

OCT 28 2013

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

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-12-1567-KuKiTa
)
 6 GASPROM, INC.,) Bk. No. ND 12-10772-RR
)
 7 Debtor.)
)
 8)
 9 GASPROM, INC.,)
)
 10 Appellant,)
)
 11 v.) **OPINION**
)
 12 MICHELLE FATEH; FRED FATEH;)
 13 SANDRA MCBETH, Chapter 7)
 14 Trustee; PARKER FORECLOSURE)
 15 SERVICES; COLONIAL PACIFIC)
 16 LEASING CORP.; JULIAN BACH;)
)
 GREEN ENERGY HOLDINGS, LLC;)
 UNITED STATES TRUSTEE,)
)
 Appellees.¹)
)

Argued and Submitted on September 19, 2013
at Pasadena, California

Filed - October 28, 2013

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

Honorable Robin L. Riblet, Bankruptcy Judge, Presiding

Appearances: Michael R. Sment argued for appellant Gasprom,
 Inc.; Peter A. Goldenring of Goldenring & Prosser
 argued for appellee Michelle Fateh.

Before: KURTZ, KIRSCHER and TAYLOR, Bankruptcy Judges.

¹ While Gasprom's Notice of Appeal named all of the above-referenced appellees as parties to the order on appeal, the only named appellee who has participated in this appeal is Michelle Fateh.

1 KURTZ, Bankruptcy Judge:
2

3 **INTRODUCTION**

4 Chapter 7² debtor Gasprom, Inc. ("Gasprom") appeals from a
5 bankruptcy court order holding that the postpetition foreclosure
6 of Gasprom's principal asset, a gas station, did not violate the
7 automatic stay because the stay had terminated by operation of
8 law as a result of the chapter 7 trustee's abandonment of the gas
9 station. The bankruptcy court based this holding on an incorrect
10 legal analysis regarding the effect of the abandonment on the
11 automatic stay.

12 In the same order, the bankruptcy court held in the
13 alternative that it would annul the stay in order to
14 retroactively validate the foreclosure sale and the actions of
15 the parties who conducted the foreclosure sale. But the
16 bankruptcy court abused its discretion in annulling the stay.
17 The court did not apply the appropriate legal standard for
18 determining whether the stay should be annulled. Nor did the
19 court give the parties any opportunity to develop the record
20 regarding the equities of their respective positions.
21 Consequently, we VACATE AND REMAND for further proceedings.

22 **FACTS**

23 Gasprom commenced its chapter 11 bankruptcy case in February
24 2012. Within roughly a month, the bankruptcy court converted
25 Gasprom's case to chapter 7, and Sandra McBeth was appointed to
26

27 ² Unless specified otherwise, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 serve as chapter 7 trustee ("Trustee").

2 Gasprom's only asset of significance was a non-operational
3 gas station in Oxnard, California ("Gas Station"). In June 2012,
4 the Trustee filed a notice of intention to abandon the Gas
5 Station. Gasprom filed a two-page objection to the proposed
6 abandonment, stating that the Trustee should not be permitted to
7 abandon the Gas Station because it had "significant equity
8 potential." Gasprom further asserted that the Gas Station
9 suffered from hazardous waste contamination and that state law
10 prohibited the Trustee from abandoning contaminated property.
11 Gasprom offered no evidence or legal authority to support its
12 assertions.

13 The Trustee then submitted evidence in support of her
14 intention to abandon the Gas Station and noticed her proposed
15 abandonment for hearing. According to the Trustee's evidence,
16 she did not have any funds available to render the Gas Station
17 operational. Nor did she have any funds available to address a
18 number of troublesome issues concerning permitting, hazardous
19 waste contamination and underground storage tank compliance. As
20 the Trustee explained, the Gas Station's value was significantly
21 impaired by these issues and by its nonoperational status, and
22 the Gas Station also was fully encumbered.

23 On July 27, 2012, a few days before the hearing on the
24 proposed abandonment, Michelle Fateh ("Fateh") filed a memorandum
25 and a declaration in support of the Trustee's proposed
26 abandonment. Fateh asserted that she was the holder of a first
27 deed of trust ("Deed Of Trust") against the Gas Station, that the
28 obligation secured by the Deed Of Trust exceeded \$1 million and

1 that Gasprom's opposition to the proposed abandonment was
2 meritless. More importantly for our purposes, Fateh asserted
3 that, if the court authorized the Trustee to abandon the Gas
4 Station, the abandonment effectively would terminate the § 362
5 automatic stay as to the Gas Station and thereby would enable
6 Fateh to proceed with her pending foreclosure sale against the
7 Gas Station.³

8 The bankruptcy court held the hearing on the proposed
9 abandonment on August 1, 2012 ("Abandonment Hearing").⁴ At the
10 hearing, Gasprom asserted that the court should continue the
11 Abandonment Hearing to "prevent any rash or sudden actions" by
12 the creditors asserting liens against the Gas Station. Hr'g Tr.
13 (Aug. 1, 2012) at 6:15-8:13. The bankruptcy court rejected
14 Gasprom's argument for a continuance. As the court put it,
15 Gasprom only sought to prevent the Trustee from abandoning the
16 Gas Station so that the automatic stay would continue to enjoin
17 other parties claiming an interest in the Gas Station from
18 pursuing their rights in state court. The court further opined

19
20 ³ Fateh originally noticed her foreclosure sale for
21 February 24, 2012, the day Gasprom filed its chapter 11
22 bankruptcy case. In light of the bankruptcy filing and the
automatic stay, Fateh apparently continued the foreclosure sale.

23 ⁴ The transcript of the Abandonment Hearing that Gasprom
24 attached to its excerpts of record does not appear to be an
25 official transcript. Nonetheless, because both sides have relied
26 on this unofficial transcript in proceedings held in the
27 bankruptcy court and on appeal, we will accept the transcript as
28 providing a generally accurate account of the Abandonment Hearing
and the bankruptcy court's key comments and rulings. See First
St. Holdings NV, LLC v. MS Mission Holdings, LLC (In re First St.
Holdings NV, LLC), 2012 WL 6050459, at *7 n.12 (mem. dec. 9th
Cir. BAP 2012) (accepting unofficial transcript under similar
circumstances).

1 that it would be improper to prohibit or delay abandonment only
2 so that the automatic stay would continue to cover the Gas
3 Station and would continue to enjoin interested parties from
4 pursuing their state law rights and remedies.

5 After the bankruptcy court orally ruled that it would
6 authorize the Trustee's proposed abandonment, Gasprom requested
7 that the court delay entry of the abandonment order. If the
8 court immediately entered the abandonment order, Gasprom
9 explained, it feared that Fateh would immediately proceed with a
10 foreclosure sale she had scheduled for that day. But the court
11 declined to delay entry of the abandonment order and instead
12 suggested that, if Gasprom sought to further enjoin Fateh's
13 foreclosure sale, Gasprom should seek an injunction from a state
14 court.⁵

15 On the same day as the Abandonment Hearing, August 1, 2012,
16 the bankruptcy court signed and entered the Trustee's proposed
17 form of order authorizing the abandonment and declaring the Gas
18
19
20

21 ⁵ At the conclusion of the hearing, the court reiterated
22 its view that, upon abandonment, the automatic stay would no
longer protect the Gas Station from foreclosure:

23 MS. LINTON [Gasprom's counsel]: Your honor, if I -- if
24 I may clarify. The -- the stay remains in effect, even
after this [Abandonment Order].

25 [COURT]: No. Once the [Gas Station] is no longer
26 property of the estate, if it's abandoned, the stay as
27 to the [Gas Station] terminates.

28 Hr'g Tr. (Aug. 1, 2012) at 12:5-10.

1 Station abandoned ("Abandonment Order").⁶ Even though the
2 Abandonment Order was silent regarding the automatic stay,
3 Fateh's affiliate and her successor in interest under the Deed of
4 Trust Green Energy Holdings ("Green") proceeded with the
5 foreclosure sale later that same day.

6 Before the Abandonment Hearing, on July 9, 2012, the Trustee
7 issued a final report reflecting that there were no estate assets
8 available for distribution. Thereafter, on August 16, 2012, the
9 bankruptcy case was closed. As a combined result of the August
10 1, 2012 abandonment and the August 16, 2012 case closure, the
11 automatic stay terminated for all purposes with respect to the
12 Gas Station on August 16, 2012, a short time after the
13 foreclosure sale. See § 362(c).

14 In September 2012, Gasprom moved to reopen its bankruptcy
15 case, so that it could seek to set aside the foreclosure sale and
16 commence contempt proceedings against Fateh, Green and others for
17 violation of the automatic stay. According to Gasprom, the
18 Abandonment Order caused the estate's interest in the Gas Station
19 to revert to it, and notwithstanding the court's comments
20 regarding the automatic stay at the Abandonment Hearing,
21 §§ 362(a)(5) and (a)(6) continued to protect Gasprom from
22 Fateh/Green's foreclosure. As a result, Gasprom asserted, when
23 Fateh/Green proceeded with the foreclosure sale on August 1,
24 2012, they wilfully violated the stay, and the foreclosure sale
25 was void as a violation of the stay.

26
27 ⁶ The Abandonment Order was not appealed by either side and
28 is beyond the scope of our review in this appeal.

1 Fateh opposed the motion to reopen, arguing that Gasprom was
2 not entitled to any of the relief that it intended to pursue upon
3 reopening. Relying principally on a single Minnesota bankruptcy
4 case, In re D'Annies Rest., Inc. v. N.W. Nat. Bank of Mankato
5 (In re D'Annies Rest., Inc.), 15 B.R. 828 (Bankr. D. Minn. 1981),
6 Fateh asserted that no aspect of the stay had survived the entry
7 of the Abandonment Order. According to Fateh and In re D'Annies,
8 when property of the estate is abandoned and the debtor is a
9 corporation (as opposed to an individual debtor), the stay no
10 longer protects either the debtor or the subject property from
11 lien enforcement. Id. at 831-32.

12 The bankruptcy court held a hearing on the motion to reopen
13 on October 23, 2012. As a threshold matter, the court granted
14 the motion to reopen. No one has challenged that ruling on
15 appeal. The court further held that the parties had fully
16 briefed the issues concerning Gasprom's anticipated motion to set
17 aside the foreclosure and Gasprom's anticipated motion for an
18 order to show cause why Fateh, Green and others should not be
19 held in contempt. Hence, the court explained, it was prepared to
20 dispose of those matters as well.

21 The court essentially adopted Fateh's position that, upon
22 entry of the Abandonment Order, the automatic stay no longer
23 enjoined Fateh/Green's foreclosure sale of the Gas Station. In
24 so ruling, the court relied on In re D'Annies and two other cases
25 from outside the Ninth Circuit.

26 In the alternative, the court ruled that it was prepared to
27 annul the automatic stay. Even though neither party in their
28 papers had discussed or even mentioned the possibility of

1 annulment of the stay, the court ruled that, to the extent
2 necessary to "validate the foreclosure," it would sua sponte
3 grant relief from the stay retroactively and nunc pro tunc. Hr'g
4 Tr. (Oct. 23, 2012) at 4:19-23. Indicating that it had been its
5 intent at the Abandonment Hearing to permit the foreclosure sale
6 to immediately proceed upon entry of the Abandonment Order, the
7 court deemed it proper to further that intent by sua sponte
8 annulling the stay, as a "belt and suspenders" measure. Id.

9 The bankruptcy court thereafter entered a written order
10 granting the motion to reopen. It also entered on December 4,
11 2012, a separate written order denying the anticipated motion to
12 set aside the foreclosure and denying the anticipated motion for
13 an order to show cause re contempt. Gasprom timely appealed the
14 the December 4, 2012 order.

15 JURISDICTION

16 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
17 §§ 1334 and 157(b)(2)(A), and we have jurisdiction under 28
18 U.S.C. § 158.

19 ISSUES

20 Did the bankruptcy court err when it held in the December 4,
21 2012 order that Fateh/Green's foreclosure sale did not violate
22 the automatic stay?

23 Did the bankruptcy court abuse its discretion when it
24 annulled the automatic stay in order to retroactively validate
25 Fateh/Green's foreclosure sale?

26 STANDARDS OF REVIEW

27 We review de novo the bankruptcy court's interpretation of
28 the Bankruptcy Code. See Danielson v. Flores (In re Flores),

1 -- F.3d --, 2013 WL 4566428, at *1 n.4 (9th Cir. Aug. 29, 2013)
2 (en banc).

3 A bankruptcy court's decision to retroactively annul the
4 automatic stay is reviewed for an abuse of discretion. Nat'l
5 Envtl. Waste Corp. v. City of Riverside (In re Nat'l Env'tl. Waste
6 Corp.), 129 F.3d 1052, 1054 (9th Cir. 1997); Williams v. Levi (In
7 re Williams), 323 B.R. 691, 696 (9th Cir. BAP 2005).

8 A bankruptcy court abuses its discretion if its decision is
9 based on an incorrect legal rule, or if its findings of fact were
10 illogical, implausible, or without support in the record. United
11 States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).

12 DISCUSSION

13 Generally speaking, actions taken in violation of the
14 automatic stay are considered void ab initio. Griffin v.
15 Wardrobe (In re Wardrobe), 559 F.3d 932, 934 (9th Cir. 2009);
16 Schwartz v. United States (In re Schwartz), 954 F.2d 569, 571
17 (9th Cir. 1992). And creditors who attempt to enforce their
18 nonbankruptcy rights against a debtor or its property without
19 first obtaining relief from the stay may be held liable for
20 damages for contempt of court. See Johnston Env'tl. Corp. v.
21 Knight (In re Goodman), 991 F.2d 613, 620 (9th Cir. 1993)
22 (holding that a corporation may recover civil contempt damages
23 for an automatic stay violation).

24 The bankruptcy court here concluded that the August 1, 2012
25 foreclosure sale had not violated the automatic stay. The
26 bankruptcy court reasoned that the Trustee's abandonment of the
27 Gas Station earlier that same day had fully terminated the stay
28 as to the Gas Station. We disagree. By operation of law, the

1 August 1, 2012 Abandonment Order only terminated one aspect of
2 the stay, the aspect protecting the Gas Station as "property of
3 the estate." Upon abandonment, the Gas Station no longer was
4 property of the estate; title to the Gas Station reverted to
5 Gasprom. See Catalano v. Comm'r, 279 F.3d 682, 685 (9th Cir.
6 2002). Hence, the aspect of the stay protecting estate property
7 no longer applied. See § 362(c)(1).

8 But the abandonment did not by operation of law terminate
9 the aspect of the stay arising from § 362(a)(5), which protects
10 "property of the debtor." Absent a ruling by the court granting
11 relief from stay under § 362(d) so as to permit foreclosure to
12 occur, § 362(a)(5) continued to protect the Gas Station from
13 foreclosure, at least until the bankruptcy court closed Gasprom's
14 bankruptcy case on August 16, 2012. See § 362(c)(2).

15 The canons of statutory interpretation support our
16 construction of § 362(a)(5). In accordance with those canons,
17 our analysis must begin with the statutory text. See Lamie v.
18 United States Trustee, 540 U.S. 526, 534 (2004). Our analysis
19 also must end with the statutory text if "'the statutory language
20 is unambiguous' . . . and 'the statutory scheme is coherent and
21 consistent.'" Schindler Elevator Corp. v. United States ex rel.
22 Kirk, -- U.S. --, 131 S.Ct. 1885, 1893 (2011) (quoting Robinson
23 v. Shell Oil Co., 519 U.S. 337, 340 (1997)). Put another way,
24 when the plain and unambiguous language of the statute does not
25 lead to absurd results, the courts' only role is to apply the
26 statute according to its terms. See Lamie, 540 U.S. at 534.

27 Section 362(a)(5) extends the protection of the automatic
28 stay to "property of the debtor." "Debtor" is a defined term in

1 the Bankruptcy Code, so there can be no doubt as to what Congress
2 intended that word to mean. The term "debtor" means any "person
3 or municipality" for which a bankruptcy case has been commenced.
4 See § 101(13). In turn, for purposes of the Bankruptcy Code, a
5 "person" is explicitly defined as including individuals,
6 partnerships and corporations. § 101(41).

7 Nor can there be any genuine doubt what the entire phrase
8 "property of the debtor" means. Without any limiting or
9 qualifying language in the statutory text, the phrase must refer
10 to property interests held by any of the above-referenced types
11 of debtors. If Congress wanted to limit "property of the debtor"
12 to exclude property of corporate and partnership debtors, it only
13 would have needed to add the word "individual" before the word
14 "debtor". Or it could have used the same phraseology it used in
15 § 362(c)(3), in which it refers to "a debtor who is an
16 individual." Congress obviously knew how to limit the term
17 debtor when it wanted to do so. It did not so limit the phrase
18 "property of the debtor" in § 362(a)(5). We cannot and will not
19 read the additional word "individual" into the statute, when it
20 appears that Congress affirmatively and specifically omitted that
21 word. See Lamie, 540 U.S. at 538. If Congress actually intended
22 to so limit § 362(a)(5), then it will need to amend the statute.
23 Id. at 542.

24 Several bankruptcy cases from both within and without the
25 Ninth Circuit have similarly interpreted the effect of
26 abandonment on the automatic stay. See, e.g., Mut. Ins. Co. of
27 New York v. County of Fresno (In re D. Papagni Fruit Co.), 132
28 B.R. 42, 45 (Bankr. E.D. Cal. 1991); Coronado v. Beach Furniture

1 & Appliance (In re Coronado), 11 B.R. 8, 9 (Bankr. D. Ariz.
2 1981); Guild Mortgage Co. v. Cornist (In re Cornist), 7 B.R. 118,
3 120 (Bankr. S.D. Cal. 1980); see also Gen. Motors Acceptance
4 Corp. v. Bell (In re Bell), 700 F.2d 1053, 1057-58 (6th Cir.
5 1983); Young v. Twin States Fin., Inc. (In re Young), 2012 WL
6 1189900, at **5-6 (Bankr. S.D. Miss. 2012); In re Vicente, 446
7 B.R. 26, 29-30 (Bankr. D. Mass. 2011); Adams v. Hartconn Assocs.,
8 Inc. (In re Adams), 212 B.R. 703, 710 (Bankr. D. Mass. 1997); In
9 re Lair, 235 B.R. 1, 21-22 (Bankr. M.D. La. 1999); Gassaway v.
10 Fed. Land Bank of New Orleans (In re Gassaway), 28 B.R. 842, 846
11 (Bankr. N.D. Miss. 1983); In re Cruseturner, 8 B.R. 581, 592
12 (Bankr. D. Utah 1981). These cases stand for the general
13 proposition that abandoned property continues to be protected by
14 the automatic stay to the extent it has reverted back to the
15 debtor, unless and until the case is closed or dismissed, or a
16 discharge is granted or denied. Accord, H.R. Rep. No. 95-595 at
17 343 (1977)(stating that, while § 362(c)(1) terminates the
18 automatic stay as to estate property when the subject property is
19 no longer estate property, that provision "does not terminate the
20 stay against property of the debtor if the property leaves the
21 estate and goes to the debtor.").

22 Fateh/Green doubtlessly would argue that the above-cited
23 cases are distinguishable because the debtors in these cases
24 typically were individuals and not corporations like Gasprom.
25 However, as we have explained above, there is no proper legal
26 basis for excluding corporate debtors from the protection
27 explicitly afforded to all debtors under § 362(a)(5).

28 The rules of statutory construction require us to

1 additionally determine whether the meaning we have derived from
2 the text of the statute is part of a coherent and consistent
3 statutory scheme. See Schindler Elevator Corp., -- U.S. at --,
4 131 S.Ct. at 1893 (2011); see also Gale v. First Franklin Loan
5 Servs., 701 F.3d 1240, 1244 (9th Cir. 2012) (holding that the
6 court must consider the statutory text in context and with a view
7 to the entire statutory scheme).

8 Nothing in the context or scheme of § 362 requires us to
9 interpret "property of the debtor" differently. The two
10 articulated purposes of the automatic stay are broad. See
11 Burkart v. Coleman (In re Tippett), 542 F.3d 684, 689-90 (9th
12 Cir. 2008). First, the stay gives the debtor respite from any
13 creditor efforts to enforce rights against the debtor and its
14 property. Id. And second, it also protects the creditors from
15 each other, as it prevents the creditors from racing to be the
16 first to claim the debtor's limited assets. Id. In turn, these
17 two purposes facilitate and promote the tandem bankruptcy goals
18 of a fresh start for the the debtor and equitable distribution
19 for creditors. See id.

20 In light of § 362's purposes, the scope of the stay granted
21 in § 362(a) is interpreted very broadly, and the exceptions set
22 forth in § 362(b) are interpreted narrowly. See Snavely v.
23 Miller (In re Miller), 397 F.3d 726, 730-31 (9th Cir. 2005)
24 (citing Stringer v. Huet (In re Stringer), 847 F.2d 549, 552 n.4
25 (9th Cir. 1988)). Thus, the context and statutory scheme in
26 which Congress used the phrase "property of the debtor" in
27 § 362(a)(5) supports our refusal to read into the text any
28 limiting or qualifying language that Congress chose not to

1 include.

2 Relying on In re D'Annies, 15 B.R. at 831, the bankruptcy
3 court held that, after abandonment of estate property,
4 § 362(a)(5) only protects a debtor from foreclosure of that
5 property if that debtor is an individual. We decline to follow
6 In re D'Annies. In re D'Annies invoked certain policy concerns
7 in an attempt to justify a narrow interpretation of § 362(a)(5),
8 an interpretation that would exclude corporate and partnership
9 debtors from the protections afforded under § 362(a)(5). But In
10 re D'Annies' narrow interpretation is inconsistent with the plain
11 reading of the statutory text and with the statutory scheme and
12 context we described above. Even if there were some validity to
13 In re D'Annies' policy concerns, those concerns do not permit us
14 to alter the meaning of Congress's plain and unambiguous
15 statutory language. See Lamie, 540 U.S. at 538. As the Ninth
16 Circuit has noted, the Supreme Court "frowns" on courts that
17 attempt to modify unambiguous provisions of the Bankruptcy Code
18 for policy reasons. See Sherwood Partners, Inc. v. Lycos, Inc.,
19 394 F.3d 1198, 1202 n.4 (9th Cir. 2005) (citing Hartford
20 Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1,
21 14 (2000)).

22 The bankruptcy court also relied on Dewsnup v. Timm (In re
23 Dewsnup), 908 F.2d 588, 590 (10th Cir. 1990), aff'd, 502 U.S. 410
24 (1992). At the October 23, 2012 hearing, the bankruptcy court
25 recited and relied upon the following language from Dewsnup:

26 [Section 554(a)] allows abandonment of property that
27 "is burdensome to the estate or that is of
28 inconsequential value and benefit to the estate."
Property abandoned under this section ceases to be part

1 of the estate. It reverts to the debtor and stands as
2 if no bankruptcy petition was filed.

3 Id. at 590 (citations omitted and emphasis added).

4 We do not dispute the correctness of this statement.
5 Indeed, the Ninth Circuit Court of Appeals has made similar
6 statements. See, e.g., Catalano, 279 F.3d at 685 (“Upon
7 abandonment, the debtor’s interest in the property is restored
8 nunc pro tunc as of the filing of the bankruptcy petition.”).
9 These statements reflect the unremarkable proposition that, after
10 an abandonment of estate property, the debtor holds the same
11 legal interest in the abandoned property that it held at the time
12 of its bankruptcy filing. The bankruptcy court here misconstrued
13 these statements. It conflated the issue of the debtor’s legal
14 interest in abandoned property with the issue of the impact of
15 abandonment on the automatic stay.

16 In sum, the bankruptcy court erred as a matter of law when
17 it concluded that, immediately upon abandonment, the automatic
18 stay no longer enjoined Fateh/Green from foreclosing on the Gas
19 Station.

20 The bankruptcy court’s December 4, 2012 order also provided
21 for annulment of the automatic stay, for the nunc pro tunc
22 termination of the stay as to the Gas Station in order to
23 retroactively validate the foreclosure sale. The bankruptcy
24 court relied on this annulment as an alternate basis for
25 concluding that the foreclosure sale did not violate the
26 automatic stay.

27 In deciding whether to annul the stay, a bankruptcy court
28 ordinarily should examine the circumstances of the specific case

1 and balance the equities of the parties' respective positions.
2 See Nat'l Envtl. Waste Corp., 129 F.3d at 1055; Fjeldsted v. Lien
3 (In re Fjeldsted), 293 B.R. 12, 24 (9th Cir. BAP 2003). In
4 balancing the equities, the court may consider a number of
5 different factors. In re Fjeldsted, 293 B.R. at 24-25. While
6 any specific list of relevant factors is subject to modification
7 depending on the circumstances of the particular case, In re
8 Fjeldsted suggested that the following list of factors could be
9 used as a general guideline or framework for assessing the
10 equities:

- 11 1. Number of filings;
- 12 2. Whether, in a repeat filing case, the circumstances
- 13 indicate an intention to delay and hinder creditors;
- 14 3. A weighing of the extent of prejudice to creditors
- 15 or third parties if the stay relief is not made
- 16 retroactive, including whether harm exists to a bona
- 17 fide purchaser;
- 18 4. The Debtor's overall good faith (totality of
- 19 circumstances test);
- 20 5. Whether creditors knew of stay but nonetheless took
- 21 action, thus compounding the problem;
- 22 6. Whether the debtor has complied, and is otherwise
- 23 complying, with the Bankruptcy Code and Rules;
- 24 7. The relative ease of restoring parties to the status
- 25 quo ante;
- 26 8. The costs of annulment to debtors and creditors;
- 27 9. How quickly creditors moved for annulment, or how
- 28 quickly debtors moved to set aside the sale or
- violative conduct;
10. Whether, after learning of the bankruptcy,
- creditors proceeded to take steps in continued
- violation of the stay, or whether they moved
- expeditiously to gain relief;
11. Whether annulment of the stay will cause
- irreparable injury to the debtor;
12. Whether stay relief will promote judicial economy
- or other efficiencies.

25 Id. at 25 (citations omitted).

26 Here, the bankruptcy court identified only a single factor
27 as justifying annulment of the stay: because it previously had
28 indicated at the Abandonment Hearing that Fateh/Green could

1 proceed with the foreclosure, it sua sponte concluded that
2 annulment should be granted. And it reached this conclusion
3 without any advance notice to the parties and without any
4 opportunity for the parties to submit any evidence or argument
5 concerning the equities.

6 In balancing the equities, a single factor may so outweigh
7 the consideration of all other factors that the single factor may
8 be dispositive. Id. Here, however, the record reflects that the
9 bankruptcy court did not actually attempt to weigh anything. In
10 other words, the bankruptcy court did not utilize the appropriate
11 legal framework because there is no indication that it attempted
12 to balance the equities. Nor did it give the parties any
13 opportunity to develop the record concerning the equities. As a
14 result, the bankruptcy court abused its discretion when it ruled
15 that the stay should be annulled. See Hinkson, 585 F.3d at 1262
16 (holding that trial court abuses its discretion if it does not
17 identify the correct legal rule to apply).

18 On remand, the bankruptcy court must give the parties an
19 opportunity to brief and present evidence regarding the equities
20 of granting an annulment if the court is intent on moving
21 forward, sua sponte, with stay annulment proceedings.⁷

22
23 ⁷ In light of our decision, we decline to express any
24 opinion at this time regarding the propriety of the bankruptcy
25 court sua sponte granting annulment. Of course, the court on
26 remand is not required to further consider annulment unless
27 Fateh/Green should see fit to formally request such relief by
28 filing an appropriate motion. Nor would it be necessary for the
court to reopen the bankruptcy case in order to address such a
motion. See Aheong v. Mellon Mortgage Co. (In re Aheong), 276
B.R. 233, 242 (9th Cir. BAP 2002)(holding that bankruptcy court
had ancillary jurisdiction to decide motion to annul the stay

(continued...)

1 **CONCLUSION**

2 For the reasons set forth above, the December 4, 2012 order
3 is VACATED, and this matter is hereby REMANDED for further
4 proceedings consistent with this decision.

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⁷(...continued)
28 without reopening the bankruptcy case or vacating the case
dismissal order).