assets. Fondiller v. Robertson  
18 (In re Fondiller), 707 F.2d 441, 442 (9th Cir. 1993). The  
19 bankruptcy court's comments suggest that Debtor did not have  
20 standing to object, at least as to the overbid procedures,  
21 because he was not a bidder. See Transcript, Jan. 26, 2007,  
22 p. 78:6-12. We believe that Debtor does have standing because he  
23 has a direct financial stake in maximizing the proceeds of any  
24 sale. As the bankruptcy court told Debtor at the hearing on  
25 December 21, 2006,

26           Ultimately, it's in your benefit [to maximize  
27 the proceeds, because] either you're going to win  
28 or lose on the state court action . . . . If you  
lose, then every dollar that is paid to the  
creditors is a dollar less you might end up owing

1 on the dischargeability issue. If you win, then a  
2 whole group of creditors go away, and after the  
3 other creditors have been paid off, you get what's  
left.

4 Transcript, Dec. 21, 2006, p. 50:6-13. See generally Fondiller,  
5 707 F.2d at 442 (Chapter 7 debtor who has pecuniary interest has  
6 standing).

7 E. The Prosecution Order

8 The bankruptcy court wrote, just above the signature line on  
9 the Prosecution Order, "This is not a finding that the [IP] will  
10 ultimately be found to be property of the estate." Our review of  
11 the bankruptcy court's online docket shows that the Patent  
12 Ownership Action is still pending. In other words, Trustee has  
13 been provisionally allowed to prosecute patent applications that  
14 she might not own. Therefore the Prosecution Order may be in the  
15 nature of interim, interlocutory relief. The flexible finality  
16 doctrine does not help because the issue of who owns the IP is  
17 intertwined with, not distinct from, the issue of who should be  
18 authorized to prosecute the patent applications. Nevertheless,  
19 if leave to appeal is required, we believe it is appropriate.  
20 See 28 U.S.C. § 158(a)(3).

21 Both Debtor and Trustee assert that they will suffer  
22 irreparable and immediate harm if they cannot prosecute the  
23 patent applications in which they claim an interest, our review  
24 may help to protect the status quo or avoid irreparable harm long  
25 enough for a determination of who really owns which assets and,  
26 as we discuss below, there is substantial ground for disagreement  
27 over the controlling issues of law underlying the Prosecution  
28 Order. See Travers v. Dragul (In re Travers), 202 B.R. 624, 626

1 (9th Cir. BAP 1996) ("Granting leave is appropriate if the order  
2 involves a controlling question of law where there is substantial  
3 ground for difference of opinion and when the appeal is in the  
4 interest of judicial economy because an immediate appeal may  
5 materially advance the ultimate termination of the litigation.")  
6 (citation omitted).

7 Finally, we must consider that the Prosecution Order might  
8 not be reviewable for another reason. Debtor has provided us  
9 with a document entitled Notice Regarding Change of Power of  
10 Attorney (the "USPTO Notice") regarding the 562 Application.  
11 According to paragraph 3 of the USPTO Notice, the Prosecution  
12 Order "is insufficient to establish authority of the trustee to  
13 take action in the instant application [one of the applications  
14 that Trustee seeks to prosecute]." The USPTO Notice was not  
15 presented to the bankruptcy court but we must consider whether it  
16 means that the Prosecution Order is moot. See generally Lowry v.  
17 Barnhart, 329 F.3d 1019, 1024 (9th Cir. 2003) ("Consideration of  
18 new facts may even be mandatory, for example, when developments  
19 render a controversy moot and thus divest us of jurisdiction.")  
20 (citation omitted). We issued an order directing the parties to  
21 be prepared to address this issue at oral argument.

22 At that time Trustee's counsel offered evidence that she  
23 asked the USPTO for a waiver of the rules applied in the USPTO  
24 Notice (the "Waiver Petition"). Debtor offered evidence that the  
25 USPTO has denied that petition. We hereby accept both parties'  
26 evidence.<sup>8</sup> Debtor's evidence strongly suggests that the

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27  
28 <sup>8</sup> Specifically, we accept and have reviewed the following:  
(a) Trustee's Waiver Petition to the USPTO, (b) an undated letter  
(continued...)

1 Prosecution Order may be moot, but Trustee's counsel argued that  
2 she could appeal from the USPTO to the District Court so the  
3 Prosecution Order might yet have some effect. Debtor, too,  
4 argued that the Prosecution Order might have some effect beyond  
5 simply allowing Trustee to prosecute various patent applications.  
6 We do not know what effect Debtor might have in mind, but we note  
7 that, by granting the Prosecution Motion, the bankruptcy court  
8 gave Trustee the exclusive authority to "enforce" certain  
9 patents, and we can conceive of situations in which Debtor might  
10 be prejudiced by Trustee's control of enforcement. Both parties  
11 may be relying on slim reeds, but we are not prepared to say that  
12 Debtor's appeal from the Prosecution Order is moot.

13 For all of these reasons we have jurisdiction over each of  
14 the orders on appeal.

#### 15 IV. STANDARDS OF REVIEW

16 "We review the bankruptcy court's conclusions of law and  
17 questions of statutory interpretation de novo, and factual  
18 findings for clear error." Village Nurseries v. Gould (In re  
19 Baldwin Builders), 232 B.R. 406, 410 (9th Cir. BAP 1999)  
20 (citations omitted). A factual finding is clearly erroneous if  
21 the appellate court, after reviewing the record, has a firm and  
22 definite conviction that a mistake has been committed. Wall St.  
23 Plaza, LLC v. JSJF Corp. (In re JSJF Corp.), 344 B.R. 94, 99 (9th  
24 Cir. BAP 2006).

25  
26  
27 <sup>8</sup>(...continued)  
28 from the USPTO to Debtor, with a copy to Trustee's attorneys,  
stating that Trustee's Waiver Petition is "dismissed," and  
(c) Trustee's complaint in the Patent Ownership Action.

1           The right of a debtor to claim exemptions and the scope of  
2 those exemptions are questions of law that we review de novo. We  
3 review the Second Exemption Order under that standard. Ford v.  
4 Konnoff (In re Konnoff), 356 B.R. 201, 204 (9th Cir. BAP 2006);  
5 Simpson v. Burkart (In re Simpson), 366 B.R. 64, 70-71 (9th Cir.  
6 BAP 2007).

7           We apply various standards of review to the Pre-Filing  
8 Order, which barred Debtor from filing further amendments to his  
9 bankruptcy Schedule C without prior approval of the bankruptcy  
10 court. Questions regarding the right of a debtor to claim  
11 exemptions are questions of law subject to de novo review,  
12 whereas whether a debtor has claimed an exemption in bad faith is  
13 a question of fact reviewed for clear error. Arnold v. Gill (In  
14 re Arnold), 252 B.R. 778, 784 (9th Cir. BAP 2000). To the extent  
15 that the Pre-Filing Order may have been intended in the nature of  
16 a vexatious litigant order, we review it for abuse of discretion.  
17 See Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1056 (9th  
18 Cir. 2007). We review any findings in support of the Pre-Filing  
19 Order for clear error.

20           We review the Sale Order for an abuse of discretion,  
21 Lahijani, 325 B.R. at 287, except for Debtor's challenge to the  
22 bankruptcy court's finding of good faith. If we reach that issue  
23 it is reviewed for clear error, mindful of the need for evidence  
24 to support it. See Thomas v. Namba (In re Thomas), 287 B.R. 782  
25 (9th Cir. BAP 2002).

26           The Prosecution Order appears to be in the nature of a  
27 preliminary injunction, attempting to preserve the status quo  
28 pending a determination of the parties' rights and interests in

1 the IP. As such, we review it for an abuse of discretion. See  
2 Solidus Networks, Inc. v. Excel Innovations, Inc. (In re Excel  
3 Innovations, Inc.), 502 F.3d 1086, 1093-96 (9th Cir. 2007).

4 A bankruptcy court necessarily abuses its discretion if it  
5 bases its ruling upon an erroneous view of the law or a clearly  
6 erroneous assessment of the evidence. We also find an abuse of  
7 discretion if we have a definite and firm conviction that the  
8 bankruptcy court committed a clear error of judgment in the  
9 conclusion it reached. Beatty v. Traub (In re Beatty), 162 B.R.  
10 853, 855 (9th Cir. BAP 1994).

## 11 V. DISCUSSION

### 12 A. The First and Second Exemption Orders

13 Except as otherwise provided by law, "all property of [a]  
14 judgment debtor is subject to enforcement of a money judgment."  
15 Cal. Code Civ. Proc. § 695.010(a). This has been held to include  
16 "intangible property such as patents and copyrights." Sleepy  
17 Hollow Inv. Co. v. Prototek, Inc., 2006 WL 279349 at \*1 (N.D.  
18 Cal.), on motion for reconsideration, 2007 WL 2701318 (N.D.  
19 Cal).<sup>9</sup>

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21 <sup>9</sup> These are unpublished decisions. The bankruptcy court  
22 stated, "I'm not even sure whether you cite to unpublished  
23 opinions or not." Transcript, Jan. 26, 2007, p. 35:2-6. We have  
24 reviewed the local rules of the District Court for the Northern  
25 District of California (which issued Sleepy Hollow) and they do  
26 not bar citation of unpublished opinions. We note that Ninth  
27 Circuit Rule 36-3 limits the citation of unpublished dispositions  
28 and orders "of this Court" issued prior to January 1, 2007, but  
nothing in that rule prohibits citation of unpublished  
dispositions issued by any other courts. See Renick v. Dun &  
Bradstreet Receivable Mgmt. Servs., 290 F.3d 1055, 1058 (9th Cir.  
2002) (construing prior 9th Circuit rule as applicable only to  
9th Circuit dispositions).

1 Debtor confirmed at oral argument that he believes all  
2 patents are exempt under California law. Debtor's (fourth)  
3 amended bankruptcy Schedule C and his various briefs before the  
4 bankruptcy court and on this appeal cite numerous statutes in  
5 support of his claimed exemptions in the IP, including California  
6 Code of Civil Procedure ("CCP") §§ 487.020, 695.040, 703.010,  
7 703.030, 703.140, 704.210, 708.450, 708.510, 708.550, 706.010 et  
8 seq., and 708.450. Debtor's core argument is that "Property that  
9 is not subject to enforcement of a money judgment is exempt  
10 without making a claim," CCP § 704.210, and allegedly there is no  
11 way under California law to levy on a patent so, in his view, it  
12 is "not subject to" enforcement of a money judgment.

13 We assume without deciding that Debtor is correct that there  
14 is no method to levy upon a patent under California law, perhaps  
15 because (as he argues) a patent is not a "general intangible"<sup>10</sup>

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17 <sup>10</sup> Debtor concedes that "all property of the judgment  
18 debtor" (CCP § 695.010) includes both tangible and intangible  
19 personal property (CCP §§ 680.290, 680.310), but he equates  
20 "intangible personal property" with "general intangibles" and  
notes that, for purposes of California law on enforcement of  
judgments,

21 "General intangibles" means "general intangibles",  
22 as defined in Section 9106 of the Commercial Code,  
consisting of rights to payment.

23 CCP § 680.210 (emphasis added).

24 Debtor argues that the patents (and other IP) are general  
25 intangibles that do not merely "consist[] of rights to payment."  
26 Therefore, he reasons, the patents (and other IP) are not among  
the types of property that are subject to enforcement of a money  
27 judgment, so they are exempt.

28 Debtor argues that the only remedy for a judgment creditor  
in this situation is to collect "from a third party who owes

(continued...)

1 or because federal law supersedes state law when it comes to a  
2 transfer of interests in patents,<sup>11</sup> or for some other reason.  
3 See Transcript, Jan. 26, 2007, p. 28:2-12.<sup>12</sup> But Debtor's

4 \_\_\_\_\_  
5 <sup>10</sup> (...continued)  
6 money [to the patent holder], like a licensee" but "only after  
7 support payments have been paid to the judgment Debtor, if he  
8 claims an exemption on those amounts." Transcript, Jan. 26,  
9 2007, p. 33:17-34:3. Debtor cites CCP § 708.510, which provides  
10 in subsection (a)(5) for assignment of "Payments due from a  
11 patent" and in subsection (c)(1) for reducing the dollar amount  
12 of any assignment for the "reasonable requirements" of the  
13 judgment debtor and any person supported by him or her.

14 Similarly (although Debtor does not appear to have raised  
15 this argument before the bankruptcy court) he claims on this  
16 appeal that his Appeal Rights in the pending state court action  
17 qualify as a "commercial tort claim" under Cal. Commercial Code  
18 § 9102(a)(13), which is excluded under CCP §§ 680.210 and  
19 481.115.

20 <sup>11</sup> See Peterson v. Sheriff of City and County of San  
21 Francisco, 115 Cal. 211, 213, 46 P. 1060 (1896) (sheriff could  
22 not be compelled to levy on patent because it "is a thing created  
23 entirely by federal legislation" that may be transferred only by  
24 assignment, and "if a creditor of the patentee can have the  
25 patent right subjected to the satisfaction of his judgment at  
26 all, it can be done only by a court of equity acting in personam,  
27 and compelling the patentee to make an assignment.").

28 <sup>12</sup> Debtor cites a leading treatise on enforcement of  
judgments, which states:

No execution levy against patent rights: A  
judgment debtor's letters patent, and inventions  
covered thereby, apparently may not be subject to  
execution levy.

Alan M. Ahart, *Enforcing Judgments and Debts* (TRG 2007),  
Chapter 6D (Enforcement of Judgment by Writ of Execution),  
¶ 6:324.3. See also id. at ¶¶ 4:77-4:77.1 (pre-judgment, patents  
are apparently exempt from attachment).

Debtor also makes much of the fact that the bankruptcy court  
stated at one point that a "patent is not an intangible."  
Transcript, Jan. 26, 2007, p. 20:2-3. The bankruptcy court later  
(continued...)



1 analysis is flawed in at least two respects.

2 First, a levy is not the only way to enforce a money  
3 judgment. The bankruptcy court held, citing Sleepy Hollow (and  
4 an unpublished decision of the Ninth Circuit), that "the proper  
5 procedure to execute on a patent is to obtain an order of the  
6 Court directing the patent holder to assign the patent."

7 Transcript, Jan. 26, 2007, pp. 35:19-21 and 36:8-23. We agree.

8 See Sleepy Hollow, 2006 WL 279349 at \*1-2.

9 The patent act provides that patents are  
10 assignable in law by instrument in writing. This  
11 does not mean that the patentee must in every case  
12 execute the assignment by his own hand. On  
13 creditor's bill a court of equity may appoint a  
trustee to make an assignment of a debtor's patent  
right in case the debtor himself does not make the  
required assignment, and an assignment executed by  
the trustee will pass title to a purchaser.

14 Zanetti v. Zanetti, 77 Cal.App.2d 553, 560, 175 P.2d 603, 606  
15 (1947) (quoting Cookson v. Louis Marx & Co., 23 F.Supp. 615, 617  
16 (S.D.N.Y. 1938) (citations omitted)). See also Coldren v. Am.  
17 Milling Research & Dev. Inst., Inc., 177 Ind.App. 134, 137; 378  
18 N.E.2d 870, 872 (1978) ("while patent and contract rights have  
19 traditionally been unavailable to a judgment creditor upon simple  
20 execution unless the judgment debtor volunteers their  
21 availability, they are available to satisfy the judgment through  
22 proceedings supplementary to execution.").

23 Debtor attempts to distinguish Sleepy Hollow, arguing that  
24 "[n]o one claimed an exemption" and the court in that case  
25 "didn't look into the definition of 'general intangibles' under  
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27 <sup>12</sup>(...continued)  
28 appears to agree that a patent is an intangible. In any event,  
it is.

1 [CCP §] 680[.]210 . . . ." Transcript, Jan. 26, 2007, p. 37:18-  
2 22. These arguments are unpersuasive and ignore the bankruptcy  
3 court's and our own analysis, described above.

4 Second, even if there were no way for a judgment creditor to  
5 reach the value of a patent, and the creditor could only reach  
6 proceeds of the patent as Debtor argues, that does not make the  
7 patent itself exempt. Debtor misreads the statutory provision  
8 that "Property that is not subject to enforcement of a money  
9 judgment is exempt without making a claim" (CCP § 704.210,  
10 emphasis added). That statute, and the California exemption  
11 scheme in general, were construed in In re Petruzelli, 139 B.R.  
12 241, 247 (E.D. Cal. 1992):

13 Most exemptions must be claimed. Unless and  
14 until an exemption is claimed, it is regarded as  
15 waived, with the result that the property remains  
vulnerable to judgment enforcement. . . .

16 Some exemptions need not be claimed. They  
17 are automatic and are denoted by the statutory  
term of art "exempt without making a claim"  
. . . .

18 Finally, narrowly circumscribed types of  
19 property are absolutely immune from judgment  
20 enforcement by virtue of being declared to be "not  
21 subject to" (another statutory term of art) such  
22 enforcement. [Emphasis added.] Examples include  
23 property that cannot be assigned or transferred  
24 and certain licenses. Such property may not be  
levied upon, and, if it is erroneously levied  
upon, may be released pursuant to the claim of  
exemption procedure. It is also deemed exempt  
without making a claim. Cal. Code Civ. Proc.  
§ 704.210. . . .

25 Petruzelli, 139 B.R. at 243-44 (footnotes and some citations  
26 omitted, emphasis added).

27 We agree with Petruzelli that the phrase "not subject to"  
28 enforcement is a term of art meaning that the property is exempt

1 without making a claim of exemption. None of the statutes cited  
2 by Debtor provide that sort of automatic exemption in patents.

3 As an alternative basis for exempting the IP, Debtor argues  
4 that he is not required to elect between alternative exemptions  
5 in various statutes but may have them all, because of statutory  
6 language like the following:

7 "Except as otherwise specifically provided by  
8 statute[,] property that is described in this  
9 chapter or in any other statute as exempt without  
making a claim is not subject to any procedure for  
enforcement of a money judgment."

10 CCP § 703.030(b) (emphasis added).

11 Debtor focuses on the first emphasized phrase while ignoring  
12 the second. As noted in Petruzelli, the phrase "exempt without  
13 making a claim" is another term of art. Petruzelli, 139 B.R. at  
14 243. None of the statutes cited by debtor create the sort of  
15 automatic exemption described by that term of art either.

16 Similarly, Debtor focuses on words like "exempt" within  
17 various provisions of CCP §§ 487.010 and 487.020 without  
18 recognizing that the specified property is exempt from  
19 attachment. As the bankruptcy court held, bankruptcy exemptions  
20 are of the post-judgment variety. Debtor's argument would  
21 incorporate all exemptions from pre-judgment remedies into  
22 exemptions from post-judgment remedies, which would make the  
23 statutory scheme meaningless.

24 As to the Appeal Rights, Debtor emphasizes that they are  
25 purely defensive and would not generate a recovery for the  
26 bankruptcy estate. As Debtor acknowledges, the bankruptcy court  
27 recognized this. It refused to authorize a sale of the Appeal  
28 Rights for that reason, but it also held that the Appeal Rights

1 are property of the estate and that Debtor has not established  
2 any basis to exempt them. On this appeal Debtor presents no  
3 basis to exempt them beyond the arguments that we have already  
4 rejected.<sup>13</sup>

5 For all of these reasons, the bankruptcy court properly  
6 sustained Trustee's objections to Debtor's claims of exemption.  
7 Debtor has not established any error in the First Exemption Order  
8 or the Second Exemption Order.

9 B. The Pre-Filing Order

10 Debtor argues that the bankruptcy court was required to, but  
11 did not, make a finding of bad faith before issuing the Pre-  
12 Filing Order (which bars him from further amending his bankruptcy  
13 Schedule C without prior approval of the bankruptcy court). We  
14 have held that "[t]he bankruptcy court has no discretion to  
15 disallow amended exemptions, unless the amendment has been made  
16 in bad faith or prejudices third parties." Arnold, 252 B.R. at  
17 784 (citations omitted). Debtor points out that he filed a  
18 declaration stating that, contrary to the bankruptcy court's  
19 recitation of the facts in the Pre-Filing Order, he filed his  
20 fourth amended bankruptcy Schedule C before, not after, the 10:00  
21 a.m. hearing on January 26, 2007. In other words, Debtor argues  
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23 <sup>13</sup> Debtor emphatically denies that he elected the  
24 exemptions under CCP § 703.140(b) and claims instead that he  
25 elected the exemptions under CCP § 703.140(a) which, he alleges,  
26 incorporates or at least permits him to assert all of the other  
27 exemptions that he claims. We do not address what election  
28 Debtor made. It is enough that Debtor has stated no basis to  
exempt any rights or interests in the IP or the Appeal Rights.  
But see generally Flinn v. Morris (In re Steward), 227 B.R. 895,  
898 (9th Cir. BAP 1998) (elections under CCP § 703.140(a) and (b)  
are mutually exclusive).

1 that he did not ignore the bankruptcy court's directions at that  
2 hearing (which he claims were ambiguous anyway).

3 Trustee responds that Debtor is guilty of bad faith, citing  
4 In re Rolland, 317 B.R. 402 (Bankr. C.D. Cal. 2004). But she  
5 does not cite any factual support in the record nor can she point  
6 to any actual finding of bad faith.

7 We consider an alternative basis for the bankruptcy court's  
8 order because we believe that the bankruptcy court had in mind  
9 something other than a bad faith bar, and "[a]n appellate court  
10 in the Ninth Circuit may consider any issue supported by the  
11 record and may affirm on any basis supported by the record, even  
12 where the issue was not expressly considered by the bankruptcy  
13 court." Fernandez v. GE Capital Mortgage Services, Inc. (In re  
14 Fernandez), 227 B.R. 174, 177 (9th Cir. BAP 1998), aff'd 208 F.3d  
15 220 (9th Cir. 2000) (table). We interpret the bankruptcy court's  
16 comments and its Pre-Filing Order as an attempt to stop Debtor  
17 from filing an endless stream of repetitive papers that have the  
18 effect of draining the estate of its resources. In other words,  
19 even if Debtor believes genuinely and in good faith that all of  
20 his claimed exemptions are valid, the bankruptcy court apparently  
21 was persuaded that he is a vexatious litigant, or something  
22 similar, and issued a typical pre-filing order.

23 We review such orders under an abuse of discretion standard,  
24 Molski, 500 F.3d at 1056, and we may not substitute our own  
25 judgment for that of the bankruptcy court, but the bar is high  
26 for pre-filing orders:

27 [P]re-filing orders are an extreme remedy that  
28 should rarely be used. Courts should not enter  
pre-filing orders with undue haste because such

1 sanctions can tread on a litigant's due process  
2 right of access to the courts. A court should  
3 enter a pre-filing order constraining a litigant's  
scope of actions in future cases only after a  
cautious review of the pertinent circumstances.

4 Molski, 500 F.3d at 1057 (citations omitted).

5 The Ninth Circuit has adopted a test with four elements.  
6 The Pre-Filing Order satisfies them all.

7 First, Debtor must have had "an opportunity to oppose the  
8 order before it was entered." DeLong v. Hennessey, 912 F.2d  
9 1144, 1147 (9th Cir. 1990) (citations omitted). He did. Before  
10 issuing the order, the bankruptcy court told him, "you take  
11 appeals, but you don't just keep filing new claims of exemption  
12 and rephrase it another way." Transcript, Jan. 26, 2007, p.  
13 60:5-7. Trustee then filed her Second Objection to Exemptions  
14 which specifically asked for the Pre-Filing Order, and then  
15 Debtor had the opportunity to (and did) file a response. That is  
16 sufficient. See Molski, 500 F.3d at 1058-59.

17 Second, although "[a]n adequate record for review should  
18 include a listing of all the cases and motions that led the  
19 [trial] court to conclude that a vexatious litigant order was  
20 needed" it is enough if "[a]t the least" the record shows, "in  
21 some manner, that the litigant's activities were numerous or  
22 abusive." DeLong, 912 F.2d at 1147 (emphasis added, citations  
23 omitted). We have reviewed the excerpts of record and, although  
24 Debtor's amendments and briefs each add some new twist on his  
25 arguments, they rely on the same faulty foundation and repeat the  
26 same arguments again and again. This element is also satisfied.

27 Third, the bankruptcy court needs to make "substantive  
28 findings as to the frivolous or harassing nature of the

1 litigant's actions," and "[t]o make such a finding, [it] needs to  
2 look at both the number and content of the filings as indicia of  
3 the frivolousness of the litigant's claims." DeLong, 912 F.2d at  
4 1148 (citation and internal quotation marks omitted); Molski, 500  
5 F.3d at 1059 ("An injunction cannot issue merely upon a showing  
6 of litigiousness. The [litigant's] claims must not only be  
7 numerous, but also be patently without merit.") (citation and  
8 internal quotation marks omitted). We believe that the  
9 bankruptcy court's statement that "you don't just keep filing new  
10 claims of exemption and rephrase it another way" constitutes a  
11 sufficiently specific finding of frivolousness. See Transcript,  
12 Jan. 26, 2007, p. 60:6-7. That finding is adequately supported  
13 by the history of Debtor's lengthy and repetitious arguments,  
14 which we have summarized above. It is true that some of Debtor's  
15 claims of exemption were not, when they were first made, patently  
16 without merit. But Debtor continued to make those arguments even  
17 after their lack of merit was explained by Trustee and, later, by  
18 the bankruptcy court in its tentative rulings. This element is  
19 satisfied.

20 Finally, the order should be narrowly tailored. It is. It  
21 does not bar Debtor from filing all documents without prior court  
22 authorization, but only further amendments to his bankruptcy  
23 Schedule C. He had already amended that schedule four times,  
24 requiring objections and responses to his numerous lengthy and  
25 repetitive briefs. The bankruptcy court's remedy is as narrowly  
26 tailored as possible to deter the specific behavior in which  
27 Debtor has engaged. No more is required under DeLong, 912 F.2d  
28 at 1148.

1 For all of these reasons, we will affirm the Pre-Filing  
2 Order.

3 C. The Sale Order

4 Some of Debtor's arguments regarding the Sale Order suggest  
5 that, in his view, the sale includes patents or patent  
6 applications that he owns. As the bankruptcy court explained,  
7 the sale was structured to include whatever the estate owns, and  
8 nothing more, whatever that might be.

9 . . . Trustee could have added into this that  
10 she's selling rights to settle on the moon. The  
11 Trustee doesn't have to own any rights to settle  
12 on the moon, but, you know, she's saying,  
"Whatever rights to settle on the moon I have,  
you're buying it from me." Okay? That's exactly  
the same thing.

13 Transcript, Dec. 21, 2006, p. 26:1-6.

14 Debtor's arguments about the so-called credit bidding and  
15 overbidding conditions are more persuasive. Section XIX.B. of  
16 his opening brief on this appeal, entitled "The Ordered Sale Does  
17 not Qualify in the 9th Circuit as a 'Good Faith' Purchase as  
18 Required by § 363(m)," actually raises broader issues than good  
19 faith. Debtor renews his objection that "the sale process was  
20 improper" and he argues that Fin LLC was not a good faith  
21 purchaser "due to overbid procedures taking 'grossly unfair  
22 advantage of other bidders' by only permitting the main buyer  
23 [Fin LLC, via its current management,] to make non-cash bids and  
24 limiting all competitive bidders to 'cash only' bids." Debtor  
25 cites Cnty. Thrift & Loan v. Suchy (In re Suchy), 786 F.2d 900,  
26 902 (9th Cir. 1985), and adds that a cash only restriction on  
27 competitive bidders is improper in view of Lahijani, 325 B.R.  
28 282. These are legitimate concerns.



1 In considering our jurisdiction we have already ruled that  
2 Debtor had standing to contest the overbidding procedures. We  
3 now rule that the bankruptcy court erred by not addressing  
4 Debtor's contention that the overbidding procedures chilled the  
5 bidding. See id.

6 As Debtor argued in his written opposition to the Sale  
7 Motion and orally before the bankruptcy court, the Sale Motion's  
8 procedures could deter overbidding and depress the dollar amount  
9 received for the Assets. Not only did overbidders have to bid  
10 cash, when the current management of Fin LLC could "credit bid,"  
11 but even that so-called credit bid is inflated. The term "credit  
12 bid" usually refers to a bid by a creditor holding a secured  
13 claim pursuant to Section 363(k) (providing that unless the court  
14 orders otherwise the holder of a secured claim "may offset such  
15 claim against the purchase price of such property"). A creditor  
16 that reduces its secured claim has benefitted the estate on a  
17 dollar for dollar basis. An unsecured creditor cannot offer as  
18 much. Fin LLC was reducing a claim on which it would receive  
19 something below 100% -- it was bidding in what have been called  
20 "tiny bankruptcy dollars."

21 Trustee argues on this appeal that Debtor's arguments miss  
22 the point because there was no credit bidding on any relevant  
23 assets:

24 [I]n order to accommodate the request of the other  
25 bidder, Mr. Chris Sommers, to participate in the  
26 overbid for the [Wing LLC interests] and the wing  
27 patent rights only, [Fin LLC] agreed that that  
28 portion of the consideration would be entirely  
cash. Thus, the playing field for [Fin LLC] and  
Mr. Chris Sommers was leveled. [Footnote  
omitted.]

1 The footnote omitted from the above quote adds:

2           Although Mr. Chris Sommers was authorized to bid  
3           on all of the assets, he chose to bid only on the  
4           [Wing LLC interests] and the wing patent rights.

5           Trustee's argument is flawed. The damage already may have  
6           been done when Trustee determined at the outset that any  
7           overbidders for the Assets (other than the current management of  
8           Fin LLC) could only pay cash, and noticed the Sale Motion with  
9           that limitation. As the bankruptcy court recognized, we have  
10          held that such a limitation needs to be justified. Lahijani, 325  
11          B.R. 282. Far from justifying it, Trustee stated that "of  
12          course" she would be willing to change that provision and she  
13          appeared to acknowledge that, at least in theory, Sommers and the  
14          faction of minority members that he represents could waive the  
15          claim of Fin LLC if they were the successful bidder and obtained  
16          a controlling interest in Fin LLC. Transcript, Dec. 21, 2006,  
17          pp. 13:25, 14:25-15:8. Trustee later alluded to possible  
18          challenges to such a bid by Sommers, but she declined to explain  
19          the issues on the record. Id., pp. 15:14-16:7.

20          The bankruptcy court generally should defer to Trustee's  
21          business judgment but, especially after that judgment was  
22          challenged by Debtor, there needed to be some justification on  
23          the record for bidding procedures that seem to favor the current  
24          management of Fin LLC over any other bidders. The fact that the  
25          Sommers Overbidders eventually chose not to bid on the Fin Assets  
26          only proves the point that they (and perhaps other minority  
27          members or outside investors) may have been deterred from  
28          bidding.

1 We recognize that the Sommers Overbidders were given the  
2 opportunity at the auction to challenge the all cash requirement  
3 and chose not to, even though the bankruptcy court specifically  
4 stated that it had not ruled in Trustee's favor on that issue.  
5 Transcript, Jan. 26, 2007, pp. 67:16-23, 68:18-20, 69:7-8, 69:20-  
6 21, 70:9-12. Had the Sommers Overbidders chosen to participate  
7 in this appeal we might have held that they waived their rights  
8 to object. But we cannot assume that they were the only  
9 potential overbidder, and Debtor raised his own objections to the  
10 bidding process. As the bankruptcy court recognized, he has a  
11 direct financial stake in maximizing the sales price. See  
12 Transcript, Dec. 21, 2006, pp. 24:5-14, 32:1-16 (suggesting to  
13 Debtor that if bidders are deterred then "you're spending your  
14 own money," because either the state court judgment is affirmed  
15 and is likely nondischargeable or that judgment is reversed and  
16 the estate is solvent).

17 For all of these reasons we believe that Trustee did not  
18 adequately justify the Sale Motion's requirement that anyone  
19 other than the current management of Fin LLC bid only cash. See  
20 Lahijani, 325 B.R. 282. This defect applies to the entire sale  
21 process because the only notice to any prospective bidders was  
22 that they could not bid anything but cash, and that Fin LLC would  
23 have the advantage of being able to credit bid.

24 We also reject Trustee's argument about a level playing  
25 field as to the Wing Assets. It is true that the initial bid by  
26 Fin LLC was \$50,000 in cash, but Trustee's counsel stated twice  
27 on the record that part of Fin LLC's overbid would be a credit  
28 bid. Transcript, Jan. 26, 2007, pp. 63:8-9, 77:9-13.

1 We hasten to add that Trustee might have very good reasons  
2 not to accept any credit bid from the Sommers Overbidders, or any  
3 other investors for that matter. But the excerpts of record  
4 contain no evidence of such reasons. Under these circumstances  
5 we agree with the bankruptcy court's tentative rulings and not  
6 its later Sale Order. It was an abuse of discretion to approve a  
7 sale process that limited everyone except Fin LLC to bidding only  
8 cash, without any evidence to support Trustee's business judgment  
9 that this is in the best interests of the estate. We must  
10 reverse the Sale Order.<sup>14</sup>

11 D. The Prosecution Order

12 The parties have not specifically addressed what legal  
13 standard the bankruptcy court should have applied in determining  
14 whether to issue the Prosecution Order, but it appears to be in  
15 the nature of preliminary relief to preserve the status quo, so  
16 the most analogous legal standard appears to be that applicable  
17 to preliminary injunctions. See generally Excel Innovations, 502  
18 F.3d at 1093-96 (describing standard for preliminary injunctive  
19 relief and applying that standard to injunction of actions  
20 against non-debtor parties). The excerpts of record do not  
21 reflect any evidence from Trustee regarding irreparable harm,  
22 balance of hardships, likelihood of success on the merits, and  
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24 <sup>14</sup> We do not reach the Section 363(m) good faith issue  
25 because it has been rendered moot by the Ninth Circuit's stay and  
26 our reversal of the Sale Order. We reject Debtor's other  
27 objections to the Sale Order, including his assertion that  
28 Trustee did not adequately advertise the sale of the assets.  
Trustee adequately explained her efforts to advertise the sale  
and how the universe of potential bidders was likely limited to  
current investors, or perhaps a "white knight" or other third  
party investor working with current investors.

1 any public interest. See id.

2 Trustee and her counsel stated that experienced patent  
3 counsel had advised them of some sort of urgency, but Debtor  
4 represented from his own knowledge that there was no urgency as  
5 to the two New Applications. Debtor also explained how he might  
6 be irreparably harmed if Trustee were to control the prosecution  
7 of the New Applications. Trustee did not present any contrary  
8 evidence or explain how Debtor's control over the New  
9 Applications would harm the estate, and it is possible that it  
10 would not. If there is any danger of harm to the estate then  
11 perhaps Debtor could be enjoined from filing papers with the  
12 USPTO without Trustee's approval or court order. There was no  
13 evidence or exploration of these issues, and the Prosecution  
14 Order cannot be sustained on the lack of evidentiary foundation  
15 presented by Trustee.

16 We must determine whether to vacate the Prosecution Order,  
17 reverse it, or take some other course. It is tempting to vacate  
18 it. We have ruled that the Prosecution Order is not moot, but  
19 the USPTO Notice and the documents submitted at oral argument  
20 before us suggest that the order has not accomplished its purpose  
21 of enabling Trustee to prosecute the New Applications. Meanwhile  
22 the Prosecution Order could prejudice Debtor by preventing him  
23 from protecting whatever rights and interests he may have in the  
24 New Applications or by subjecting him to sanctions for trying.  
25 On the other hand, vacating the order could also cause harm. The  
26 USPTO's letter rejecting Trustee's Waiver Petition states (rather  
27 aggressively in our view) that it considers the filing of a  
28 petition or other paper "on behalf of a party having no standing"

1 as "a petition or paper presented for an improper purpose" and  
2 that "any further third party petitions" may be referred to "the  
3 Office of Enrollment and Discipline for appropriate action."  
4 More fundamentally, without any evidence in the record we are as  
5 much in the dark as the bankruptcy court about the balance of  
6 hardships and other factors, all of which might bear on whether  
7 vacating the Prosecution Order could somehow harm the estate.  
8 Accordingly we will reverse that order without prejudice to  
9 Trustee seeking alternative or even identical relief<sup>15</sup> upon a  
10 proper evidentiary showing, and we will remand with directions to  
11 the bankruptcy court to take such actions as are consistent with  
12 the foregoing discussion.

13 On remand the focus should be on whether whoever has the  
14 right to prosecute the patent applications can and will exercise  
15 that power to preserve the status quo while the parties' rights  
16 and interests in the contested IP can be determined. If  
17 something like the Prosecution Order is issued, then presumably  
18 the parties will need to address how to make it acceptable to or  
19 binding on the USPTO.<sup>16</sup>

## 20 VI. CONCLUSION

21 We AFFIRM the First Exemption Order and the Second Exemption  
22 Order, which sustain Trustee's objections to Debtor's claims of  
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24 <sup>15</sup> Perhaps such relief could be granted by means of a  
25 preliminary injunction or mandatory injunction within the Patent  
26 Ownership Action.

27 <sup>16</sup> The foregoing discussion does not attempt to capture the  
28 minutiae of all of Debtor's numerous arguments. We have,  
however, carefully reviewed them and we reject all arguments not  
specifically discussed above.

1 exemption in the IP and the Appeal Rights. We also AFFIRM the  
2 Pre-Filing Order, which strikes Debtor's fourth amended  
3 bankruptcy Schedule C and bars him from filing further amendments  
4 without prior order of the bankruptcy court. We REVERSE the Sale  
5 Order because we do not believe that Trustee adequately addressed  
6 the bankruptcy court's concerns about limiting overbidders to all  
7 cash bids. Trustee presented scant analysis and no evidence in  
8 support of her decision to grant only the current management of  
9 Fin LLC, and no other prospective bidder, the right to bid  
10 something other than cash. We REVERSE the Prosecution Order  
11 without prejudice because it is not supported by adequate  
12 analysis from Trustee nor any evidence of urgency, harm to the  
13 estate, or other relevant matters. Finally, we REMAND for  
14 further proceedings regarding the sale of the Fin Assets and Wing  
15 Assets and how to preserve the status quo while the various  
16 rights and interests in the IP are being determined.

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