

MAR 24 2010

SUSAN M SPRAUL, CLERK
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NOT FOR PUBLICATION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 No.	WW-09-1282-MkHMo
)		
7	BENZION ERREZ,)	Bk. No.	09-13325-SJS
)		
8	Debtor.)		
	_____)		
9)		
10	BENZION ERREZ,)		
)		
11	Appellant,)		
)		
12	v.)	MEMORANDUM*	
)		
13	NANCY L. JAMES, Chapter 7)		
	Trustee; AUBURN ACE HOLDINGS,)		
14	LLC; TRH LENDERS, LLC,)		
)		
15	Appellees.)		
	_____)		

Argued And Submitted On February 19, 2010
at Seattle, Washington

Filed - March 24, 2010

Appeal From The United States Bankruptcy Court
for the Western District of Washington

Honorable Samuel J. Steiner, Bankruptcy Judge, Presiding

Before: MARKELL, HOLLOWELL and MONTALI, Bankruptcy Judges.

*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.

1 that qualifies as the debtor's homestead as specified in RCW
2 6.13.010² and 6.13.040.³

3 Two parties filed objections to Errez's homestead exemption
4 claim within thirty days of the May 19, 2009, § 341(a) meeting of
5

6 ²RCW 6.13.010(1) provides, in relevant part:

7 (1) The homestead consists of real or personal property
8 that the owner uses as a residence. In the case of a
9 dwelling house or mobile home, the homestead consists
10 of the dwelling house or the mobile home in which the
11 owner resides or intends to reside, with appurtenant
12 buildings, and the land on which the same are situated
13 and by which the same are surrounded, or improved or
14 unimproved land owned with the intention of placing a
15 house or mobile home thereon and residing thereon. . .
16 . Property included in the homestead must be actually
17 intended or used as the principal home for the owner.

18 ³RCW 6.13.040 provides, in relevant part:

19 (1) Property described in RCW 6.13.010 constitutes a
20 homestead and is automatically protected by the
21 exemption described in RCW 6.13.070 from and after the
22 time the real or personal property is occupied as a
23 principal residence by the owner or, if the homestead
24 is unimproved or improved land that is not yet occupied
25 as a homestead, from and after the declaration or
26 declarations required by the following subsections are
27 filed for record

28 (2) An owner who selects a homestead from unimproved or
improved land that is not yet occupied as a homestead
must execute a declaration of homestead and file the
same for record in the office of the recording officer
in the county in which the land is located

(3) The declaration of homestead must contain:

(a) A statement that the person making it is residing
on the premises or intends to reside thereon and claims
them as a homestead;

1 creditors in Errez's bankruptcy case: (1) the chapter 7 trustee
2 Nancy James ("Trustee") filed an objection on June 16, 2009, and
3 (2) Auburn Ace Holdings, LLC ("Auburn") filed a separate
4 objection on June 18, 2009.⁴ Among other things, Auburn is a
5 judgment creditor of Errez's. In their objections, and in
6 subsequent filings made in support of their objections, the
7 Trustee and Auburn asserted that the Okanogan Property did not
8 qualify as Errez's homestead, because he did not reside at the
9 Okanogan Property, he had not filed a declaration of homestead,
10 and he did not intend to reside at the Okanogan Property.
11 According to the Trustee and Auburn, Errez's true intent was to
12 sell the Okanogan Property, as suggested by listings that Errez
13 had posted for the sale of the Okanogan Property.

14 In response, Errez admitted that he had posted listings for
15 the sale of the Okanogan Property. However, Errez claimed that
16 the sale listings were not really meant to solicit potential
17 buyers for the Okanogan Property; rather, according to Errez, he
18 posted the sale listings because he wanted to find a caretaker
19 for the Okanogan Property. According to Errez, the best way he
20 could find to look for a caretaker was to post spurious sale
21 listings. Errez represented that he truly intended to reside at
22 the Okanogan Property eventually, but that he currently could not
23 do so because of a joint custody arrangement concerning his minor

24
25 ⁴In August 2009, another party by the name of Theresa
26 Heacock belatedly joined in objecting to Errez's homestead
27 exemption claim. Ms. Heacock's joinder and accompanying
28 declaration added nothing material to the bankruptcy court
proceedings, nor are they material to our analysis.

1 son that necessitated Errez living in or near Seattle, and the
2 Okanogan Property was simply too remote (a five-hour drive) from
3 Seattle. According to Errez, once his son reached an age where
4 he could take care of himself, Errez intended to move his
5 residence from Seattle to the Okanogan Property.⁵

6 Errez recited the following list of alleged actions as
7 manifestations of his intent to eventually make the Okanogan
8 Property his residence:

- 9 a. I designed and built a house on the Property;
- 10 b. I installed a private sewer and dug a well (420 feet
11 deep) as its water source;
- 12 c. I obtained a Construction Permit and Certificate of
13 Occupancy for the Property;
- 14 d. I installed solar panels and a wind generator as the
15 power source for the Property;
- 16 e. I fenced the Property;
- 17 f. I planted a vineyard to mature and be ready for wine
18 production as my source of income by the time I am
19 ready to move in;
- 20 g. I installed a significant driveway; and
- 21 h. I am current on the payment of my taxes on the
22 Property.

23 July 31, 2009, Declaration of Benzion Errez at para. 17.

24 Errez further argued that the objections filed were either
25 untimely, invalid, or both. At the August 14, 2009, hearing on
26 the objections, the bankruptcy court did not explicitly address
27 Errez's arguments regarding the timeliness and validity of the
28 objections, but the court must have implicitly rejected those
arguments because it ultimately sustained the objections and
disallowed Errez's homestead exemption claim. The court offered
the following explanation for its ruling:

⁵Errez's opening brief on appeal indicates that Errez's son
currently is eleven years old.

1 As I understand it, on the Washington State
2 Homestead Exemption, there are a couple of key factors
3 which have to be considered. First, as I understand
4 it, the statute requires that in order to have a valid
5 homestead in unoccupied land, not only do you have to
6 have an intent to reside there permanently, but you
7 have to file this homestead declaration. The homestead
8 declaration in this case was never filed up to the time
9 of filing.

10 Now, beyond that, the debtor had this property for
11 sale, which in my mind, negates any intent to live
12 there permanently. I think this bit about having it
13 for sale in order to get a caretaker is so ridiculous
14 as to be unbelievable.

15 In short, the declaration wasn't filed. The
16 property was for sale. There's no intent to live there
17 permanently. And the objection will be sustained.

18 August 14, 2009, Hearing Transcript at pp. 9-10.

19 On August 19, 2009, the bankruptcy court entered its order
20 denying Errez's claimed homestead exemption, and Errez timely
21 appealed, on Monday, August 31, 2009.

22 JURISDICTION

23 The bankruptcy court had jurisdiction under 28 U.S.C.
24 §§ 1334 and 157(b)(2)(B). We have jurisdiction under 28 U.S.C.
25 § 158.

26 ISSUE

27 Did the bankruptcy court err when it disallowed Errez's
28 homestead exemption claim?

STANDARDS OF REVIEW

The scope of a statutory exemption is a question of law
subject to de novo review. Gonzalez v. Davis (In re Davis),
323 B.R. 732, 734 (9th Cir. BAP 2005); Kelley v. Locke
(In re Kelley), 300 B.R. 11, 16 (9th Cir. BAP 2003). The
construction and application of Rule 4003(b), which governs

1 procedure for objecting to exemption claims, also is a question
2 of law reviewed de novo. Spener v. Siegel (In re Spener),
3 212 B.R. 625, 628 (9th Cir. BAP 1997).

4 A debtor's intent to reside on property, for purposes of
5 determining the validity of a homestead exemption claim, is a
6 factual issue which we review under the clearly erroneous
7 standard. In re Kelley, 300 B.R. at 16. A factual finding is
8 clearly erroneous, when there is evidence to support it, only if
9 we have a definite and firm conviction that a mistake has been
10 committed. Banks v. Gill Distribution Ctrs., Inc. (In re Banks),
11 263 F.3d 862, 869 (9th Cir. 2001)(quoting Anderson v. City of
12 Bessemer City, N.C., 470 U.S. 564, 573 (1985)). Alternately
13 stated, we must affirm the bankruptcy court's findings of fact
14 unless those findings are "illogical, implausible, or without
15 support in inferences that may be drawn from the record."
16 U.S. v. Hinkson, 585 F.3d 1247, 1263 (9th Cir. 2009).

17 **DISCUSSION**

18 Since Errez claimed his homestead exemption under state law,
19 state law governs the validity of his exemption claim.
20 In re Kelley, 300 B.R. at 16; Arkison v. Gitts (In re Gitts),
21 116 B.R. 174, 178 (9th Cir. BAP 1990), aff'd, 927 F.2d 1109
22 (9th Cir. 1991). "[U]nder Washington law . . . 'a declaration of
23 homestead is a right or privilege given a property owner by
24 statute, so that its validity depends upon compliance with the
25 statutory requirements and only by such compliance does the
26 homestead come into existence.'" Wilson v. Arkison

1 (In re Wilson), 341 B.R. 21, 27 (9th Cir. BAP 2006) (quoting Bank
2 of Anacortes v. Cook, 10 Wash.App. 391, 395, 517 P.2d 633, 636
3 (1974)). See also United States Fidelity & Guar. Co. v. Alloway,
4 173 Wash. 404, 406, 23 P.2d 408, 409 (1933).

5 In Washington, a property owner can establish a homestead
6 exemption in his property in one of two different ways. A
7 homestead subject to exemption is automatically created "from and
8 after the time the property is occupied as a principal residence
9 by the owner." In re Gitts, 116 B.R. at 178 (quoting
10 RCW 6.13.040(1)). Alternatively, the owner may establish a
11 homestead for exemption purposes by declaration. In re Wilson,
12 341 B.R. at 26. In relevant part, to declare a homestead in
13 property he or she does not occupy as his or her residence, the
14 owner must: (1) intend in the future to reside at the property;
15 and (2) record a declaration of homestead. Id. (citing
16 In re Gitts, 116 B.R. 178).

17 In this case, Errez admitted that the Okanogan Property was
18 not his residence. Thus, the only potential means by which he
19 could have established the Okanogan Property as his homestead was
20 by declaration. However, Errez also admitted that he had not
21 recorded a homestead declaration. This by itself is fatal to
22 Errez's homestead exemption claim.

23 In his response to the exemption objections, and in his
24 appeal briefs, Errez expressed an intention to record a homestead
25 declaration in the future. Ordinarily, a debtor's entitlement to
26 an exemption is determined based on facts as they existed at the
27

1 time of the bankruptcy filing, and subsequent changes to those
2 facts typically are irrelevant for exemption determination
3 purposes. See Hopkins v. Cerchione (In re Cerchione), 414 B.R.
4 540, 548 (9th Cir. BAP 2009). Errez apparently takes comfort in
5 In re Gitts, which held that debtors who recorded their
6 Washington homestead declarations after the date of their
7 bankruptcy filing had a valid exemption enforceable against the
8 bankruptcy trustee. Washington law recognizes declared homestead
9 exemptions as effective against judgment lienholders if the
10 declaration is recorded at any time prior to execution on the
11 judgment lien or other forced sale. See In re Gitts, 116 B.R. at
12 178-80. According to In re Gitts, since bankruptcy trustees
13 enjoy no greater rights to a debtor's property than a judgment
14 lienholder who has not completed a sale, the bankruptcy trustee's
15 interest in the debtor's property is subject to a declared
16 homestead exemption under Washington law even if the homestead
17 declaration is recorded after the bankruptcy is filed. Id.

18 Assuming that In re Gitts correctly applied federal law
19 regarding when and how a debtor's state exemption rights are
20 determined, there are two key distinctions between the facts
21 presented in In re Gitts and the facts presented here. First,
22 Errez's expressed intention does not change the undisputed fact
23 that, at the time the bankruptcy court ruled upon his homestead
24 exemption claim, Errez had not recorded a homestead declaration.
25 By contrast, in In re Gitts, the debtors recorded the requisite
26 homestead declarations between the date of the bankruptcy filing

1 and the date of the bankruptcy court's ruling on the exemptions.
2 See Id. at 175-76. The holding in In re Gitts simply does not
3 confer upon Errez a Washington homestead exemption by his merely
4 expressing an intent to record a homestead declaration sometime
5 in the future, without actually recording the declaration. To
6 conclude otherwise would significantly alter Washington homestead
7 exemption law, by allowing debtors in bankruptcy to establish
8 Washington homestead exemptions by expression of an intent to
9 record homestead declarations, rather than by actually recording
10 the requisite declarations as prescribed in RCW 6.13.040.⁶

11 There is a second, independent reason why the holding in
12 In re Gitts does not apply here. In re Gitts relies in part on
13 the fact that the debtors therein had a right under Washington
14 law, as of the date of the bankruptcy filing, to record a
15 _____

16 ⁶The requirements of appellate procedure bolster our
17 analysis. The undisputed fact that Errez had not recorded a
18 homestead declaration by the time of the bankruptcy court's
19 ruling controls the outcome of this appeal; we can not consider a
20 different set of facts from those that were before the bankruptcy
21 court. See Oyama v. Sheehan (In re Sheehan), 253 F.3d 507, 512
22 n.5 (9th Cir. 2001) ("[e]vidence that was not before the lower
23 court will not generally be considered on appeal"); Kirschner v.
24 Uniden Corp of Am., 842 F.2d 1074, 1077-78 (9th Cir. 1988)
25 (papers not filed or admitted into evidence by trial court prior
26 to judgment on appeal were not part of the record on appeal and
27 thus stricken; appellate court would not consider issues which
were not supported by record on appeal). As noted by the Ninth
Circuit in Kirschner, "'We are here concerned only with the
record before the trial judge when his decision was made.'" Kirschner,
842 F.2d at 1077 (quoting United States v. Walker,
601 F.2d 1051, 1055 (9th Cir. 1979)). In short, even if Errez
had recorded a homestead declaration the day after the bankruptcy
court's ruling, and even if he had presented to us evidence of
that recordation, we could not consider it.

1 homestead declaration and establish a declared homestead. That
2 right, in turn, was based on evidence before the court that the
3 court concluded was sufficient to establish the requisite intent
4 of the debtors to make their declared homestead their future
5 residence. See In re Gitts, 116 B.R. at 180 (noting that the
6 debtors there took steps prior to their bankruptcy filing
7 sufficient to manifest their declared intent to reside at the
8 subject property). In this case, by contrast, the bankruptcy
9 court found that Errez did not have the requisite intent to make
10 the Okanogan Property his future residence. According to the
11 bankruptcy court, Errez intended to sell the Okanogan Property,
12 rather than reside there. In making its finding regarding
13 intent, the bankruptcy court principally relied on the undisputed
14 fact that Errez had listed the Okanogan Property for sale.
15 Further, the bankruptcy court did not believe Errez's
16 representation that he posted the sales listings merely to locate
17 a caretaker. The bankruptcy court stated: "I think this bit
18 about having it for sale in order to get a caretaker is so
19 ridiculous as to be unbelievable." August 14, 2009, Hearing
20 Transcript at p. 10.

21 Thus, the holding in In re Gitts can not be applied here;
22 unlike the debtors in In re Gitts, Errez had no right as of the
23 date of his bankruptcy filing to record a homestead declaration
24 because he had no intent to make the Okanogan Property his
25 residence. Under Washington law, homestead declarations must be
26 made in good faith, which in relevant part means that the

1 declaration must accurately reflect the owner's true intent to
2 reside at the subject property. See In re Wilson, 341 B.R. at
3 26-27 (citing Heck v. Kaiser Gypsum Co., 56 Wash.2d 212, 214,
4 351 P.2d 1035, 1036 (1960); Clark v. Davis, 37 Wash.2d 850,
5 856-57, 226 P.2d 904, 908 (1951); Cook, 10 Wash.App. at 395,
6 517 P.2d at 636). Here, the bankruptcy court found that Errez
7 did not truly intend to reside in the future at the Okanogan
8 Property. Thus, Errez could not in good faith have recorded a
9 homestead declaration under Washington law.

10 On appeal, Errez has challenged the bankruptcy court's
11 findings concerning his intent. According to Errez, the
12 objecting parties did not successfully refute his allegations
13 regarding intent. We disagree. It is true that the objecting
14 parties bore the burden of proof, and the ultimate burden of
15 persuasion, regarding the validity of Errez's exemption claim.
16 See Rule 4003(c); In re Cerchione, 414 B.R. at 548; In re Kelley,
17 300 B.R. at 16-17. The objecting parties needed to come forward
18 with evidence sufficient "to rebut the presumptively valid
19 exemption." In re Kelley, 300 B.R. at 16 (citing Carter v.
20 Anderson (In re Carter), 182 F.3d 1027, 1029 (9th Cir. 1999)).
21 The objecting parties did come forward with evidence regarding
22 Errez's intent, in the form of the sales listings, which Errez
23 ultimately acknowledged. Having produced this and other
24 evidence, the bankruptcy court found that the objecting parties
25 had met their initial burden of production. At that point, as
26 stated in In re Kelley, the burden of production then shifted to
27

1 Errez "to come forward with unequivocal evidence to demonstrate
2 that the exemption [was] proper." Id. (emphasis added, again
3 citing Carter).

4 The bankruptcy court determined that Errez did not come
5 forward with unequivocal evidence demonstrating his intent to
6 reside at the Okanogan Property. We agree. Errez's list of
7 actions that he allegedly took to maintain and/or to improve the
8 Okanogan Property are equally consistent with either an intent to
9 sell or an intent to reside. His alleged actions do little or
10 nothing to counter the impression regarding his intent that
11 arises from his posting of the sales listings.

12 In sum, we perceive no reversible error in the bankruptcy
13 court's findings regarding Errez's intent. The bankruptcy
14 court's findings were not clearly erroneous. Based on the record
15 on appeal, we can not say that we have been left with a definite
16 and firm conviction that a mistake has been committed. See
17 In re Banks, 263 F.3d at 869. Nor can we say that the bankruptcy
18 court's findings were "illogical, implausible, or without support
19 in inferences that may be drawn from the record." Hinkson,
20 585 F.3d at 1263.

21 Errez also argues that the objections filed were either
22 untimely, invalid, or both. According to Errez, the Trustee's
23 objection was untimely. Errez contends that an exemption
24 objection must be filed within sixty days of the bankruptcy
25 filing. This simply is incorrect. In order to be considered
26 timely and valid, objections generally must be filed within
27

1 thirty days of the conclusion of the § 341(a) meeting of
2 creditors. Rule 4003(b); In re Spenler, 212 B.R. at 629 (citing
3 Taylor v. Freeland & Kronz, 503 U.S. 638, 643 (1992)). Absent a
4 timely, valid objection, a debtor's exemption claims ordinarily
5 are deemed allowed. Id. The record here establishes that the
6 § 341(a) meeting of creditors in Errez's bankruptcy case was
7 concluded on May 19, 2009, and that the Trustee filed her initial
8 objection to Errez's homestead exemption claim on June 16, 2009,
9 within the thirty-day limitation period set forth in
10 Rule 4003(b).

11 Nor is there any doubt regarding the sufficiency of the
12 Trustee's initial objection. The initial objection specified in
13 relevant part:

14 1. The Debtor has claimed a homestead exemption
15 in real property and a cabin held for vacation property
16 in Eastern Washington. It is unclear whether or not
17 this property qualifies as homestead property and
18 therefore, the Trustee objects to the same.

19 * * *

20 The Trustee is objecting, in part, to preserve her
21 rights to object pending receipt of more information
22 about the Debtors' [sic] assets. She is also objecting
23 in part to preserve any equity the estate may have in
24 property that is subject to the Debtors' [sic]
25 exemption. The Trustee reserves the right to assert
26 any other basis for her objection or otherwise amend
27 this objection as she may determine to be appropriate
28 at a later date.

June 16, 2009, Trustee's Objection To Claimed Exemptions at
pp. 1-2.

We are convinced that the trustee's initial objection was
timely and sufficient under Rule 4003(b). As noted in

1 In re Spenler, unlike many other types of filings governed by the
2 Federal Rules of Bankruptcy Procedure, Rule 4003(b) sets out no
3 specific requirements as to the form of exemption objections.
4 Id. at 630. Further, the principal purpose of the exemption
5 objection is to put the debtor on notice that his or her
6 exemption claim has drawn an objection. Id. It is beyond cavil
7 that the Trustee's initial objection, here, was sufficient to put
8 Errez on notice that his homestead exemption claim was the
9 subject of an objection.⁷

10 Errez asserts that Auburn's exemption objection was invalid
11 because the attorneys who filed the objection on Auburn's behalf
12 were, according to him, not properly retained by Auburn in
13 compliance with Auburn's operating agreement. Errez claims that
14

15 ⁷The Trustee's initial objection apparently did not comply
16 with Western District of Washington Local Bankruptcy Rule 9013-1
17 ("Local Rule 9013-1"), which on its face seems to cover exemption
18 objections. See Local Rule 9013-1(a) ("As used herein, the term
19 "motion" includes any motion, application, objection, or other
20 request for an order or determination of the court").
21 Pursuant to Local Rule 9013-1(d), all motions are supposed to be
22 accompanied by a memorandum of points and authorities and all of
23 the evidence to be offered to support the motion. The Trustee's
24 initial objection was not accompanied by these items; rather, the
25 evidence and legal argument were submitted later. (In large
26 part, the Trustee relied upon and adopted the evidence offered
27 and legal arguments made by Auburn.) However, Errez never raised
28 the issue of the Trustee's non-compliance with Local Rule 9013-1,
and the bankruptcy court did not raise it sua sponte. We will
not address this issue because it was not raised during the
bankruptcy court proceedings. See Moldo v. Matsco, Inc.
(In re Cybernetic Services, Inc.), 252 F.3d 1039, 1045 n.3
(9th Cir. 2001) (declining to consider ramifications of new
argument, and deeming argument waived, when argument was raised
for the first time on appeal).

1 the appointment of one of Auburn's attorneys (Dean Von
2 Kallenbach) required the approval of a majority of Auburn's
3 members pursuant to section 7.1 of Auburn's operating agreement
4 because his fees likely have exceeded \$100,000. As for Auburn's
5 other attorney (Christine Tobin), Errez contends that her
6 appointment was invalid because Auburn's board of directors
7 attempted to appoint her at an improperly-held board meeting on
8 April 21, 2008.⁸ We note that the bankruptcy court, and the
9 district court on appeal, rejected similar arguments that Errez
10 made in support of his motion to dismiss Auburn's April 2008
11 bankruptcy filing, and in support of his appeal of the order
12 denying that motion. See In re Auburn Ace Holdings, LLC,
13 Case No. C08-1242RAJ (W.D. Wash. September 23, 2009).

14 In any event, we need not determine the validity of Auburn's
15 exemption objection. The bankruptcy court did not address this
16

17 ⁸Errez's arguments challenging Auburn's objection arise from
18 the ownership structure and governance of Auburn. As reflected
19 in the record, Plan B Development, LLC ("Plan B") held 50% of
20 Auburn's membership interests and Third Century, LLC ("Third
21 Century") held the other 50%. In turn, Plan B was owned and
22 controlled by Errez, and Third Century was owned and controlled
23 by Pat and Jan Cavanaugh. Initially, both Plan B and Third
24 Century designated two directors each to Auburn's board of
25 directors. Third Century's two designated directors were the
26 Cavanaugh's, and Plan B's were Errez and a man by the name of
27 Martin Loesch. Apparently, Mr. Loesch resigned from Auburn's
28 board of directors, thereby leaving Auburn with only three
directors. Because the Cavanaugh's, by themselves, constituted a
majority of Auburn's board, Errez's arguments regarding the
retention of Dean Von Kallenbach and the convening of the
April 21, 2008 board meeting hinge on Errez's claim that these
two actions required the affirmative vote of a majority of
Auburn's members rather than a majority of Auburn's directors.

1 issue, and the bankruptcy court did not commit reversible error
2 by not doing so. The validity of Auburn's objection is
3 irrelevant because the Trustee timely filed an objection, as set
4 forth above. That the Trustee also later joined in Auburn's
5 objection does not alter the controlling fact that the Trustee
6 timely filed her own objection in compliance with Rule 4003(b).⁹

7 **CONCLUSION**

8 For all of the reasons set forth above, the bankruptcy
9 court's order disallowing Errez's homestead exemption claim is
10 AFFIRMED.

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24 ⁹On March 2, 2010, Errez filed a motion asking us to rule,
25 separate from our decision in this appeal, whether the meeting of
26 Auburn's board held on April 21, 2008, was valid. For the
27 reasons stated immediately above, it is not necessary for us to
reach that issue. Accordingly, Errez's motion for a separate
ruling is hereby ORDERED DENIED.