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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NOT FOR PUBLICATION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

| | | | | |
|----|--------------------------|---|---|----------------|
| 6 | In re: |) | BAP Nos. | AZ-06-1362-DNK |
| | |) | | AZ-06-1445-DNK |
| 7 | MARK DAVID BISHOP, |) | | AZ-07-1023-DNK |
| | |) | | |
| 8 | Debtor. |) | Bk. No. | 06-00254-RJH |
| | |) | | |
| 9 | _____ |) | | |
| | MARK DAVID BISHOP, |) | | |
| 10 | |) | | |
| | Appellant, |) | | |
| 11 | |) | | |
| | v. |) | M E M O R A N D U M ¹ | |
| 12 | |) | | |
| | DIANE M. MANN, Chapter 7 |) | | |
| 13 | Trustee, |) | | |
| | |) | | |
| 14 | Appellee. |) | | |
| | _____ |) | | |

Submitted Without Oral Argument
on October 25, 2007

Filed - November 5, 2007

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Randolph J. Haines, Bankruptcy Judge, Presiding

Before: DUNN, NEITER² and KLEIN, Bankruptcy Judges.

¹This 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.

²Hon. Richard Neiter, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

1 Pro se chapter 7³ debtor appealed three orders issued by the
2 bankruptcy court: an order approving auctioneer's fees, an order
3 authorizing surcharge of debtor's homestead exemption, and an
4 order denying debtor's request for refund of an appellate filing
5 fee. We REVERSE and REMAND with respect to the surcharge of
6 debtor's homestead exemption, and AFFIRM the auctioneer's
7 compensation and the denial of debtor's request for refund of the
8 appellate filing fee.

9
10 **I. FACTS**

11 Mark David Bishop ("Bishop"), acting pro se, filed a
12 voluntary chapter 7 petition on February 3, 2006. Bishop's
13 chapter 7 discharge was entered May 22, 2006.

14 Diane M. Mann was appointed the Chapter 7 trustee
15 ("Trustee") in Bishop's bankruptcy case. Consistent with her
16 duties under the bankruptcy code, the Trustee took actions
17 designed "to collect and reduce to money," i.e. to sell, property
18 in Bishop's bankruptcy estate.

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21 On the Trustee's application, the bankruptcy court
22 authorized the employment ("Employment Order") of George
23 Cunningham of Cunningham & Associates, Inc. as auctioneer

24 _____
25 ³Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
28 enacted and promulgated as of October 17, 2005, the effective
date of most of the provisions of the Bankruptcy Abuse Prevention
and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.

1 ("Auctioneer") to sell firearms, nunchucks, a skinning knife,
2 ammunition, and binoculars, which constituted property ("Auction
3 Property") of Bishop's bankruptcy estate. The Trustee then
4 provided notice ("Auction Notice") to creditors and interested
5 parties of the date, time, and place of the proposed sale of the
6 Auction Property.

7 The Auction Notice disclosed the terms of the Auctioneer's
8 compensation: 10% of the gross sale proceeds, plus necessary
9 expenses not to exceed 10%. Although he was served with the
10 Auction Notice, Bishop filed no objection, either to what was
11 being sold under the Auction Notice, or to the terms of the
12 proposed auction, which included the compensation arrangements
13 for the Auctioneer.

14 The auction was conducted on September 24, 2006. As
15 reflected in the Trustee's Report of Auction Sale ("Auction
16 Report"), gross receipts of the auction totaled \$2,377.75. By
17 his application filed October 2, 2006, the Auctioneer requested
18 compensation of \$237.78 and \$150.00 in expenses (\$100.00 for
19 advertising and \$50.00 for transportation costs). These amounts
20 were supported by the itemization attached to the Auction Report.

21 By its order entered October 11, 2006 ("Compensation
22 Order"), the bankruptcy court awarded the Auctioneer the full
23 \$387.78 he had requested. Bishop timely appealed ("Auctioneer
24 Compensation Appeal").

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27 On March 9, 2006, the bankruptcy court authorized the
28 Trustee's employment of a real estate broker to sell Bishop's

1 residence ("Residence") to recover non-exempt equity for the
2 benefit of Bishop's unsecured creditors. The Trustee encountered
3 difficulty obtaining Bishop's cooperation in the sale of the
4 Residence. As a result, the Trustee sought and obtained an order
5 from the bankruptcy court directing Bishop both to cooperate in
6 the Trustee's sale efforts and to refrain from interfering with
7 the sale process.⁴ Once the Trustee gained access to the
8 Residence, she incurred expenses in restoring electrical and
9 water service,⁵ and for cleaning, before the Residence could be
10 marketed.

11 Ultimately, the bankruptcy court authorized the sale of the
12 Residence over Bishop's objection. Notwithstanding the sale,
13 Bishop refused to vacate the Residence.

14 The Trustee then sought and obtained an order from the
15 bankruptcy court ("July 28 Order") (1) directing Bishop to vacate
16 the Residence, and (2) directing the United States Marshal
17 Service ("USMS") to remove Bishop from the Residence if he
18 refused to vacate. Bishop did not voluntarily vacate the
19 Residence, requiring the Trustee to incur additional expenses in
20 the form of fees for USMS services and costs for moving and
21 storage of Bishop's belongings.

24 ⁴Bishop, a licensed real estate salesperson at the time,
25 believed that unless he personally advised each prospective buyer
26 of every defect in the Residence of which he was aware he could
27 be personally sued, notwithstanding that the Residence now
28 belonged to his bankruptcy estate rather than to him personally.

⁵Bishop had been living at the Residence without utility
services for several months.

1 The sale price of the Residence was \$250,000, an amount
2 sufficient to preserve the full \$150,000 Arizona homestead
3 exemption available to Bishop. The July 28 Order authorized the
4 Trustee to withhold \$10,000 of the exempt sale proceeds
5 ("Withheld Exempt Proceeds") pending further order of the
6 bankruptcy court. The Trustee remitted \$140,000 of the sale
7 proceeds, representing the balance of Bishop's homestead
8 exemption, to Bishop on August 3, 2006.

9 On September 15, 2006, the Trustee moved ("Surcharge
10 Motion") for an order authorizing her to apply the \$10,000
11 Withheld Exempt Proceeds to offset the fees and expenses she
12 incurred as a result of Bishop's failure to cooperate in the sale
13 process. Following a hearing held November 27, 2006, the
14 bankruptcy court granted the Surcharge Motion over Bishop's
15 objection. The minute order authorizing the Trustee to retain
16 the \$10,000 Withheld Exempt Proceeds ("Surcharge Order") was
17 entered November 27, 2006. Bishop timely filed his notice of
18 appeal ("Surcharge Appeal").

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21 At the time Bishop filed his bankruptcy petition, he was
22 unemployed, on public assistance, and without liquid assets. On
23 February 17, 2006, the bankruptcy court entered its "Order
24 Granting Application for Waiver of Chapter 7 Filing Fee" ("Fee
25 Waiver Order").

26 Uncertain whether the Fee Waiver Order applied to the filing
27 fee due in connection with the Auctioneer Compensation Appeal,
28 Bishop tendered the \$255.00 fee to the bankruptcy court on

1 October 24, 2006. Bishop then moved the Panel for a refund of
2 that fee. We remanded the refund request to the bankruptcy court
3 for determination.

4 On January 9, 2007, the bankruptcy court denied the refund
5 request for the reason that Bishop, by that time having received
6 \$140,000 from the sale of the Residence, no longer was entitled
7 to a waiver of fees in the case. This timely appeal ("Fee Waiver
8 Appeal") followed.

10 II. JURISDICTION

11 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
12 §§ 1334 and 157(b)(1) and (b)(2)(A) and (O). We have
13 jurisdiction pursuant to 28 U.S.C. § 158.

15 III. ISSUES

16 Whether the bankruptcy court abused its discretion in
17 awarding \$387.78 as compensation to the Auctioneer.

18 Whether the bankruptcy court abused its discretion in
19 surcharging Bishop's homestead exemption.

20 Whether the bankruptcy court abused its discretion when it
21 denied Bishop's request to refund the filing fee in connection
22 with the Auctioneer Compensation Appeal.

24 IV. STANDARDS OF REVIEW

25 "We review the bankruptcy court's decision to allow
26 compensation for abuse of discretion." Movitz v. Baker (In re
27 Triple Star Welding, Inc.), 324 B.R. 778, 788 (9th Cir. BAP
28 2005). We also review the bankruptcy court's equitable surcharge

1 of a debtor's exemptions for an abuse of discretion. Latman v.
2 Burdette, 366 F.3d 774, 786 (9th Cir. 2004).

3 We review the bankruptcy court's order denying waiver of a
4 filing fee (or denying the refund of a fee already paid) for
5 abuse of discretion. Cf. O'Loughlin v. Doe, 920 F.2d 614 (9th
6 Cir. 1990) (standard of review for trial court's determination of
7 in forma pauperis status under 28 U.S.C. § 1915(a) is abuse of
8 discretion). Although 28 U.S.C. § 1915 is not applicable in
9 bankruptcy cases (see Perroton v. Gray (In re Perroton), 958 F.2d
10 889, 896 (9th Cir. 1992)), the fee waiver available in bankruptcy
11 cases pursuant to 28 U.S.C. § 1930(f) is analogous.

12 A ruling based on an erroneous view of the law or on clearly
13 erroneous factual findings constitutes an abuse of discretion.
14 To reverse for abuse of discretion, the panel must have a
15 definite and firm conviction that the bankruptcy court committed
16 a clear error of judgment in the conclusion it reached. Hansen
17 v. Moore (In re Hansen), 368 B.R. 868, 874-75 (9th Cir. BAP
18 2007).

20 V. DISCUSSION

21 A. Completeness of the Record

22 Rule 8006 specifies what constitutes the record on appeal:

23 The record on appeal shall include the items . . .
24 designated by the parties, the notice of appeal, the
25 judgment, order, or decree appealed from, and any
opinion, findings of fact, and conclusions of law of
the court.

26 Once the statement of issues, designation of record, and any
27 transcripts designated by the parties have been filed with the
28 bankruptcy court, the clerk of the bankruptcy court transmits to

1 the BAP Clerk a certificate that the record is complete. 9th
2 Cir. BAP Rule 8007(b)-1. The record itself is retained by the
3 clerk of the bankruptcy court. Id. In addition to setting the
4 criteria for filing briefs on appeal, the BAP Rules further
5 provide for the filing by a party of an Appendix to its brief,
6 which is comprised of a party's excerpts of the record. 9th Cir.
7 BAP Rule 8009(b)-1.

8 We generally limit our review of the record to an
9 examination of those excerpts which have been provided by the
10 parties, and are not obligated to examine portions of the record
11 not included in the excerpts. See In re Kritt, 190 B.R. 382,
12 386-87 (9th Cir. BAP 1995); In re Anderson, 69 B.R. 105, 109 (9th
13 Cir. BAP 1986). Neither Bishop nor the Trustee has aided us in
14 our review of the record on appeal; Bishop's informal briefs
15 contain copies of documents with no clarification regarding where
16 in the record they are located, and the Trustee filed no
17 Appendix.

18 As an exercise of our discretion, we have reviewed the
19 record on appeal independently.

20
21 B. The Auctioneer Compensation Appeal (AZ-06-1362)

22 Section 327(a) authorized the Trustee, with court approval,
23 to employ the Auctioneer to "assist the trustee in carrying out
24 the trustee's duties under [title 11]." As required by Rule
25 6005, the Employment Order "fixed" the rate of compensation at
26 10% of gross auction proceeds plus expenses not to exceed 10%.
27 Notwithstanding the rate of compensation established in the
28 Employment Order, the bankruptcy court could have allowed a

1 different compensation to the Auctioneer if the terms set in the
2 Employment Order "prove to have been improvident. . . ." Section
3 328(a). Section 330(a)(1) authorized the bankruptcy court to
4 award the Auctioneer "(A) reasonable compensation for actual,
5 necessary services . . .; and (B) reimbursement for actual,
6 necessary expenses."

7 Bishop's statement of issues filed with the bankruptcy court
8 identifies the following as his bases for contesting the
9 Compensation Order:

- 10 1. Need for firearm sales.
- 11 2. Federal Guidelines pertaining to sale of non-
12 collectible firearms.
- 13 3. Procedural compliance from start to finish.
- 14 4. Contractor performance and compliance with Federal
Requirements.

15 These issues relate not to the compensation of the Auctioneer,
16 but rather to the propriety of the underlying sale. There is
17 nothing in the record on appeal which establishes that Bishop
18 filed an objection to the Auction Notice, despite having been
19 served with the Auction Notice. Bishop appears simply to have
20 waited until the Auctioneer performed the services for which he
21 was hired, and long after the Auction Property had been sold, to
22 voice his disapproval with the sale through the Auctioneer
23 Compensation Appeal. Because these issues were not raised first
24 before the bankruptcy court, we do not consider them now. See In
25 re E.R. Fegert, Inc., 887 F.2d 955 (9th Cir. 1989).

26 Bishop has raised no issue as to the reasonableness of the
27 Auctioneer's compensation, which is all that was determined by
28 the Compensation Order. On the record before us, we can find no

1 abuse of discretion in the bankruptcy court's award of \$387.78
2 compensation and expenses to the Auctioneer in this case.

3
4 C. The Surcharge Appeal (AZ-06-1445)

5 We disagree with the Trustee that this appeal should be
6 considered untimely where Bishop did not appeal the July 28 Order
7 which provided for the "hold back" of the \$10,000 Retained Exempt
8 Proceeds in the first instance. At the hearing on the Surcharge
9 Motion, the bankruptcy court noted that it earlier had ruled it
10 had authority to withhold or surcharge exempt assets "subject
11 only to the showing that these are the amounts that are
12 attributable to those efforts to interfere with the
13 administration of the estate." In fact, the Trustee filed the
14 Surcharge Motion, seeking to "keep" the Retained Exempt Proceeds,
15 recognizing that the determination as to whether she could in
16 fact retain the \$10,000 never had been made.

17 The Trustee's position ignores what generally is referred to
18 as the "final judgment rule."

19 A judgment as to fewer than all the claims or fewer
20 than all the parties is not a "final judgment" unless
21 the court makes an "express determination that there is
22 no just reason for delay" and "an express direction for
23 the entry of judgment." Fed.R.Civ.P. 54(b). The
24 requirement cannot be ignored: if there is no Rule
25 54(b) certification, then an order, even an order
26 titled "judgment," does not end the action as to any
27 claims or party and is subject to revision at any time
28 before entry of the judgment that adjudicates all of
the claims and the rights and liabilities of the
parties. Id.

26 Wolkowitz v. Beverly (In re Beverly), 374 B.R. 221, 231 (9th Cir.
27 BAP 2007).

1 The July 28 Order was interlocutory with respect to the
2 Retained Exempt Proceeds. It was not until the Trustee
3 established, at the November 27, 2006, hearing, that she had
4 incurred fees and expenses of at least \$10,000, and that some or
5 all of those fees and expenses were incurred as a result of
6 Bishop's failure to cooperate, that the Trustee could argue that
7 the estate was entitled to some or all of the Retained Exempt
8 Proceeds. Accordingly, the Surcharge Appeal was timely filed.

9 The Ninth Circuit has recognized the right of a bankruptcy
10 court to surcharge a debtor's exemptions in appropriate
11 circumstances.

12 We hold that the bankruptcy court may equitably
13 surcharge a debtor's statutory exemptions when
14 reasonably necessary both to protect the integrity of
15 the bankruptcy process and to ensure that a debtor
16 exempts an amount no greater than what is permitted by
17 the exemption scheme of the Bankruptcy Code.

18 Latman v. Burdette (In re Latman), 336 F.3d 774, 786 (9th Cir.
19 2004). We recently determined that concealment of assets is not
20 the only basis for imposing a surcharge. "An unjustified refusal
21 to turn over property of the estate may be the basis for a
22 surcharge of the debtor's exemptions." Onubah v. Zamora (In re
23 Onubah), 375 B.R. 549, 554 (9th Cir. BAP 2007).⁶

24 An exemption surcharge can provide a means of protecting the
25 rights of creditors in cases where debtors are resisting
26 surrender of non-exempt assets in bad faith. Misconduct on the
27 part of the debtor is necessary to support the surcharge.

28 ⁶The Panel issued its opinion in Onubah after the bankruptcy
court had ruled on the Surcharge Motion.

1 We hasten to add . . . that the remedy of surcharge may
2 not be used to shift costs to a debtor who has
3 unsuccessfully, but in good faith, opposed a trustee's
4 effort to liquidate a partially exempt asset or who has
5 otherwise challenged the trustee's administration of
6 the case.

7 Id. at 556. Further, the amount of the surcharge must be
8 calculated to compensate the bankruptcy estate for actual damage
9 caused by a debtor's misconduct.

10 In her Surcharge Motion, the Trustee recounted the
11 difficulty she encountered in attempting to market and sell the
12 Residence. Ultimately, she was required to obtain a court order,
13 the July 28 Order, authorizing her to have Bishop and his
14 belongings removed from the Residence. As relevant to this
15 appeal, the July 28 Order provided that, upon Bishop's failure to
16 remove his belongings and his person from the Residence not later
17 than 10:00 a.m. on July 31, 2006, the Trustee was:

18 AUTHORIZED AND DIRECTED TO . . . retain from [Bishop's]
19 \$150,000 homestead proceeds, the amount of \$10,000.
20 That amount is to be held in the Trustee's account
21 until further Order of this Court, to allow the Trustee
22 to seek a motion (on proper notice to the Debtor and
23 opportunity for hearing) for reimbursement to the
24 Estate for all additional costs and fees that may have
25 been incurred **beyond the normal costs and fees** to
26 clean, market, sell and deliver occupancy of the
27 [Residence] due to [Bishop's] continued interference
28 and non-cooperation with the sales process. . . .
(emphasis added).

29 At the hearing on the Surcharge Motion, the bankruptcy court
30 stated in granting the surcharge: "I am thoroughly familiar with
31 the debtor's efforts to preclude the sale of the house. None of
32 them had any merit. . . . [T]he efforts all did increase the cost
33 of administering the estate. . . ." Tr. of Nov. 27, 2006,
34 Hearing 12:14-20. In addition, the following finding was

1 incorporated into the July 28 Order:

2 The Court finds that [Bishop's] current actions are
3 jeopardizing the Estate's primary asset, are in
4 violation of his duties of cooperation under the
5 Bankruptcy Code and in contempt of this Court's sale
6 order dated July 18, 2006.

7 The Trustee's itemization to support the Surcharge Motion
8 included expenses of \$4,634.49 and attorney fees in the amount of
9 \$8,815.00. On the basis of these submissions, the bankruptcy
10 court authorized a surcharge of the entire \$10,000 of the
11 Retained Exempt Proceeds. The bankruptcy court made no findings
12 regarding the appropriateness of the particular fees and expenses
13 which the Trustee sought to surcharge.

14 Some of the fees and expenses included in the itemization
15 exceeded the scope of the July 28 Order. Specifically, a number
16 of the items for which surcharge is sought are neither "beyond
17 the normal costs and fees to clean, market, sell and deliver
18 occupancy," nor are they "due to [Bishop's] continued
19 interference and non-cooperation with the sales process." For
20 example, Bishop's homestead exemption was surcharged \$1,118.01
21 for utility services incurred during the time the Residence was
22 marketed. These services were incurred only after Bishop was
23 directed to allow the Trustee and the broker access to the
24 property for the purpose of marketing it, but Bishop had been
25 living without utility service for some time prior to the
26 commencement of his bankruptcy case.

27 Similarly, on the record before us, the cost of cleaning the
28 Residence, either prior to listing it for sale or after it had
29 been sold, is not properly the subject of a surcharge remedy
30 where it has not been demonstrated that the costs were beyond the

1 normal for marketing the property and/or were the consequence of
2 debtor's misconduct. These costs total \$1,027.35. Further, in
3 light of the fact that the Trustee hired a business to move
4 Bishop's belongings from the Residence to storage, the necessity
5 for the broker to hire and pay two additional men, one of whom
6 may have been related to the broker, to assist in the move
7 appears questionable.

8 We have not reviewed in detail the fee itemization submitted
9 by the Trustee for surcharge other than to note it appears likely
10 that the itemization provided also exceeds the scope of the July
11 28 Order.

12 Finally, we note that while the bankruptcy court found that
13 none of Bishop's efforts to preclude sale of the Residence had
14 merit, lack of merit does not automatically equate to bad faith
15 or other misconduct sufficient to support a surcharge.

16 Based on the inadequacy of the findings to support a
17 surcharge of the itemized fees and expenses against the Retained
18 Exempt Proceeds, we conclude that the bankruptcy court abused its
19 discretion in entering the Surcharge Order.

20
21 D. The Fee Waiver Appeal (AZ-07-1023)

22 As a result of the enactment of BAPCPA, a bankruptcy court
23 now has authority, in appropriate cases, to waive fees in
24 bankruptcy cases. See 28 U.S.C. § 1930(f). The bankruptcy court
25 may waive a chapter 7 debtor's filing fee "if the court
26 determines that such individual has income less than 150 percent
27 of the income official poverty line . . . applicable to a family
28 of the size involved **and is unable to pay that fee in**

1 **installments.”** Id. (emphasis added). The bankruptcy court also
2 may waive other fees prescribed by the Judicial Conference of the
3 United States under 28 U.S.C. § 1914(b). Id.

4 At the time Bishop filed his bankruptcy case, he filed an
5 application for waiver of the filing fee. As noted previously,
6 Bishop was unemployed and receiving public assistance. The
7 bankruptcy court granted the application in the Fee Waiver Order
8 entered February 17, 2006; the waiver also covered the filing fee
9 for any notice of appeal. The Fee Waiver Order explicitly
10 stated: “This order is subject to being vacated at a later time
11 if developments in the administration of the bankruptcy case
12 demonstrate that the waiver was unwarranted.”

13 The bankruptcy court denied Bishop’s request that the filing
14 fee he paid October 24, 2006, for the Auctioneer Compensation
15 Appeal, be refunded to him based on the Fee Waiver Order. In the
16 order denying the refund, the bankruptcy court recited both that
17 it had entered an order on November 29, 2006, vacating the Fee
18 Waiver Order prospectively, and that, because he had received at
19 least \$140,000 from the sale of the Residence, Bishop “now has
20 sufficient funds to pay the fees and costs incurred in
21 administrating [sic] his case, including any appeals he may
22 file.”

23 Bishop filed neither a designation of the record nor a
24 statement of issues, as required by Rule 8006, with respect to
25 the Fee Waiver Appeal. Nevertheless we have reviewed the record
26 on appeal and determine that the bankruptcy court did not abuse
27 its discretion in refusing to refund the fee paid October 24,
28 2006, where Bishop had received \$140,000 on August 3, 2006, and

1 therefore had adequate resources from which to pay the fee
2 regardless of his income.

3
4 **VI. CONCLUSION**

5 The bankruptcy court did not abuse its discretion in
6 awarding the Auctioneer compensation and reimbursement of
7 expenses in the amount of \$387.78. Further, the bankruptcy court
8 did not abuse its discretion in denying Bishop's request for a
9 refund of the filing fee for the Auctioneer Compensation Appeal.
10 We therefore AFFIRM both the Auctioneer Compensation Order (AZ-
11 06-1362) and the order denying refund of the filing fee for
12 appeal AZ-06-1362 (AZ-07-1023).

13 The Surcharge Order is not supported by adequate findings,
14 and the fees and expenses surcharged against the Retained Exempt
15 Proceeds may both have been, at least in part, beyond the scope
16 of the July 28 Order and unwarranted for surcharge of Bishop's
17 homestead exemption under existing law. We REVERSE the Surcharge
18 Order, and REMAND for further proceedings in the bankruptcy court
19 to determine if a surcharge of Bishop's homestead exemption is
20 appropriate, and if appropriate, in what amount, supported by
21 specific factual findings and appropriate legal conclusions.