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

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No. AZ-11-1045-ClJuKi
	)	
TUSCAN RANCH, INC.,	)	Bk. No. 0:10-14417-JMM
	)	
Debtor.	)	
_____	)	
TUSCAN RANCH, INC.,	)	
	)	
Appellant,	)	
	)	
v.	)	M E M O R A N D U M <sup>1</sup>
	)	
AEA FEDERAL CREDIT UNION,	)	
	)	
Appellee.	)	
_____	)	

Argued and Submitted on January 18, 2012  
Filed - February 2, 2012

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

Honorable James M. Marlar, Chief Bankruptcy Judge, Presiding

Appearances: Robert M. Cook, Esq. Of the Law Offices of Robert  
M. Cook, PLLC argued for Appellant Tuscan Ranch,  
Inc.; Gregory J. Gnepper, Esq. of Gammage & Burnham  
argued for Appellee AEA Federal Credit Union

Before: Clarkson<sup>2</sup>, Jury and Kirscher, Bankruptcy Judges.

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

<sup>2</sup> Hon. Scott C. Clarkson, United States Bankruptcy Judge for  
the Central District of California, sitting by designation.

1 Chapter 11<sup>3</sup> Debtor in Possession and appellant Tuscan Ranch,  
2 Inc. ("Tuscan Ranch", "Debtor" or "Appellant") appeals the  
3 bankruptcy court's order (the "Order") granting the Motion for  
4 Relief from the Automatic Stay to Exercise Set-Off Rights Against  
5 Tuscan Ranch's Accounts Held by AEA Federal Credit Union (the  
6 "Motion for Relief"). The Appellant identifies three general  
7 challenges to the bankruptcy court's order:

8 (1) Whether the bankruptcy court erred in granting at a  
9 preliminary hearing the Motion for Relief;

10 (2) Whether the Bankruptcy Court erred in denying Tuscan  
11 Ranch's Motion for Reconsideration of the Motion for Relief Order  
12 ("Motion for Reconsideration"); and

13 (3) Whether the Bankruptcy Court erred in failing to conduct  
14 an evidentiary final hearing relative to the Motion for Relief<sup>4</sup>.

15 For the reasons discussed below, we AFFIRM the bankruptcy  
16 court's Order.

17 **I. FACTS**

18 Tuscan Ranch filed its voluntary chapter 11 petition on  
19 May 11, 2010, (the "Petition Date") in the District of Arizona,  
20 Yuma Division. On the Petition Date, the Debtor had in its bank  
21 deposit accounts with AEA Federal Credit Union ("AEA")  
22 approximately \$122,000.00. On that same date, AEA placed an  
23 "administrative freeze" on the deposit accounts.

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25 <sup>3</sup> Absent contrary indication, all section and chapter  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

27 <sup>4</sup> This third argument was mentioned only in passing within  
28 the opening section of Appellant's Brief and is never later  
addressed on the merits. The record is devoid of any request for a  
final hearing made by any party.

1           On July 26, 2010, approximately 75 days following the  
2 Petition Date, AEA filed its "Motion for Relief from the Automatic  
3 Stay to Exercise Set-Off Rights Against Tuscan Ranch's Accounts  
4 Held by AEA," asserting that (a) on January 31, 2008, the Debtor  
5 and AEA entered into a "Commercial Loan Agreement for Loan 536"  
6 (the "Loan Agreement"), and other related loans; (b) that at the  
7 time of the Petition Date, the Debtor was in default on these  
8 loans<sup>5</sup>, and (c) that the Loan Agreement, and other related loans,  
9 authorized AEA to "set-off any amounts due and payable under the  
10 terms of the Loan against any rights the Debtor had to receive  
11 money from AEA, which included any deposit accounts that the  
12 Debtor had with AEA."<sup>6</sup>

13           On August 17, 2010, the Debtor filed its Response and  
14 Objection to the Motion for Relief from the Automatic Stay,  
15 stating that AEA had no setoff rights, but provided no factual  
16 specifics to the bankruptcy court regarding this assertion, and  
17 that AEA improperly imposed an "administrative freeze". The  
18 Debtor further asserted that the "administrative freeze" by AEA  
19 constituted a violation of § 362(a)(3) ("any act...to exercise  
20 control over property of the estate"), and requested that the  
21 Motion for Relief be denied.

22 \_\_\_\_\_  
23           <sup>5</sup> A proof of claim was filed by AEA on September 14, 2010, as  
24 Claim 1-1, which has been submitted within the Appendix to Appeal  
25 Brief of AEA, indicating that AEA was owed \$1,360,048.44 on the  
26 Petition Date for Loans No. 191, 536, 537,540, and 915. Further,  
the Debtor's schedule D indicates that the AEA was owed at least  
\$895,000.00 by the Debtor.

27           <sup>6</sup> The Motion for Relief did not cite under which specific  
28 provision of § 362(d) (i.e. 362(d)(1) or (d)(2)) relief was being  
requested, and only that the Movant was entitled to relief under  
"362" and "362(d)".

1           On August 30, 2010, AEA replied to the Debtor's Response and  
2 Objection, arguing that there was no dispute that the Debtor's  
3 accounts were subject to setoff rights under § 553, that § 553  
4 allows setoff "if the debt was not incurred during the 90 days  
5 before bankruptcy, while the debtor was insolvent, or for the  
6 purposes of obtaining a set-off right." AEA further discussed and  
7 refuted the Debtor's arguments that AEA's administrative freeze  
8 was improper, arguing that the Debtor's reliance on the Ninth  
9 Circuit's BAP decision of In re Mwangi, 432 B.R. 812 (9th Cir. BAP  
10 2010), was misplaced in that Mwangi only restricted the use of  
11 administrative freezes on debtors' bank accounts unless and except  
12 when setoff rights were being protected.

13           On December 3, 2010, the bankruptcy court held a preliminary  
14 hearing on AEA's Motion for Relief from the Automatic Stay to  
15 Foreclose on Security Interests. Both counsel for AEA and Debtor  
16 were present at the hearing. At this hearing AEA's counsel  
17 informed the bankruptcy court that the parties had agreed to  
18 submit this matter without a hearing. The parties informed the  
19 bankruptcy court that the matter could be submitted on the briefs.

20           Neither the Debtor nor AEA sought further briefing  
21 opportunities, evidentiary hearings, or final hearings on the  
22 Motion for Relief to Exercise Set-off Rights.

23           On December 7, 2010, the bankruptcy court entered its order  
24 granting to AEA relief from stay<sup>7</sup>, specifically ruling that "AEA

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26           <sup>7</sup> The record reflects that the Motion for Relief was not  
27 supported by any admissible evidence. However, the parties, by  
28 implication, acknowledge that the Debtor's Schedules admitted both  
the debt to AEA and the deposit account at AEA on the petition  
date, demonstrating the mutuality necessary for set off rights.

1 is entitled to assert setoff rights once stay is lifted."  
2 However, the Court also suggested within its Order that setoff  
3 rights might not be necessary if the real property security for  
4 the loan was sufficient to satisfy the AEA loans, stating,  
5 [t]he court has not been provided information as to  
6 whether AEA intends to marshal assets, and perhaps proceed  
7 against the real property collateral to satisfy the debt.  
8 If it can do so, it has no need to access the deposit  
9 accounts, which the Debtor may utilize in its  
10 reorganization. But no party has raised this issue.

11 The Order further continued,  
12  
13 However, this case was filed on May 11, 2010. The court  
14 ordered a plan and disclosure statement be filed by  
15 September 8, 2010. To date, none has been filed, and no  
16 extensions have been granted. The case has been before the  
17 court for seven months, with no plan.

18 This last textural portion of the Order gives rise to the  
19 Debtor's assertion within this appeal that the Motion for Relief  
20 was granted in error, because no Disclosure Statement and Plan was  
21 filed by a deadline which the court remembered in its Order as  
22 September 8, 2010. The Debtor correctly points out, both in its  
23 Motion to Reconsider and in this appeal, that the court-imposed  
24 deadline was December 8, 2010, not September 8, 2010.

25 On December 14, 2010, the Debtor filed its Motion for  
26 Reconsideration of Order Granting AEA Stay Relief Re: Account  
27 Setoff ("Motion for Reconsideration"), asserting that the court  
28 had based its Order on a misapprehension that the Debtor's  
Disclosure Statement and Plan had not been timely filed. On  
January 24, 2011, the Motion for Reconsideration was denied.

A review of the underlying record reflects that the  
bankruptcy court only granted relief from stay to AEA to allow  
later setoff activities under state law. The Order did not

1 formally approve the setoff of the accounts itself. The Debtor did  
2 not file any substantive pleadings with the bankruptcy court  
3 addressing AEA's setoff rights, and as such, the final "rights" to  
4 setoff accounts were not addressed in the Order and are not  
5 addressed in the pending appeal. The only question presented is  
6 whether the bankruptcy court erred in granting relief from stay so  
7 that those rights could later be determined and exercised.

## 8 **II. JURISDICTION**

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

## 11 **III. ISSUE**

12 Whether the bankruptcy court erred in granting AEA relief  
13 from the automatic stay to permit setoff of the Debtor's deposit  
14 accounts.

## 15 **IV. STANDARDS OF REVIEW**

16 The bankruptcy court's decision to grant a motion for relief  
17 from the automatic stay is within its sound discretion and is  
18 reviewed for an abuse of discretion. In re Delaney-Morin, 304 B.R.  
19 365, 368 (9th Cir. BAP 2003). To determine whether the bankruptcy  
20 court abused its discretion, we conduct a two-step inquiry: (1) we  
21 review de novo whether the bankruptcy court "identified the  
22 correct legal rule to apply to the relief requested" and (2) if it  
23 did, whether the bankruptcy court's application of the legal  
24 standard was illogical, implausible or "without support in  
25 inferences that may be drawn from the facts in the record."  
26 United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir.  
27 2009)(en banc). A bankruptcy court necessarily abuses its  
28 discretion if it bases its decision on an erroneous view of law or

1 clearly erroneous factual findings. Cooter & Gell v. Hartmarx  
2 Corp., 496 U.S. 384, 405 (1990), superseded on other grounds by  
3 Fed. Rules Civ. Proc. R. 11. The panel may also find an abuse of  
4 discretion if it has a definite and firm conviction that the  
5 bankruptcy court committed a clear error of judgment in the  
6 conclusion it reached. Beatty v. Traub (In re Beatty), 162 B.R.  
7 853, 855 (9th Cir. BAP 1994).

8 **V. DISCUSSION**

9 Tuscan Ranch raises three specific arguments on appeal. Its  
10 first argument is that the bankruptcy court "was at all times  
11 confused as to proper deadlines" with respect to its previous  
12 order setting deadlines for the Debtor to file a plan and  
13 disclosure statement and that the Order's "Memorandum of Points  
14 and Authorities" (sic) "plainly states" that the Order was  
15 premised on the failure to file the Disclosure Statement and Plan  
16 on September 8, 2010, when the deadline was actually December 8,  
17 2010.

18 The second argument raised by Tuscan Ranch is that the  
19 bankruptcy court erred in granting relief by determining that AEA  
20 was entitled to assert setoff rights.

21 Finally, the third argument raised by Tuscan Ranch, initially  
22 in its Response to the Motion and again in its own Motion to  
23 Reconsider, is that AEA improperly imposed an administrative  
24 freeze on the Debtor's deposit accounts at AEA, and (assumably,  
25 but not specifically stated by Tuscan Ranch) that such action was  
26 a proper defense to the Motion for Relief.

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1           1.    Deadlines for Debtor to File Disclosure Statement and  
2                    Plan

3           Tuscan Ranch's first argument, that the bankruptcy court  
4 premised its order granting relief on a misconception of when a  
5 Plan and Disclosure Statement was to be filed is, initially, one  
6 way to read the Order Granting Relief. The bankruptcy court's  
7 Order states that "[t]he Debtor's legal arguments are misplaced.  
8 AEA is entitled to assert setoff rights, once the stay is lifted."  
9 If the Order said nothing more, no reasonable ambiguity could be  
10 promoted by Tuscan Ranch. However, the Order goes further,  
11 stating:

12           The Debtor's schedules reflect that AEA is also secured  
13 by various parcels of real property. The court has not  
14 been provided information as to whether AEA intends to  
15 marshal assets, and perhaps proceed against its real  
16 property collateral to satisfy the debt. If it can do  
17 so, it has no need to access the deposit accounts, which  
18 the Debtor may utilize in its reorganization. But, no  
19 party has raised this issue.

20           However, the case was filed on May 11, 2010. The court  
21 ordered the plan and disclosure statement be filed by  
22 September 8, 2010. To date, none has been filed, and no  
23 extensions have been granted. The case has been before  
24 the court for seven months, with no plan.

25           Tuscan Ranch argues that the Motion for Relief would  
26 not have been granted if the bankruptcy court had known that  
27 the actual deadline was December 8, 2010, instead of  
28 September 8, 2010<sup>8</sup>. Tuscan Ranch raised this matter within  
its Motion for Reconsideration. However, as observed in the  
bankruptcy court's Order, the Debtor's Response to the

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27           <sup>8</sup> Tuscan Ranch is correct that the deadline for the Debtor to  
28 file a Plan and Disclosure Statement was December 8, 2010, and not  
September 8, 2010, as set out in the Order.



1 Motion for Relief did not raise the obvious arguments that  
2 AEA was premature in desiring to setoff the bank accounts,  
3 or that other options were available to AEA, such as  
4 marshaling collateral or proceeding against the real  
5 property collateral as a first step of collecting its debt.  
6 While the bankruptcy court was perhaps mistaken regarding  
7 the dates of the previously imposed filing deadlines, the  
8 bankruptcy court was correct that the case had been pending  
9 for seven months with no plan, and that the Debtor had  
10 raised no reasonable arguments as an alternative to granting  
11 relief to allow AEA to seek its setoff remedies under  
12 Arizona state law. To assign error to the court granting  
13 relief from stay because of a mistaken filing date for the  
14 plan and disclosure statement, where the court recognized  
15 that the case had been pending for a lengthy time, and that  
16 it had no other alternative arguments before it, is a thin  
17 and unsubstantial reed. This Panel interprets the Order of  
18 the bankruptcy court as simply observing that the court had  
19 no alternative arguments (aside from AEA's request for  
20 setoff of its claim) from the Debtor as to the use of the  
21 deposit account funds within a plan or reorganization<sup>9</sup>. The  
22 Debtor's argument does not demonstrate the court's abuse of  
23 discretion with respect to the erroneous deadline stated  
24 within its Order.

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26 <sup>9</sup> Although not stated by the court, this line of thought  
27 presents itself as an inquiry of whether the Debtor had even  
28 attempted to meet its burden of demonstrating the deposit  
accounts' necessity for the purpose of reorganization as required  
by § 362(d)(2). However, as discussed below, this consideration  
was not even raised by AEA or the Debtor.

1           2.    Alleged Adjudication of AEA's Right to Setoff

2           Tuscan Ranch's second argument, that the bankruptcy  
3 court erred in determining that AEA had established setoff  
4 rights in the first place, runs afoul of the limited role  
5 bankruptcy courts must undertake in determining whether  
6 relief from stay should be granted to exercise setoff  
7 rights.

8           Once a bankruptcy petition is filed, the stay under §  
9 362 takes effect and all pre-petition creditors are  
10 automatically enjoined from taking actions to collect their  
11 debts. Section 362(a)(7) specifically prohibits "the setoff  
12 of any debt owing to the debtor that arose before the  
13 commencement of the case under this title against any claim  
14 against the debtor." 11 U.S.C. § 362(a)(7).

15           When a creditor demonstrates adequate grounds for  
16 relief from stay, the bankruptcy court may grant relief from  
17 stay pursuant to § 362(d). It is only after relief from stay  
18 is granted that a creditor may exercise its offset rights  
19 without violation of the stay. In re Pieri, 86 B.R. 208,  
20 210 (9th Cir. BAP 1988); Grella v. Salem Five Cent Sav.  
21 Bank, 42 F.3d 26, 33-34 (1st Cir. 1994)(explaining that  
22 relief from the stay is "merely a grant of permission from  
23 the court allowing the creditor to litigate its substantive  
24 claims elsewhere without violating the automatic stay").

25           The scope of a § 362 motion for relief from stay  
26 hearing is summary in nature. "The hearing on a motion for  
27 relief from stay is meant to be a summary proceeding, and  
28 the statute requires the bankruptcy court's action to be

1 quick." Grella 42 F.3d at 31 (citing Matter of Vitreous  
2 Steel Prods. Co., 911 F.2d 1223, 1232 (7th Cir. 1990)).  
3 These motions do not and should not involve an adjudication  
4 of the merits of claims, defenses, or counterclaims, but  
5 simply determine whether the moving creditor holds a  
6 colorable claim or rights to the property of the estate.  
7 See In re Johnson, 756 F.2d 738, 740 (9th Cir.), cert.  
8 denied, 474 U.S. 828 (1985)("Hearings on relief from the  
9 automatic stay are thus handled in a summary fashion. The  
10 validity of the claim or contract underlying the claim is  
11 not litigated during the hearing.")(citation omitted); In re  
12 Ellis, 60 B.R. 432, 436 (9th Cir. BAP 1985)("In any case,  
13 stay litigation is not the proper vehicle for determination  
14 of the nature and extent of those rights."); Grella, 42 F.3d  
15 at 33 ("We find that a hearing on a motion for relief from  
16 stay is merely a summary proceeding of limited effect, and .  
17 . . a court hearing a motion for relief from stay should  
18 seek only to determine whether the party seeking relief has  
19 a colorable claim to property of the estate."); see also,  
20 3 Collier on Bankruptcy ¶ 362.08[6], 362-130 and 131  
21 (16th ed. rev. 2011).

22 In the present case, AEA filed its motion to annul the  
23 automatic stay (citing §362 and §362(d) in general) in order  
24 to exercise its setoff rights established under its  
25 contract(s) with the Debtor and Arizona state law, and this  
26 is precisely what was ordered by the bankruptcy court. "AEA  
27 is entitled to assert setoff rights once stay is lifted."  
28 Where and when AEA was to assert those rights were beyond

1 the scope of the Motion for Relief or the Order.

2       The bankruptcy court was not required to determine the  
3 precise rights afforded and duties placed upon AEA to  
4 exercise its setoff rights; it was only required to find  
5 that AEA held colorable claims of setoff rights in order to  
6 be granted relief from the automatic stay. Tuscan Ranch's  
7 argument simply overstates the requirements necessary to  
8 grant such relief, and the Panel finds that the bankruptcy  
9 court did not abuse its discretion in granting the relief  
10 sought.

11       With respect to the statutory basis for the court to  
12 grant relief from the automatic stay, AEA had but two  
13 sections of § 362 to rely upon, § 362(d)(1) and § 362(d)(2).  
14 In reviewing the record, the only grounds set out for relief  
15 by AEA were its discussion of its rights to setoff the  
16 deposit accounts under § 553. The parties did not discuss  
17 any issues regarding "equity" in the deposit accounts or  
18 that the deposit accounts were necessary for an effective  
19 reorganization. Indeed, as earlier noted, the bankruptcy  
20 court briefly touched on the specific lack of discussion by  
21 the Debtor for the need of the funds in any reorganization  
22 effort. Thus, the Panel concludes that both AEA and the  
23 bankruptcy court relied on § 362(d)(1) as the basis for  
24 requesting and receiving relief from the automatic stay.  
25 The parties have not raised any issues arising under  
26 §362(d)(2), including the issue of equity in the deposit  
27 accounts or necessity of the deposit accounts for an  
28 effective reorganization, and we are not compelled to

1 address any such matters.

2 3. Section 362(d)(1): AEA Established that Cause  
3 Existed for Granting Relief from Stay

4 This Panel's decision in In re Gould sets out the  
5 standards for granting relief to parties seeking to setoff  
6 mutual pre-petition obligations under § 362(d)(1). In re  
7 Gould (United States v. Gould), 401 B.R. 415, 426, (9th Cir.  
8 BAP 2009). AEA, as the party seeking relief, first must  
9 establish a prima facie case that cause exists for relief  
10 under § 362(d)(1). Once a prima facie case has been  
11 established, the burden shifts to the opponent to show that  
12 relief from the stay is not warranted. Id. at 426. In  
13 In re Gould, this Panel adopted the view explained in  
14 In re Ealy, 392 B.R. 408, 414 (Bankr. E.D. Ark. 2008), that  
15 "Courts generally recognize that, by establishing a right to  
16 setoff, the creditor has established a prima facie showing  
17 of 'cause' for relief from the automatic stay under  
18 §362(d)(1)." In re Gould at 426.

19 The record is clear that AEA asserted, and Tuscan Ranch  
20 did not rebut, that the Loan Agreements giving rise to  
21 Tuscan Ranch's obligations authorized AEA to setoff under  
22 §553 "any amounts due and payable under the terms of the  
23 Loan against any rights the Debtor had to receive money from  
24 AEA, which included any deposit accounts that the Debtor had  
25 with AEA." Tuscan Ranch's only defense to the asserted  
26 setoff rights was that AEA had improperly imposed an  
27 administrative freeze on the accounts in violation of this  
28 Panel's holdings in In re Mwanqi.

1           4.     The Administrative Freeze

2           Tuscan Ranch raises the fact that AEA imposed an  
3 administrative freeze on the Debtor's deposit accounts on  
4 the Petition Date and, by implication, reasons that such  
5 action should have served as a defense to the Motion for  
6 Relief. Tuscan Ranch asserts that this Panel's decision in  
7 In re Mwangi, 432 B.R. 812 (9th Cir. BAP 2010) directs AEA  
8 to not impose an administrative freeze on the Debtor's  
9 deposit accounts. We do not believe that a full scale  
10 revisitaton or discussion of the In re Mwangi decision is  
11 warranted at this time, except to provide a general  
12 background and effect of that decision, as well as to remind  
13 us of the Supreme Court decision of Citizens Bank of  
14 Maryland v. Strumpf, 516 U.S. 16 (1995), which authorizes  
15 administrative freezes for specific purposes.

16           In Strumpf, the Supreme Court held that a bank may  
17 place an administrative freeze on a bankruptcy debtor's bank  
18 account while the bank pursues relief from the automatic  
19 stay. In In re Mwangi, this Panel considered the systemic  
20 practice of financial institutions placing administrative  
21 freezes in almost all cases in which an individual chapter 7  
22 debtor was a depositor of the institution, but where there  
23 was no affirmative assertion of setoff rights. The BAP held  
24 in In re Mwangi that a bank cannot place an administrative  
25 freeze on an individual chapter 7 debtor's bank account when  
26 the bank does not claim a right of setoff, simply because  
27 the bank was unsure of what to do with the funds.

28           Mwangi has very little, if anything, to do with this

1 present case or its facts. Mwagni involved an individual  
2 chapter 7 debtor who held undisputed statutory exemptions on  
3 the funds held by the bank. The bank in that case held no  
4 claims of setoff, and asserted no claims, against the  
5 deposited funds. On the other hand, the case before us  
6 concerns a corporate chapter 11 debtor in possession, with  
7 no eligible statutory exemptions, and a credit union with  
8 demonstrable setoff rights.

9 The "administrative freeze" argument, presented to the  
10 court as a defense to the Motion, is simply unpersuasive and  
11 does not provide a rebuttal to the prima facie case under §  
12 362(d)(1) made by AEA.

13 **VI. CONCLUSION**

14 The bankruptcy court did not abuse its discretion and  
15 its decision is supported by the record. For the reasons  
16 set forth above, we AFFIRM.

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