

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

United States Bankruptcy Appellate Panel No. SC-16-1227
Chapter 7 Bankruptcy Case No. 16-00629-MM7

In re:

RW MERIDIAN LLC,

Debtor.

COUNTY OF IMPERIAL TREASURER-TAX COLLECTOR,

Appellant,

v.

RONALD E. STADTMUELLER, Trustee;
RW MERIDIAN, LLC,

Appellees.

APPELLANT'S OPENING BRIEF

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I. JURISDICTIONAL STATEMENT

Appellant, County of Imperial Treasurer - Tax Collector ("County"), appeals from the Memorandum Decision ("Decision"), issued by the Honorable Margaret M. Mann ("Judge Mann") of the United States Bankruptcy Court for the Southern District of California ("Bankruptcy Court") on July 5, 2016, which held that a tax sale conducted by the County violated the automatic stay. (App. 13:133.)¹ The Bankruptcy Court had jurisdiction over the matter under 11 U.S.C. §§ 1334 and 157. The Decision is a final order appealable under 28 U.S.C. §158 (a)(1).

The County timely filed its Notice of Appeal on July 18, 2016, within 14 days of the entry of the Decision as prescribed by Fed. R. Bankr. P. 8002. (App. 14: 146.) No party elected to have the appeal heard by the district court, and therefore the United State Bankruptcy Appellate Panel of the Ninth Circuit ("BAP") has jurisdiction under 28 U.S.C. §158 (a)(1), (b)(1), and (c)(1).

II. STATEMENT OF ISSUES

1. Did the Bankruptcy Court err in finding that the real property became property of the estate when the petition was filed and therefore was protected by the automatic stay provisions of 11 U.S.C. §362(a)(3) and 11 U.S.C. §362(a)(4), even though the right of redemption had expired pre-petition by the terms of California Revenue and Taxation Code §3707(a)(1) and the trustee had no right to cure the tax default and redeem the property under 11 U.S.C. §108(b)?

2. Did the Bankruptcy Court err in finding that the sale occurred post-petition when California Revenue and Taxation Code §3692.1 defines the date of the sale as the date the auction begins and the petition was not filed until two days after the auction began?

¹ Appendix references shall be in the form "App. X:YY" with the first number being the PDF number of the item and the second number being the page number in the Appendix.

3. Did the Bankruptcy Court err in finding that the County's action violated 11 U.S.C. §362(a)(6) as an act to collect a claim against the debtor when, under California state law, the real property tax obligation is an *in rem* obligation and not a personal obligation of the property owner?

4. Did the Bankruptcy Court err in finding that the Tax Collector's failure to stop the auction after the petition was filed was a discretionary action that violated the automatic stay even though the right of redemption had expired and the auction had started before the petition was filed?

III. STANDARD OF REVIEW

There are no disputed issues of fact in this case. The issues presented for review are purely questions of law, involving interpretations of the Bankruptcy Code and interpretations of state law with regard to the ultimate question of whether the automatic stay was violated. Each of those matters is recognized as a matter that is subject to *de novo* review.

A bankruptcy court's interpretation of the Bankruptcy Code is reviewed *de novo*. *Mwangi v. Wells Fargo Bank*, 764 F.3d 1169, 1173 (9th Cir. 2014) ("*Mwangi*"). A bankruptcy court's interpretation of state law is reviewed *de novo*. *In re Park at Dash Point, L.P.*, 985 F.2d 1008, 1010 (9th Cir. 1993). Specifically, the question of whether the automatic stay has been violated is recognized as a question of law which is reviewed *de novo*. *Mwangi*, 764 F.3d at 1173.

IV. STATEMENT OF THE CASE

A. Factual Background

As of February 5, 2016, RW Meridian, LLC ("Meridian") was the owner of 58+ acres of unimproved land located in the County of Imperial, California, on which the property taxes had not been paid for more than five years. (App. 1:1) In accordance with all applicable statutory requirements imposed by the California Revenue and Taxation Code ("R&T Code"), none of which are in dispute in this

case, the property was scheduled for tax sale by internet auction that was to commence on Saturday, February 6, 2016. (App. 1:1)

Pursuant to the statutory notices that were given to Meridian, and R&T Code §3707(a)(1), Meridian's right to redeem the property expired at 5:00 p.m. on Friday, February 5, 2016. (App. 1:2) Meridian did not redeem the property, and the auction began on Saturday, February 6, 2016, as scheduled. On Monday, February 8, 2016, at approximately 4:20 p.m., Meridian filed a Chapter 7 petition. (App. 1:2)

Relying upon the fact that the right of redemption had expired prior to the petition being filed, and the BAP's decision in *In re Tracht Gut, LLC*, 503 B.R. 804 (9th Cir. BAP 2014) ("*Tracht Gut*"), *aff'd*, No. 14-60007 (9th Cir. Sept. 8, 2016),² the County allowed the auction to continue and accepted the high bid of \$343,000. (App. 1:2-3, 11:79-80)

B. Procedural History

The County filed a Motion for Comfort Order on February 11, 2016, requesting confirmation that the completion of the auction had not violated the automatic stay because the right of redemption had expired prior to the petition being filed, and that the further act of recording the Tax Deed would not be a violation. (App. 1:1-3.) The Trustee filed a Request for Hearing and Opposition on February 24, 2016. (App. 3:8, 4:10, 5:14)

The hearing on the County's Motion for Comfort Order was set for April 7, 2016. (App. 3:8) Judge Mann issued a Tentative Ruling on April 5, 2016, which stated that the court's tentative was to deny the County's motion. (App. 7:28-30) At the hearing, Judge Mann requested further briefing on the question of whether a

² A copy of the Ninth Circuit's decision, referred to herein as *Tracht Gut I*, is included as PDF 23 in the Appendix.

tax collector has discretion during the course of the auction to accept a credit bid under R&T Code §3707(a)(2), whether the contingent right of redemption provided in §3707(d) is a sufficient property interest to bring the property into the estate when a bankruptcy is filed during the course of the auction, and what impact, if any, the Ninth Circuit's 2016 decision in *In re Perl* might have upon the issue. (App. 9:39-41, 49-50) To provide an opportunity for such briefing, Judge Mann continued the hearing to June 23, 2016, and set June 9, 2016, as the due date for both parties to file supplemental briefs and evidentiary materials. (App. 9:51)

On June 9, 2016, the County filed a Supplemental Brief and a Supplemental Declaration of Karen Vogel in support of its motion (App. 11:69-130), and the Trustee filed a Supplemental Brief and a Declaration of Ronald E. Stadtmueller in Support of Trustee's Supplemental Brief (App. 10:53-68).

On June 21, 2016, the court took the June 23 hearing off calendar and stated that a written decision would be provided. (App. 12:132) On July 5, 2016, Judge Mann issued the Decision, ruling that the County had violated the automatic stay and that the sale to the successful bidder was void. (App. 13:133-145) The County filed its Notice of Appeal on July 18, 2016. (App. 14:146)

V. SUMMARY OF ARGUMENT

The central issue on appeal is whether the Bankruptcy Court erred in finding that the County violated the automatic stay by allowing the auction to continue even though, under state law, the statutory right of redemption had expired prior to the petition being filed. There is no dispute that the right of redemption expired pursuant to R&T Code §3707 approximately three days before the petition was filed, without Meridian taking any action to redeem the property. The County asserts that, due to the pre-petition expiration of the right of redemption, the property was not protected by either 11 U.S.C. §362(a)(3) or (4), because it was not "property of the estate."

The County's position is supported by the BAP's ruling in *Tracht Gut*, which has been affirmed by the Ninth Circuit, decisions of other bankruptcy judges in California, 11 U.S.C. §108(b), and other decisions that have acknowledged that the dispositive question is whether the right of redemption existed when the petition was filed. No decision has been identified in which any court has held that tax-defaulted real property became property of the estate when a petition was filed after the right of redemption had expired under R&T Code §3707(a)(1). It appears that the Bankruptcy Court's ruling to that effect is the first of its kind.

The County also contends that Judge Mann erred in summarily concluding that the sale occurred post-petition without consideration of the fact that the R&T Code specifies that the date of sale is the date the auction begins. The auction was concluded after the petition was filed, but the question of when the sale occurred is a matter of state law, and California has expressly addressed the question by providing by statute that the date of the sale is the date the auction begins.

The Bankruptcy Court also erred in ruling that the continuation of the auction violated 11 U.S.C. §362(a)(6) which prohibits actions taken against the debtor to collect a claim. The auction was part of a lien-enforcement process against the real property and did not constitute an effort to collect a claim against the debtor. Under California state law, the real property tax obligation is an *in rem* obligation collectible only by enforcement of the statutory tax lien; it is not a personal obligation of the property owner and cannot be enforced as against the property owner personally.

Finally, as to the Bankruptcy Court's finding that the County's continuation of the auction was not a ministerial act because the County had discretion to stop or postpone the sale, the County submits that, because the right of redemption expired pre-petition, the property never became property of the estate and therefore, whether the County had discretion to stop the sale or not is irrelevant.

To the extent that the County could have taken action that would have resulted in the revival of the right of redemption by withdrawing the property from the auction or postponing the sale, the County submits that no bankruptcy law imposes an affirmative obligation on the County to take steps to put the debtor in a better position than the position that it occupied when the petition was filed.

This appeal presents serious questions involving the interface between California's property tax law and federal bankruptcy law. The Decision is of great concern to tax collectors throughout the state because it is contrary to their understanding of the law and their established practice. (App. 11:79-81) In affirming the BAP's decision in *Tracht Gut*, the Ninth Circuit emphasized that, when considering the interaction between a state's property tax regulatory scheme and bankruptcy law, deference must be given to state law. The Bankruptcy Code should not be read to frustrate a state's regulatory system regarding real property interests, unless there is clear and unambiguous language requiring such an interpretation. See, *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 546 (1994).

VI. ARGUMENT

- A. The Bankruptcy Court Erred in Finding That the Real Property Became Property of the Estate When the Petition Was Filed and Therefore Was Protected by the Automatic Stay Provisions of 11 U.S.C. §362(a)(3) and 11 U.S.C. §362(a)(4), Because the Right of Redemption Had Expired Pre-Petition by the Terms of California Revenue and Taxation Code §3707(a)(1) and the Trustee Had No Right to Cure the Tax Default and Redeem the Property Under 11 U.S.C. §108(b).

Any finding of a violation of the automatic stay based upon either 11 U.S.C. §362(a)(3) or (a)(4), must begin with a determination that the asset in question was "property of the estate." 11 U.S.C. §362(a)(3) prohibits any action to obtain possession of, or exercise control over, "property of the estate." 11 U.S.C. §362(a)(4) prohibits any action with respect to a lien against "property of the estate." If the asset in question is not "property of the estate," no action taken with

regard to that asset, whether as part of an effort to gain possession of or control over the asset, or to enforce a lien against the asset, violates 11 U.S.C. §362(a)(3) or (a)(4).³ See, *Mwangi*, 764 F.3d at 1179 (an asset that is not property of the estate is not, “subject to the protections of §362(a)(3)’s automatic stay provision.”)

To determine the property rights of a debtor on the petition date, one must look to state law. It is well established bankruptcy law that property rights are created and defined by state law (see, *Butner v. United States*, 440 U.S. 48, 54-55 (1979) (“*Butner*”)); the Bankruptcy Code does not create property rights that do not otherwise exist under state law. In affirming the BAP’s decision in *Tracht Gut*, the Ninth Circuit held that, when applying bankruptcy law in the context of property tax sales, deference must be given to the state statutory regulatory system that governs real property rights. *In re Tracht Gut, LLC*, No. 14-60007 (9th Cir. Sept. 8, 2016) (“*Tracht Gut I*”). (App. 23:247)

Under R&T Code §3707(a)(1), “the right of redemption terminates at the close of business on the last business day prior to the date of sale.” Under R&T Code §3692.1 the “date of sale” is “the date upon which a public auction begins.” In this case, the public auction began on Saturday, February 6, 2016, and the right of redemption expired under R&T Code §3707(a)(1) at 5:00 p.m. on Friday, February 5. Meridian’s petition was not filed until Monday, February 8, three days after the right of redemption had terminated under state law.

³ In ruling that the County violated §§362(a)(4) and (6), Judge Mann stated that, “Wholly apart from whether Debtor had any remaining rights in the Property as of the petition date, the County’s post-petition Sale of the Property was an action to enforce its tax lien post-petition to collect its prepetition claim against the Debtor.” (App. 13:136) The suggestion that a violation of §362(a)(4) for enforcement of a lien can occur “[w]holly apart from whether Debtor had any remaining rights in the Property as of the petition date” is erroneous on its face; §362(a)(4) only prohibits the enforcement of liens as against “property of the estate.” The same foundational question is presented by both §362(a)(3) and (4) – did the property become property of the estate when the petition was filed? If it did not, neither §362(a)(3) nor (4) could be violated. The fact that the tax sale did not constitute an action to collect a prepetition claim against the debtor, apart from enforcement of a lien, is discussed in Section VI.C., below.

1. *A Bankruptcy Trustee Has No Power to Redeem Tax-Defaulted Property If the Right to Redeem Has Expired Pre-Petition.*

On the day that the petition was filed, Meridian had no ability under state law to stop the sale of the property. (App. 11:82-83.) There is no provision in the Bankruptcy Code that would give the Trustee greater rights with respect to the property than those possessed by Meridian at the time the petition was filed. See, *In re Sandralee Rodgers*, 333 F.3d 64, 68-69 (2d Cir. 2003) (“*Rodgers*”).

Consistent with the principle that state law is controlling as to substantive property rights, 11 U.S.C. §108(b) provides, in pertinent part:

[I]f applicable nonbankruptcy law ... fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may ... cure a default, or perform any other similar act, *and such period has not expired before the date of the filing of the petition*, the trustee may only file, cure, or perform, as the case may be, before the later of –

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) 60 days after the order for relief. (Emphasis added.)

11 U.S.C. §108(b) limits the cases in which a trustee may cure a pre-petition default to situations in which a cure period established by applicable nonbankruptcy law has “not expired before the date of filing the petition.” A trustee has no right to cure a default if the time to cure, as fixed by applicable nonbankruptcy law, expired before the petition was filed. 11 U.S.C. §362 and 11 U.S.C. §108 must be read in a manner that gives meaning to both. Section 108 gives the trustee an expanded period of time to cure a default or redeem property *only if the right of redemption has not expired under state law* when the petition is filed. If 11 U.S.C. §362 were read to require a creditor to take affirmative steps to cause the revival of an expired right of redemption, the limitation in §108 would have no meaning.

If a right of redemption has *not* expired under state law, then that right of redemption becomes property of the estate. *Bank of Commonwealth v. Bevan*, 13 B.R. 989 (E.D. Mich. 1981). However, the filing of the petition does not resurrect the right of the debtor or a trustee to redeem property when that right has already been lost under state law. See, *Rodgers*, 333 F.3d at 65-66. That is exactly the situation in this case. R&T Code §3707(a)(1) fixed the time within which Meridian could redeem the property and that time expired prior to the commencement of this case. Therefore, there was no remaining right of redemption to pass to the estate.

The fact that the right of redemption might have revived under certain conditions is irrelevant; none of the conditions that would have revived the right of redemption occurred. No provision in the Bankruptcy Code requires a tax collector to take affirmative steps to trigger a revival of the right of redemption. The dispositive fact is that, when the petition was filed, neither the debtor nor the Trustee had any right under state law to redeem the property or to extend the redemption period. While 11 U.S.C. §108(b) was cited by the County in support of its position (App. 11:71), Judge Mann made no mention of it in the Decision.

The Trustee has argued that “redemption rights that commonly expire *subsequent* to a sale are consistent with the provisions of 11 U.S.C. §108(b).” (App. 21:211) Apparently, the Trustee believes that a state law that provides that a right of redemption expires *before* a sale is somehow inconsistent with §108(b) and should be disregarded, but there is no authority for that position. Section 108(b) expressly acknowledges that the expiration of a right of redemption is likely to be a matter of nonbankruptcy law, in this case California property tax law. Bankruptcy law does not dictate how a state may choose to define the expiration of a right of redemption. To the contrary, it is a well-established tenet of bankruptcy law that state law governs when it comes to defining real property rights.

2. *The BAP Held in Tracht Gut That, When the Right of Redemption Expires Pre-Petition, Tax-Defaulted Property Does Not Become Property of the Estate.*

The only appellate level decision identified that directly addresses the effect of the expiration of the right of redemption under R&T Code §3707 is *Tracht Gut*, which states that, if the right of redemption has expired under §3707 before the bankruptcy petition is filed, no subsequent action by a tax collector with respect to the property would violate the automatic stay. *Tracht Gut*, 503 B.R. at 811. In *Tracht Gut*, the bankruptcy court dismissed the debtor's claim for violation of the automatic stay without leave to amend, finding that it would not be possible to state a viable cause of action. The BAP affirmed, acknowledging that the owner's right of redemption as to tax-defaulted real property lapses the day before a scheduled tax sale under R&T Code §3707, and held:

Debtor's right of redemption as to the Properties lapsed the day before the tax sales occurred. Cal. Rev. & Tax. Code §3707.... Under these facts, *since Debtor's interest in the Properties lapsed before it filed for bankruptcy, the Properties never became property of the estate under §541, and any action by the County concerning these Properties would not run afoul of the automatic stay under §362(a).* *Id.* at 811-812 (emphasis added).

The BAP also rejected the argument that the recordation of the tax deed after the tax sale would violate the automatic stay on the basis that the recordation of the tax deed was a purely ministerial act (*id.* at 812), but that was set forth as a second independent basis for the BAP's ruling, and was not necessary once the BAP held that the property had not become property of the estate.

Under *Tracht Gut*, recently affirmed by the Ninth Circuit, the land never became property of the estate, or subject to the automatic stay, because Meridian's right of redemption lapsed three days before it filed its petition. Since the decision in *Tracht Gut* was issued, tax collectors throughout the state have relied upon the decision as authority for the proposition that, once the right of redemption has

expired, the filing of a bankruptcy has no effect upon the tax sale process. (App. 11:79-81)

Judge Mann concluded that *Tracht Gut* was not controlling because in that case the auction had been completed pre-petition. (App. 13:138.) But, the BAP did not say that the basis for its decision was that the auction was completed before the petition was filed; it said its decision was based upon the fact that the debtor's interest lapsed before the petition was filed.⁴ Judge Mann disregarded the fact that the basis for the decision, as stated by the BAP, was that, "*since Debtor's interest in the Properties lapsed before it filed for bankruptcy*, the Properties never became property of the estate under §541." *Id.* at 811-812 (emphasis added).

At the hearing on the County's motion for a stay pending appeal, Judge Mann explained that, in her opinion, the pre-petition expiration of the right of redemption was simply irrelevant, with the dispositive fact in this case being that the sale occurred post-petition:

I find Lusardi and Whiting Pools controlling in this context instead of *Tracht Gut*.

So the Ninth Circuit can disagree with me and say the right of redemption is important, but that's their job, not mine. (App. 8:81)

In reaching that conclusion, Judge Mann utterly disregarded the express language of the *Tracht Gut* decision, state law that terminates an owner's rights in tax-defaulted property at close of business on the last business day prior to the scheduled tax sale, and state law which provides that the date of sale is the date the auction begins.

⁴ The Trustee argued that, in *Tracht Gut*, the debtor's "redemption rights were extinguished prior to the bankruptcy filing *because the sale took place prior to the bankruptcy filing*" (App. 4:12, emphasis added.) That assertion ignores both the express language of the BAP's decision and the plain language of the R&T Code, which specifies that the right of redemption terminates at the close of business on the last business day prior to the scheduled sale.

3. *In Affirming Tracht Gut, the Ninth Circuit Expressly Acknowledged the Deference Due to the State's Statutory Property Tax System.*

In affirming the BAP's decision in *Tracht Gut* the Ninth Circuit extended the application of the Supreme Court's decision in *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994) ("*BFP*") to real property tax sales. In *BFP*, the Court addressed the nexus between a state law regulatory system and the federal bankruptcy law in the context of a mortgage foreclosure, and held that, "[a]bsent a clear statutory requirement to the contrary, we must assume the validity of this state-law regulatory background and take due account of its effect." *BFP*, 511 U.S. at 539. In *Tracht Gut I*, the Ninth Circuit noted the Supreme Court's reticence to interpret the bankruptcy law in a way that would frustrate the state regulatory regime, and found the Court's deference to state statutory regulatory systems that govern real property rights to be equally applicable to real property tax sales. (App. 23:247) Both the BAP and the Ninth Circuit concluded that, with regard to tax sales, "federal courts should pay considerable deference to state law on matters relating to real estate" (App. 23:247-248, citing *Tracht Gut*, 503 B.R. 816), and the Ninth Circuit went on to hold that "tax foreclosure sales conducted by state and local governments are governed by state law." (App. 23:248)

The Ninth Circuit decision included an extensive review of the due process protections contained in California's property tax scheme, noting that the statutory framework provides a "substantial lead time" during which tax-defaulted property may be redeemed, and that the final notice that is required before the sale must include a "statement that the right of redemption terminates the day before the sale." (App. 23:248-249)

The Ninth Circuit acknowledged the state's "traditional interest in regulating sales of real property," stating that avoiding sales that are conducted in accordance with the state's statutory framework would "seriously impinge upon that traditional

state interest” (App. 23:250), and going on to hold that “the policy of deferring to state law on matters of real estate applies as much to tax sales as to mortgage foreclosures” (App. 23:251).

In reaching its conclusion that the Supreme Court’s reasoning in *BFP* applies equally to tax sales, the Ninth Circuit noted that both the Fifth and Tenth Circuits have extended *BFP* to tax sales. (App. 23:250) In *T.F. Stone Company Inc. v. Harper*, 72 F.3d 466 (5th Cir. 1995), cited by the Ninth Circuit, the Fifth Circuit acknowledged “the presumption *against* reading federal laws to impinge on traditional areas of state regulation in the absence of a clear and manifest statutory mandate” (*id.* at 471), and noted that, “traditional rules of statutory construction and *deference to state regulatory interests* support the same outcome” (*id.* at 472, (emphasis added)).

According to the Supreme Court, while the Bankruptcy Code may override conflicting state law, in order to do so the meaning of the Bankruptcy Code’s text must be clear or the implications unambiguous, and “where the intent to override is doubtful, our federal system demands deference to long-established traditions of state regulation.” *BFP*, 511 U.S. at 546. As stated by the Court, the “security of titles to real estate” is an “essential state interest” and, “the power to ensure that security ‘inheres in the very nature of [state] government.’” *Id.* at 544, quoting *American Land Co. v. Zeiss*, 219 U.S. 47, 60 (1911). “To displace traditional state regulation in such a manner, the federal statutory purpose must be ‘clear and manifest.’” *Id.*, quoting *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990).

In this case, Judge Mann refused to follow state law which provides that the property owner’s redemption rights end the day before the auction begins (not upon the sale of the property), and specifies that the date of the sale is the date the auction begins.

4. *The BAP's Decision in Tracht Gut is Consistent with the Rulings of Other Bankruptcy Judges in California Who Have Addressed This Issue.*

Other bankruptcy courts in California have ruled that, where the right of redemption expired prior to the filing of a bankruptcy petition, the property did not become property of the estate so as to be protected by the automatic stay. In 2010, prior to *Tracht Gut*, the Honorable Richard M. Neiter of the Central District of California, Los Angeles Division, addressed a factual situation virtually identical to the facts of this case and concluded, based upon 11 U.S.C. §108, that the court had no jurisdiction to set aside the sale because the right of redemption had terminated under state law prior to the bankruptcy being filed. *In re Fahmi Hammad*, No. 2:10-bk-54706-RN (C.D. Cal. 2010) ("*Hammad*").

In *Hammad*, the tax sale was scheduled to start on Monday, October 18, 2010, and therefore Mr. Hammad's right to redeem the property expired at 5:00 p.m. on Friday, October 15. Mr. Hammad filed bankruptcy on Monday, October 18, prior to his property being offered at the auction. The tax collector proceeded to sell Mr. Hammad's property on Tuesday, October 19. Mr. Hammad alleged the sale violated the automatic stay, but Judge Neiter disagreed, stating:

The Debtor's right of redemption terminated at 5:00 p.m. on October 15, 2010. Therefore, pursuant to 11 U.S.C. § 108, this Court is without jurisdiction to set aside the sale, as the Debtor filed the instant bankruptcy petition at 4:50 p.m. on October 18, 2010, after the right to redeem the property had terminated.

A copy of Judge Neiter's Order in the *Hammad* case was provided to the Bankruptcy Court and is part of the record on appeal. (App. 11:80-81, 89-90)

The County understands that the *Hammad* decision has no precedential value, but it demonstrates that other bankruptcy courts in other California districts have ruled that tax-defaulted real property does not become property of the estate if the right of redemption has expired prior to the filing of the petition.

5. *Decisions from Other Circuits Acknowledge That, If the Right to Redeem Has Expired Pre-Petition, the Property Does Not Become Part of the Estate.*

The Second Circuit's decision in *In re Sandralee Rodgers*, 333 F.3d 64 (2d Cir. 2003) ("*Rodgers*"), contains an excellent discussion of the principles relevant to the issue now before this Panel. In *Rodgers*, tax-defaulted property was sold at public auction. The owner filed bankruptcy before the purchase price was paid and the deed was delivered. The county recorded the deed post-petition, and the debtor alleged a violation of the automatic stay. As summarized by the Second Circuit:

[The debtor] filed a bankruptcy petition hoping that the automatic stay would block transfer of the deed and resurrect her ability, lost under state law, to redeem the property. She contended that since a deed had not been transferred, she retained 'legal or equitable interests ... in property' that, upon filing the petition, became property of the estate. *Id.* at 65-66.

The Second Circuit cast the "central question" as whether the debtor possessed "legal or equitable interests" in the property so that it became part of the bankruptcy estate. *Id.* at 66. The court acknowledged that "[s]tate law generally determines the existence of these interests" and that "[p]roperty interests are created and defined by state law." *Id.* Under New York tax foreclosure law, the right to redeem had expired pre-petition on the day before the commencement of the public auction (*id.* at 67), and the court concluded that, "once the ability to redeem has been lost pre-petition, the foreclosed property sold at a public sale is no longer property of the estate for purposes of Section 541" (*id.* at 68).

Judge Mann cited *Rodgers* in support of her ruling that the property became property of the estate, referring to language from a *mortgage* foreclosure case cited in *Rodgers* that referred to the owner's title and right to possession continuing until the equity of redemption was extinguished at the foreclosure sale. (App. 13:138) However, a close reading of *Rodgers* reveals that the court reviewed both New York's *tax* foreclosure law under which the right of redemption expired the day

before the start of the auction, and New York's *mortgage* foreclosure law under which the right of redemption expired at the conclusion of the auction, and concluded that, "in the context of *either* a tax or mortgage foreclosure, under New York law, '*once the ability to redeem has been lost pre-petition*, the foreclosed property sold at a public sale is no longer property of the estate'" *Id.* at 68 (emphasis added). Most importantly, the court expressly rejected the debtor's argument that her possession of title alone should have been sufficient to bring the property into the estate "whether or not she had the right to redeem under state law", noting that "the estate's legal and equitable interests in property rise no higher than those of the debtor," and that "the estate only 'includes property to which the debtor would have a right if the debtor were solvent.'" *Id.* at 68-69.

Similarly, in *In re Thomas K. Theoclis*, 213 B.R. 880 (Bkrcty Ct. Mass. 1997), a mortgage foreclosure case, the court reviewed Massachusetts state law to determine when the mortgagor's redemption rights terminated, and then held that, since those redemption rights terminated a few hours prior to the filing of the bankruptcy, "neither the Debtor nor the bankruptcy estate had any interest in the [property] (other than the Debtor's limited rights as a tenant at sufferance) and, as a result, the automatic stay was inapplicable to a transfer of title." *Id.* at 882.

6. *Lusardi Did Not Address the Dispositive Question Presented in This Appeal.*

In the proceedings below, the Trustee cited *40235 Washington Street Corp. v. W.C. Lusardi*, 329 F.3d 1076 (9th Cir. 2003) ("*Lusardi*") and claimed that the pertinent facts were nearly identical. (App. 4:12) That is not true. *Lusardi* did not so much as mention, much less address, the issue of what the effect is of the automatic stay when the owner's right of redemption has expired under state law prior to the filing of the bankruptcy petition. That was not an issue in the case.

The Decision characterized *Lusardi* as "the most cogent authority as to the breadth of the automatic stay where a tax sale occurs post-petition." (App. 13:136)

As Judge Mann explained, she interprets the *Lusardi* decision as standing for the proposition that a post-petition tax sale is void, regardless of whether the right of redemption has expired before the petition was filed or not. (App. 22:222)

The County does not take issue with anything the Ninth Circuit said in the *Lusardi* decision. However, *Lusardi* does not address the dispositive issue in this case, i.e., whether the estate acquires any interest in tax-defaulted property as to which the right of redemption has expired under state law before the bankruptcy case is filed. That was simply not an issue in *Lusardi* because in that case the petition was filed *before* the right of redemption expired.⁵

In *Lusardi*, the tax sale was scheduled to commence on Monday, March 5, 1990, and the right of redemption expired at 5:00 p.m. on Friday, March 2, 1990. The petition was filed on Thursday, March 1, 1990, before the right of redemption expired. These facts, which are a matter of public record and are not disputed, were presented to the Bankruptcy Court in a declaration of Karen Vogel, the Imperial County Tax Collector, and the court was asked to take judicial notice of them so that the *Lusardi* decision could be interpreted in its proper context.

While the Trustee did not contest the accuracy of the dates of the relevant events or object to judicial notice being taken of them, Judge Mann was apparently unwilling to accept the County's evidence of the dates, all of which are matters of

⁵ *Lusardi* does not discuss the expiration of the right of redemption, suggesting that it was not an issue in the case. While the actual dates are not noted in the decisions, the fact that the petition was filed *before* the right of redemption expired can certainly be inferred. The District Court decision recites that the bankruptcy was filed and "a week later" the tax sale occurred. *40235 Washington St. Corp. v. WC Lusardi*, 177 F.Supp.2d 1090, 1095 (S.D. Cal. 2001) (emphasis added). The clear implication is that, at the time the bankruptcy petition was filed, the right of redemption had not expired.

To confirm the actual facts, the County inquired of the Tax Collector of the County of Riverside, which was the tax collector's office that was involved in the *Lusardi* case, and presented the actual dates to the Bankruptcy Court by way of declaration. (App. 6:21-22)

public record.⁶ In the Decision, Judge Mann declined to consider the factual distinction between the cases, and made no mention of the evidentiary showing made by the County to establish the relevant dates, simply saying: “While the County attempts to distinguish *Lusardi* by extrapolating from the sale date mentioned in the case to argue that the right of redemption had not expired, the expiration of the right of redemption neither appears in the decision nor is discussed as a basis for the Ninth Circuit’s ruling.” (App. 13:137) Of course, the expiration of the right of redemption was not mentioned or discussed in *Lusardi* – the right of redemption had not expired when the petition was filed and therefore it simply was not an issue. That fact is essential to a proper analysis of whether *Lusardi* has any bearing whatsoever upon this case.

Lusardi was premised upon the protection afforded by the automatic stay to “property of the estate.” In that case, the bankruptcy was filed *before* the right of redemption expired and therefore the property indisputably became property of the estate when the petition was filed. The critical fact in this case, which is the essential basis for the legal question presented, is that the petition was filed *after* the right of redemption expired. Since that did not happen in *Lusardi*, and the decision contains no discussion whatsoever of the right of redemption, *Lusardi* provides no insight as to whether tax-defaulted property, as to which the right of redemption has expired, becomes property of the estate when the petition is filed.

⁶ To remove any uncertainty as to the relevant dates of the events in *Lusardi*, a Declaration of Melissa Johnson, the Chief Deputy Treasurer Tax-Collector for Riverside County, authenticating certified copies of relevant documents from Riverside County’s official records is submitted herewith, and this Panel is respectfully requested to take judicial notice of them, and of the fact that they establish that in *Lusardi* the right of redemption expired at 5:00 p.m. on March 2, 1990, and the tax sale began on March 5, 1990. (App. 19:177-207) This Panel is also asked to take judicial notice of the fact that the bankruptcy petition in the underlying case in *Lusardi* was filed on March 1, 1990, in the United States Bankruptcy Court for the Southern District of California in Bankruptcy Case No. 90-01612-LM11. (App. 20:208)

7. *The Whiting Pools Decision Does Not Support the Decision.*

The Decision cited *United States v. Whiting Pools*, 462 U.S. 198 (1983) (“*Whiting Pools*”) for the proposition that, “[a]ll rights held by Debtor on the petition date became property of the estate under §541 on the petition date.” (App. 13:137-138) *Whiting Pools* was not an automatic stay case per se; it involved a situation where the IRS had seized property of the Debtor before a Chapter 11 petition for reorganization was filed and a turn-over order was requested under 11 U.S.C. §542(a). The Court reviewed the status of the parties’ rights in the property and found that the property fell within the broad scope of the reorganization estate because the collection provisions of *the Internal Revenue Code* do not transfer ownership of the property until the property is sold. *Id.* at 210 (emphasis added).

In reaching its conclusion, the Court noted that its conclusion was dependent upon the case being a reorganization case, and not a liquidation case:

Our analysis in this case depends in part on the reorganization context in which the turnover order is sought. *We express no view on the issue whether 542(a) has the same broad effect in liquidation or adjustment of debt proceedings.* *Id.* at 208 n. 17 (emphasis added).

Moreover, in finding that the seized property fell within the scope of the reorganization estate for purposes of a turn-over order, the Court did not rely upon the definition of the “estate” as set forth in §541(a)(1) alone, but noted that, “in the context of this case [a reorganization], §541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code”, and found that several other such provisions brought the property in question into the estate. *Id.* at 205. In this case, no other provision of the Bankruptcy Code brings the property into the estate. In fact, 11 U.S.C. §108 supports the conclusion that the property did not become property of the estate because the right of redemption had expired pre-petition under state law.

Whiting Pools does not support the Decision because there was no discussion whatsoever of what the impact would be of a taxpayer's right of redemption having expired prior to the filing of the bankruptcy petition. Under I.R.C. §6337, any person whose property has been levied upon by the IRS has the right to redeem the property "at any time prior to the sale thereof." Consequently, it is clear that at the time the reorganization petition was filed in *Whiting Pools*, the taxpayer still had the right to redeem the property under the terms of the Internal Revenue Code. That is the critical distinction between the situation in *Whiting Pools* and the situation in this case.

The Court acknowledged that it looked to the Internal Revenue Code to determine the respective rights of the parties at the time the petition was filed, and noted that the situation would have been different if, under the Internal Revenue Code, title to the property had passed to the IRS upon the seizure of the property. *Id.* at 210. In this case, California law expressly terminates the property owner's right to redeem the property at 5:00 p.m. on the last business day prior to the scheduled sale and, under the terms of 11 U.S.C. §108, the right of redemption is not extended in such a situation.

Whiting Pools actually supports the County's position that the fact that Meridian still held legal title to the property when it filed its petition does *not* compel a finding that the property became property of the estate, because the Court specifically noted that "Congress intended to exclude from the estate property of others in which the debtor had some minor interest such as a lien or bare legal title." *Whiting Pools*, 462 U.S. at 205 n. 8. In discussing *Whiting Pools*, the *Rodgers* court concluded that, while the debtor might retain some "incidents of ownership," such as bare legal title and a limited right to possession, those are insufficient to bring the property within the estate and the protection of the automatic stay. *Rodgers*, 333 F.3d at 69.

8. *The Ninth Circuit's Decision in In Re Perl Confirms That Only Property Interests Cognizable Under State Law Become Property of the Estate.*

In *In re Perl*, 811 F.3d 1120 (9th Cir. 2016) (“*Perl*”), the Ninth Circuit considered what the nature of a debtor’s interest in real property must be in order to trigger the protection of the automatic stay. *Perl* involved the post-petition eviction of the debtor from residential real property. Perl had lost title to the property through a foreclosure, but refused to vacate. The new owner of the property obtained a judgment and a writ of possession in state court. Perl filed bankruptcy, but was then evicted and asserted a violation of the automatic stay. The bankruptcy court ruled, “that Perl’s ‘bare possessory interest, coupled with the possibility of some sort of relief [from the pending litigation]’ gave ‘the bankruptcy estate a protected interest that is subject to the automatic stay.’” *Id.* at 1124. On appeal, the BAP held that, “Perl had a recognizable equitable interest in the property by virtue of his physical occupancy, notwithstanding the illegality of his continued occupancy.” *Id.* The Ninth Circuit disagreed.

The Ninth Circuit began by acknowledging that a bankruptcy court is to “look to state law to determine property interests in bankruptcy proceedings,” citing *Butner*, and held that the controlling factor was not Perl’s physical occupancy, but whether Perl had any legal or equitable rights in the property *under California law* on the petition date. *Id.* at 1127-1128. The court concluded that at the time he filed his bankruptcy petition, “Perl had been completely divested of all legal and equitable rights that would otherwise be protected by the automatic stay” and that the eviction “did not violate the automatic stay because no legal or equitable interests in the property remained to become part of the bankruptcy estate.” *Id.* at 1130.

The Ninth Circuit’s conclusion that physical occupancy alone, without an underlying legal right to possession, did not constitute a legal or equitable property

interest that would become property of the estate subject to protection by the automatic stay, is consistent with Supreme Court's remark in *Whiting Pools* that minor interests such as "bare legal title" do not constitute property of the estate.

9. *The Decision Did Not Identify a Property Interest Cognizable Under State Law Sufficient to Bring the Real Property into the Estate.*

Judge Mann's assertion that the debtor held a variety of rights related to the property even after the right of redemption expired - legal title, physical possession, and "an interest in proceeds from the sale if the Property was not sold during the tax auction" (App. 13:137), disregards California real property law which, as part of its regulatory tax collection system, terminates the owner's right of redemption and gives the County the right to foreclose its tax lien and sell the property, despite the fact that the owner retains bare legal title and possession. By adopting such an expansive view of the scope of the automatic stay, the Decision violates the principle set forth by the Supreme Court in *BFP* and by the Ninth Circuit in *Tracht Gut I*, that considerable deference must be given to state law on matters relating to real estate, and that bankruptcy law should not be interpreted in a way that would frustrate state regulatory systems that govern real property rights.

None of the items listed by Judge Mann are sufficient to bring the property into the estate. Bare legal title is not sufficient to bring property into the estate. *Whiting Pools*, 462 U.S. at 205 n. 8. While possession in this case is questionable since the property is unimproved raw land, even if Meridian were technically "in possession" of the land when it filed its petition, bare possession alone is not sufficient to bring the property into the estate. *Perl*, 811 F.3d at 1130. Judge Mann's statement about sales proceeds is ambiguous because it assumes a completed sale. If the property is "not sold" there will be no "proceeds from the sale." Only if the sale is validated will there be "proceeds from the sale" in which Meridian will have an interest. The court's statement appears to confuse two

concepts – the debtor’s right to receive excess proceeds from a completed sale, and the possibility of the debtor’s right of redemption being revived under state law if the property were not sold. The two concepts are mutually exclusive.

At the April 7 hearing, Judge Mann questioned whether the potential for revival of the right of redemption under R&T Code §3707(d) if the property was not sold might constitute a property interest that would pass to the estate. While it is true that if the property had not sold at the auction, Meridian’s right of redemption would have revived under R&T Code §3707(d), no bankruptcy law has been identified that would impose on the County an affirmative obligation to stop the auction so as to cause a revival of the right of redemption. The filing of a bankruptcy petition does not “resurrect” a right of redemption already lost under state law. See, *Rodgers*, 333 F.3d at 65-66.

Once the right of redemption expired, the only remaining property interest that Meridian had was a contingent right, and no action by either Meridian or the Trustee could trigger the contingency. There was nothing that Meridian could have done if it had been solvent to stop the auction or revive the right of redemption; all that Meridian could have done was wait and see whether a qualifying bid was made. Since there was nothing that Meridian could do to trigger the contingency at the time the petition was filed, there was no legal or equitable interest that could become property of the estate. In *Perl*, the Ninth Circuit rejected the debtor’s argument that “the possibility of some sort of relief,” contingent upon the outcome of the pending litigation, gave the estate a legal or equitable interest in the property. *Perl*, 811 F.3d at 1124. In this case, all that Meridian could do was wait and see whether the property would sell; when the successful bid was accepted, Meridian’s contingent right was terminated.⁷

⁷ In this section of the Decision, Judge Mann attempts to recharacterize the nature of the property owner’s rights under state law, by referring to “the contingent expiration of the redemption right under

The Decision listed a number of other factual situations in which Meridian's expired right of redemption could have revived under state law and cited *In re Gallardo*, 35 B.R. 321 (Bankr. N.D. Ohio 1983) ("*Gallardo*") as authority for the proposition that, "contingent rights become property of the estate." (App. 13:139) However, *Gallardo* says nothing about contingent rights becoming property of the estate. Rather, *Gallardo* dealt with the question of whether an *unexpired* right of redemption, provided for by state law, would be a sufficient interest in property to bring the property into the estate. In *Gallardo*, the bankruptcy court noted that, under Ohio state law, the "debtor retains the right of redemption until the sale has been confirmed", and went on to state that, "[i]t is well established *that a right of redemption which exists at the time a bankruptcy petition is filed* becomes property of the estate." *Id.* at 322 (emphasis added). The court went on to state that "the right of redemption *which exists* pursuant to [state law] is an interest which becomes part of the bankruptcy estate upon the filing of the petition." *Id.* (emphasis added). The court stated that the question presented was "whether the statutory right is sufficient interest in property so as to enable a debtor to exercise the avoidance power available under the Bankruptcy Code," and then held that a statutory right of redemption was a sufficient interest. *Id.* at 323.

Clearly, if the right of redemption had still existed when the petition was filed, it would have been a sufficient interest to bring the property into the estate. That was the case in *Gallardo*, but *Gallardo* says nothing about a situation such as the one presented in this case where the right of redemption expired before the petition was filed, and would only revive upon the occurrence of other events over which neither the debtor nor the Trustee had any control.

Tax Code §3707(a)(1)." (App. 13:138) In fact, it is not the expiration that is contingent, all conditions to the expiration having occurred, it is the revival of the right of redemption that is contingent.

Judge Mann apparently misunderstood the County's position with regard to the contingent right of revival, stating that "[t]he County contends that the contingent revival of the right of redemption set forth in Tax Code §3707(d) is not property of the estate because the contingency is not in the Debtor's control." The County does not contend that the contingent interest is not property of the estate, but that none of the events that would have triggered revival occurred, and that the contingent interest is not sufficient to bring the land itself within the protection of the automatic stay. None of the triggering events were things that either Meridian or the Trustee could control; they would either occur, in which case Meridian's right of redemption would revive and be an asset of the estate, or they would not occur and the right of redemption would not revive and the contingent right would terminate.

The point is not that contingent rights that are not within the control of the Trustee or the debtor are not property of the estate but that, if neither the Trustee nor the debtor can control them, they may become worthless by the passage of time or by the occurrence of other events that are also beyond the control of the Trustee or the debtor. In this case, that is exactly what happened. When the petition was filed, Meridian had a contingent right in that, if the property did not sell at the auction, its right of redemption would revive and would be property of the estate, but the property did sell and therefore the debtor's contingent interest terminated. No authority has been identified that would suggest that the County had an affirmative obligation to take steps that would have resulted in the revival of the debtor's right of redemption.

Judge Mann ruled that the automatic stay was violated, "[b]ecause Debtor had valuable property rights on the day it filed bankruptcy under state law which were only in part contingent." (App. 13:140) The Decision does not explain why

Meridian's rights under state law were "only in part contingent." The absolute right of redemption had expired, leaving Meridian with only contingent rights.

B. The Bankruptcy Court Erred in Finding That the Sale Occurred Post-Petition When California Revenue and Taxation Code §3692.1 Defines the Date of the Sale as the Date the Auction Begins and the Petition Was Not Filed Until Two Days After the Auction Began.

State law governs when it comes to matters involving real estate transfers. R&T Code §3692.1 defines the "date of sale" as "the date upon which a public auction begins." The Decision acknowledged that "Debtor's right of redemption in regard to the Sale expired at 5:00 p.m. on Friday, February 5, 2016 pursuant to Tax Code section 3707(a)(1)." (App. 13:135) Under R&T Code §3707(a)(1), the right of redemption terminates on the last business day prior to "the date of the sale." By acknowledging that the right of redemption expired on February 5, Judge Mann apparently accepted the fact that, for purposes of §3707(a)(1), the "date of the sale" was Saturday, February 6, when the auction began, and not Tuesday, February 9, when the auction concluded.

Yet, Judge Mann's ruling was based upon her summary determination that, "the tax sale here occurred post-petition." (App. 13:134) While it is undisputed that the *auction was concluded* post-petition, that does not establish when the *sale occurred*. There are different points in times at which the sale could be deemed to occur. The sale could occur at the commencement of the auction, at the time of the first qualifying bid, at the time of the acceptance of the high bid, at the time the purchase money is paid, or at the time the deed is recorded. When the sale actually occurs is a matter of state law, and the California Legislature has expressly provided in R&T Code §3692.1 that the "date of sale" is the date the auction begins, which in this case was February 6, two days before the petition was filed. Judge Mann does not appear to have critically considered the question of when, *under state law*, the sale occurred, or the significance of §3692.1.

C. The Bankruptcy Court Erred in Finding That the County's Action Violated 11 U.S.C. §362(a)(6) as an Act to Collect a Claim Against the Debtor When, Under California State Law, the Real Property Tax Obligation is an *In Rem* Obligation and Not a Personal Obligation of the Property Owner.

Judge Mann ruled that, even if there was no violation of 11 U.S.C. §362(a)(3) or §362(a)(4) because the land did not become “property of the estate,” the continuation of the auction violated §362(a)(6) as an action to “collect ... a claim against the debtor.” (App. 13:19) That issue had not been raised by the Trustee or briefed by either party, but was raised for the first time in the Decision.

Section 362(a)(6) bars action taken to collect a “claim against the debtor” as distinguished from action taken against “property of the estate,” but a claim for property taxes is not, under California law, a claim against the debtor. Real property taxes are not personal debts, no personal liability arises from their nonpayment, they are *in rem* liens which can only be enforced as against the real property itself. *City of Huntington Beach v. Superior Court*, 78 Cal.App.3d 236, 240 (1978). As stated in *In re D. Papagni Fruit Co.*, 132 B.R. 42 (Bankr.E.D.Cal 1991), “real property taxes are *in rem* taxes assessable against the property only [citation omitted] and, unlike virtually every other type of tax imposed, are not in any manner enforceable against an individual or other entity.” *Id.* at 44.

The Decision asserted that §362(a)(6) prohibits collection activities for antecedent debts (App. 13:136-137), without addressing the fact that the prohibition in §362(a)(6) specifically applies to action taken “against the debtor,” as distinguished from action against “property of the estate.” What §362(a)(6) prohibits is action *against a debtor* for a debt for which the debtor can be held individually liable. Under California law, the County cannot collect real property taxes by taking action against the property owner.

When ruling upon the County's motion for a stay pending appeal, Judge Mann cited *In re Bates*, 270 B.R. 455 (Bankr. N.D. Ill. 2001) (“*Bates*”) for the

principle that an *in rem* claim falls within the Bankruptcy Code's definition of a "claim". (App. 24:260) However, *Bates* specifically noted that, under Illinois' real property tax law, the owner of property "is personally liable for the taxes levied." *Id.* at 457. That is not the case in California. In addition, the *Bates* decision expressly acknowledged the distinction between situations in which the statutory right of redemption still existed as of the petition date, and those in which the right of redemption had expired pre-petition. *Id.* at 469-470.

In *Bates*, the court stated that, "[i]f a Chapter 13 debtor with property subject to an Illinois tax sale still had the right to redeem by a lump-sum payment at the time of the filing of the case, that right would remain after bankruptcy, and would be subject to the 60-day extension of §108(b)." *Id.* at 466 (emphasis added). The court went on to explain that, "[c]laims in bankruptcy are assessed as of the date the bankruptcy is filed" and, "[a]s long as the redemption period has not expired prior to the bankruptcy filing, there is a claim that can be treated during the bankruptcy case" *Id.* at 467 (emphasis added). In a later section of the decision, the court took care to explain at length that:

(5) *The effect of expiration of the redemption period prior to a bankruptcy filing.* The discussion of bankruptcy and Illinois tax sales, as set out above, considers only the situation of a bankruptcy case filed during the period of redemption allowed by Illinois law. If a bankruptcy case is filed after the expiration of the redemption period, the situation is different.... In effect, a transfer of the landowner's rights occurs at the end of the redemption period if a bankruptcy is not in place. Under these circumstances, there is no "claim" (or "right to payment" under § 101(5) of the Bankruptcy Code) that can be treated in the bankruptcy case. *Id.* at 469-470 (emphasis in original).

Judge Mann cited *Morgan Guar. Tr. Co. v. Am. Sav. & Loan Ass'n*, 804 F.2d 1487 (9th Cir. 1986) ("*Morgan*") for the principle that §362(a)(6) is to be interpreted broadly. (App. 24:260) However, in *Morgan* the Ninth Circuit explained that the activities prohibited under the other subparts of §362(a), including the enforcement of liens under 362(a)(4), "all involve attempts to

confiscate the debtor's property or require the debtor to act affirmatively to protect its interests" and went on to explain that, "[a]n additional purpose of the stay, to which Congress specifically addressed subsection 362(a)(6), is to prevent harassment of the debtor." *Id.* at 1491. Here, the continuation of the auction was not an act of harassment against the debtor; it was simply an action to enforce a lien, which would be subject to §362(a)(4) if the land was "property of the estate."

D. The Bankruptcy Court Erred in Finding That the Tax Collector's Failure to Stop the Auction After the Petition Was Filed Was a Discretionary Action That Violated the Automatic Stay Even Though the Right of Redemption Had Expired and the Auction Had Started Before the Petition Was Filed.

R&T Code §3706 imposes a mandatory duty on a tax collector to sell property that is scheduled for sale if it is not redeemed; it states, "[i]f the property is not redeemed before the close of business on the last business day prior to the date of the sale of the property, the tax collector *shall* sell the property at public auction to the highest bidder at the time and place fixed." (Emphasis added.)

The Decision referred to a number of sections in the R&T Code that Judge Mann believed showed that the Tax Collector had discretion to stop, postpone, or modify the sale after the right of redemption had expired. In several cases, Judge Mann's characterization of the power bestowed by the section cited is not accurate. However, the County will not address each of those sections in detail at this time, because the question of whether the Tax Collector had discretion to stop, postpone, or modify the sale would only be relevant if it were first determined that the land became property of the estate at the time the petition was filed and the BAP's statement in *Tracht Gut* is clear that, where the debtor's right of redemption has lapsed under R&T Code §3707 before it files for bankruptcy, the property does not become property of the estate and no action by the County, whether discretionary or not, would violate the automatic stay. *Tracht Gut*, 503 B.R. at 811-812.

VIII. CONCLUSION

The state has a substantial interest in the regulation of real property sales and in the efficient collection of real property taxes. Both the Supreme Court and the Ninth Circuit have held that, in such circumstances, deference must be given to state law and bankruptcy law is not, absent clear and unambiguous language dictating the result, to be interpreted in a way that will frustrate the state's interests.

Under California law, Meridian's right of redemption expired prior to the filing of the petition and neither Meridian nor the Trustee had any ability to stop the sale or resurrect the right of redemption. Under state law, the date of the sale was the date the auction began, which was two days prior to the petition being filed. No authority has been identified that would compel the BAP to conclude, contrary to its statement in *Tracht Gut*, that despite the pre-petition lapse of the right of redemption, the property still became property of the estate subject to the protection of the automatic stay when the petition was filed.

The County respectfully submits that the Decision should be reversed and remanded to the Bankruptcy Court for entry of an order confirming that the County did not violate the automatic stay by concluding the auction, and that the recordation of the Tax Deed will not be a violation.

Respectfully, submitted,

Dated: October 7, 2016

SCHWARTZ HYDE & SULLIVAN, LLP

By: /s/ Laurel Lee Hyde
Laurel Lee Hyde
Attorneys for Appellant,
COUNTY OF IMPERIAL
TREASURER-TAX COLLECTOR

CERTIFICATION OF INTERESTED PARTIES

The undersigned certifies that the following parties have an interest in the outcome of this appeal. These representations are made to enable judges of the Panel to evaluate possible disqualification or recusal:

1. American Pacific Investments, LLC – Buyer at Tax Sale
2. Iqbal Ahmed – Principal in Buyer at Tax Sale
3. Mehnaz Ahmed - Principal in Buyer at Tax Sale
4. Fraz Ahmed - Principal in Buyer at Tax Sale
5. Harris Ahmed - Principal in Buyer at Tax Sale
6. County of Imperial - Appellant
7. Ronald E. Stadtmueller – Trustee, Appellee
8. RW Meridian, LLC - Debtor
9. Ralph Bowen – Principal in Debtor
10. Nicole H. Kim – Unsecured Creditor
11. Pitzerwood, LLC – Unsecured Creditor

Dated: October 7, 2016

SCHWARTZ HYDE & SULLIVAN, LLP

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COUNTY OF IMPERIAL
TREASURER-TAX COLLECTOR

CERTIFICATION REQUIRED BY BAP RULE 8015(a)-1(b)

BAP DOCKET NUMBER SC-16-1227
Bankruptcy Case No. 16-00629-MM7

[CHAPTER 7]

In re RW MERIDIAN LLC

The undersigned certifies that the following are known related cases and appeals:
NONE.

Dated: October 7, 2016

SCHWARTZ HYDE & SULLIVAN, LLP

By: /s/ Laurel Lee Hyde
Laurel Lee Hyde
Attorneys for Appellant,
COUNTY OF IMPERIAL
TREASURER-TAX COLLECTOR

CERTIFICATE OF COMPLIANCE

Federal Rule of Bankruptcy Procedure 8015(a)(7)

Pursuant to Federal Rule of Bankruptcy Procedure 8015(a)(7), the undersigned certifies that the Appellant's Opening Brief complies with the type-volume limitation and that the Appellant's Opening Brief contains 10,462 words (excluding the cover page, tables, signature blocks and required certificates) as counted by the computer program used to prepare the Opening Brief.

Dated: October 7, 2016

SCHWARTZ HYDE & SULLIVAN, LLP

By: /s/ Laurel Lee Hyde
Laurel Lee Hyde
Attorneys for Appellant,
COUNTY OF IMPERIAL
TREASURER-TAX COLLECTOR

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2016, I electronically filed the APPELLANT'S OPENING BRIEF with the Clerk of the Court for the Bankruptcy Appellate Panel for the Ninth Circuit by using the CM/ECF system.

I certify that all parties of record to this appeal either are registered CM/ECF users, have registered for electronic notice, or have consented in writing to electronic service, and that service will be accomplished through the CM/ECF system.

The parties of record who are being served through the CM/ECF system are as follows:

See attached Service List

Dated: October 7, 2016

/s/ Patricia Russell

Patricia Russell

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