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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NOT FOR PUBLICATION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

In re:) BAP No. CC-10-1275-SaPaKi
)
 WILSHIRE COURTYARD,) Bk. No. 97-10771
)
 Debtor,)
)
 _____)
 CALIFORNIA FRANCHISE TAX BOARD,)
)
 Appellant)
)
 v.) **M E M O R A N D U M**¹
)
 WILSHIRE COURTYARD; JEROME H.)
 SNYDER GROUP I, LTD.; LEWIS P.)
 GEYSER REVOCABLE TRUST; GEYSER)
 CHILDREN'S TRUST, FBO JENNIFER)
 GEYSER, LEWIS P. GEYSER, TRUSTEE;)
 WENDY K. SNYDER; JEROME H. SNYDER;)
 GEYSER CHILDREN'S TRUST, FBO)
 DANIEL GEYSER, LEWIS P. GEYSER,)
 TRUSTEE; RUSSELL & RUTH KUBOVEC,)
 DECEASED, KUBOVEC FAMILY TRUST,)
 RITA FARMER, TRUSTEE; WILLIAM N.)
 SNYDER; JOAN SNYDER; GEYSER)
 CHILDREN'S TRUST, FBO DOUGLAS)
 GEYSER, LEWIS P. GEYSER, TRUSTEE;)
 LON J. SNYDER; SNYDER CHILDREN'S)
 TRUST, FBO WILLIAM N. SNYDER,)
 LEWIS P. GEYSER, TRUSTEE,)
)
 Appellees.)
 _____)

Argued and Submitted on July 25, 2014
at Pasadena, California

Filed - April 7, 2015

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

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8024-1.

1 Honorable Samuel Bufford, Bankruptcy Judge and
2 Honorable Vincent Zurzolo, Bankruptcy Judge, Presiding²

3 Appearances: Lisa W. Chao appeared for Appellant California
4 Franchise Tax Board; Kenneth John Shaffer of Quinn
5 Emmanuel Urquhart & Sullivan, LLP appeared for
6 Appellees Wilshire Courtyard, Jerome H. Snyder
7 Group I, Ltd., Lewis P. Geysler Revocable Trust,
8 Wendy K. Snyder, Jerome H. Snyder, Geysler
9 Children's Trust, FBO Jennifer Geysler, Lewis P.
10 Geysler, Trustee, Geysler Children's Trust, FBO
11 Daniel Geysler, Lewis P. Geysler, Trustee, Russell &
12 Ruth Kubovec, Deceased, Kubovec Family Trust, Rita
13 Farmer, Trustee, William N. Snyder, Joan Snyder,
14 Geysler Children's Trust, FBO Douglas Geysler, Lewis
15 P. Geysler, Trustee, Lon J. Snyder and Snyder
16 Children's Trust, FBO William N. Snyder, Lewis P.
17 Geysler, Trustee.

18 Before: SARGIS,³ PAPPAS, and KIRSCHER, Bankruptcy Judges.

19 The parties to this bankruptcy case, and the appeals arising
20 therefrom, survived the real estate crash of the late 1990s, the
21 Y2K "disaster" with the turning of the Millennium, and the real
22 estate implosion of the 2000s, all while fighting over the effect
23 of the April 1998 confirmation of a chapter 11 plan. The
24 complexities of the arguments have increased and the reasons for
25 supporting or rejecting the reasoning of the bankruptcy court have
26 grown. In considering the appeal, this Panel returns to the
27 basics of what was actually decided by the bankruptcy court, the
28 evidence presented, arguments of the parties, and the plain
29 language of the Bankruptcy and Internal Revenue Codes.

30 For the issues presented on appeal, the ruling of the

31 ² Bankruptcy Judges Bufford and Zurzolo each entered orders
32 that are implicated in this appeal.

33 ³ The Honorable Ronald H. Sargis, Bankruptcy Judge for the
34 Eastern District of California, sitting by designation.

1 bankruptcy court that the order confirming the chapter 11 plan
2 determined whether the plan provided for a sale of property is
3 REVERSED. Based upon this Panel's de novo review of the summary
4 judgment, the decision of the bankruptcy court granting summary
5 judgment is AFFIRMED.

6 **APPELLATE HISTORY**

7 This is the second time that the appeal of the bankruptcy
8 court's order at issue has been before this Panel. Previously,
9 this Panel considered whether proper post-confirmation
10 jurisdiction existed for determination of the underlying issues.
11 Concluding that such post-confirmation jurisdiction did not exist,
12 this Panel reversed and ordered that the matter be remanded with
13 instructions to dismiss. In re Wilshire Courtyard, 459 B.R. 416,
14 (9th Cir. BAP 2011).

15 The Ninth Circuit Court of Appeals reversed, concluding that
16 post-confirmation jurisdiction existed, and remanded to this Panel
17 for further proceedings. Wilshire Courtyard v. Cal. Franchise Tax
18 Bd. (In re Wilshire Courtyard), 729 F.3d 1270 (9th Cir. 2013)
19 ("Wilshire I").

20 **CHAPTER 11 BANKRUPTCY CASE** 21 **AND CONFIRMED CHAPTER 11 PLAN**

22 This dispute began when Wilshire Courtyard, a California
23 general partnership, ("Debtor"), filed a chapter 11 bankruptcy
24 case on January 8, 1997 ("Wilshire Bankruptcy Case"). Debtor
25 developed and owned two commercial complexes on Wilshire Boulevard
26 in Los Angeles containing almost a million square feet of rental
27 office space (the "Property"). The lender holding the debt
28 secured by the first position lien on the Property ("Senior

1 Secured Claim") was Continental Bank, N.A., which secured claim
2 subsequently came to be held by the successor "Senior Secured
3 Creditors" in the Wilshire Bankruptcy Case. Various other
4 entities held subordinated secured debt. Early in the Wilshire
5 Bankruptcy Case, Continental was acquired by Bank of America, N.A.
6 ("BofA"). BofA served as the loan servicer and trustee for the
7 Senior Secured Creditors in the Wilshire Bankruptcy Case.
8 Debtor's total secured debt aggregated almost \$350 million. After
9 Debtor defaulted on the Senior Secured Claim in July 1996, and a
10 foreclosure sale was scheduled for January 9, 1997, Debtor filed
11 its chapter 11 bankruptcy petition.

12 Appellant California Franchise Tax Board ("CFTB") was listed
13 in the creditor mailing matrix filed by Debtor in the Wilshire
14 Bankruptcy Case. Though CFTB received notice of the commencement
15 of the case, CFTB did not file a proof of claim, did not assert
16 any other claim, did not oppose the chapter 11 Plan, and did not
17 otherwise investigate or participate in the Wilshire Bankruptcy
18 Case.

19 **Confirmed Chapter 11 Plan**

20 The Senior Secured Creditors, Debtor, and the Debtor's
21 partners ("Partners") negotiated the terms of a joint, consensual
22 chapter 11 plan of reorganization ("Joint Plan"). Under the terms
23 of the Joint Plan, the Debtor was restructured from a California
24 general partnership to a Delaware limited liability company -
25 Wilshire Courtyard, LLC ("Wilshire LLC"). After confirmation,
26 Wilshire LLC continued to own and operate the Property. Under the
27 terms of the Joint Plan, Wilshire LLC arranged for a new,
28 nonrecourse loan for approximately \$100,000,000, secured by a

1 first deed of trust on the Property ("New Secured Financing").

2 For their part in the reorganization through the Joint Plan,
3 the Senior Secured Creditors agreed to contribute \$23,000,000 to
4 Wilshire, LLC, and to release the balance of their secured
5 indebtedness, in part, for receipt of the New Secured Financing
6 proceeds. Additionally, the Senior Secured Creditors acquired a
7 99% ownership interest in the reorganized Wilshire LLC. For the
8 Partners, confirmation resulted in their receipt of the remaining
9 1% interest in Wilshire LLC. In addition, the Partners also
10 received approximately \$3,500,000 in cash, and a \$450,000 loan
11 from the Senior Secured Creditors' entity created to acquire their
12 99% interest in Wilshire LLC. Other creditors holding the junior
13 secured claim ("Co-Investors"), agreed to accept a \$2,500,000
14 payment on their \$221,000,000 secured claim, and to forgive the
15 balance of the claim. Administrative expenses and general
16 unsecured claims totaling around \$900,000 were paid in full
17 through the Joint Plan. These transactions in the Joint Plan by
18 which Wilshire LLC became the successor to the Debtor, the New
19 Secured Financing obtained, claims paid, and the releases granted
20 are referred to as the "Transaction."

21 Debtor's Second Amended Disclosure Statement was approved by
22 the bankruptcy court on February 19, 1998. Notice of the
23 confirmation hearing for the Joint Plan was sent by Debtor to
24 interested parties in the Wilshire Bankruptcy Case on February 12,
25 1998. However, CFTB was neither served with a copy of the
26 proposed plan nor given notice of the confirmation hearing.

27 After the confirmation hearing, the bankruptcy court entered
28 an Order Confirming the Joint Plan of Reorganization on April 14,

1 1998 ("Confirmation Order"). CFTB acknowledges that it received
2 the "Notice of Order Confirming Chapter 11 Plan" from the Clerk of
3 the bankruptcy court. The Notice stated in relevant part that,
4 "Notice is hereby given of the entry of an order of this Court
5 confirming a Plan of Reorganization. A copy of the order and the
6 plan itself are contained in the Court file located at the address
7 listed herein." This Confirmation Order is the epicenter from
8 which the present dispute emanates.

9 The Joint Plan having been confirmed, the Wilshire Bankruptcy
10 Case was closed on October 22, 1998. Wilshire LLC contends, and
11 CFTB has not effectively disputed, that the confirmed plan was
12 implemented and consummated. The restructure of the Debtor was
13 accomplished, the Transaction was implemented and the Joint Plan
14 was completed, and Wilshire LLC became the successor to the
15 Debtor.

16 After confirmation and consummation of the Joint Plan, the
17 Partners reported approximately \$208,000,000 in aggregate
18 cancellation of debt income ("CODI") on their individual 1998
19 California state tax returns. On November 15, 2002, CFTB sent
20 Wilshire LLC and the Partners an "Audit Issue Presentation Sheet"
21 ("AIPS"). The AIPS informed them that CFTB challenged the
22 Partners' characterization of the tax consequences of the
23 Transaction affected by the confirmed Joint Plan as CODI. Rather
24 than \$208,000,000 in CODI, CFTB argued that the Partners should
25 have reported approximately \$231,000,000 in capital gain income
26 arising from the Transaction. CFTB contends that the treatment of
27 the Senior Secured Creditors' Claim and the Co-Investors' Claim
28 and interests under the Joint Plan constituted a disguised sale of

1 the Property. Based on the AIPS, CFTB issued notices of proposed
2 assessments to the Partners on June 15, 2004, totaling
3 approximately \$13,000,000 in unpaid income taxes.

4 The Partners disputed CFTB's assertion that the Transaction
5 resulted in income to the Debtor and the Partners. Over the next
6 five years, CFTB and the Partners engaged in several California
7 state administrative hearings relating to this dispute.

8 **Enforcement of Joint Plan and Confirmation Order**

9 On May 27, 2009, the dispute shifted from the state
10 administrative proceedings back to the bankruptcy court.
11 Wilshire LLC filed an ex parte motion to reopen the Wilshire
12 Bankruptcy Case. Wilshire LLC argued that through the AIPS and
13 the continuing administrative hearings, CFTB was attempting to
14 collaterally attack the Confirmation Order and Joint Plan by
15 recharacterizing the terms of the Joint Plan as effecting a
16 disguised sale of the Property. Wilshire LLC asserted that the
17 Joint Plan provided for Wilshire LLC, as the reorganized Debtor,
18 to retain ownership of the Property and did not provide for a sale
19 of the Property. The bankruptcy court granted the motion and
20 entered an order reopening the Wilshire Bankruptcy Case on June 4,
21 2009.

22 Wilshire LLC then filed a motion for an Order to Show Cause
23 Re Contempt ("OSC") on June 23, 2009.⁴ The bankruptcy court
24 issued the OSC on August 12, 2009, directing CFTB to appear before
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26 ⁴ Ex. 4, p. 24. (All references to the Record are from the
27 Exhibits presented by Appellant CFTB, Exhibits 1 - 34, identified
28 by Exhibit ("Ex.") number and the page number at which the
referenced document or specific text may be located in the
Record.)

1 the bankruptcy court to show why it should not be held in contempt
2 for collaterally attacking, and by refusing to act in accordance
3 with, the Joint Plan and Confirmation Order.⁵

4 CFTB responded to the OSC on August 27, 2009, arguing that
5 Wilshire LLC had not given CFTB adequate notice of the terms of
6 the Joint Plan prior to confirmation, of the time for objecting to
7 the plan, or of the confirmation hearing.⁶ Therefore, CFTB
8 asserted it was not bound by the Joint Plan and Confirmation
9 Order. Further, CFTB asserted that Wilshire LLC lacked standing
10 to prosecute the OSC motion and issuance of a contempt order by
11 the bankruptcy court against CFTB would be fundamentally unfair
12 because the state tax consequences of the plan terms were never
13 considered by the bankruptcy court. CFTB also argued that the
14 bankruptcy court lacked the authority to determine such taxes. If
15 the court decided the court had authority to determine and
16 Wilshire LLC had standing to prosecute the motion, Wilshire LLC
17 was guilty of laches. CFTB asserted that laches bars the
18 determination because Wilshire LLC delayed raising these issues in
19 the Wilshire Bankruptcy Case during the six-year period after
20 confirmation that the CFTB was prosecuting the issue in the state
21 administrative proceedings.

22 Wilshire LLC replied on September 9, 2009, arguing that:
23 (1) CFTB had received adequate notice of the filing of the
24 Wilshire Bankruptcy Case and proceedings and entry of the
25 Confirmation Order; and (2) Wilshire LLC had both prudential and

27 ⁵ Ex. 22; p. 697.

28 ⁶ Ex. 6; p. 33.

1 constitutional standing to seek enforcement of the Confirmation
2 Order. Additionally, Wilshire LLC argued that CFTB could not
3 prove an affirmative defense of laches.⁷

4 The bankruptcy court held an initial hearing on the OSC on
5 September 15, 2009. Wilshire LLC and CFTB appeared by counsel;
6 however, the Partners were not represented at the hearing. Only
7 Wilshire LLC had sought the issuance of the OSC.⁸ After hearing
8 arguments of counsel, the bankruptcy court directed the parties to
9 submit further briefing whether a contempt motion was proper under
10 the circumstances of this case, and suggested that the Partners
11 should be joined as parties to the proceedings.

12 After a continued status conference, on March 12, 2010,
13 acting under authority of Rule 7019,⁹ made applicable in contested
14 matters by Rule 9014(c), the bankruptcy court ordered the joinder
15 of the Partners in the proceedings. None of the Partners objected
16 to the joinder order.

17 **Motion for Summary Judgment**
18 **or Summary Adjudication of Issues**

19 Eleven months after the OSC was filed, Wilshire LLC and the
20 Partners filed a joint Motion for Summary Judgment or Summary
21 Adjudication of Issues on May 3, 2010 ("Motion for Summary
22

23 ⁷ Ex. 7; p. 50.

24 ⁸ Ex. 4, p. 24; Notice of and Motion for Issuance of Order to
25 Show Cause.

26 ⁹ All Rule references are to the Federal Rules of Bankruptcy
27 Procedure, Rules 1001-9037, and all Civil Rule references are to
28 the Federal Rules of Civil Procedure 1-86. Rule 7019 makes Fed.
R. Civ. P. 19 for joinder of parties applicable in bankruptcy
adversary proceedings.

1 Judgment or Summary Adjudication"). In the motion, they repeated
2 Wilshire LLC's earlier contentions concerning CFTB's receipt of
3 adequate notice in the Wilshire Bankruptcy Case, that CFTB's
4 characterization of the Transaction as a disguised sale amounted
5 to a collateral attack on the Joint Plan, and that the
6 Confirmation Order should be enforced under applicable provisions
7 of the Bankruptcy Code.

8 CFTB filed an opposition to the Motion for Summary Judgment
9 or Summary Adjudication on June 9, 2010, generally countering
10 these arguments. In addition to its earlier arguments, CFTB also
11 argued that the bankruptcy court lacked subject matter
12 jurisdiction to decide the motion and that, if it had
13 jurisdiction, the bankruptcy court should abstain from considering
14 the tax issues. Further, CTFB argued that if the bankruptcy court
15 was inclined to resolve the tax issues and determine whether the
16 Transaction did indeed result in CODI rather than capital gain,
17 CFTB requested a six-month continuance to undertake discovery on
18 that issue.

19 Wilshire LLC and the Partners responded to CFTB's opposition
20 on June 16, 2010, generally repeating and supporting their earlier
21 arguments.

22 The bankruptcy court conducted a hearing on both the OSC and
23 summary judgment motion on June 22, 2010, at which all the parties
24 were represented by counsel. The bankruptcy court rejected CFTB's
25 request to submit additional briefing, and denied its request for
26 additional time to conduct discovery. On July 15, 2010, the
27 bankruptcy court issued an Order for Summary Adjudication of
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1 Issues and Continued Hearing ("Summary Adjudication Order").¹⁰ In
2 the Summary Adjudication Order the court made the following
3 pertinent findings and conclusions:

- 4 1. That jurisdiction existed under 28 U.S.C. §§ 1334(b) and
5 1346(a), and 11 U.S.C. §§ 346(a) and 346(j) to interpret the
6 terms of the Joint Plan and Confirmation Order.
- 6 2. Finding "V" (page 6 line 17) of Confirmation Order¹¹ states,
7 "The Joint Plan and all agreements, settlements, transactions
8 and transfer contemplated thereby do not provide for, and
9 when consummated will not constitute, the liquidation of all
10 or substantially all of the property of the Debtor's Estate
11 under Bankruptcy Code section 1141(d)(3)(A); . . ."
- 12 3. The bankruptcy court further concluded that "[b]ecause the
13 [Joint] Plan did not implement a sale or exchange, the
14 release or forgiveness under the [Joint] Plan did not create
15 capital gain income reportable by the [Debtor]."

16 The Summary Adjudication Order further provided that within
17 ten days of the entry of that Order, CFTB must vacate the
18 assessments which are based on the Joint Plan effectuating a
19 disguised sale or that the Transaction was a sale or exchange.
20 CFTB was further ordered to cease and desist from taking further
21 action in contempt of the Confirmation Order. The bankruptcy
22 court ordered that it would conduct a further hearing concerning
23 the impact, if any, of Stackhouse v. United States, 441 F.2d 465
24 (5th Cir. 1971), to consider whether there could be a different
25 tax result for the Partners than for the Debtor (the
26 partnership).¹²

25 ¹⁰ Ex. 31, p. 1078.

26 ¹¹ Ex. 22, p. 702

27 ¹² Summary Adjudication Order, Ex. 31, p. 1080; and Hearing
28 Transcript ("Hrg. Tr.") of June 22, 2010 hearing, Ex. 32,
pp. 1124: 16-23, 1125: 1-15.

1 **Second Hearing on Motion for Summary Judgment**
2 **and August 31, 2010 Written Decision**

3 The bankruptcy court held a second hearing on July 20, 2010,
4 on the Motion for Summary Judgment or Summary Adjudication. Early
5 in the hearing, the court noted that the Summary Adjudication
6 Order interpreting Finding "V" was effective only as to Wilshire
7 LLC, but only tentative as to the individual Partners based on the
8 court having ordered further briefing and argument on the
9 "Stackhouse issue." After hearing the arguments of the parties,
10 the bankruptcy court announced it would grant summary judgment in
11 favor of both Wilshire LLC and the Partners. Among the statements
12 made by the bankruptcy court at the hearing were that:

13 (a) "Section 1141 provides that all creditors are bound by the
14 plan. This includes [CFTB];" (b) "In this case the plan's results
15 also apply to the Debtor's partners, . . .;" and (c) "so [CFTB's]
16 actions are in contempt of the confirmation order and [CFTB] is
17 ordered to cease and desist."¹³

18 On August 31, 2010, the bankruptcy court issued a written
19 Decision entitled "Opinion on the Summary Judgment Motion"
20 ("August 31 Decision").¹⁴ No further order was issued after the
21 July 20, 2010 continued hearing. In the August 31 Decision the
22 bankruptcy court made the following determinations:

23 1. "[B]ecause [CFTB] received both the case commencement notice
24 and a notice of entry of the confirmation order, the notice
25 provided to [CFTB] was constitutionally adequate and did not
26 deny [CFTB] its due process rights." Ex. 38, p. 1486.

27 ¹³ Ex. 37; Hr'g Tr., p. 1479:1-3; 8-9; 18-19 (July 20, 2010
28 Continued Hearing on Motion for Summary Judgment or Summary
Adjudication).

¹⁴ Ex. 38, p. 1483.

- 1 2. "[T]he interests of the Partners are wholly derivative from
2 the status of the Property in the partnership." *Id.*,
3 p. 1483.
- 4 3. "The confirmation order specifically provided that the plan
5 and transactions thereunder 'do not provide for, and when
6 consummated will not constitute, the liquidation of all or
7 substantially all of the property of the Debtor's estate.'" *Id.*, p. 1484
- 8 4. "Because the [CFTB] is bound by the chapter 11 plan, . . . ,
9 the action now taken by [CFTB] [to recharacterize the
10 Transaction as a disguised sale] in contravention of the plan
11 is an impermissible collateral attack on confirmation order."
12 *Id.*, p. 1487.
- 13 5. "[CFTB's] attempt to recharacterize the [Transaction] as a
14 disguised sale would nullify the effect of the [1980
15 Bankruptcy Tax Act which overturned *Stackhouse*] and would
16 ignore the interplay between § 346 and relevant IRC
17 Provisions [IRC § 108(a)(1)] allowing debtor to exclude CODI
18 from its realizable income." *Id.*, p. 1488
- 19 6. [W]hen there is a cancellation of indebtedness at the
20 partnership level . . . , there is no realized taxable
21 income, even at the partner level, when a partnership does
22 not realize CODI." *Id.*

23 **October 4, 2010 Order Granting Summary Judgment**

24 On October 4, 2010, the bankruptcy court entered a final
25 "Order Granting Summary Judgment" ("Summary Judgment Order").¹⁵
26 This final order was consistent with the August 31 Decision, with
27 the court making some additional findings and conclusions, which
28 are paraphrased as follows:

1. The court summarily adjudicates and interprets Finding "V" of the Confirmation Order to establish that the transaction implemented under the Joint Plan is not a sale or exchange for any purpose.
2. The court summarily adjudicates and interprets Finding X of the Confirmation Order and the Joint Plan Article VI.A.2 to establish that the transfers and transactions implemented under the Joint Plan are not a sale of partnership interests by the existing Partners.

¹⁵ Ex. 39, p. 1491.

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3. The court summarily adjudicates and interprets Finding "X" of the Confirmation Order to establish that the transfers and transactions contained in Joint Plan Article VI.A., and specifically Article VI.A.2., to be a capital contribution to Wilshire LLC in return for receiving the LLC interests.
 4. The court summarily adjudicates and interprets Finding "Y" of the Confirmation Order and Joint Plan Article VII.A and C to establish that the junior secured claim in the approximate amount of \$221 Million is released and discharged for payment of \$2.5 Million as provided in Joint Plan Article V.C-2.
 5. The court summarily adjudicates and interprets Bankruptcy Code § 346 (as it existed in 1997) as applying to the State of California so that income is not realized by (1) the bankruptcy estate, (2) debtor, or (3) successor to debtor by reason of forgiveness or discharge of indebtedness under Title 11.
 6. The excluded discharge of indebtedness is income subject to passthrough pursuant to IRC Section 702(a) resulting in a basis increase under IRC Section 705.
 7. The CFTB Assessments (Ex. 14, pp. 223-257) of taxes on the Partners constitute an impermissible collateral attack on the Confirmation Order and Joint Plan based on the requirement on a government unit to raise the tax avoidance issue either at or before the confirmation hearing, or in the event of fraud within 180 days thereafter as provided in 11 U.S.C. §§ 1129(d) and 1144.
 8. CFTB is ordered to vacate the Assessments within ten days of the entry of this Order Granting Summary Judgment.

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**THE SUMMARY ADJUDICATION ORDER, SUMMARY JUDGMENT ORDER,
AND THE AUGUST 31 DECISION ARE PROPERLY ON APPEAL**

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On July 26, 2010, CFTB filed a Notice of Appeal ("First Notice of Appeal") in connection with the Motion for Summary Judgment or Summary Adjudication.¹⁶ The First Notice of Appeal states that CFTB appeals to the Bankruptcy Appellate Panel from: (1) the Summary Adjudication Order (filed July 15, 2010), (2) the "July 20, 2010 Decision," and (3) "any judgment, order or decree related to such decision, which has not, as yet, been issued."

28

¹⁶ Ex. 33, p. 1128.

1 On October 13, 2010, CFTB filed a second Notice of Appeal in
2 connection with the Motion for Summary Judgment or Adjudication
3 ("Second Notice of Appeal").¹⁷ The second Notice states that CFTB
4 appeals to the Bankruptcy Appellate Panel from: (1) the July 15,
5 2010 Order for Summary Adjudication and Continuing Hearing,
6 (2) the July 20, 2010 oral decision of the bankruptcy court and
7 any judgment, order or decree related to that oral decision, which
8 has not, as yet been issued, (3) the August 31 Decision, and
9 (4) the Order Granting Summary Judgment.

10 CFTB argues that the bankruptcy court lacked jurisdiction to
11 issue the Summary Judgment Order on October 4, 2010, because CFTB
12 filed a Notice of Appeal of the Summary Adjudication Order on
13 July 25, 2010. CFTB contends that the Summary Judgment Order
14 filed on October 4, 2010, altered and expanded the Summary
15 Adjudication Order previously filed on July 15, 2010, which was
16 the subject of the July 25, 2010 Notice of Appeal. In support of
17 this contention, CFTB cites Rains v. Flinn (In re Rains), 428 F.3d
18 893, 904 (9th Cir. 2005) for the basic legal principle that, once
19 a notice of appeal is filed, the bankruptcy court may not finally
20 adjudicate substantial rights directly involved in the appeal.
21 CFTB concludes that the August 31 Decision is the judgment or
22 order from which it has appealed, and the October 4, 2010 Order
23 altered that judgment or order. CFTB's arguments miss the mark on
24 several points.

25 First, subject to exceptions not applicable here, an appeal
26 may be taken as a matter of right only from a final judgment or
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28 ¹⁷ Ex. 40, p. 1496.

1 order. 28 U.S.C. § 158(a)(1). The final judgment or order
2 requirement is intended to preclude piecemeal litigation, conserve
3 judicial energy, and eliminate delays caused by interlocutory
4 appeals. Catlin v. United States, 324 U.S. 229, 233-34 (1945).
5 "In the ordinary course a 'final decision' is one that ends the
6 litigation on the merits and leaves nothing for the court to do
7 but execute the judgment." Ray Haluch Gravel Co. v. Cent. Pension
8 Fund of the Int'l Union of Operating Eng'rs & Participating
9 Emp'rs, 134 S. Ct. 773, 779 (2014) (quoting Catlin, 324 U.S. at
10 233).

11 It is clear from the history of hearings and orders in the
12 Wilshire Bankruptcy Case beginning with the Summary Adjudication
13 Order, through the hearings and oral statements from the
14 bankruptcy court at the July 20, 2010 hearing, the issuance of the
15 August 31 Decision, and ultimately the Summary Judgment Order, the
16 final order from which an appeal could be taken as a matter of
17 right was not issued by the court until October 4, 2010. The CFTB
18 incorrectly seeks to treat the August 31 Decision, the Summary
19 Adjudication Order, and the statements of the court at the two
20 hearings as the "final orders" for purposes of appeal - all of
21 which predated the issuance of the actual final order, the
22 October 4, 2010 Summary Judgment Order.¹⁸

23 In substance, CFTB complains that the bankruptcy court
24 conducted multiple proceedings and afforded the parties several

26 ¹⁸ CFTB's First Notice of Appeal foretells that a final order
27 is to come, stating that CFTB is appealing from not only the
28 Summary Adjudication Order and Decision, but from any other order
or decree relating to the motion "which has not, as yet, been
issued." Ex. 33, p. 1128.

1 opportunities to consider interim rulings and further brief
2 specific issues. Beginning with the bankruptcy court's July 20,
3 2010 oral statements, and continuing through the August 31
4 Decision and the final Summary Judgment Order on October 4, 2010,
5 the final legal conclusions made by the bankruptcy court evolved
6 as the judge considered the evidence and arguments. Once the
7 Summary Judgment Order was entered, the universe of the bankruptcy
8 court's findings of fact and conclusions of law was fixed and the
9 final, appealable order issued. The bankruptcy court did not
10 issue such a final order, but continued the hearing on the
11 "Stackhouse Issue" to determine whether the tax assessments could
12 be made against the Partners.

13
14 **The Summary Adjudication Order
Cannot Be a Final Order**

15 Further, the Summary Adjudication Order did not purport to be
16 a final determination of the Contested Matter, but only a "summary
17 adjudication." The term "summary adjudication" is not a federal
18 procedural term, but one under California state law. "Summary
19 adjudication" is a procedure by which the state court judge may
20 determine some of the claims or issues, but does not conclude the
21 action before the court. The final judgment is, and must be,
22 subsequently issued.¹⁹

23 In federal court the analogous rule is found in Civil
24 Rule 56(a), as incorporated by Rule 7056, providing for partial
25 summary judgment on a claim or defense. As noted in MOORE'S FEDERAL
26

27 ¹⁹ See 6 Witkin, Cal. Proc. 5th, §§ 267 - 277, Proceedings
28 Without Trial, for general discussion of the state law principle
of summary adjudication.

1 PRACTICE, CIVIL § 56.122 (Matthew Bender 3d Ed.), "Of course, the
2 reference to 'judgment' in the term 'partial summary judgment' is
3 a misnomer. Any ruling that disposes of less than all issues and
4 fewer than all parties in an action is not a judgment within the
5 meaning of Rule 54." A partial summary judgment order is "not an
6 inherently final order." Mueller v. Auker, 576 F.3d 979, 1002
7 (9th Cir. 2009); SEIU, Local 102 v. Cnty. of San Diego, 60 F.3d
8 1346, 1350 (9th Cir. 1994).

9 Further, CFTB's assertion that the Summary Adjudication Order
10 is a "final order" does little to avoid piecemeal litigation, and
11 actually has the effect of creating piecemeal, fragmented,
12 potentially inconsistent litigation between the CFTB and Wilshire
13 LLC on the one hand, appealing the Summary Adjudication Order, and
14 then CFTB and Partners in appealing the Summary Judgment Order.

15 The Summary Judgment Order is the final order from which CTFB
16 could appeal. The bankruptcy court properly exercised
17 jurisdiction over the Motion for Summary Judgment or Summary
18 Adjudication through and including the issuance of the Summary
19 Judgment Order. CFTB timely appealed the final order.

20 **STANDARDS OF REVIEW**

21 The bankruptcy court's decision to grant or deny a summary
22 judgment is reviewed de novo by the appellate court. Botosan v.
23 Paul McNally Realty, 216 F.3d 827, 830 (9th Cir. 2000). The same
24 standards used by the bankruptcy court under Civil Rule 56, as
25 made applicable by Rules 7056 and 9014, apply upon appellate
26 review. Meade v. Cedarapids, Inc., 164 F.3d 1218, 1221 (9th Cir.
27 1999). Facts determined for summary judgment proceedings are not
28 entitled to the clearly erroneous standard of appellate review.

1 Audrey, Inc. v. Casey (In re Audre, Inc.), 216 B.R. 19, 25 (9th
2 Cir. BAP 1997); Gertsch v. Johnson & Johnson, Finance Co.
3 (In re Gertsch), 237 B.R. 160, 165 (9th Cir. BAP 1999). Summary
4 judgment is not proper if material factual issues exist for trial.
5 Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995).

6 An appellate court may base its ruling on any ground
7 supported by the record. Danning v. Miller (In re Bullion Reserve
8 of N. Am.), 922 F.2d 544. 546 (9th Cir. 1991); Gilbert v. Ben-
9 Asher, 900 F.2d 1407, 1410 (9th Cir. 1990), cert. denied, 498 U.S.
10 865 (1990).

11 **STANDING, CONSTITUTIONALLY SUFFICIENT**
12 **NOTICE, BINDING ORDER CONFIRMING PLAN,**
13 **AND NO DETERMINATION OF NATURE OF TRANSACTION**

14 CFTB first asserts that Wilshire LLC, as successor to the
15 reorganized Debtor, does not meet the minimum Constitutional
16 standing requirements for a party with an actual case or
17 controversy to be adjudicated by the federal courts. U.S. CONST.
18 art 3, sec. 2. A determination of standing is subject to de novo
19 review on appeal. La Asociacion de Trabajadores de Lake Forest v.
City of Lake Forest, 624 F.3d 1083, 1087(9th Cir. 2010).

20 Federal courts are not forums for hypothetical claims or
21 litigation by persons who do not have rights which are the subject
22 of the federal court proceeding (with limited exceptions to this
23 rule, such as class action and other special representative
24 proceedings authorized by Congress). Ne. Fla. Chapter of the
25 Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.,
26 508 U.S. 656, 663 (1993). Standing must be determined to exist
27 before the court can proceed with a case. Sacks v. Office of
28 Foreign Assets Control, 466 F.3d 764, 771 (9th Cir. 2006).

1 A person must have a legally protected interest, for which
2 there is a direct stake in the outcome, to have standing in
3 federal court. This fundamental requirement arises under the
4 Constitution. Arizonans for Official English v. Ariz., 520 U.S.
5 43, 64 (1997). The Supreme Court provided a detailed explanation
6 of the Constitutional case or controversy requirement in
7 Northeastern Florida Chapter of the Associated General Contractors
8 of America v. City of Jacksonville, Florida, supra 508 U.S. at
9 663. In that decision, the court explained that a party seeking
10 to invoke federal court jurisdiction must demonstrate: (1) injury
11 in fact, not merely conjectural or hypothetical injury; (2) a
12 causal relationship between the injury and the challenged conduct;
13 and (3) the prospect of obtaining relief from the injury as a
14 result of a favorable ruling is not too speculative. Id.

15 CFTB asserts that Wilshire LLC lacks standing because the
16 taxes at issue are to be paid by the Partners, not the Debtor,
17 citing Culver, LLC v. Chiu (In re Chiu), 266 B.R. 743, 748 (9th
18 Cir. BAP 2001), aff'd, 304 F.3d 905 (9th Cir. 2002). Wilshire LLC
19 counters, arguing that as the entity in which the tax event is
20 determined, and then passed through to the Partners, it has
21 standing to determine the taxes arising from the operation of its
22 business, citing Sprint Communications Co., L.P. v. APCC Servs.,
23 Inc., 554 U.S. 269, 287 (2008).

24 The tax liabilities or benefits of the Partners are wholly
25 derivative of the tax consequences of the Transaction created by
26 and for Debtor through the Joint Plan. Determination of taxable
27 income for a partnership is done in the same manner as for an
28 individual, with that income or loss then passed through from the

1 partnership to the partners. United States v. Basye, 410 U.S.
2 441, 448 (1973); 26 U.S.C. §§ 703, 701. The partnership is
3 regarded as an independently recognizable entity apart from the
4 aggregate of its partners. Only once its income is ascertained
5 and reported, then the existence of the partnership may be
6 disregarded and then each partner is attributed a tax attribute
7 for a portion of the total, treating the partnership as merely a
8 conduit through which the partnership's income has passed. Id.²⁰
9 For partnerships, the California Revenue and Taxation Code
10 incorporates the provisions of Subchapter K of Chapter 1 of
11 Subtitle A of the Internal Revenue Code (26 U.S.C. §§ 701-776).
12 Cal. Rev. & Tax Code § 17851 (with specific statutory exceptions
13 not applicable to the issue before the court).

14 Wilshire LLC, as the successor to Debtor, is the "person"
15 whose transaction is the subject of the controversy to determine
16 whether income was generated for tax purposes for the partnership.
17 After the taxation income determination from the Transaction is
18 made for the partnership (Debtor), then the partnership serves as
19 the conduit through which the income (or loss) is passed through
20

21 ²⁰ Footnote 8 in United States v. Basye, 410 U.S. at 448,
22 quotes the legislative history, echoing the Solicitor General's
23 remarks that it is odd to be debating the issue of income being
24 determined at the partnership and that being then passed through
25 to the partners. "The legislative history indicates, and the
26 commentators agree, that partnerships are entities for purposes of
27 calculating and filing informational returns but that they are
28 conduits through which the taxpaying obligation passes to the
individual partners in accord with their distributive shares. See,
e. g., H. R. Rep. No. 1337, 83d Cong., 2d Sess., 65-66 (1954);
S. Rep. No. 1622, 83d Cong., 2d Sess., 89-90 (1954); 6 J. Mertens,
Law of Federal Income Taxation § 35.01 (1968); S. Surrey &
W. Warren, Federal Income Taxation 1115-1116 (1960); Jackson,
Johnson, Surrey, Tenen & Warren, The Internal Revenue Code of
1954: Partnerships, 54 Col. L. Rev. 1183 (1954)."

1 to the Partners. Wilshire LLC, the successor which emerged from
2 the confirmed Joint Plan, has standing to litigate the Joint Plan
3 issues concerning the nature of the Transaction. Once such
4 determination is made, then Wilshire LLC can properly report such
5 income or losses (or correct previously reported information) to
6 the Partners for inclusion on their tax returns.

7 The bankruptcy court's determination that Wilshire LLC has
8 standing to prosecute the Order to Show Cause and obtain a
9 determination of the Transaction is correct and is affirmed.

10 **CFTB Was Provided Constitutionally Sufficient Notice**
11 **Of The Wilshire Bankruptcy Case**

12 This Panel having determined that Wilshire LLC has standing,
13 next considers CFTB's assertion that it is not bound by the
14 provisions of the Confirmation Order. This argument operates on
15 two levels: first, whether CFTB was bound by the reorganization of
16 the Debtor and Transaction provided for in the Joint Plan and the
17 Confirmation Order; and second, whether specific findings made in
18 the Confirmation Order bind Wilshire LLC, the Partners, and CFTB
19 concerning the nature of the Transaction (whether it was a sale or
20 a non-sale reorganization of the Debtor with debt forgiveness
21 under the Bankruptcy Code). CFTB conflates these two separate
22 issues.

23 In the Summary Adjudication Order, the bankruptcy court
24 determined that Finding "V" of the Confirmation order establishes
25 that the Transaction was not a sale or exchange for any purpose.²¹
26 The bankruptcy court subsequently issued the August 31 Decision
27

28 ²¹ Ex. 31; Summary Adjudication Order, p. 1078.

1 which concluded that notice of filing of the Wilshire Bankruptcy
2 Case and the subsequent notice that the Confirmation Order had
3 been entered provided constitutionally sufficient notice that
4 CFTB's rights and interests were determined through confirmation
5 of the Joint Plan.

6 The touchstone for a question of whether sufficient notice
7 was provided for Constitutional Due Process purposes for a
8 determination of a person's rights or interest in property is
9 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).
10 Such constitutionally sufficient notice must be "[r]easonably
11 calculated, under all the circumstances, to apprise interested
12 parties of the pendency of the action and afford them an
13 opportunity to present their objections." Id. at 314. In the
14 context of bankruptcy proceedings, the issue of Due Process was
15 recently addressed by the Supreme Court in United Student Aid
16 Funds, Inc. v. Espinosa, 559 U.S. 260 (2010). Having received
17 notice of the plan and its contents prior to the bankruptcy court
18 confirming the chapter 13 plan, the Supreme Court found that such
19 notice satisfied United Student Aid Funds, Inc.'s Due Process
20 rights. Id. at 272. As restated in Tulsa Professional Collection
21 Services, Inc. v. Pope, 485 U.S. 478, 484 (1988), notice is
22 constitutionally sufficient when it is reasonably calculated,
23 under all the circumstances, to apprise interested parties of the
24 pendency of the action and afford them an opportunity to present
25 their objections.

26 Here, CFTB received notice of both the Wilshire Bankruptcy
27 Case and the Confirmation Order. Had it chosen to act, such as
28 requesting special notice, CFTB could have monitored the Wilshire

1 Bankruptcy Case. CFTB cannot now complain that it was not invited
2 by the Debtor to assert whatever rights or objections CFTB might
3 possibly have to the Joint Plan which was moving toward
4 confirmation.

5 The bankruptcy court's determination that CFTB received
6 sufficient notice of the Wilshire Bankruptcy Case and the
7 proceedings which led to the Confirmation Order is affirmed. The
8 terms of the Joint Plan and Confirmation Order bind Wilshire LLC,
9 the Partners, and CFTB to the Joint Plan.

10
11 **Findings in the Confirmation Order Stating the
Nature of the Transaction Are Not Binding on CFTB**

12 As the Panel reads Wilshire LLC's and the Partners' briefs,
13 they contend that the Confirmation Order not only confirms the
14 Joint Plan, but "binds" CFTB to a determination stated in the
15 Confirmation Order that, for purposes of tax treatment, the
16 Transaction is not a sale of the partnership assets or interests.
17 This argument overstates the effect of the Confirmation Order.

18 For this proposition, Wilshire LLC and the Partners direct
19 the Panel to the progeny of Lawrence Tractor Co. v. Gregory
20 (In re Gregory), 705 F.2d 1118, 1123 (9th Cir. 1983). In Gregory
21 the Ninth Circuit Court of Appeals affirmed the lower courts,
22 concluding that notice of a chapter 13 bankruptcy case was
23 sufficient notice to the creditor that confirmation of the plan
24 could lead to the discharge of its debt. The notice of the
25 bankruptcy case put the creditor on inquiry notice that its claim
26 could be affected, including discharged as provided by the
27 Bankruptcy Code, which required the creditor to investigate the
28 case. If the creditor had so acted, it would have seen that

1 debtor was seeking to confirm a chapter 13 plan which provided a
2 0% percent dividend for the creditor's claim and a discharge of
3 that debt upon completion of the Chapter 13 plan.

4 In 2009, the Ninth Circuit again addressed this issue in Joye
5 v. Franchise Tax Board (In re Joye), 578 F.3d 1070 (9th Cir.
6 2009). In Joye, the CFTB (same party as in this appeal) received
7 notice of the Joye bankruptcy case having been filed and that
8 September 3, 2001, was the claims bar date set for governmental
9 claims. The CTFB, with knowledge of the Joye bankruptcy case, did
10 not file a proof of claim until October 15, 2001. In Joye, the
11 court concluded that while having notice of the bankruptcy case,
12 the CFTB "[i]gnored the Joyes' bankruptcy proceeding 'at its
13 peril.'" Id. at 1080.

14 In the present case, Wilshire LLC does not contend that the
15 proposed Chapter 11 plan or the bankruptcy court file provided
16 notice that confirmation of the Joint Plan would constitute a
17 determination that the Transaction was not a sale. Nor is it
18 asserted that notice was provided that confirmation of the Joint
19 Plan would determine the tax consequences flowing from the
20 Transaction. Rather, Wilshire LLC only argues that by virtue of
21 adding language stating such a "determination" to the order
22 subsequently signed by the bankruptcy judge, that language now
23 binds CFTB.

24 A review of the Second Amended Disclosure Statement,
25 Section III, Part H, titled "Tax Consequences of Joint Plan,"
26 imparts the following information with respect to the tax
27 consequences of confirmation: "CREDITORS AND INTEREST HOLDERS
28 CONCERNED WITH HOW THE JOINT PLAN MAY AFFECT THEIR TAX LIABILITY

1 SHOULD CONSULT WITH THEIR OWN ACCOUNTANTS, ATTORNEYS, AND/OR
2 ADVISORS."²² It continues to state, "The Proponent CANNOT and DOES
3 NOT represent that the tax consequences contained below are the
4 only tax consequences of the Joint Plan because the Tax Code
5 embodies many complicated rules that make it difficult to state
6 completely and accurately all of the tax implications of any
7 action."²³ This Section H of the Second Amended Disclosure
8 Statement restates several times that no representation concerning
9 the actual tax consequences of confirmation and performance of the
10 plan would be made by Debtor.

11 For the Partners, the Second Amended Disclosure Statement
12 states that there will be a discharge of indebtedness and Partners
13 will recognize cancellation of indebtedness income ("CODI"). The
14 Second Amended Disclosure Statement continues, stating that the
15 Partners may elect to treat the CODI as provided in § 108 of the
16 Internal Revenue Code. Such § 108 treatment may allow the CODI to
17 be excluded from income or Partners may elect to offset it against
18 operating losses.²⁴ The Joint Plan does not contain any provision
19 either characterizing the Transaction or the tax effects of the
20 Transaction.²⁵

21 The Joint Plan and the Confirmation Order do not constitute
22 the final determination of the Transaction for tax purposes. Such
23 determination was properly the subject of the subsequent post-

24
25 ²² Id., p. 496:20-22.

26 ²³ Id., p. 496:25-27, 497:1-2.

27 ²⁴ Id., p. 498:3-13.

28 ²⁵ Ex. 12; Second Amended Disclosure Statement, pp. 515-561.

1 confirmation judicial proceedings in the bankruptcy court which
2 are the subject of this appeal. The bankruptcy court properly
3 considered CFTB's contentions, rejecting Wilshire LLC's contention
4 that the Joint Plan and Confirmation Order is a final order
5 previously determining that issue between Wilshire LLC and CFTB.

6
7 **THE BANKRUPTCY COURT CORRECTLY DETERMINED
8 THAT THE TRANSACTION WAS NOT A SALE**

8 The Ninth Circuit Court of Appeals remanded this appeal to
9 the Bankruptcy Appellate Panel to make a merits determination of
10 whether the bankruptcy court gave "due consideration to the
11 'economic realities' of the transaction as structured through the
12 [Joint] Plan and Confirmation Order." These "economic realities"
13 are a consideration of whether there are "tax independent
14 considerations" for the transaction and that the economic
15 substance of the transaction "is not shaped solely by tax-
16 avoidance features that have meaningless labels attached"
17 Frank Lyon Co. v. United States, 435 U.S. 561, 583-584 (1978). So
18 long as there are significant and genuine non-tax attributes to
19 the transaction, the form of the transaction adopted by the
20 parties governs for tax purposes. Id. See also Sollberger v.
21 Commissioner, 691 F.3d 1119, 1124, n.6 (9th Cir. 2012) (The court
22 conducts a flexible, case-by-case analysis of whether the burdens
23 and benefits of ownership have been transferred. There are not
24 hard and fast rules of thumb which can be used for such a
25 determination, and no single factor is controlling. The
26 transaction must be viewed in light of realism and practicality.)

27 The bankruptcy court determined the Transaction eleven months
28 after the Order to Show Cause was issued. The bankruptcy court

1 issued three documents stating the findings and conclusions upon
2 which the Summary Judgment Order is based. For the flexible,
3 case-by-case analysis of whether "tax independent considerations"
4 exist and the economic substance of the Transaction, this Panel,
5 through its de novo review, considers the evidence presented and
6 the findings of fact and conclusions of law to be drawn therefrom.

7
8 **First Hearing on Motion for
Summary Judgment or Summary Adjudication**

9 The hearing on the Motion for Summary Judgment or Summary
10 Adjudication was conducted on June 22, 2010. In its Opposition²⁶
11 and at the June 22, 2010 hearing²⁷ CFTB did not argue that tax
12 independent considerations did not exist or that the economic
13 realities of the Transaction demonstrated that they were only tax
14 driven. Rather, CFTB's arguments focused on why the bankruptcy
15 court did not have jurisdiction (which jurisdiction the Ninth
16 Circuit established does exist in Wilshire I) and why 11 U.S.C.
17 § 346(j) did not apply to the Transaction under the confirmed
18 Joint Plan. CFTB stated at the hearing, "We're not challenging,
19 your Honor, the aspects of the plan."²⁸ Rather, CFTB asserted that
20 the court does not have jurisdiction to determine the issue if
21 11 U.S.C. § 346 applied, and the application of the Internal
22 Revenue Code to treat the Transaction as a sale of partnership

23
24
25

26 ²⁶ Ex. 24; Opposition to Motion for Summary Judgment or
Adjudication, p. 875.

27 ²⁷ Ex. 32; Transcript, p. 1085.

28 ²⁸ Ex. 32; Transcript, p. 1114:8-9.

1 interests by the Partners.²⁹ At the conclusion of the June 22,
2 2010 hearing the bankruptcy court did not state any findings of
3 fact or conclusions of law on the record.

4 **Request for Continuance Was Properly Denied**

5 As part of its Opposition, CFTB requested a six-month
6 continuance so that it could conduct discovery on the issue of
7 whether the Transaction resulted in cancellation of indebtedness.³⁰
8 The scope of the requested discovery is set forth in Paragraph 22
9 of the Declaration of Robert Babcock ("Babcock Declaration") filed
10 in opposition to the Motion for Summary Judgment or Summary
11 Adjudication.³¹ The scope of the discovery described relates to
12 the underlying substance of the Transaction, with discovery to be
13 conducted of the Debtor, creditors, Partners, and Wilshire LLC.

14 CFTB also filed an Ex Parte Motion for Continuance if the
15 bankruptcy court did not discharge the Order to Show Cause based
16 on CFTB's legal arguments. CFTB requested the continuance to
17 allow an additional six months to conduct discovery.³²

18 The continuance for CFTB to undertake such discovery was not
19 granted by the court. The bankruptcy court's denial of the
20 request for further discovery before ruling on the motion for
21 summary judgment is reviewed for abuse of discretion. Chance v.
22 Pac-Telerac, Inc., 242 F.3d 1151, 1161 n.6 (9th Cir. 2011). The
23

24 ²⁹ Ex. 32; Transcript, p. 1114: 1-4, 18-22.

25 ³⁰ Ex. 24; Opposition, p. 1:19-21, 2:1-14.

26 ³¹ Ex. 34; Babcock Declaration, p. 1138.

27 ³² Ex. 19; Conditional Ex Parte Motion to Continue Hearing,
28 p. 316.

1 burden is on the party seeking further discovery to show that it
2 diligently pursued its previous discovery opportunities and that
3 evidence it seeks exists. Id., citing Nidds v. Schindler Elevator
4 Corp., 113 F.3d 912 920 (9th Cir. 1996), and Conkle v. Jeong,
5 73 F.3d 909, 914 (9th Cir. 1995).

6 In the Opposition, CFTB theorized that the Transaction
7 resulted in capital gain, and therefore there was no cancellation
8 of indebtedness income which could have been excluded pursuant to
9 Internal Revenue Code ("IRC") § 108 (26 U.S.C. § 108) and
10 11 U.S.C. § 346(j) would not be applicable. CFTB argued that the
11 Transaction consisted of a sale of 99% of the properties of Debtor
12 for \$3,500,000 and cancellation of \$284,570,000 of indebtedness.³³
13 CFTB treated the Transaction as in substance being a sale by the
14 Partners of 99% of their partnership interests to the Senior
15 Secured Creditors who acquired such 99% interest in the Debtor to
16 be their 99% interest in Wilshire LLC. CTFB further contended
17 that the Transaction violated IRC § 701 (which provides that a
18 partnership shall not be subject to the income tax imposed), and
19 that by applying the step-transaction doctrine CFTB can treat the
20 Transaction as one by which Debtor sold a 99% interest in the
21 properties or that the Partners sold 99% of their interests in the
22 Debtor. Evidence was not presented to support these arguments.

23 As Wilshire LLC and the Partners argue, the briefing and
24 hearing schedule on the Motion for Summary Judgment or Summary
25 Adjudication was set pursuant to a stipulation between CFTB and
26

27
28 ³³ Ex. 24; Opposition, p. 916:1-9.

1 Wilshire LLC ("Scheduling Stipulation").³⁴ As part of the
2 Stipulation, dated April 22, 2010, CFTB, Wilshire LLC, and the
3 Partners agreed and stipulated to several matters. First, the
4 bankruptcy court had issued an order joining all of the Partners
5 into this Contested Matter. Second, no objection to the joinder
6 by any of the Partners was filed and the Partners were parties to
7 this Contested Matter. CFTB, Wilshire LLC, and the Partners then
8 stipulated that the hearing on the Motion for Summary Judgment or
9 Summary Adjudication occur on June 22, 2010. Further, the Motion
10 for Summary Judgment or Adjudication would be filed by May 3,
11 2010, Opposition filed by June 7, 2010, and Replies filed by
12 June 15, 2010.

13 In denying the request for a continuance to undertake
14 discovery, the bankruptcy court noted that no discovery had been
15 attempted by CFTB during the one year that this Contested Matter
16 had been pending. CFTB argued that the issues relating to
17 11 U.S.C. § 346(j) had not been raised until the filing of the
18 Motion for Summary Judgment or Summary Adjudication. The
19 bankruptcy court noted that the issue of whether 11 U.S.C. § 346
20 applied had been fully briefed by the parties.

21 The bankruptcy court further noted that in its September 8,
22 2009 Reply to CFTB's Response to the Order to Show Cause,
23 Wilshire LLC asserted that the grounds for contempt included the
24 assertion that CFTB's conduct constituting a collateral attack on
25 the Confirmation Order and Joint Plan in violation of 11 U.S.C.

26
27
28 ³⁴ Ex. 13; Joint Status Report, p. 166.

1 § 346(j).³⁵ The Reply expressly quoted the language of 11 U.S.C.
2 § 346(j)(1) stating that no income is realized from the
3 forgiveness or discharge of indebtedness in a case under
4 Title 11.³⁶ There was no "surprise" that 11 U.S.C. § 346 was a
5 basis for the relief requested (contempt for a collateral attack
6 on the Confirmation Order and Joint Plan) from September 8, 2009
7 forward, and the record shows that CFTB was aware that 11 U.S.C.
8 § 346 was at issue when it entered into the Scheduling
9 Stipulation.

10 No adequate basis is shown for reversing the bankruptcy
11 court's denial of the Ex Parte Motion for Continuance. No basis
12 is shown for granting relief to CFTB from the stipulation setting
13 the schedule for filing and hearing cross-summary judgment
14 motions. Neither in its brief nor at oral argument on this appeal
15 has CFTB provided any explanation of how it was prevented from
16 conducting discovery during that one-year period after the motion
17 for the OSC was filed. Denial of the request for a continuance is
18 affirmed.

19
20 **Bankruptcy Court Determination That
The Transaction Was Not A Sale**

21 In the Summary Adjudication Order the bankruptcy court
22 determined that: (1) Finding "V" of the Confirmation Order
23 establishes "[T]hat the transaction implemented under the Plan is
24 not a sale or exchange;" and (2) that since the transaction was
25

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27 ³⁵ Ex. 7; Wilshire LLC's Reply to Opposition to CFTB Response
to Order to Show Cause, pp. 67:1 - 68:17.

28 ³⁶ Id.; p. 67:3-6.

1 not a sale or exchange, “[t]he release or forgiveness of
2 indebtedness under the Plan did not create capital gain income
3 reportable by [Debtor].”³⁷ The court then continued the hearing
4 for further briefing and oral argument on the Stackhouse issue.

5 The bankruptcy court conducted a further hearing and issued
6 the August 31 Decision.³⁸ It first determined that the Joint Plan
7 “does not effect a sale of the partners’ interest in the
8 partnership property.” The bankruptcy court further stated,
9 consistent with the Summary Adjudication Order, that the Joint
10 Plan restructured the Debtor from a general partnership into a
11 limited liability company (Wilshire LLC), with Wilshire LLC, the
12 restructured Debtor, continuing to own the Properties. The
13 bankruptcy court repeated the prior finding and determination
14 pursuant to Finding “V” of the Confirmation Order.

15 The bankruptcy court, in connection with the substance of the
16 Transaction, made the determination that CFTB’s interpretation of
17 the tax laws and the Transaction “would nullify the effect of the
18 [Bankruptcy Tax Act of 1980] at the partner level in a
19 [cancellation of indebtedness] scenario and would ignore the
20 interplay between § 346 and relevant IRC provisions allowing the
21 debtor to exclude [cancellation of indebtedness income] from its
22 realizable income.” The bankruptcy court concluded that the
23 Bankruptcy Tax Act of 1980 overruled Stackhouse v. United States,
24 441 F.2d 465 (5th Cir. 1971), which had previously interpreted the
25 IRC to allow for income to be determined in one manner for a

26
27 ³⁷ Ex. 31; p. 1079.

28 ³⁸ Ex. 38; p. 1483.

1 partnership and then in a different manner by the IRS for the
2 individual partners.

3 The August 31 Decision concludes with the bankruptcy court
4 expressly stating that the Transaction: (1) resulted in discharge
5 of indebtedness; (2) was not a disguised sale; and (3) did not
6 result in a capital gain.

7 The court then issued the Summary Judgment Order on
8 October 4, 2009, which includes the following determinations by
9 the court concerning the Transaction. First, the court
10 interpreted and adjudicated Finding "X" of the Confirmation Order
11 to establish that the Transaction was not a sale of the
12 partnership interests. Second, that there was a capital
13 contribution by the Senior Secured Creditors for their interest in
14 the restructured Debtor, Wilshire LLC, as part of the Transaction.
15 Third, that Finding "Y" of the Confirmation Order established that
16 the \$221,000,000 claim secured by the second deed of trust was
17 released and discharged solely in exchange for the payment of
18 \$2,500,000 as provided in the Joint Plan.

19
20 **Upon De Novo Review, The Evidence Presented Supports the
Determination That The Transaction Was Not a Sale**

21 The CFTB complains that the bankruptcy court did not, and
22 could not, have really considered the "economic realities" of the
23 transaction because it was not presented with evidence of the
24 transaction by CFTB. As discussed above, this Panel, upon
25 completing its de novo review, concurs with the decision of the
26 bankruptcy court in denying CFTB's request for a continuance to
27 begin discovery on the eve of the stipulated hearing on the Motion
28 for Summary Judgment or Summary Adjudication. CFTB was aware

1 since September 2009 that the 11 U.S.C. § 346 discharge or
2 forgiveness of indebtedness was at the core of Wilshire LLC's
3 contention that CFTB was engaging in an impermissible collateral
4 attack of the confirmed Joint Plan and Confirmation Order. CFTB's
5 strategy decision to not present any additional evidence does not
6 mean that the bankruptcy court did not have evidence from which it
7 made its decision, and this Panel can conduct its de novo review.

8 The federal judicial process is not a GIGO (garbage in,
9 garbage out) system. Irrespective of the sufficiency of the legal
10 briefs, a federal judge has the responsibility to make his or her
11 decision based on the correct law. United Student Aid Funds, Inc.
12 v. Espinosa, 559 U.S. at 277. However, the federal judge is
13 dependant on the parties to present the competent, credible
14 evidence from which the judge is to make the required findings of
15 fact. In making the requisite findings of fact and making the
16 conclusions of law therefrom, the judge should not go outside the
17 record unless the facts are matters of common knowledge or capable
18 of certain verification (Fed. R. Evid. 201, Judicial Notice).
19 Clicks Billards, Inc. v. Sixshooters, Inc., 251 F.3d 1252, 1267
20 (9th Cir. 2001). A party cannot complain that it would have
21 conducted discovery or presented other evidence if it had known in
22 advance the findings of fact and conclusions of law which the
23 court was going to draw from the discovery and other evidence
24 presented at the hearing or trial.

25 For the bankruptcy court, the evidence of the Transaction
26 provided by Wilshire LLC, the Partners, and CFTB consists
27 substantially of the Disclosure Statement and Joint Plan. The
28 bankruptcy court concluded that the Transaction was not a sale or

1 exchange, but a restructure by which the Debtor partnership was
2 reorganized into Wilshire LLC, a limited liability company. While
3 CFTB theorizes whether, if evidence existed and were produced, a
4 court at sometime in the future might determine that the
5 Transaction is not as stated in the Joint Plan, no such evidence
6 was presented by CFTB to the bankruptcy court.

7 In conducting the de novo review, this Panel concurs that
8 (1) there is not any conflicting evidence of any material fact and
9 (2) there are no genuine issues of material fact - only a dispute
10 as to the legal conclusions drawn from the undisputed evidence.
11 From the evidence presented, the bankruptcy court did not err in
12 concluding that the Joint Plan and Transaction constituted a
13 reorganization of the Debtor into Wilshire LLC, and such
14 reorganization was not a sale, transfer, or a disguised
15 foreclosure or deed in lieu of foreclosure. The Disclosure
16 Statement describes a very complex business transaction by which
17 the Senior Secured Creditors acquire a 99% interest in Wilshire,
18 LLC, the successor reorganized Debtor that emerges from bankruptcy
19 through the Joint Plan. For the Partners, 99% of their interests
20 in the Debtor are lost, with them having only a 1% interest in
21 Wilshire LLC, the reorganized successor to Debtor.

22 The Joint Plan and Disclosure Statement identify the
23 following assets and claims to be addressed. As of the Second
24 Amended Disclosure Statement, the assets of the Debtor and
25 bankruptcy estate are listed to have a value of \$164,645,000,
26 which are subject to the Senior Secured Creditors' lien
27 (\$173,570,000 claim) and the Co-Investors' Junior lien
28

1 (\$221,000,000 claim).³⁹ Under the Debtor's liquidation analysis,
2 this exhausts any value in the assets, or as may be more commonly
3 stated, all creditors and interest holders, other than the Senior
4 Secured Creditors (on at least a portion of their secured claim),
5 are "out of the money." The Liquidation Analysis identifies an
6 additional \$850,000 to \$900,000 in general unsecured claims which
7 would also "be out of the money" in a Chapter 7 liquidation.

8 The Disclosure Statement also informs creditors that a
9 settlement was reached and approved by the Court among the Debtor,
10 acting as the then debtor in possession,⁴⁰ Senior Secured
11 Creditors, and California Federal Bank. The settlement resolved a
12 lease dispute with California Federal Bank and provided for a new
13 lease of the Property for the Joint Plan. Under the settlement,
14 California Federal Bank also agreed to pay the Estate \$27,825,000,
15 assign its existing leases and subleases to the Estate, enter into
16 a new five year lease, dismiss the pending adversary proceeding,
17 and execute mutual releases.

18 The Joint Plan provides for Wilshire LLC to obtain New
19 Secured Financing of \$95,000,000 to \$100,000,000 to be paid to the
20 Senior Secured Creditors. The difference between the \$123,000,000
21 portion of the Senior Secured Claim and the payment from the New
22 Secured Financing would constitute the Senior Secured Creditors'
23 capital contribution to acquire the 99% interest in Wilshire LLC.

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25 ³⁹ Ex. 21; Disclosure Statement, p. 509 Liquidation Analysis,
26 and pp. 491-492, Article III, D, Class B and C-2 (Senior Secured
Claim), and Class C-2 (Co-Investor Secured Claim).

27 ⁴⁰ The debtor in possession serves as the fiduciary of the
28 bankruptcy estate in the place of, and exercising many of the
powers of, a Chapter 11 trustee. 11 U.S.C. § 1107.

1 The \$40,570,000 balance of the Senior Secured Creditors' Claim was
2 to be paid \$40.57, with the remainder of the Senior Secured claim
3 discharged and the parties executing releases.

4 For the Co-Investors' Claim in the amount of \$221,000,000,
5 they were to be paid \$2,500,000, with the balance of the
6 obligation being discharged and the parties executing releases.⁴¹

7 Under the Joint Plan the creditors holding \$850,000 to
8 \$900,000 in general unsecured claims were paid in full.

9 The Disclosure Statement provides information about the pre-
10 and post-petition operation of the Property by the Debtor and the
11 Bankruptcy Estate. This included a discussion of the dispute with
12 California Federal Bank and commencing the Wilshire Bankruptcy
13 Case to prevent the Senior Secured Creditors from proceeding with
14 a foreclosure sale. It further discussed the active prosecution
15 of the case by the Debtor and the Secured Creditors, including an
16 attempt to have a bankruptcy trustee appointed. The final
17 approved disclosure statement was forged from drafts advanced by
18 the Debtor and objections asserted by the U.S. Trustee, Secured
19 Creditors, and California Federal Bank. During the Wilshire
20 Bankruptcy Case the creditors who chose to be active conducted
21 discovery, investigated the operation of the Debtor's business,
22 evaluated competing claims, and participated in advancing a
23 chapter 11 plan. By early October 1997, Debtor, Secured
24 Creditors, and Co-Investors entered into a Memorandum of
25 Understanding which was the foundation for the Joint Plan.
26 Ultimately, the parties in the Wilshire Bankruptcy Case structured

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28 ⁴¹ Ex. 21; Disclosure Statement 491-492. Ex. 21; Plan Art.
VII A. and C., pp. 545, 546.

1 the Joint Plan and moved forward to implement the Transaction
2 through confirmation of the Joint Plan.⁴²

3 The uncontested evidence presented shows that this was not
4 only a highly complex real estate partnership bankruptcy case, but
5 one in which the various parties (Debtor, competing creditors with
6 secured claims, third-party lessee - all natural enemies) acted in
7 their own economic self-interests. This is not a case in which
8 the only active parties were the debtor and insider creditors
9 constructing a reorganization based on personal tax issues, not
10 business economic realities.

11 The evidence presented shows that the Joint Plan was created
12 by the Debtor, BofA, Senior Secured Creditors, Co-Investors
13 holding the Junior Secured claim, California Federal Bank, and
14 creditors holding general unsecured claims based on the economic
15 realities of the assets and claims, not as a tax avoidance plan.
16 This is a case where the Debtor had limited assets and extensive
17 debts which far outstripped the assets. The creditors and Debtor
18 fashioned a plan which made the economic results for creditors,
19 even those holding general unsecured claims, dramatically better.
20 To the extent that the Partners considered the tax consequences of
21 the Transaction, such consideration did not drive the economic
22 realities decision of the creditors in supporting the Joint Plan.⁴³

24 ⁴² Ex. 21: Disclosure Statement, pp. 483-487.

25 ⁴³ It should not be forgotten that in the chapter 11 process
26 the creditors not only vote to accept or reject a plan, but
27 creditors are not dependent on a "take it or leave it" plan put
28 forward by the debtor. Creditors may advance their own chapter 11
plan to compete in the bankruptcy marketplace for creditor votes.
11 U.S.C. §§ 1121(c), 1129(a)(7) and (b).

1 There was no conflicting evidence presented to the court,
2 only arguments about the legal conclusions to be drawn from the
3 evidence. The bankruptcy court did not err in concluding that the
4 Joint Plan was based on the economic realities of the Transaction,
5 that the Transaction was not a sale, and that the Transaction was
6 not shaped by tax-avoidance features or purpose.

7 The bankruptcy court's determination that the Transaction was
8 a restructure of the Debtor and not a sale is affirmed.

9 **THE FORGIVENESS OF DEBT THROUGH THE JOINT PLAN**
10 **DOES NOT RESULT IN REPORTABLE INCOME FOR FEDERAL**
 AND STATE TAXES FOR THE PARTNERS

11 Having concluded that the Joint Plan and Transaction were not
12 a disguised sale or other than the reorganization and restructure
13 of the Debtor as stated in the Joint Plan, the bankruptcy court
14 further determined that the discharge or forgiveness of debt
15 through that Joint Plan was not income to the partnership.

16 It has long been recognized that providing deductions or
17 exclusions for income arising from cancellation or discharge of
18 indebtedness through a bankruptcy case was a necessary and
19 integral part of the bankruptcy laws. Claridge Apartments Co. v.
20 Comm'r, 323 U.S. 141, 149 (1944) (discussing the Chandler Act
21 provisions to encourage the freer use of bankruptcy reorganization
22 and avoid otherwise unnecessary or premature liquidations).

23 The term "gross income," from which a tax calculation begins,
24 is defined in IRC § 61. This non-exclusive list "means all income
25 from whatever source derived." Some statutory examples
26 [identified by numbering used in the statute] are (1) compensation
27 for services, (2) gross income from business, (3) gains from
28 dealings in property, (8) alimony, and (12) income from discharge

1 of indebtedness. In 2925 Briarpark, Ltd. v. Comm'r, 163 F.3d 313
2 (5th Cir. 1993), the Fifth Circuit Court of Appeals reviewed a
3 decision of the United States Tax Court concerning a sale of
4 property by a partnership. In Briarpark, the partnership sold
5 property subject to \$24,562,763 in liens for \$10,936,532. As part
6 of the sale, the creditor released Briarpark and the guarantor
7 (who was insolvent) of approximately \$14,000,000 of liability in
8 excess of the sales proceeds paid to the creditor. On its tax
9 return, Briarpark reported \$14,468,154 of cancellation of
10 indebtedness income relating to the sale.

11 The Fifth Circuit noted that gross income pursuant to IRC
12 § 61 comes in many forms, with two of the examples being "gains
13 derived in dealing in property" (IRC § 61(a)(3)) and "income from
14 discharge of indebtedness" (IRC § 61(a)(12)). Because the
15 practical effect of the Briarpark transaction was to sell the
16 property to a buyer, then the purchase price paid and the debt
17 forgiveness were determined by the Tax Court (the trial court) to
18 be part of a single transaction for income defined as "from a sale
19 or exchange" of property. In closing, the Fifth Circuit
20 emphasized that it is for the trial court, upon consideration of
21 the entire transaction, to determine the factual category (dealing
22 in property or cancellation of indebtedness) of the income for
23 taxation purposes.⁴⁴

24 The Transaction which occurred in this case is the
25 reorganization of Debtor into Wilshire LLC. The bankruptcy court
26 determined that the reorganization was not a sale or transfer of
27

28 ⁴⁴ Id. at 318.

1 property. As part of the reorganization, the former interests of
2 the Partners were cancelled and a creditor obtained a 99% interest
3 in Wilshire LLC for a portion of its secured claim. The
4 confirmation of the Joint Plan included forgiveness of the
5 indebtedness, as part of a complex restructuring of the Debtor and
6 creditors' rights and interest.

7 After considering the evidence presented, the bankruptcy
8 court determined that the forgiveness of debt through the Joint
9 Plan constituted cancellation of debt income, not capital gain.⁴⁵
10 Upon de novo review, this Panel makes the same determination. The
11 Transaction and restructuring of the complex rights and interests
12 of the bankruptcy estate, Senior Secured Creditors, Co-Investors,
13 creditors holding general unsecured claims, and Partners,
14 resolving lease disputes, and creating the new successor
15 Wilshire LLC, is consistent with the forgiveness of debt, not with
16 a sale of the Property.

17 Merely because the restructuring of the Debtor, the emergence
18 of the successor entity, the forgiveness of indebtedness, the New
19 Refinance Loan, and issuance of the interests in the reorganized
20 debtor all occur in one document, the Chapter 11 Plan, that does
21 not mean that it is just one big sale transaction. In every
22 bankruptcy case, the confirmation of the Chapter 11 plan fixes the
23 rights and interests, provides for the forgiveness of
24 indebtedness, and binds the parties (11 U.S.C. § 1141) in one fell
25 swoop.

26 The Joint Plan provides for the forgiveness of indebtedness

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28 ⁴⁵ Ex. 40; August 31 Decision, p. 1507.

1 as one of multiple plan provisions. Some creditors forgave
2 substantial amounts for the payment of a modest amount (recovering
3 "only" \$2,500,000 on a \$212,000,000 claim, rather than getting
4 nothing), while the Senior Secured Creditors forgave indebtedness
5 and contributed \$23,000,000 to the reorganized Debtor. As part of
6 this complex Transaction, the Senior Secured Creditors acquired
7 99% of the interest in Wilshire LLC.

8 As noted by the Ninth Circuit Court of Appeals in Wilshire I,
9 bankruptcy plans are often dependent on the cancellation of
10 indebtedness relief in bankruptcy to facilitate a reorganization.
11 A reorganization produces better economic results for all and
12 preserves a business operation, rather than merely shutting
13 everything down and liquidating the pieces. Such a reorganization
14 often, as in the Wilshire Bankruptcy Case, is a complex reordering
15 of rights and interests, forgiving debt, incurring new
16 obligations, making capital contributions, and deferring payment.
17 This is much more complex than - "sell the property and pay the
18 money."

19 The evidence presented to the bankruptcy court, for which
20 there were no material facts in dispute, supports the
21 determination that the Transaction resulted in the forgiveness of
22 debt and "cancellation of debt income," not "gains from dealings
23 in property."

24 **The Bankruptcy Code And Internal Revenue Code**
25 **Provide For No Realization of Income From Forgiveness**
26 **Of Indebtedness In A Bankruptcy Case**

27 To facilitate reorganizations under the Bankruptcy Code
28 rather than forcing liquidations of business and financial
enterprises, Congress has provided for special tax treatment when

1 indebtedness is discharged or forgiven through a bankruptcy case.
2 In this appeal, the provisions of 11 U.S.C. § 346(a) and (j) as
3 they existed in 1998 are at issue.

4 § 346. Special tax provisions

5 (a) Except to the extent otherwise provided in this
6 section, subsections (b), (c), (d), (e), (g), (h), (i),
7 and (j) of this section apply notwithstanding any State
or local law imposing a tax, but subject to the Internal
Revenue Code of 1986.

8

9 (j) (1) Except as otherwise provided in this
10 subsection, income is not realized by the estate, the
11 debtor, or a successor to the debtor by reason of
forgiveness or discharge of indebtedness in a case under
this title. . . .

12 In addition to § 346, the Internal Revenue Code itself has a
13 specific section addressing income generated from the discharge of
14 indebtedness. In pertinent part, IRC § 108 provides:

15 § 108. Income from discharge of indebtedness

16 (a) Exclusion from gross income.

17 (1) In general. Gross income does not include any
18 amount which (but for this subsection) would be
19 includible in gross income by reason of the discharge
(in whole or in part) of indebtedness of the taxpayer
if-

20 (A) the discharge occurs in a title 11 case,

21 (2) Coordination of exclusions.

22 (A) Title 11 exclusion takes precedence.
23 Subparagraphs (B), (C), and (D) of paragraph (1) shall
24 not apply to a discharge which occurs in a title 11
case. . . .

25 The Debtor that was reorganized into Wilshire LLC was a
26 partnership. While the tax liabilities and attributes for a
27 partnership are passed through to the partners, the income or loss
28 (tax attributes) are first determined at the partnership, and then

1 those attributes are passed through to the partners.

2 The plain language of 11 U.S.C. § 346(j) states, "income is
3 not realized by the estate, the debtor, or a successor to the
4 debtor by reason of forgiveness or discharge of indebtedness in a
5 case under [Title 11]." IRC § 108 confirms that if a discharge of
6 indebtedness occurs in a case under Title 11, then that basis for
7 such discharge shall control over all others. By Confirmation of
8 the Joint Plan in the Wilshire Bankruptcy Case, Debtor was
9 forgiven debt of \$40,570,000 of the Secured Creditors' Claim and
10 \$218,500,000 of the Co-Investor's Claim.⁴⁶

11 No income is realized by either the bankruptcy estate or
12 Debtor for such forgiveness of indebtedness. Properly applying
13 the provisions of 11 U.S.C. § 346(j) and IRC 108(a), the Debtor,
14 bankruptcy estate, and Wilshire LLC did not obtain income from the
15 forgiveness of debt. There being no income for the Debtor, there
16 is no income to pass through to the Partners by virtue of the
17 forgiveness of indebtedness in the Wilshire Bankruptcy Case under
18 Title 11. It may well be that there are other adjustments of tax
19 attributes (IRC § 108(b)) or partnership basis (IRC § 705), but
20 the determination of whether there is income or loss is computed
21 at the partnership, not the individual partners.⁴⁷

22 The determination by the bankruptcy court that discharge or
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25 ⁴⁶ Ex. 21; Disclosure Statement Classes C-1 and C-2, p. 492.
26 Ex. 21; Joint Plan Classes C-1 and C-2, p. 537, and Article VII
Discharge and Release, pp. 545-546.

27 ⁴⁷ IRC § 704 provides that a partner's share of income, gain,
28 loss, deductions, or creditors (once determined for the
partnership) are distributed among the partners pursuant to the
partnership agreement.

1 forgiveness of indebtedness exclusion from income applies to the
2 Debtor and results in there not being income from discharge of
3 indebtedness for the Partners is affirmed.

4 **CONCLUSION**

5 We **REVERSE** the bankruptcy court's determination that the
6 Confirmation Order itself was a determination whether the
7 Transaction was a sale or not a sale of property.

8 We **AFFIRM**, upon de novo review, the bankruptcy court's entry
9 of summary judgment in favor of Wilshire LLC and the Partners. In
10 so affirming, this Panel determines: (1) Wilshire LLC has standing
11 to file and prosecute the OSC; (2) CFTB received sufficient notice
12 for the Confirmation Order to be binding on CFTB; (3) the proper
13 appeal is taken from the Summary Judgment Order filed on
14 October 4, 2010; (4) the Transaction, based upon the economic
15 realities of the Transaction, was not motivated by tax avoidance;
16 (5) the Transaction was not a sale, but provided for the
17 forgiveness of debt owed by the Debtor; (6) the forgiveness of
18 debt through the Joint Plan was subject to the provisions of 11
19 U.S.C. § 346 (in effect as of the confirmation of the Joint Plan)
20 and 26 U.S.C. § 108; (7) the tax consequences of the Transaction
21 are determined at the Debtor, the partnership, and such tax
22 consequences are then passed through to the Partners; and (8) the
23 forgiveness of debt did not result in income realized by the
24 Debtor or passed through to the Partners.

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