NOT FOR PUBLICATION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**[1]
AMY GOLDMAN, Chapter 7 Trustee; CHRIS SOMMERS; NATURE'S WING FIN DESIGN, LLC; NICHOLAS JENKINS,[2]	
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

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[1] 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.

[2] 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.

Before: MONTALI, PAPPAS and DUNN, Bankruptcy Judges.

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

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

[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as enacted and promulgated prior to the effective date of The 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).

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

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

I. FACTS

A. Background

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

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

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

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

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

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

B. The Sale Motion

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

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

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

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

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

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

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

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

The Sale Motion provides that Fin LLC may not credit bid 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).

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

The bankruptcy court issued the following tentative ruling:

> The trustee needs to advertise more broadly. I would assume in one or more diving magazines. Solely using the NABT Website is no[t] likely to create a broad range of bidders. Continue for additional advertising.
>
> As to the terms of the overbid, they cannot be limited to all cash. See [Simantob v. Claims Prosecutor, LLC] In re Lahijani, 325 B.R. 282 (9th Cir. BAP 2005).
>
> As to the other objections, I do not find them persuasive. Once there is proper advertising, the value of the items is what someone will pay for them.

On December 21, 2006, the bankruptcy court held a hearing on the Sale Motion. Trustee represented that advertising would not be useful because (1) the fin IP has no value except to Fin LLC since it holds an exclusive license, and (2) the membership interests in Fin LLC have no value except to insiders because "the way the LLC was drafted" if those interests are "sold outside to a third party, that person has no voting rights and no say in this LLC" and would not receive any dividend until cash investors are repaid. Transcript, Dec. 21, 2006, pp. 4:8-5:17. 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

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

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

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

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

> There's another story which I told [Sommers' attorney] off the record about how her client became a minority [member]. I'm not sure I want 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

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

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

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

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

Thereafter the bankruptcy court issued the following tentative ruling:

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

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

C. Debtor's claimed exemptions

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

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

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

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

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

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

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

1. The exemptions and the Assets to be sold

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

related assets. Regarding the patents it later stated:

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

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

The Appeal Rights, however, troubled the bankruptcy court. It was "tremendously uncomfortable about selling those rights" and stated at one point, "I'm not going to let it happen." Transcript, Jan. 26, 2007, pp. 48:23-24, 55:9-10. See also id. at pp. 38:18-22, 47:10-13, 48:10-12, 60:13-15. Fin LLC agreed to modify its bid such that the Appeal Rights would not be included in the assets to be purchased. Id. p. 62:13-23.[5]

2. Sale of the Fin Assets

Sommers appeared at the hearing as a possible overbidder, apparently as representative of a faction of minority investors in Fin LLC (collectively, the "Sommers Overbidders"). Transcript, Jan. 26, 2007, p. 65:14-15, 66:17. Debtor was not qualified as a prospective overbidder (id. pp. 64:23-65:2) but he objected to the terms of the overbidding process. His objection is hard to understand but his essential point appears to be that

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[5] Removing the Appeal Rights from the proposed sale changed the Cash/Non-Cash Ratio for any overbid by Fin LLC (see footnote 4 above). Trustee's counsel stated "we have to sit down 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 cash / $375,000 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.

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

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

pp. 70:19-71:2.

3. Sale of the Wing Assets

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

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

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

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

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

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

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

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

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

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

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

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

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

> . . . debtor argues that because he exempted the appellate rights, those rights cannot be property of the estate. He supports his argument under CCP § 704.210 ("Property that is not subject to enforcement of a money judgment is exempt without making a claim."). . . . [Mozer v. Goldman] [In re] Mozer [302 B.R. 892 (C.D. Cal. 2003), cited by Trustee,] does not reach the exemption issue, but it does clearly hold that debtor's defensive appellate rights constitute property of the bankruptcy estate. 302 B.R. at 895. . . . [Trustee] points out that debtor is unable to point to any specific exemption for appellate rights and no such exemption exists under California law. Instead, the debtor makes an argument identical to that made in front of Judge Klein in the bankruptcy case of In re Petruzzelli, 139 B.R. 241 (Bankr. E.D. Cal. 1992) . . . [Under Petruzzelli], § 704.210 cannot serve as a substitute for a specifically listed exemption. . . . [T]he trustee's objection to the debtor's exemption in defensive appellate rights must be sustained.
>
> Having said this, . . . I will not approve a 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].

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

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

E. The Prosecution Order

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

two of the New Applications, described as follows:

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

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

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

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

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

or modifications."

The bankruptcy court issued a tentative ruling:

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

The day before the hearing Debtor filed a 19-page "Supplemental" to his opposition to the Prosecution Motion. Debtor's declaration, included in the Supplemental, states that the 562 Application was filed on February 27, 2006, and the 935 Application was filed on July 10, 2006, so that both applications were filed after the Petition Date. Debtor alleges that the New Applications are not mere continuations of the patent applications existing as of the Petition Date but are improvements or modifications. Debtor also alleges that by removing some of the specificity of earlier patents or patent applications he has eliminated a limitation and broadened the scope of patent protection, which can be an improvement or modification that is recognized as "patentably distinct" from the earlier Patents or Existing Applications.[6] Debtor concludes that

[6] Debtor cites Advanced Cardiovascular Sys., Inc. v. Medtronic, Inc., 265 F.3d 1294 (Fed. Cir. 2001) (patent had sufficiently general language to encompass both side-by-side or coaxial designs for a catheter). We need not determine whether 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.

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

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

The Prosecution Motion came on for hearing on June 20, 2007. The bankruptcy court expressed the wish that Debtor had included in his original opposition the material in his supplemental papers, but it did not strike those papers and was initially inclined to continue the hearing as to the two New Applications. The bankruptcy court wanted "somebody who knows something not about the law of patent but about the technical thing of this type of patent" to compare the New Applications to the "original patent applications and see whether or not these fall into modifications or improvements, because I can't tell . . . ." Transcript, June 20, 2007, p. 2:3-8. Trustee's counsel responded that "we are apparently on a very short time string." Id. p. 2:11. The bankruptcy court asked why and he responded that "our patent counsel informed my client that we need to start dealing with the Patent Office very soon, within the next week to 10 days" in order to "process the paperwork to make sure that 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

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

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

> Now, if the Trustee takes over, she is the gatekeeper to my continued services and my continued modifications. The Patent Office may say "We like what you've done, but you haven't fully explained this one aspect. Please explain it more. Otherwise we won't approve it." I need to be able to have control of that and see it through to final prosecution of my claims.
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> * * *
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> If she takes over, she can cancel my claims. She can submit new claims that are different. She can prevent me from continuing my work which I'm allowed to under 541(a)(6).
>
> * * *
>
> There's a conflict of interest. If [Trustee] submit[s] my new patent claims and they get issued, [then Trustee does not] get a right to it.
>
> * * *
>
> If they are in charge, I can't even call the patent examiner.

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

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

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

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

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II. ISSUES

A. Do we have jurisdiction?

B. Has Debtor shown error in the First or Second Exemption Order?

C. Has Debtor shown error in the Pre-Filing Order?

D. Has Debtor shown error in the Sale Order?

E. Has Debtor shown error in the Prosecution Order?

III. JURISDICTION

A. Generally

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

B. The First and Second Exemption Orders

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

[7] Our order denying a stay pending appeal, on April 11, 2007, states that the Interlocutory Exemption Order became final when the Exemption Order was issued, but the motions panel did (continued...)

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

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

C. The Pre-Filing Order

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

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[7](...continued)
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).

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

D. The Sale Order

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

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

> Ultimately, it's in your benefit [to maximize the proceeds, because] either you're going to win 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

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

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

E. The Prosecution Order

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

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

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

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

At that time Trustee's counsel offered evidence that she asked the USPTO for a waiver of the rules applied in the USPTO Notice (the "Waiver Petition"). Debtor offered evidence that the USPTO has denied that petition. We hereby accept both parties' evidence.[8] Debtor's evidence strongly suggests that the

[8] Specifically, we accept and have reviewed the following: (a) Trustee's Waiver Petition to the USPTO, (b) an undated letter (continued...)

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

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

IV. STANDARDS OF REVIEW

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

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[8](...continued)
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.

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

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

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

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

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

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

V. DISCUSSION

A. The First and Second Exemption Orders

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

[9] These are unpublished decisions. The bankruptcy court stated, "I'm not even sure whether you cite to unpublished opinions or not." Transcript, Jan. 26, 2007, p. 35:2-6. We have reviewed the local rules of the District Court for the Northern District of California (which issued Sleepy Hollow) and they do not bar citation of unpublished opinions. We note that Ninth Circuit Rule 36-3 limits the citation of unpublished dispositions 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).

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

We assume without deciding that Debtor is correct that there is no method to levy upon a patent under California law, perhaps because (as he argues) a patent is not a "general intangible"[10]

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[10] Debtor concedes that "all property of the judgment debtor" (CCP § 695.010) includes both tangible and intangible personal property (CCP §§ 680.290, 680.310), but he equates "intangible personal property" with "general intangibles" and notes that, for purposes of California law on enforcement of judgments,

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

CCP § 680.210 (emphasis added).

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

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

(continued...)

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

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

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

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

[12] 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...)

analysis is flawed in at least two respects.

First, a levy is not the only way to enforce a money judgment. The bankruptcy court held, citing Sleepy Hollow (and an unpublished decision of the Ninth Circuit), that "the proper procedure to execute on a patent is to obtain an order of the Court directing the patent holder to assign the patent." Transcript, Jan. 26, 2007, pp. 35:19-21 and 36:8-23. We agree. See Sleepy Hollow, 2006 WL 279349 at *1-2.

> The patent act provides that patents are assignable in law by instrument in writing. This does not mean that the patentee must in every case execute the assignment by his own hand. On 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.

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

Debtor attempts to distinguish Sleepy Hollow, arguing that "[n]o one claimed an exemption" and the court in that case "didn't look into the definition of 'general intangibles' under

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[12](...continued)
appears to agree that a patent is an intangible. In any event, it is.

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

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

> Most exemptions must be claimed. Unless and until an exemption is claimed, it is regarded as waived, with the result that the property remains vulnerable to judgment enforcement. . . .
>
> Some exemptions need not be claimed. They are automatic and are denoted by the statutory term of art "exempt without making a claim" . . . .
>
> Finally, narrowly circumscribed types of property are absolutely immune from judgment enforcement by virtue of being declared to be "not subject to" (another statutory term of art) such enforcement. [Emphasis added.] Examples include property that cannot be assigned or transferred 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. . . .

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

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

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

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

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

CCP § 703.030(b) (emphasis added).

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

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

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

are property of the estate and that Debtor has not established any basis to exempt them. On this appeal Debtor presents no basis to exempt them beyond the arguments that we have already rejected.[13]

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

B. The Pre-Filing Order

Debtor argues that the bankruptcy court was required to, but did not, make a finding of bad faith before issuing the Pre-Filing Order (which bars him from further amending his bankruptcy Schedule C without prior approval of the bankruptcy court). We have held that "[t]he bankruptcy court has no discretion to disallow amended exemptions, unless the amendment has been made in bad faith or prejudices third parties." Arnold, 252 B.R. at 784 (citations omitted). Debtor points out that he filed a declaration stating that, contrary to the bankruptcy court's recitation of the facts in the Pre-Filing Order, he filed his fourth amended bankruptcy Schedule C before, not after, the 10:00 a.m. hearing on January 26, 2007. In other words, Debtor argues

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[13] Debtor emphatically denies that he elected the exemptions under CCP § 703.140(b) and claims instead that he elected the exemptions under CCP § 703.140(a) which, he alleges, incorporates or at least permits him to assert all of the other exemptions that he claims. We do not address what election 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).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. The Sale Order

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

> . . . Trustee could have added into this that she's selling rights to settle on the moon. The Trustee doesn't have to own any rights to settle 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.

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

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

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

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

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

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

The footnote omitted from the above quote adds:

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

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

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

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

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

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

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

D. The Prosecution Order

The parties have not specifically addressed what legal standard the bankruptcy court should have applied in determining whether to issue the Prosecution Order, but it appears to be in the nature of preliminary relief to preserve the status quo, so the most analogous legal standard appears to be that applicable to preliminary injunctions. See generally Excel Innovations, 502 F.3d at 1093-96 (describing standard for preliminary injunctive relief and applying that standard to injunction of actions against non-debtor parties). The excerpts of record do not reflect any evidence from Trustee regarding irreparable harm, balance of hardships, likelihood of success on the merits, and

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[14] We do not reach the Section 363(m) good faith issue because it has been rendered moot by the Ninth Circuit's stay and our reversal of the Sale Order. We reject Debtor's other objections to the Sale Order, including his assertion that 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.

any public interest. See id.

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

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

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

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

VI. CONCLUSION

We AFFIRM the First Exemption Order and the Second Exemption Order, which sustain Trustee's objections to Debtor's claims of

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[15] Perhaps such relief could be granted by means of a preliminary injunction or mandatory injunction within the Patent Ownership Action.

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

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