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2 **FOR PUBLICATION**

FILED & ENTERED

MAY 09 2011

CLERK U.S. BANKRUPTCY COURT
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8 **UNITED STATES BANKRUPTCY COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **RIVERSIDE DIVISION**

11 In re:

12 RICHARD JOHN RINARD,

13
14 Debtor(s),

15 RICHARD JOHN RINARD, Debtor and
16 HELEN R. FRAZER, Chapter 7 Trustee,

17 Plaintiff(s),

18
19 Vs.

20 POSITIVE INVESTMENTS, INC.,

21 Defendant(s).

Case No.: 6:10-bk-50349-SC

Adversary No.: 6:11-ap-01660-SC

Chapter: 7

MEMORANDUM OPINION

Hearing Date:

Date: May 9, 2011

Time: 11:00 a.m.

**Location: Video Hearing Room 126,
3240 Twelfth Street, Riverside, CA 92501**

and

**Ronald Reagan Federal Building & Court
House, Courtroom 5C
411 West Fourth Street
Santa Ana, CA 92701**

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26 Before the Court is an Emergency Motion pursuant to Rule 65 of the Federal Rules of
27 Civil Procedure filed by Movants Richard John Rinard (the "Debtor") and Helen R. Frazer, the
28 Chapter 7 Trustee for the Debtor's Bankruptcy Estate ("Trustee") (together the "Movants")

1 seeking entry of a temporary restraining order and/or a preliminary injunction order enjoining
2 Defendant Positive Investments, Inc. (the "Defendant" or "Respondent") and its officers,
3 agents, servants, employees, and attorneys and those in active concert or participation with
4 them, from foreclosing on commercial real property of the bankruptcy estate commonly known
5 as 1812 - 1816 W. Foothill, Upland, CA, 91786 (the "Foothill Parcels").
6

7 The Court is presented with, among others, the following issues:

- 8 (1) Does the Automatic Stay remain in existence, with respect to Estate Property, at this
9 time?
10
11 (2) Are decisions by the Bankruptcy Appellate Panel authoritative and precedential?
12
13 (3) Are the Movants entitled to the Temporary Restraining Order or Preliminary
Injunction Order they seek under the presented circumstances?

14 **Background**

15 The pending Chapter 7 case is the Debtor's second case filed within a year. The Debtor
16 originally filed a voluntary petition under Chapter 7 of Title 11 of the United States Code on
17 November 9, 2010, as case no. 6:10-bk-46358. That case was dismissed by order of the Court
18 on November 30, 2010, when the Debtor's Schedules and Statements were not timely filed
19 with the Court.
20

21 Following the entry of the order of dismissal of the Debtor's first case on November 30,
22 2010, on December 15, 2010, this case (the Debtor's second chapter 7 case) was
23 commenced. Apparently cognizant of the provisions of 11 U.S.C. §362(c)(3)(A), which
24 instructs that "the stay under subsection (a) with respect to any action taken with respect to a
25 debt or property securing such debt or with respect to any lease shall terminate *with respect to*
26 *the debtor* on the 30th day after the filing of the later case." (*emphasis added*), the Debtor,
27 through counsel, twice sought to have a hearing on his request to extend the automatic stay.
28

1 On January 12, 2011 (Dk. No. 16), the Debtor filed an “Emergency motion For Order
2 Imposing a Stay or Continuing the Automatic Stay as the Court Deems Appropriate” which
3 was denied by an order of the Court entered January 13, 2011 (Dk. No. 20). On January 13,
4 2011 (Dk. No. 21), the Debtor renewed his request and filed an “Application shortening time, in
5 addition to Notice of Motion and Motion in Individual Case for Order Imposing a Stay or
6 Continuing the Automatic Stay as the Court Deems Appropriate” which was again denied by
7 the Court by an order entered January 13, 2011 (Dk. No. 23).

8
9 Due to procedural error (a fee was not paid) on the first attempt, the Debtor’s motion to
10 extend the stay was denied. It is not clear to this Court why the second attempt was denied
11 without a hearing¹; however, the thirty day period passed after January 14, 2011.
12

13 **The Estate Property at Issue**

14 Part of the Debtor’s Bankruptcy Estate is the previously identified Foothill Parcels, which
15 are the subject of this Motion. According to the Movants, “foreclosure proceedings have been
16 instituted by creditor Positive Investments, Inc., 222 S. Santa Anita Ave, Arcadia, CA 91006,
17 against certain real property commonly known as 1812 - 1816 W. Foothill, Upland, CA, 91786
18 (the “Foothill Parcels”). The foreclosure sale is scheduled for May 17, 2011.” Motion, page
19 1:3-6, and the D. Edward Hays Declaration (the “Hays Declaration”) stating that the
20 Respondent “published” a Notice of Sale, ¶ 8, page 11:9-12.² There is further evidence before
21 the Court as to when the Respondent instituted “foreclosure proceedings” or “published” a
22 Notice of Sale, that date being April 11, 2011³, which the Court observes is after the Petition
23
24
25

26 ¹ These motions were considered and rejected by the Honorable Thomas B. Donovan prior to
27 the transfer of the case to this Court on or about February 1, 2011.

28 ² Certain Evidentiary Objections have been made by the Respondent, but not to ¶ 8 of the
Hays Declaration.

³ The Movants have requested, and this Court takes judicial notice of, (1) the Declaration of D.
Edward Hays in support of Joint Emergency Motion of Debtor and Trustee for Order

1 Date of this case. The Respondent has not addressed the act or timing of publication of the
2 Notice of Sale.

3 The Court has carefully examined the Debtor's Schedules, the Court Docket of this
4 case, and the evidence presented within this Motion. The Foothill Parcels are properly
5 scheduled and the Court can find no actions by the Trustee or operations of law that indicate
6 that the Foothill Parcels have passed from the Estate at this time. Therefore, there is no doubt,
7 and the Court can find no assertions from any of the parties here to the contrary, that the
8 Foothill Parcels remain part of the Estate. Finally, the Court has reviewed the Debtor's sworn
9 Schedules and finds, for purposes of this Motion only, that the value of the Foothill Parcels is
10 \$1,500,000.00. In reviewing the pleadings, the Court finds, for purposes of this Motion only,
11 that the claim secured by the lien held by the respondent on the Foothill Parcels is
12 approximately \$889,000.00. Finally, the Court finds that, for purposes of this Motion only,
13 there is significant equity in the Foothill Parcels that inure to the benefit of the Estate and/or
14 Debtor.
15
16
17

18 **The Motion For Temporary Restraining Order and/or a Preliminary Injunction Order**

19 On April 29, 2011, the Debtor and the Trustee jointly filed an emergency motion entitled
20 "Joint Emergency Motion of Debtor and Trustee for Order Determining That Automatic Stay
21 Pursuant to 11 U.S.C. Section 362(a) Has Not Been Terminated With Respect to the Estate;
22 Memorandum of Points and Authorities; and Declarations of D. Edward Hays and Richard
23 John Rinard; with Proof of Service." (Dk. No. 44). The Debtor and Trustee's Motion requested
24 that this Court make an order stating that the automatic stay was not terminated with respect to
25

26
27 Determining that Automatic Stay Pursuant to 11 U.S.C. §362(a) Has Not Been Terminated
28 With Respect to the Estate (Dk. No. 44), and (2) and the Declaration of Richard John Rinard in
support of Joint Emergency Motion of Debtor and Trustee for Order Determining that
Automatic Stay Pursuant to 11 U.S.C. §362(a) Has Not Been Terminated With Respect to the
Estate (Dk. No. 44).

1 the estate by operation of 11 U.S.C. §362(c)(3)(A). On May 3, 2011, the Court conducted a
2 hearing and declined to issue an order on the subject of the pending motion, because, in the
3 Court's opinion, a controversy was not present at that particular time (i.e. the motion was not
4 ripe), and the procedure utilized would have required an impermissible advisory opinion.
5

6 On May 3, 2011, a Complaint entitled "Complaint for 1. Declaratory Relief; 2. Injunctive
7 Relief; and 3. Damages for Willful Violation of Automatic Stay," was filed by the Debtor and the
8 Trustee against the Defendant, as well as their Motion which seeks entry of a temporary
9 restraining order and/or a preliminary injunction order enjoining Defendant and its officers,
10 agents, servants, employees, and attorneys and those in active concert or participation with
11 them, from foreclosing on the Foothill Parcels.
12

13 As a precursor to the requested relief, the Movants and Respondent both directly
14 address the presence of the decision of the Ninth Circuit Bankruptcy Appellate Panel's
15 decision in *Reswick v. Reswick (In re Reswick)*, 2011 Bankr. LEXIS 873, 6-8 (B.A.P. 9th Cir.
16 Feb. 4, 2011). The Movants explain,
17

18 "[n]otwithstanding the plain meaning of 11 U.S.C. § 362(c)(1)—that the stay as to
19 estate property continues until such property is no longer property of the estate—the
20 Bankruptcy Appellate Panel recently published a case arising in a Chapter 13 which
21 concluded that the stay terminated as to the debtor and the estate upon expiration of
22 the 30 day period in the second bankruptcy case. See, *In re Reswick*, --- B.R. ----,
23 2011 WL 612728, NC-10-1154-SAHKI, (9th Cir. BAP February 4, 2011). While the
24 unstated assumption in *Reswick* is that Section 362(c)(1) does not compel a different
25 result, the failure of the BAP to address this issue results in the case not being
26 persuasive or binding authority on this issue. As such, the declaratory relief issue
27 presented in Movants' Complaint is a question of first impression on an important
28 issue regarding whether a trustee as the estate's representative loses the protections
of the stay as to estate property after 30 days have elapsed in a second bankruptcy
case filed within one year after dismissal of a prior case. Debtor's counsel is aware
that the *Reswick* case has been appealed to the Ninth Circuit.

Motion, page 2:26-28 through page 3:1-9.

1 The Respondent also addresses *Reswick*. “On February 14, 2011, the Ninth Circuit
2 BAP issued a decision in *In re Reswick*, which provides the most recent precedential authority
3 in the circuit interpreting Bankruptcy Code section 362(c)(3)(A). (Citation omitted).”
4
5 Opposition, page 3:17-19.

6 The Respondent further states that this Court is bound by the BAP’s *Reswick* decision
7 because “[t]he principle of *stare decisis* requires federal courts to adhere to the opinions of
8 higher courts and “to the explications of the governing rule of law.” (citations omitted.)
9
10 Opposition, page 4:3-4. Citing several Ninth Circuit decisions on the general premises of *stare*
11 *decisis*, the Respondent grounds its assertion that this Court is bound by *Reswick* firmly on the
12 Ninth Circuit BAP’s own decision of 1987, *In re Windmill Farms, Inc.*, 70 B.R. 618, 621 (9th Cir.
13 1987), rev’d on other grounds, 841 F.2d 1467 (9th Cir. 1988).

14 The parties address *Reswick* on the issue of whether there continues to exist the
15 automatic stay *as to property of the Estate*, under 11 U.S.C. §362(a), for if the automatic stay
16 continues in existence as to property of the Estate, then a decision to issue a Temporary
17 Restraining Order (“TRO”) or Preliminary Injunction (“PI”) by this Court may be unnecessary.
18
19 Indeed, the determination by this Court of whether the automatic stay remains in force as to
20 the Estate must rest heavily on the minds of the Debtor, the Trustee and the Respondent. If
21 the foreclosure proceeding is not enjoined by this Court, and the automatic stay has been
22 terminated as to the Debtor and the Estate, the Foothill Parcels are at risk of being lost to the
23 detriment to the Estate’s creditors and any residual estate surplus to the Debtor. If the
24 automatic stay was in effect on April 11, 2011, then the Respondent has violated the automatic
25 stay, perhaps unintentionally, perhaps not. Moreover, the Ninth Circuit has made it clear that
26 the Respondent has an affirmative duty to reverse its actions in the instance of a violation of
27 the automatic stay, once it learns of the automatic stay, or else the action is elevated to a
28

1 willful violation of the stay. “Consistent with the plain and unambiguous meaning of the statute,
2 and consonant with Congressional intent, we hold that § 362(a)(1) imposes an affirmative duty
3 to discontinue post-petition collection actions.” *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d
4 1210, 1215 (9th Cir. Cal. 2002). Clearly, the Respondent is wary of potential sanctions and
5 awards of attorneys’ fees against it. Therefore, in addressing the need for a TRO or PI, the
6 Court must first determine whether the automatic stay is in effect as to the Estate.
7

8 **The Automatic Stay’s Effect Under 11 U.S.C. § 362(c)(3)(A).**

9 11 U.S.C. § 362(c)(3)(A) reads, in pertinent part:

10
11 “(3) if a single or joint case is filed by or against debtor who is an individual in a case
12 under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within
13 the preceding 1-year period but was dismissed, other than a case refiled under a
chapter other than chapter 7 after dismissal under section 707 (b)—

14 (A) the stay under subsection (a) with respect to any action taken with respect to
15 a debt or property securing such debt or with respect to any lease *shall*
16 *terminate with respect to the debtor* on the 30th day after the filing of the later
case...”

17 11 U.S.C. § 362(c)(3)(A) (*emphasis added*.)

18 The relevant portion of the section, for our purposes today, are the words “shall
19 terminate with respect to the debtor.” Indeed, this discussion would most likely not be occurring
20 if the Congress has simply added “or the estate” to the sentence in § 362(c)(3)(A). But
21 Congress didn’t, and here we are.
22

23 The Ninth Circuit BAP’s *Reswick* decision sets out, with remarkable clarity, both the
24 majority and minority positions of the nation’s bankruptcy courts with respect to whether the
25 automatic stay remains in effect as to the bankruptcy estate, by the effect of the provisions of
26 11 U.S.C. § 362(c)(3)(A). As to the majority view – that the automatic stay does not terminate
27 as to the estate under the terms of § 362(c)(3)(A) -- *Reswick* teaches
28

1 The majority interpretation finds the phrase "with respect to the debtor" to be both
2 critical and unambiguous, and concludes that on the 30th day after the petition date, the
3 automatic stay terminates only with respect to the debtor and the debtor's property, but
4 not as to property of the estate. See, e.g., *Holcomb v. Hardeman* (In re *Holcomb*), 380
5 B.R. 813 (10th Cir. BAP 2008); *Jumpp v. Chase Home Finance, LLC* (In re *Jumpp*), 356
6 B.R. 789 (1st Cir. BAP 2006); *In re Pope*, 351 B.R. 14 (Bankr. D.R.I. 2006); *In re*
7 *Murray*, 350 B.R. 408 (Bankr. S.D. Ohio 2006); *In re Brandon*, 349 B.R. 130 (Bankr.
8 M.D.N.C. 2006); *Bankers Trust Co. of Cal. v. Gillcrese* (In re *Gillcrese*), 346 B.R. 373
9 (Bankr. W.D. Pa. 2006); *In re Williams*, 346 B.R. 361 (Bankr. E.D. Pa. 2006); *In re*
10 *Harris*, 342 B.R. 274 (Bankr. N.D. Ohio 2006); *In re Jones*, 339 B.R. 360 (Bankr.
11 E.D.N.C. 2006); *In re Moon*, 339 B.R. 668 (Bankr. N.D. Ohio 2006); *In re Johnson*, 335
12 B.R. 805 (Bankr. W.D. Tenn. 2006). Although these decisions state that the court need
13 not read beyond the phrase "with respect to the debtor" to discern its meaning, see,
14 e.g., *Jones*, 399 B.R. at 363 ("Section 362(c)(3)(A) provides that the stay terminates
15 'with respect to the debtor.' How could that be any clearer?"), these decisions arguably
16 do read beyond the phrase because they find that the stay terminates with respect to
17 the debtor and to any property of the debtor that is not property of the estate. *Id.* at 362;
18 see also *Holcomb*, 380 B.R. at 816 ("[W]e conclude that the language of § 362(c)(3)(A)
19 terminates the stay only as to the debtor and the debtor's property."); *Jumpp*, 356 B.R.
20 at 797 ("Section 362(c)(3)(A) provides for a partial termination of the stay.").

21 *Reswick v. Reswick* (In re *Reswick*), 2011 Bankr. LEXIS 873, 6-8 (B.A.P. 9th Cir. Feb. 4,
22 2011).

23 As to the minority view – that the automatic stay terminates as to both the Debtor and
24 the Estate, *Reswick* described the view as follows:

25 “The minority interpretation urges that the phrase "with respect to the debtor" must be
26 analyzed in the context of section 362(c)(3) as a whole. See *In re Jupiter*, 344 B.R. 754
27 (Bankr. D.S.C. 2006), expanded upon in *In re Daniel*, 404 B.R. 318 (Bankr. N.D. Ill.
28 2009), and adopted in two subsequent decisions including the order on appeal here.
Using this analysis, these courts conclude that section 362(c)(3)(A) terminates the
automatic stay in its entirety (i.e., with respect to the debtor, the debtor's property and
property of the estate). *Id.* at 329; *Jupiter*, 344 B.R. at 759; *In re Furlong*, 426 B.R. 303,
307 (Bankr. C.D. Ill. 2010). They construe "the remaining language of 'with respect to
the debtor' to define which debtor is effected by this provision, with reference to section
362(c)(3)." *Jupiter*, 344 B.R. at 759. Because section 362(c)(3) begins by referencing
either a "single or joint case," the language "with respect to the debtor" in section
362(c)(3)(A) simply distinguishes between the debtor and the debtor's spouse. *Id.*;
Daniel, 404 B.R. at 326. The courts found further support in the legislative history of
section 362(c)(3)(A), noting its intent to address the perceived abuse of successive
filings. *Id.* at 327; *Jupiter*, 344 B.R. at 761. See also *In re Curry*, 362 B.R. 394 (Bankr.
N.D. Ill. 2007)(interpreting section 362(c)(3)(A) to terminate the automatic stay in its
entirety is consistent with history aimed at discouraging successive bankruptcy filings).”

1 *Reswick v. Reswick (In re Reswick)*, 2011 Bankr. LEXIS 873, 8-9 (B.A.P. 9th Cir. Feb. 4,
2 2011).

3 In one single sentence, and *contra* to the minority view that it chooses to adopt (see
4 below), the BAP in *Reswick* determined, or rather “designates”, that the language of
5 §362(c)(3)(A) is ambiguous. (“And while we recognize the desire to be cautious in designating
6 statutory text as “ambiguous,” we believe that such a designation is appropriate here.”

7
8 *Reswick* at 9-10.) The BAP did not determine that the language was ambiguous because they
9 did not understand the sentence “the stay under subsection (a) with respect to any action
10 taken with respect to a debt or property securing such debt or with respect to any lease *shall*
11 *terminate with respect to the debtor* on the 30th day after the filing of the later case...”.

12 Instead, the BAP admits, in the preceding sentence of its decision, that the minority view does
13 not “expressly” determine the language of §362(c)(3)(A) to be “ambiguous”.

14
15 “The minority approach does not expressly determine that the language is ambiguous
16 but reads “with respect to the debtor” in context with section 362(c)(3) as a whole and
17 then looks to the provision's legislative history to support their reading. Because reading
18 the phrase in context, rather than in isolation, better comports with principles of statutory
19 construction, the minority interpretation is more persuasive.”

20 *Reswick* at 9.

21 The BAP designates the text of the provision as ambiguous only because it believes
22 that the phrase “with respect to the debtor” is not placed there by Congress to differentiate
23 between property of the debtor and property of the estate, but instead to give certain meaning
24 (the meaning assigned by the *Reswick* BAP) to the remaining provisions of § 362(c)(3). The
25 *Reswick* BAP thus believes that the legislative scheme within §362(c)(3) is the ideal legislative
26 context to place the language of §362(c)(3)(A), and so engages. Others disagree.

27 As the Tenth Circuit BAP stated in *In re Holcomb*, 380 B.R. 813, 816 (BAP 10th Cir.
28 2008):

1 First, we see no ambiguity in the language of the statute. "Statutory construction must
2 begin with the language employed by Congress and the assumption that the ordinary
3 meaning of that language accurately expresses the legislative purpose." *Park 'N Fly,*
4 *Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194, 105 S. Ct. 658, 83 L. Ed. 2d 582
5 (1985). Nowhere in § 362 does Congress use the phrase "with respect to the debtor" as
6 incorporating the debtor, the debtor's separate property, and property of the estate. In
7 fact, "[s]ection 362(a) differentiates between acts against the debtor, against property of
8 the debtor and against property of the estate." *Jones*, 339 B.R. at 363. As observed in
9 *Jones*, "a plain reading of those words ['with respect to the debtor'] makes sense and is
10 entirely consistent with other provisions of § 362 and other sections of the Bankruptcy
11 Code." *Id.*

12 Reading this statute according to its plain meaning is also consistent with the policies
13 behind bankruptcy law. At the core of bankruptcy law is the policy of "obtaining a
14 maximum and equitable distribution for creditors." *BFP v. Resolution Trust Corp.*, 511
15 U.S. 531, 563, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994); *Research-Planning, Inc. v.*
16 *Segal (In re First Capital Mortgage Loan Corp.)*, 917 F.2d 424, 428 (10th Cir. 1990)
17 (noting that the preference provisions found in 11 U.S.C. § 547 further this important
18 policy). The minority approach circumvents this policy by allowing a single creditor, who
19 may be oversecured, full access to property that would otherwise be property of the
20 estate. Such property may be necessary to implement a debtor's Chapter 13 plan; or, in
21 a Chapter 7 case, equity in the property above the creditor's security interest could be
22 realized by the trustee to pay a dividend to creditors. This dividend could potentially be
23 lost if we adopt the reasoning of the bankruptcy court. Maintaining the stay with respect
24 to such property is an important creditor protection.

25 *Holcomb v. Hardeman (In re Holcomb)*, 380 B.R. 813, 816 (B.A.P. 10th Cir. 2008).

26 That the facts of *Reswick* specifically involve a Chapter 13 debtor, where an ex spouse,
27 one of the creditors of the debtor, garnished the post-petition wages of the debtor to collect
28 monies perhaps entitled to a priority distribution, which were property of the Chapter 13 estate,
is not lost on this Court. If *Reswick* stands on appeal with the Ninth Circuit, the outcome of the
decision provides money for the ex-wife, and a failed Chapter 13 plan for the rest of the
creditors. Thus, other provisions of the Bankruptcy Code providing an ex-spouse creditor with
priorities for alimony and support are rendered meaningless by the decision of *Reswick*.
Under *Reswick's* determination, a creditor race to the courthouse exists. This overturns the
primary overarching two premises of federal bankruptcy law – a fresh start for an honest
debtor and equal treatment among classes of creditors.

The facts of the Tenth Circuit BAP's *Holcomb* decision fit squarely with the facts of the
instant case (where a secured creditor attempts to foreclose on estate property), and

1 demonstrate that the plain meaning standard of legislative interpretation can also result in
2 consistent and accurate expressions of legislative intent and goals.

3 The plain text of §362(c)(3)(A) is crystal clear that the automatic stay is terminated with
4 respect to the Debtor. There is no mention of the Estate in the text. There are no fuzzy words;
5 there are no hanging paragraphs; there are no words requiring a dictionary. And, the context
6 of the language gives meaning to the Bankruptcy Code's design to permit the Chapter 7
7 trustee to administer the estate unimpeded by individual creditors who may otherwise obtain
8 windfalls at the expense of the other creditors of the estate. (As noted above, under the facts
9 of *Reswick*, the plain meaning interpretation of the section in question would also provide for
10 the overarching and primary goals of the Bankruptcy Code – a Chapter 13 reorganization that
11 provides a fresh start for the debtor and equal treatment (and perhaps superior treatment due
12 to the statutory priorities provided for obligations to an ex-spouse)).

13 To achieve the results of the minority view and *Reswick*, Congress was only required to
14 add three more words to the section – “and the estate” – which Congress did not do. This
15 Court will also not step into the shoes of Congress. The “majority” views are the correct ones
16 in this instance.

17 **The Binding Effect of the Ninth Circuit BAP Within this Court's Own District.**

18 The Respondent asserts that this Court is bound by the decision *In re Reswick*. In
19 support of its assertion, it states “[o]n February 14, 2011, the Ninth Circuit BAP issued a
20 decision in *In re Reswick*, which provides the most recent precedential authority in the circuit
21 interpreting Bankruptcy Code section 362(c)(3)(A). (citation omitted).” Opposition, page 3:17-
22 19. This Court, according to the Respondent, is bound by the BAP's *Reswick* decision because
23 “[t]he principle of *stare decisis* requires federal courts to adhere to the opinions of higher courts
24 and “to the explications of the governing rule of law.” (citations omitted.) Opposition, page 4:3-
25 4. Citing several decisions on the general premises of *stare decisis*, the Respondent mainly
26 grounds its assertion that this Court is bound by *Reswick* firmly on the Ninth Circuit BAP's own
27 decision of 1987, *In re Windmill Farms, Inc.*, 70 B.R. 618, 621 (9th Cir. 1987), rev'd on other
28 grounds, 841 F.2d 1467 (9th Cir. 1988).

1 Much has been written within the Ninth Circuit regarding the precedential value of BAP
2 decisions. *In re Windmill Farms, Inc.*, a 1988 decision written by a panel consisting of three
3 Article I bankruptcy judges, opined that their own Ninth Circuit BAP decisions are to be treated
4 with precedential value. Other courts have held otherwise. “The decisions of the Bankruptcy
5 Appellate Panel of the Ninth Circuit (“BAP”) do not carry the weight of stare decisis. *In re Bank*
6 *of Maui*, 904 F.2d 470, 471 (9th Cir. 1990). The decisions of the BAP are binding only on the
7 judges whose orders have been reversed or remanded by the BAP in that particular dispute. In
8 all other instances, the decisions of the BAP are effective only to the extent they are
9 persuasive.” *CASC Corp. v. Milner (In re Locke)*, 180 B.R. 245, 254 (Bankr. C.D. Cal. 1995).
10 The citation to *In re Bank of Maui* by the Bankruptcy Court in *In re Locke* is only slightly amiss,
11 since the Ninth Circuit in *Locke* ultimately held that the determination of whether BAP
12 decisions were controlling *would not be decided* because:

13
14 “We need not and do not decide the authoritative effect of a BAP decision because, for
15 the purposes of Bankruptcy Rule 9011, *its binding effect is so uncertain* that it cannot be
16 the basis for sanctioning a party for seeking a contrary result in a district where the
17 underlying issue has never been resolved. Accordingly, the Bank’s reliance on Marin
18 Aviation was not clearly frivolous and unreasonable.”

19 *Bank of Maui v. Estate Analysis*, 904 F.2d 470, 472 (9th Cir.1990) (*emphasis added*).

20 However, *Windmill* was decided in 1988, and *Bank of Maui* was decided in 1990. This
21 Court finds that Congress determined, in 2005, that BAP decisions have no authoritative or
22 precedential effect. On April 20, 2005, the President signed into law the Bankruptcy Abuse
23 Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23
24 (“BAPCPA”). Among other things, BAPCPA authorizes the direct appeal of a bankruptcy court
25 order to the court of appeals on certification from the appropriate court and acceptance by the
26 court of appeals. 28 U.S.C.S. §158(d)(2).

27 Specifically, appellate jurisdiction was altered in BAPCPA by addition of the provision
28 that the Circuit Courts of Appeal have jurisdiction for all final orders of a bankruptcy court and

1 may take an appeal directly *if the bankruptcy court, district court, or **Bankruptcy Appellate***
2 **Panel**, on the lower court's own motion or on the motion of a party to the judgment, certifies
3 *that the bankruptcy court's final order involves a question of law on which there is no*
4 *controlling decision in that circuit or that the issue involves one of public importance, or that an*
5 *immediate appeal is otherwise necessary.* If Congress believed that decisions of BAPs across
6 the nation were authoritative and precedential (which would then grant BAPs more
7 authoritative/precedential value than Article III district courts surely possess), there would have
8 been no need to include BAPs with the power to certify direct appeals from bankruptcy courts
9 to Circuit Courts of Appeals. The BAP could simply take the appeal, forget certification, and
10 provide authoritative pronouncements, *tout de suite*. Implicit in the inclusion of the BAP as a
11 “certifier” is the Congressional determination that BAPs could not make authoritative or
12 precedential determinations, and instead confirm that Circuit Courts of Appeals are to exercise
13 this role.

14
15
16 BAP decisions are not binding on bankruptcy courts, as district court decisions are not.
17 The arguments set forth in the multitude of cases determining that panels composed of Article I
18 judges to hear bankruptcy court appeals do not have the inherent power to make authoritative
19 or precedential decisions, especially if Article III district courts hearing the same appeals have
20 no such control, were convincing enough. Congress, in 2005, finished the argument.

21
22
23 For all of the reasons stated above, this Court finds that (1) the Respondent has not
24 obtained relief from stay to proceed with any foreclosure activities respecting the Foothill
25 Parcels; (2) the automatic stay as provided by 11 U.S.C. §362(a) remains in force as to
26 property of the Estate; (3) the Foothill Parcels are property of the Estate in this case; (4) the
27 Foothill Parcels hold equity that inure to the benefit of the Estate and/or the Debtor; (5) the
28 Respondent has violated the automatic stay by noticing the Trustee Sale and will further

1 willfully violation the stay if it causes a foreclosure sale; and (6) Respondent already has
2 transmuted the violation of the automatic stay into a willful violation of the automatic stay by
3 not affirmatively reversing its actions.
4

5 **The Requirement for a Temporary Restraining Order or Preliminary Injunction Order**

6 The next step is to determine whether the Movants are entitled to a Temporary
7 Restraining Order ("TRO") or Preliminary Injunction ("PI") Order.

8 Injunctive relief is available in bankruptcy court in two ways: pursuant to the court's
9 discretionary and inherent equitable power under §105(a) "to issue any order, process, or
10 judgment that is necessary or appropriate to carry out the provisions of this title," or under the
11 auspices of Bankruptcy Rule 7065, which makes Federal Rule 65 applicable in adversary
12 proceedings.
13

14 The Movants have requested this Court to consider their Motion and request under Rule
15 7065 and Federal Rule 65. The Court is not bound by the Motion to restrict its basis for issuing
16 a TRO or PI under Federal Rule 65. Section 105(a) of the Bankruptcy Code serves the same
17 purpose, as described below. Nevertheless, the same standards for issuing such injunctions
18 are applicable. The Court will examine whether grounds exist for a TRO and/or PI to issue.
19

20 "The standards for granting a temporary restraining order and a preliminary injunction
21 are identical." *Haw. County Green Party v. Clinton*, 980 F. Supp. 1160, 1164 (D. Haw. 1997);
22 *cf. Stuhlberg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n. 7 (9th Cir. 2001)
23 (observing that an analysis of a preliminary injunction is "substantially identical" to an analysis
24 of a temporary restraining order). The Ninth Circuit recently modified its standard for
25 preliminary injunctive relief to conform to the Supreme Court's admonition in *Winter v. Natural*
26 *Resources Defense Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 375-76, 172 L. Ed. 2d 249
27
28

1 (2008), that the moving party must demonstrate that, absent an injunction, irreparable injury is
2 not only possible, but likely.

3 Under Federal Rule 65, the traditional criteria for issuing a preliminary injunction are: "1)
4 a strong likelihood of success on the merits, 2) the possibility of (now likely, not just possible)
5 irreparable injury to plaintiff if the preliminary relief is not granted, 3) a balance of hardships
6 favoring the plaintiff, and 4) advancement of the public interest (in certain cases)." *Morgan-*
7 *Busby v. Gladstone (In re Morgan-Busby)*, 272 B.R. 257, 261 (9th Cir. B.A.P. 2002).

8
9 **(1) Strong Likelihood of Success on the Merits**

10 The Movant's Complaint asserts that the Respondent's actions in proceeding with the
11 foreclosure activities violate 11 U.S.C. §362(a) in that estate property is being foreclosed upon.
12 The Court is not required to determine whether the Movants will succeed on the merits of their
13 cause of action, but is only required to determine whether there is a strong likelihood of
14 success on this cause of action. For all of the reasons set forth in this Memorandum Opinion
15 as to why the automatic stay is still effective as to estate property, it is clear to this Court that
16 there is a strong likelihood of success on the merits.
17

18 With respect to the Complaint's asserting that the Notice of Default filed with respect to
19 the Foothill Parcels is defective, there is evidence presented as to this matter within the Hays
20 Declaration that accompanies the Motion that corresponds to the allegations contained in ¶¶
21 14, 15 and 16. Limited legal analysis is presented to the Court on these allegations by any
22 party appearing on this Motion, and the Court cannot determine the merits of these allegations
23 at this stage. Therefore, the Court cannot assert that there is, or is not, a strong likelihood of
24 success on the merits with respect to the NOD arguments. However, as the Violation of the
25 Stay cause of action stands alone for these purposes, the Court can await further briefing and
26 fact-finding at the PI stage of the process.
27
28

1 **(2) The Likelihood of Irreparable Injury to Plaintiff**

2 According to the Movant, the foreclosure sale has been noticed for May 17, 2011. If the
3 Respondent continues to go forward with its foreclosure sale, and whether or not a bona fide
4 purchaser were to obtain the property through a trustee sale, the bankruptcy estate could be
5 irreparably harmed by not having the opportunity to maximize recovery to the creditors of the
6 estate, by utilizing the equity in the Foothill Parcels. That equity has already been established,
7 for purposes of this Order only.
8

9 The Movants' reliance with respect to the required showing of irreparable harm on
10 *FSLIC v. Sahni*, 868 F.2d 1096 (9th Cir. 1999), in light of the Supreme Court's decision in
11 *Winter, supra*, is misplaced. The correct standard is "likely irreparable harm," not possible
12 irreparable harm.
13

14 If more than nominal equity exists in the Foothill Parcels that would inure to the benefit
15 of the Estate and/or the Debtor, than the likelihood of irreparable harm to the Plaintiffs exists.
16 The Respondent is protected by an equity cushion in the Foothill Parcels, and suffers little or
17 no harm by a delay in the foreclosure process at this time.
18

19 **(3) Balance of Hardships Favoring the Plaintiff**

20 The Movants assert that there is no requirement to balance hardships in circumstances
21 of intentional conduct by defendants, citing *United States v. Marine Shale Processors*, 81 F.3d
22 1329, 1359 (5th Cir. 1996). Within that case, the Fifth Circuit identified certain cases involving
23 "willful acts" that might not require a balancing of the hardships, including *Louis W. Epstein*
24 *Family P'Ship v. KMart Corp.*, 13 F.3d 762, 769-70 (1994) (Pennsylvania law, encroachment
25 on land); *Kratze v. Indep. Order of Oddfellows*, 442 Mich. 136, 500 N.W.2d 115, 121 & n.10
26 (Mich. 1993) (land encroachment); *Amabile v. Winkles*, 276 Md. 234, 347 A.2d 212, 216-17
27 (Md. 1975) (land); *Normandy B. Condominium Ass'n, Inc. v. Normandy C. Ass'n, Inc.*, 541 So.
28

1 2d 1263 (Ct. App. Fla. 1989) (interference with an easement); *Barrett v. Lawrence*, 110 Ill.
2 App. 3d 587, 442 N.E.2d 599, 603, 66 Ill. Dec. 173 (Ill. App. 1982) (failure to deposit money in
3 an escrow); *Christensen v. Tucker*, 114 Cal. App. 2d 554, 250 P.2d 660, 665-66 (Cal. App.
4 1952) (land encroachment);. *Helene Curtis Indus., Inc. v. Church & Dwight Co.*, 560 F.2d
5 1325, 1333-34 (7th Cir. 1977) (trademark infringement), *cert. denied*, 434 U.S. 1070, 55 L. Ed.
6 2d 772, 98 S. Ct. 1252 (1978); and *E.F. Johnson Co. v. Uniden Corp. of America*, 623 F. Supp.
7 1485, 1504 (D. Minn. 1985) (patent infringement). *See United States v. Marine Shale*
8 *Processors*, 81 F.3d 1329, 1359 (5th Cir. 1996).

9
10 This Court sees no reason in this case to divert from the traditional standards for issuing
11 a TRO or PI, and based on the instant facts is not required to do so. The Defendant's hardship
12 is slight (i.e. a delay receiving payment without risk because of the equity cushion in the
13 Foothill Parcels) compared to the Movants' risk of permanent loss of the real property or its
14 equity value over a relatively short period of time. The Court finds that the hardships balance
15 in favor of the Plaintiffs.
16

17 18 **(4) Advancement of the Public Interest**

19 Unless the Court considers that there is a public interest for (or against) the issuance of
20 a TRO or PI within the circumstances of this case (and there might be an argument to be made
21 that it is in the public interest to curtail violations of the automatic stay), the case is not one
22 where advancement of the public interest is relevant. Therefore, the Court finds that a
23 determination of this component of the standard is unnecessary.
24

25 **This Court's Powers under 11 U.S.C. §105**

26 Under 11 U.S.C. § 105(a), a bankruptcy court "may issue any order, process, or
27 judgment that is necessary or appropriate to carry out the provisions of this title." Section
28 105(a) gives the bankruptcy courts the power to stay actions that are not subject to the 11

1 U.S.C. § 362(a) automatic stay (footnote omitted) but "threaten the integrity of a bankrupt's
2 estate." *Canter v. Canter (In re Canter)*, 299 F.3d 1150, 1155 (9th Cir. 2002) (citation and
3 quotation marks omitted); *Ingersoll-Rand Fin. Corp. v. Miller Mining Co.*, 817 F.2d 1424, 1427
4 (9th Cir. 1987)." *Solidus Networks, Inc. v. Excel Innovations, Inc. (In re Excel Innovations,*
5 *Inc.)*, 502 F.3d 1086, 1093 (9th Cir. 2007). The Ninth Circuit, in *Solidus Network* further found
6 that the usual preliminary injunction standard applies to stays of proceedings against non-
7 debtors under § 105(a). *Solidus* at 1094.

9 For the same factual reasons, and applying the same standards that this Court
10 determined that a TRO should issue under Federal Rule 65, as made applicable by
11 Bankruptcy Rule 7065, the Court finds that the ruling may be jointly based on 11 U.S.C.
12 §105(a).

14 **Conclusion and Order**

15 In accordance with my Memorandum of Opinion this date,

16 **IT IS HEREBY ORDERED** that Defendant Positive Investments Inc. and its officers,
17 agents, servants, employees, and attorneys and those in active concert or participation with
18 them, are hereby temporarily restrained from foreclosing on commercial real property of the
19 bankruptcy estate commonly known as 1812 - 1816 W. Foothill, Upland, CA, 91786 (the
20 "Foothill Parcels").
21

22 **IT IS FURTHER ORDERED** that Positive Investments, Inc. is ordered to appear in
23 Courtroom 5C of this court, located at 411 West Fourth Street, Santa Ana, California, on May
24 25, 2011 at 11:00 a.m., and show cause, if any, why a Preliminary Injunction should not issue
25 enjoining Positive Investments Inc. and its officers, agents, servants, employees, and attorneys
26 and those in active concert or participation with them from foreclosing on commercial real
27
28

1 property of the bankruptcy estate commonly known as 1812 - 1816 W. Foothill, Upland, CA,
2 91786 (the "Foothill Parcels").

3 **IT IS FURTHER ORDERED** that further pleadings from Positive Investments, Inc. as to
4 this matter, must be electronically filed and physically served on counsels for the Debtor and
5 Trustee by 12:00 p.m. pacific time, at least two days before the aforesaid hearing, with copies
6 physically delivered to chambers by 12:00 p.m. pacific time on that day. Any Reply filed by the
7 Debtor or Trustee must be electronically filed and physically served on counsels for the Debtor
8 and Trustee by 12:00 p.m. pacific time, at least one day before the aforesaid hearing, with
9 copies physically delivered to chambers by 12:00 p.m. pacific time on that day.
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28 DATED: May 9, 2011

United States Bankruptcy Judge

NOTE TO USERS OF THIS FORM:

- 1) Attach this form to the last page of a proposed Order or Judgment. Do not file as a separate document.
- 2) The title of the judgment or order and all service information must be filled in by the party lodging the order.
- 3) **Category I.** below: The United States trustee and case trustee (if any) will always be in this category.
- 4) **Category II.** below: List ONLY addresses for debtor (and attorney), movant (or attorney) and person/entity (or attorney) who filed an opposition to the requested relief. DO NOT list an address if person/entity is listed in category I.

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*) **MEMORANDUM OPINION** was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of May 9, 2011, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

- Lori E Eropkin leropkin@laklawyers.com
- Helen R. Frazer (TR) hfrazer@aalrr.com,
mbuenaventura@aalrr.com;hfrazer@ecf.epiqsystems.com,C112@ecfcbis.com
- D Edward Hays ehays@marshackhays.com
- United States Trustee (RS) ustpreion16.rs.ecf@usdoj.gov
- Darlene C Vigil cdcaecf@bdfgroup.com

Service information continued on attached page

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by U.S. Mail to the following person(s) and/or entity(ies) at the address(es) indicated below:

Service information continued on attached page

III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s) and/or email address(es) indicated below:

Service information continued on attached page