



Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
July 24, 2018

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

\* \* \* \* \*

In re:	)	Case No.: 11-19593-MKN
	)	Chapter 7
MYONG LEEDS,	)	
	)	
Debtor.	)	Date: June 27, 2018
	)	Time: 2:30 p.m.
	)	

**ORDER REGARDING SFR INVESTMENTS POOL 1, LLC’S MOTION TO  
RETROACTIVELY ANNUL THE AUTOMATIC STAY<sup>1</sup>**

On June 27, 2018, the court heard argument regarding SFR Investment Pool 1, LLC’S Motion to Retroactively Annul the Automatic Stay (“Annulment Motion”).<sup>2</sup> The appearances of

<sup>1</sup> In this Order, all references to “ECF No.” are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “NRS” are to provisions of the Nevada Revised Statutes. All references to “FRBP” are to the Federal Rules of Bankruptcy Procedure. All references to “FRE” are to provisions of the Federal Rules of Evidence. All references to “Local Rule” are to the Local Rules of Bankruptcy Practice for the District of Nevada.

<sup>2</sup> The instant motion arises because of certain issues raised in an interpleader action pending in the Eighth Judicial District Court, Clark County, Nevada (“State Court”), styled as Alessi & Koenig, LLC v. Leeds, et al., Case No. A-13-688246-C (“Interpleader Action”). The plaintiff in that action subsequently commenced a Chapter 7 liquidation proceeding denominated Case No. 16-16593-ABL (“Alessi & Koenig Bankruptcy”). Thereafter, the Interpleader Action was removed to this bankruptcy court and assigned Adversary Proceeding No. 17-01038-ABL. The court takes judicial notice under FRE 201 of the papers filed in Interpleader Action and the Alessi & Koenig Bankruptcy. See U. S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); Conde v. Open Door Mktg., LLC, 223 F. Supp. 3d 949, 970 n.9 (N.D. Cal. 2017); Gree v. Williams, 2012

1 counsel were noted on the record. After arguments were presented, the matter was taken under  
2 submission.

3 **BACKGROUND**

4 On June 17, 2011, a voluntary Chapter 7 bankruptcy petition was filed, in *pro se*, by  
5 Myong Leeds (“Leeds”). The case was assigned to David Rosenberg (“Rosenberg”) as Chapter  
6 7 trustee. (ECF No. 2).<sup>3</sup>

7 On July 5, 2011, Leeds filed her schedules of assets and liabilities (“Schedules”), along  
8 with her statement of financial affairs (“SOFA”). (ECF No. 11). On her real property Schedule  
9 “A,” Leeds disclosed her interest in a residence located at 8254 Bowman Woods Circle, Las  
10 Vegas, Nevada (“Leeds Residence”). Leeds stated under penalty of perjury that the value of her  
11 residence was \$307,554. On her secured creditor Schedule “D,” previously filed with her  
12 petition, Leeds listed BAC Home Loans as having a claim in the amount of \$610,000 secured by  
13 the Leeds Residence.

14 On July 21, 2011, Rosenberg filed an application to employ the law firm of Howard Kim  
15 & Associates (“Kim Firm”) as special counsel on behalf of the estate. (ECF No. 13).

16 On July 29, 2011, attorney Seth D. Ballstaedt (“Ballstaedt”) filed a notice of appearance  
17 as bankruptcy counsel for Leeds. (ECF No. 18).

18 On August 15, 2011, an order was entered approving the employment of the Kim Firm as  
19 special counsel to the estate. (ECF No. 20).

20 On September 13, 2011, Ballstaedt filed the Debtor’s amendments to her Schedules and  
21 SOFA, including a Disclosure of Compensation of Attorney for Debtor(s) – Amended, required  
22 under FRBP 2016(b) (“2016 Statement”). (ECF Nos. 25 and 26).

23 On September 20, 2011, the court entered an order granting Leeds her Chapter 7  
24 discharge. (ECF No. 30). As a result of her discharge, the automatic stay terminated as to Leeds  
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26 WL 3962458, at \*1 n.1 (D. Nev. Sept. 7, 2012); Bank of Am., N.A. v. CD-04, Inc. (In re Owner  
27 Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015).

28 <sup>3</sup> According to the docket in the instant case, Rosenberg’s address was 5030 Paradise  
Road, Suite B-215, Las Vegas, Nevada 89119.

1 under Section 362(c)(2)(C), but remained in effect as to the Leeds Residence.

2 On February 29, 2012, an order was entered approving the settlement of a preference  
3 action that had been commenced by the Kim Firm on behalf of the bankruptcy estate. (ECF No.  
4 40).

5 On July 10, 2012, Rosenberg filed a final report and proposed distribution (“TFR”).  
6 (ECF No. 54). The TFR stated that the Leeds Residence would be abandoned pursuant to  
7 Section 554(c).

8 On October 15, 2012, an order was entered approving the TFR. (ECF No. 62).

9 On May 8, 2013, the Leeds Residence was purchased for \$42,000 by SFR Investments  
10 Pool 1, LLC (“SFR”) at a foreclosure sale conducted on behalf of Butler Estates Homeowners  
11 Association (“Butler HOA” or “HOA”) through its foreclosure trustee, Alessi & Koenig, LLC  
12 (“A&K”). See Exhibit “F” to Declaration of Jamie Combs in Support of Bank of America  
13 N.A.’s Opposition to SFR Investments Pool 1, LLC’s Motion to Retroactively Annul the  
14 Automatic Stay (“Combs Declaration”).<sup>4</sup> (ECF No. 107).

15 On September 10, 2013, A&K filed a complaint in State Court commencing the  
16 Interpleader Action. See Exhibit “1” to Notice of Removal, filed March 8, 2017, in Alessi &  
17 Koenig Bankruptcy (“Removal Notice”). A&K was in possession of excess funds from the  
18 foreclosure sale and sought a determination of claims to the funds.

19 On August 1, 2013, Rosenberg filed a final distribution report (“TDR”). (ECF No. 65).  
20 The TDR attested that the Leeds Residence was fully administered and that no funds were  
21 received by the bankruptcy estate.

22 On January 29, 2014, a final decree was entered closing the Chapter 7 proceeding and  
23 discharging Rosenberg from any further duties. (ECF No. 72). As a result of the case closure,  
24 the automatic stay terminated as to the Leeds Residence pursuant to Section 362(c)(2)(A), and  
25 any interest of the bankruptcy estate in the Leeds Residence was abandoned under Section  
26 554(c).

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27 <sup>4</sup> Exhibit “F” is a copy of a Trustee’s Deed Upon Sale. In addition to other information,  
28 that document lists the address of SFR as 5030 Paradise Road, Suite B-214, Las Vegas, Nevada,  
89119.

1 On December 13, 2016, A&K commenced the Alessi & Koenig Bankruptcy proceeding.

2 On March 8, 2018, Bank of America, N.A. (“BOA”) filed the Removal Notice indicating  
3 that the Interpleader Action was removed from the State Court to the bankruptcy court pursuant  
4 to 28 U.S.C. § 1452(a). (A&K ECF No. 187). Upon removal, the Interpleader Action was  
5 assigned Adversary Proceeding No. 17-01038-ABL.

6 On August 24, 2017, the bankruptcy court entered an order remanding the Interpleader  
7 Action to the State Court. (A&K v. Leeds AECF No. 22).

8 On April 16, 2018, the State Court in the Interpleader Action entered the default of the  
9 Debtor, as well as her non-debtor spouse, Marc Leeds.

10 On May 3, 2018, an order was entered granting the motion of SFR to reopen the Leeds  
11 proceeding (“Reopening Order”). (ECF No. 75). The purpose of the motion was for SFR to  
12 seek a further court order annulling the automatic stay that arose under Section 362(a) when  
13 Leeds filed her Chapter 7 bankruptcy petition.

14 On May 9, 2018, notice of entry of the Reopening Order was served by SFR (“Reopening  
15 Notice”). (ECF No. 76).

16 On May 10, 2018, SFR filed the instant Annulment Motion, accompanied by the  
17 supporting Declaration of Christopher J. Hardin (“Hardin Declaration”). (ECF Nos. 77 and 79).  
18 SFR also filed a notice of hearing that the Annulment Motion would be heard on June 13, 2018,  
19 accompanied by a Certificate of Service (“COS”). (ECF Nos. 80 and 81).

20 On June 6, 2018, an order was entered granting BOA’s request to continue the hearing to  
21 June 27, 2018. (ECF No. 102).

22 On June 13, 2018, BOA filed an opposition to the Annulment Motion (“BOA  
23 Opposition”), accompanied by the Combs Declaration. (ECF Nos. 106 and 107).

24 On June 18, 2018, the State Court in the Interpleader Action entered an order granting  
25 summary judgment in favor of BOA (“BOA SJ Order”). See Exhibit “A” to Declaration of  
26 Jamie K. Combs, Esq. Regarding Clark County District Court’s Entry of Order Granting Bank of  
27 America, N.A.’s Motion for Summary Judgment (“Supplemental Combs Declaration”). (ECF  
28 No. 110). The State Court concluded that BOA had standing to challenge the validity of the

1 Butler HOA foreclosure sale as a violation of the automatic stay, see BOA SJ Order at ¶ 12, that  
2 a foreclosure sale conducted in violation of the automatic stay is void ab initio, see id. at ¶ 13,  
3 that a void foreclosure sale does not extinguish a deed of trust, see id. at ¶ 14, that an HOA sale  
4 is void if the Notice of Delinquent Assessment Lien or the Notice of Default was recorded while  
5 the automatic stay was in effect, see id. at ¶ 15, and, that an HOA sale initiated in violation of the  
6 automatic stay is void even if the foreclosure sale is conducted after the automatic stay has  
7 elapsed. Id. at ¶ 16. The State Court then concluded by determining that the Butler HOA sale  
8 was void, id. at ¶ 20, that BOA's deed of trust against the Leeds Residence remains valid, id. at ¶  
9 21, and that summary judgment be granted in favor of BOA and against SFR. Id. at ¶ 22. The  
10 State Court then vacated the trial scheduled in the Interpleader Action. Id. at ¶ 23.

11 On June 20, 2018, SFR filed a reply in support of the Annulment Motion, accompanied  
12 by an additional Declaration of Christopher J. Hardin ("Supplemental Hardin Declaration").  
13 (ECF Nos. 108 and 109).

14 On June 25, 2018, BOA filed the Supplemental Combs Declaration.

#### 15 **APPLICABLE LEGAL STANDARDS**

16 The automatic stay arises only upon the filing of a bankruptcy petition and is applicable  
17 to "all entities." 11 U.S.C. § 362(a). The automatic stay applies to any act to "obtain possession  
18 of property of the estate or of property from the estate or to exercise control over property of the  
19 estate." 11 U.S.C. § 362(a)(3). The automatic stay also applies to any act to "enforce any lien  
20 against property of the estate." 11 U.S.C. § 362(a)(4). Property of the estate includes "all legal  
21 or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. §  
22 541(a)(1).

23 Under Section 554(c), scheduled property that is not otherwise administered at the close  
24 of a Chapter 7 case is abandoned to the debtor and deemed administered. Under Section  
25 362(c)(1), the stay of acts against property of the estate continues until the property is no longer  
26 property of the estate. Under Section 362(c)(2), the stay of all other acts continues until the case  
27 is closed, the case is dismissed, or the debtor is granted or denied a discharge. By operation of  
28 law, the automatic stay terminated and cannot be reinstated. See *Canter v. Canter (In re Canter)*,

1 299 F.3d 1150, 1155 n.1 (9th Cir. 2002). After the automatic stay is terminated, a debtor may  
2 seek to obtain an injunction from the bankruptcy court. Compare Lattin v. Midland Mortgage  
3 Co. (In re Lattin), 461 B.R. 832 (Bankr. D. Nev. 2011) (denying creditor’s motion to dismiss  
4 debtor’s adversary complaint seeking injunction under Section 105(a) after automatic stay had  
5 terminated under Section 362(c)(3)).

6 On request from a “party in interest,” the court may grant relief from the automatic stay  
7 by terminating, annulling, modifying, or conditioning the automatic stay. 11 U.S.C. § 362(d).

8 In the Ninth Circuit, if an act is taken by a creditor in violation of the automatic stay, any  
9 such act, including a sale of estate property, is *void ab initio*. See Schwartz v. U. S. (In re  
10 Schwartz), 954 F.2d 569, 571 (9th Cir. 1992). Thus, a party who purchases an asset owned by a  
11 bankruptcy estate in violation of the automatic stay does not obtain valid legal title. See, e.g.,  
12 40235 Washington St. Corp. v. Lusardi (In re 40235 Washington St. Corp.), 329 F.3d 1076, 1080  
13 (9th Cir. 2003) (purchase of bankruptcy estate property at county tax sale in violation of  
14 automatic stay was without effect). The party who violated the stay, however, may seek an order  
15 from the bankruptcy court to annul the automatic stay retroactively for cause under Section  
16 362(d)(1). See Schwartz, 954 F.2d at 572-73.

17 Annulment of the automatic stay “has the effect of retroactively validating acts that  
18 otherwise violate the stay.” Lonestar Sec. & Video, Inc., v. Gurrola (In re Gurrola), 328 B.R.  
19 158, 172 (B.A.P. 9th Cir. 2005). See, e.g., Ceralde v. The Bank of N.Y. Mellon (In re Ceralde),  
20 2013 WL 4007861 (B.A.P. 9th Cir. Aug. 6, 2013) (annulment motion granted in involuntary  
21 Chapter 7 case in favor of lender that foreclosed without prior knowledge of involuntary  
22 proceeding). See also, Sundquist v. Bank of Am., N.A. (In re Sundquist), 566 B.R. 563, 685  
23 (Bankr. E.D. Cal. 2017).

24 Whether “cause” exists under Section 362(d)(1) to annul the stay is determined under a  
25 “balancing of the equities” test. See In re Fjeldsted, 293 B.R. 12, 24 (B.A.P. 9th Cir. 2003).

26 The following factors should be considered:

- 27 1. Number of filings;
- 28 2. Whether, in a repeat filing case, the circumstances indicate an intention to  
delay and hinder creditors;

- 1 3. A weighing of the extent of prejudice to creditors or third parties if the
- 2 stay relief is not made retroactive, including whether harm exists to a bona
- 3 fide purchaser;
- 4 4. The Debtor's overall good faith (totality of circumstances test): *cf. Fid. &*
- 5 *Cas. Co. of N.Y. v. Warren (In re Warren)*, 89 B.R. 87, 93 (9th Cir. BAP
- 6 1988)(chapter 13 good faith);
- 7 5. Whether creditors knew of stay but nonetheless took action, thus
- 8 compounding the problem;
- 9 6. Whether the debtor has complied, and is otherwise complying, with the
- 10 Bankruptcy Code and Rules;
- 11 7. The relative ease of restoring parties to the *status quo ante*;
- 12 8. The costs of annulment to debtors and creditors;
- 13 9. How quickly creditors moved for annulment, or how quickly debtors
- 14 moved to set aside the sale or violative conduct;
- 15 10. Whether, after learning of the bankruptcy, creditors proceeded to take
- 16 steps in continued violation of the stay, or whether they moved
- 17 expeditiously to gain relief;
- 18 11. Whether annulment of the stay will cause irreparable injury to the
- 19 debtor;
- 20 12. Whether stay relief will promote judicial economy or other efficiencies.

21 Id. at 25.<sup>5</sup> Five of these factors (1, 2, 4, 6, and 11) focus solely on the debtor (“debtor factors”);

22 three of these factors (3, 5 and 10) focus solely on non-debtors (“non-debtor factors”); three of

23 these factors ( 7, 8 and 9) focus on both the debtor and non-debtor parties (“common factors”);

24 and one factor (12) looks to judicial interests (“neutral factor”). All twelve factors (“Fjeldsted

25 Factors”) simply provide an analytical framework and any one factor may be dispositive in

26 comparison to the others. Id. Thus, determining whether annulment is proper is made on a case

27 by case basis. See Nat’l Envtl. Waste Corp. v. City of Riverside (In re Nat’l Envtl. Waste

28 Corp.), 129 F.3d 1052, 1055 (9th Cir. 1997).

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24 <sup>5</sup> Factor 5 refers to the Warren decision by the Bankruptcy Appellate Panel for the Ninth

25 Circuit (“BAP”). In that proceeding, the individual debtor sought to discharge a \$40,970

26 embezzlement judgment through a Chapter 13 plan that paid only \$1,000 to his creditors. The

27 embezzlement judgment would have been nondischargeable in Chapter 7 under Section

28 523(a)(6), but was not excepted from the so-called “super-discharge” in Chapter 13 under then-

Section 1328(c). 89 B.R. at 93. The BAP determined that a finding of the debtor’s good faith in

proposing a plan under Section 1325(a)(3) should take into consideration the amount of the

proposed payment to creditors and the presence of a debt that would be nondischargeable in

Chapter 7. Id. at 95.

## DISCUSSION

1  
2 During the Chapter 7 proceeding, the automatic stay prevented creditors from enforcing  
3 claims against the Leeds Residence without first obtaining relief from stay from the bankruptcy  
4 court. On May 8, 2013, however, SFR purchased the Leeds Residence at a foreclosure sale  
5 conducted on behalf of the Butler HOA. Under Nevada law, certain portions of HOA  
6 assessment liens have priority over residential mortgages. See NRS 116.3116(2)(b). When the  
7 homeowner does not satisfy the priority lien, the HOA can foreclose on the residence. The  
8 Nevada Supreme Court has concluded that a valid HOA foreclosure sale of residential property  
9 extinguishes the lower priority mortgage held by the residential lender. See SFR Inv. Pool 1,  
10 LLC v. U.S. Bank, 334 P.3d 408, 419 (Nev. 2014). Even though Leeds had scheduled the value  
11 of her residence at \$307,554 in her Schedule A,” SFR purchased the real property at the HOA  
12 foreclosure sale for \$42,000.

13 In a bankruptcy context, the consequence to the residential lender is extreme: the  
14 individual debtor’s personal liability for the loan is discharged by the bankruptcy, see 11 U.S.C.  
15 § 727(b), and the lender’s security interest against the residence is extinguished by the  
16 foreclosure. See also Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mort.,  
17 388 P.3d 970, 973 (Nev. 2017). The residential lender ends up with no enforceable obligation  
18 against the borrower because of the discharge injunction, see 11 U.S.C. § 524(a)(1 and 2), and  
19 the purchaser at the HOA foreclosure sale ends up with title to the residence unencumbered by  
20 the prior mortgage.

21 The foreclosure sale for the Leeds Residence occurred on May 8, 2013, but the Leeds  
22 bankruptcy case did not close until January 29, 2014. As there was no abandonment of the  
23 Leeds Residence under Section 554(a or b) prior to case closure, the Leeds Residence was still  
24 property of the bankruptcy estate being administered by Rosenberg at the time SFR purchased  
25 the Leeds Residence at the Butler HOA foreclosure sale.

26 In the instant case, the Reopening Order obtained under Section 350 did not reimpose the  
27 automatic stay nor did it revert the Leeds Residence or any other property in the prior Chapter 7  
28 estate. Additionally, there was no injunction entered by this court precluding further action in

1 the A&K v. Leeds Action. As a result, the State Court order granting summary judgment in  
2 favor of BOA did not violate the automatic stay nor any order issued by a federal court.  
3 Likewise, that summary judgment order did not violate the discharge injunction protecting Leeds  
4 because it was not a determination of the personal liability of Leeds with respect to an obligation  
5 that was discharged in her bankruptcy. In short, nothing about the State Court summary  
6 judgment order in favor of BOA violated the automatic stay, an order of this court, or the  
7 discharge injunction. Compare Gruntz v. Cty. of Los Angeles (In re Gruntz), 202 F.3d 1074,  
8 1077-78 (9th Cir. 2000) (state court child support conviction of Chapter 11 debtor in possession  
9 was subject to bankruptcy court's exclusive jurisdiction to grant relief from stay, but criminal  
10 prosecutions are excepted from application of the automatic stay). While the bankruptcy court  
11 has authority to consider the instant Annulment Motion, it has no authority to set aside or  
12 otherwise review the State Court summary judgment order.<sup>6</sup>

13 In the instant case, the automatic stay was violated both by the HOA in seeking to  
14 enforce its assessment lien against the Leeds Residence, and by SFR in seeking to obtain  
15 possession and control over the Leeds Residence. Both the HOA and SFR are "entities" that  
16 were subject to the automatic stay and the Leeds Residence was property of the estate. Under  
17 settled automatic stay jurisprudence, both the act of the HOA and the act of SFR are *void ab*  
18 *initio*. Only SFR, however, has sought to annul the automatic stay. But if the automatic stay is  
19 annulled to permit the foreclosure sale to proceed retroactively, separate relief in favor of Butler  
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21 <sup>6</sup> The "Rooker-Feldman" doctrine requires federal courts to give full faith and credit to  
22 the decisions of state courts. The doctrine applies in bankruptcy proceedings where the relevant  
23 dispute also is raised before a state court. See Reusser v. Wachovia Bank, N.A., 525 F.3d 855,  
24 858-59 (9th Cir. 2008). In Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005),  
25 Justice Ginsburg clarified that the Rooker-Feldman doctrine is "confined to cases of the kind in  
26 which the doctrine acquired its name: cases brought by state-court losers complaining of  
27 injuries caused by state-court judgments rendered before the district court proceedings  
28 commenced and inviting district court review and rejection of those judgments." 544 U.S. at 284  
(emphasis added). Where a federal and state court have concurrent jurisdiction over a factual or  
legal issue, "[d]isposition of the federal action, once the state-court adjudication is complete,  
would be governed by preclusion law." Id. at 293. The Interpleader Action was commenced  
well after the Leeds bankruptcy was concluded and the summary judgment order was entered by  
the State Court after the Annulment Motion was filed.

1 HOA should not be necessary. SFR argues that annulment of the automatic stay is appropriate  
2 under the “Fjeldsted Factors.” See Annulment Motion at 5:12 to 6:4; SFR Reply at 12:11 to  
3 15:13. BOA opposes retroactive relief for SFR for a variety of reasons. See BOA Opposition at  
4 9:3 to 14:16. SFR asserts that BOA lacks standing to oppose its request for annulment because a  
5 creditor lacks standing to enforce the automatic stay. See SFR Reply at 6:11 to 12:9.

6 The court having considered the written and oral arguments of the parties concludes that  
7 the Annulment Motion must be denied for several reasons.

8 **First, Rosenberg breached his fiduciary duty to the Leeds bankruptcy estate.**

9 In its opposition to the Annulment Motion, BOA alleges, among other things, that  
10 Rosenberg established, managed, controlled, and/or advised SFR while he was still the duly  
11 appointed Chapter 7 trustee in the instant case. See BOA Opposition at 4:4 to 7:8. It alleges that  
12 Rosenberg hired the current manager of SFR (Christopher J. Hardin) and conducted business  
13 with SFR through an adjoining office space. See BOA Opposition at 5:19-26.<sup>7</sup> BOA also  
14 alleges that Rosenberg obtained authorization to employ bankruptcy counsel (Howard Kim) on  
15 behalf of the Leeds bankruptcy estate and later hired Kim to represent SFR. See BOA  
16 Opposition at 4:10-19 and 6:18 to 7:8.<sup>8</sup> It further alleges that Rosenberg hired Diamond to  
17 attend HOA foreclosure sales in Las Vegas to purchase residential properties on behalf of SFR.  
18 See BOA Opposition at 6:1-8. BOA also alleges that both Rosenberg and Kim provided legal  
19 guidance in the operation of SFR’s business. See BOA Opposition at 6:9 to 7:8.<sup>9</sup> The  
20 opposition filed by BOA is accompanied by excerpts of the deposition testimony of Mssrs.

21  
22 <sup>7</sup> As discussed in notes 3 and 4, supra, Rosenberg occupies Suite B-215 and SFR  
23 occupies Suite B-214 at the same Las Vegas street address.

24 <sup>8</sup> BOA also alleges that during his employment as special counsel to the Leeds estate,  
25 attorney Kim also reviewed the Schedules that listed the Leeds Residence as an asset of the  
26 bankruptcy estate. See BOA Opposition at 5:4-7.

27 <sup>9</sup> BOA also objects under FRE 602 (personal knowledge), 701 (opinion testimony), 801  
28 and 802 (hearsay), and 1002 (best evidence) to Paragraphs 7, 8, 9 and 11 of the Hardin  
Declaration. See Evidentiary Objections to Declaration of Christopher J. Hardin in Support of  
SFR Investments Pool 1, LLC’s Motion to Retroactively Annul the Automatic Stay  
 (“Evidentiary Objection”). (ECF No. 105).

1 Hardin, Diamond, and Kim taken in connection with various civil proceedings in State Court.  
2 See Exhibits “A,” “C,” and “D” to Combs Declaration. The opposition also is accompanied by  
3 the affidavit of Adam Bailey (“Bailey Affidavit”) who apparently was employed by SFR  
4 between 2012 and 2013. See Exhibit “B” to Combs Declaration. Bailey attests that SFR was  
5 formed by Rosenberg and his wife, Barbara Rosenberg. See Bailey Affidavit at ¶¶ 5 and 6. He  
6 attests that Hardin was not the sole manager of SFR, but that Bailey reported to Rosenberg, to his  
7 wife, and to Kim. Id. at ¶ 10.

8 In response to BOA’s serious allegations,<sup>10</sup> SFR submitted only the Supplemental Hardin  
9 Declaration. Hardin attests that SFR is a manager-managed limited liability company, that he  
10 has been the manager of SFR since October 8, 2012, and that he purchased the Leeds Residence  
11 at the HOA foreclosure sale on May 8, 2013. See Supplemental Hardin Declaration at ¶¶ 4 and  
12 6. He further attests that as the sole manager of SFR, he had sole decision making authority on  
13 the purchase of properties at the HOA auctions, that he did not discuss or consult with his  
14 attorneys the properties to be purchased, and that he had no knowledge of the Leeds bankruptcy  
15 at the time of the purchase. Id. at ¶¶ 8, 9 and 12. Although SFR’s response does not directly  
16 contradict any of the evidence presented by BOA,<sup>11</sup> factual disputes ordinarily would require an  
17 evidentiary hearing before a disposition of the Annulment Motion.

18 At the hearing on the Annulment Motion, however, counsel for SFR acknowledged on  
19 the record that Rosenberg did act as counsel for SFR when Rosenberg was still the Chapter 7  
20 trustee in the Leeds case. He also confirmed that Rosenberg was counsel for SFR at the time the  
21 Leeds Residence was purchased by SFR at the HOA foreclosure sale. Counsel for SFR was  
22 unaware of whether Rosenberg received compensation for his services to SFR, but  
23 acknowledged that SFR receives rent for the former Leeds Residence as part of SFR’s business

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24 <sup>10</sup> If true, the allegations made by BOA implicate various bankruptcy provisions of Title  
25 18, including 18 U.S.C. §§ 153, 154 and 157.

26 <sup>11</sup> For example, a limited liability company (“LLC”) can be member-managed or  
27 manager-managed. See NRS 86.161(d). An LLC can have a non-member manage its  
28 operations. See NRS 86.291(3). The non-member manager has no ownership interest in the  
LLC and need not have any involvement in the formation of the LLC.

1 operations. Apparently in support of one of the Fjelsted Factors, counsel for SFR argued that  
2 Rosenberg’s knowledge of the Leeds bankruptcy proceeding should not be imputed to SFR.<sup>12</sup>

3 A bankruptcy trustee has a fiduciary duty to all creditors of the bankruptcy estate. See  
4 generally 3 COLLIER ON BANKRUPTCY, ¶ 323.02[2] and 6 COLLIER ON BANKRUPTCY, ¶ 704.04[1]  
5 (Richard Levin and Henry J. Sommer, eds., 16th ed. 2018).<sup>13</sup> Chapter 7 panel trustees are  
6 required to “immediately resign from the case” upon discovery of “a conflict of interest or a lack  
7 of disinterestedness after accepting appointment” in a case. See Handbook for Chapter 7 Panel  
8 Trustees at Page 2-7, Effective October 1, 2012, U.S. Department of Justice, Executive Office  
9 for United States Trustees (“Trustee Handbook”).<sup>14</sup> An actual or potential conflict of interest or  
10 lack of disinterestedness exists, for example, where the bankruptcy estate has a potential cause of  
11 action against a client of the trustee or an entity with whom the trustee has a business  
12 relationship. See Trustee Handbook at Page 2-7, example “d.” Moreover, a lack of  
13 disinterestedness also exists where an appearance of impropriety is present. See Dye v. Brown  
14  
15

16 \_\_\_\_\_  
17 <sup>12</sup> Counsel argued that if Rosenberg was an “all-knowing” trustee aware, *inter alia*, that  
18 the HOA foreclosure sale was in violation of the automatic stay, his assumed knowledge still  
19 should not be imputed to SFR. A Chapter 7 trustee is not required, however, to be “all-knowing”  
20 or otherwise omniscient to understand when property of his or her assigned bankruptcy case  
21 remains property of the estate. Only three months after the HOA foreclosure sale, Rosenberg  
22 attested in his TDR that the Leeds Residence had been fully administered, even though it had  
23 been purchased by his own client in violation of the automatic stay. Had the case been closed  
24 before the HOA foreclosure sale, the Leeds Residence would have been administered by  
25 abandonment to Leeds pursuant to Section 554(c). As both a Chapter 7 trustee and a bankruptcy  
26 attorney, Rosenberg knew or should have known that the HOA sale and SFR’s purchase are  
27 void.

24 <sup>13</sup> Attorneys employed by the trustee on behalf of the estate also have a fiduciary duty to  
25 the bankruptcy estate. See In re Taxman Clothing Co., 49 F.3d 310, 314 (7th Cir. 1995); Everett  
26 v. Perez (In re Perez), 30 F.3d 1209, 1219 (9th Cir. 1994) (fiduciary duty also rests with  
27 bankruptcy counsel for Chapter 11 debtor in possession).

27 <sup>14</sup> One of the specific non-exclusive examples of a situation presenting an actual or  
28 potential conflict of interest or lack of disinterestedness is where the bankruptcy estate has a  
potential cause of action against a client of the trustee or an entity with whom the trustee has a  
business relationship. See Trustee Handbook at Page 2-7, example “d.”

1 (In re AFI Holding, Inc.), 530 F.3d 832, 850 (9th Cir. 2008)<sup>15</sup> (“The Code’s definition of  
2 disinterestedness ‘covers not only actual impropriety, but the appearance of impropriety as  
3 well.’”).<sup>16</sup>

4 The record in this matter sufficiently demonstrates that Rosenberg breached his fiduciary  
5 duties in this case. While Rosenberg was serving as the Chapter 7 trustee, SFR acknowledges  
6 that Rosenberg also acted as counsel for SFR. While Rosenberg was acting as counsel for SFR,  
7 SFR acknowledges that it purchased the Leeds Residence while it was still property of the  
8 bankruptcy estate. SFR acknowledges that it was a client of Rosenberg when it purchased the  
9 Leeds Residence in violation of the automatic stay.<sup>17</sup> Under any spin of the other evidence  
10 presented, the record establishes that while serving as the Chapter 7 trustee of the Leeds estate,  
11 Rosenberg permitted his private client to obtain possession and control over property of the  
12 bankruptcy estate.<sup>18</sup>

13  
14  
15 <sup>15</sup> The AFI Holding decision is commonly cited as authority for denying compensation to  
16 estate professionals who fail to disclose activities and connections that create an appearance of  
17 impropriety. See, e.g., In re American West Development, Inc., Case No. 12-12349-MKN, “The  
18 Acting United States Trustee’s Objection to (I) Field Law Ltd.’s Final Application for the Period  
19 Beginning on April 12, 2012 and Ending on March 15, 2013 Pursuant to 11 U.S.C. §§ 327,  
20 328(c) and 330 of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure 9014 and  
21 2016 [Docket No. 904] and (II) James L. Moore’s Final Fee Application for the Period  
22 Beginning April 10, 2012 and Ending March 15, 2013 [Docket No. 908],” at ¶¶ 78, 79 and 80,  
23 Docket No. 935.

24 <sup>16</sup> Bankruptcy Judge Bert Goldwater observed more pointedly: “Plutarch, in his writings,  
25 quoted Caesar: ‘I wish my wife to be not so much suspected.’ That is the benchmark for trustees  
26 in bankruptcy administering millions of dollar in property and money in this Court. The Court  
27 and the trustees in bankruptcy must be above suspicion...The trustee in this case and the  
28 integrity of the United States Bankruptcy Court must be protected from any prejudiced  
suggestion of impropriety. The unwarranted inference of improper motive against [the  
trustee]...requires the Court, on its motion, to relieve the trustee of her duties.” In re Mason, 12  
B.R. 318, 319 (Bankr. D. Nev. 1981).

<sup>17</sup> Remarkably, SFR asserts that had it known of the automatic stay violation, it likely  
would not have purchased the Leeds Residence. See Annulment Motion at 4:21-22.

<sup>18</sup> Under these circumstances, it is unnecessary to resolve the Evidentiary Objections to  
the Hardin Declaration.

1           **Second, service of the Annulment Motion was insufficient.**

2           The Ninth Circuit has stated that retroactive relief from the automatic stay should be  
3 granted only in extreme circumstances. See Mataya v. Kissinger (In re Kissinger), 72 F.3d 107,  
4 109 (9th Cir. 1995). But see In re Ceralde, 2013 WL 4007861, at \*4 (a balance of equities  
5 approach is actually applied in finding cause to annul the automatic stay rather than an extreme  
6 circumstances standard). Notice of a motion seeking annulment of the automatic stay relief must  
7 be given to the appropriate parties. See FED.R.BANKR.P. 4001(a)(1), 9014(a), and 7004(b)(1).  
8 Notice must be given in the manner reasonably calculated to apprise the parties of the relief  
9 requested and an opportunity to object. See Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S.  
10 306, 314 (1950); Low v. Trump Univ., LLC, 881 F.3d 1111, 1120 (9th Cir. 2018)(notice need  
11 not be “perfect” but must “reasonably convey the required information”); Nationstar Mortgage  
12 LLC v. Springs Property Owners Association, 2018 WL 894615, at \*6 (D. Nev. Feb. 13,  
13 2018)(“Due process does not require actual notice...Rather, it requires notice ‘reasonably  
14 calculated, under all of the circumstances, to apprise interested parties of the pendency of the  
15 action and afford them an opportunity to present their objections.””).

16           While maintaining that it has standing to seek annulment of the automatic stay, SFR also  
17 maintains that BOA lacks standing to assert the protections of the stay in opposition to an  
18 annulment request. Citing a circuit decision holding that a secured creditor lacks standing to  
19 appeal an adverse ruling on a separate creditor’s automatic stay violation, SFR asserts that the  
20 only appropriate parties with standing to object to retroactive in a Chapter 7 proceeding are the  
21 debtor and the bankruptcy trustee. See Annulment Motion at 2:17-18; SFR Reply at 2:2-14,  
22 citing Tilley v. Vucurevich (In re Pecan Groves of Ariz.), 951 F.2d 242 (9th Cir. 1983).<sup>19</sup>

23 \_\_\_\_\_  
24           <sup>19</sup> SFR also mis-cites the decision of the bankruptcy court for the Southern District of  
25 California as a decision of the Ninth Circuit. See SFR Reply at 2:6, citing In re Int’l Forex of  
26 Cal., Inc., 247 B.R. 284 “(9th Cir. 2000),” rather than (Bankr. S.D. Cal. 2000). In fact, the  
27 correct court in the Int’l Forex voiced its concern that the Ninth Circuit’s Pecan Groves decision  
28 “has been misstated for the proposition that the automatic stay is solely for the benefit of the  
debtor, and a creditor cannot have standing under § 362(h). *See, e.g., Little Pat Inc. v. Conter (In*  
*re Soll)*, 181 B.R. 433, 443 (Bankr. D. Ariz. 1995). This Court finds ample authority for the  
proposition that the automatic stay is intended to benefit creditors, as well as debtors.” 247 B.R.  
at 291.

1 Assuming that this proposition is correct with respect to a Chapter 7 proceeding closed years  
2 after a debtor has received a discharge and the assigned Chapter 7 trustee has been discharged of  
3 any further duties,<sup>20</sup> how is notice of an annulment motion accomplished?

4 In the instant case, Leeds received her discharge on September 20, 2011. The Butler  
5 HOA foreclosure was completed on May 8, 2013. The Interpleader Action was commenced on  
6 September 10, 2013. On April 17, 2014, an “Affidavit of Due Diligence re: Myong Leeds, an  
7 Individual,” was filed in the Interpleader Action. See Exhibit 16 to Removal Notice. That  
8 affidavit attests that a licensed process server was unable to locate Leeds at various addresses in  
9 Las Vegas, Nevada, as well as in Illinois.<sup>21</sup> According to the COS accompanying the instant  
10 Annulment Motion, notice of SFR’s request was given electronically to Ballstaedt, Rosenberg,  
11 the Office of the United States Trustee (“UST”), and counsel for two secured creditors. The  
12 Annulment Motion also was served by United States mail on an unsecured creditor and on  
13 counsel for BOA.

14 There is no evidence in the record that Leeds was ever served with the Annulment  
15 Motion by personal service, by mail, or any other method. There is evidence in the record that  
16 attorney Ballstaedt never agreed to represent Leeds in relief from stay proceedings. See 2016  
17  
18

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19 <sup>20</sup> The standing of a secured creditor to appeal an order annulling the automatic stay is  
20 presently before the Ninth Circuit in connection with U.S. Bank, N.A., et al v. SFR Investments  
21 Pool 1, LLC, Case No. 17-16938. That appeal arises out of this judicial district in a case entitled  
22 In re Dino J. Petrone and Connie L. Petrone, Case No. 09-32084-LED, cited by SFR in the  
23 current proceeding. See Annulment Motion at 8 n.3 and SFR Reply at 14 n.5; see also Exhibit  
24 “1” to Annulment Motion. In that case, an order annulling the automatic stay in favor of SFR  
25 was entered by the bankruptcy court. The secured creditors’ appeal to the U.S. District Court was  
26 dismissed for lack of standing to appeal based on the holding in Pecan Groves. The district  
27 court’s decision was appealed to the Ninth Circuit. SFR then sought to dismiss the circuit appeal  
28 for lack of standing. On May 24, 2018, the motion panel of the Ninth Circuit denied the motion  
to dismiss without prejudice to renewing the arguments in SFR’s answering brief. SFR’s  
answering brief is due on July 25, 2018. At the June 27, 2018 hearing on the instant Annulment  
Motion, SFR did not inform this bankruptcy court of the motion panel’s order.

<sup>21</sup> Whether Leeds could be located at this time to effectuate personal service of an  
annulment request is unknown.

1 Statement at ¶ 7.<sup>22</sup> Moreover, under Local Rule 5005(c)(4), electronic service of notice to an  
 2 attorney does not constitute service on the client unless the attorney is authorized to accept  
 3 service by the client. Likewise, under Local Rule 5005(e)(4), an attorney's waiver of any right  
 4 to receive notice by first class mail or personal service does not constitute an agreement to accept  
 5 service or notice on behalf of a client. Thus, even if attorney Ballstaedt has any contact with a  
 6 Chapter 7 client for whom a discharge was obtained more than six years earlier, his  
 7 representation of Leeds expressly excluded this Annulment Motion, and electronic notice to  
 8 Ballstaedt does not establish the contrary.

9 There is evidence, of course, that SFR served Rosenberg with the Annulment Motion.  
 10 Combined with SFR's acknowledgement that Rosenberg actually represented SFR at the time of  
 11 the very sale in question, however, that evidence gives new and virtually literal meaning to the  
 12 adjective "self-serving." Moreover, Rosenberg no longer serves on the Chapter 7 trustee panel in  
 13 this judicial district. Thus, even if Rosenberg remotely could be considered disinterested in  
 14 connection with the instant matter, he has no legal authority to respond to the Annulment Motion  
 15 as a fiduciary on behalf of the bankruptcy estate.

16 Under these circumstances, there is no evidence of adequate notice to any of the parties,  
 17 i.e., the debtor and the bankruptcy trustee, who apparently have standing to oppose the relief that  
 18 SFR seeks.<sup>23</sup> Thus, notice reasonably calculated to apprise those parties of the requested relief

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19 <sup>22</sup> "By agreement with the debtor(s), the above-disclosed fee does not included the  
 20 following services:...Representation of the debtors in...relief from stay actions..." 2016  
 21 Statement at ¶ 7.

22 <sup>23</sup> This court agrees with the concerns expressed by the bankruptcy court in Inter'l Forex,  
 23 i.e., that the holding in Pecan Groves has been overstated. See discussion at note 19, supra. In  
 24 Inter'l Forex, Judge Adler concluded that a prepetition creditor of a Chapter 11 debtor may be an  
 25 individual entitled to recover damages under Section 362(k), including costs and attorney's fees,  
 26 for a violation of the automatic stay. 247 B.R. at 291. The court concluded that a non-debtor  
 27 party violated the automatic stay protecting the Chapter 11 debtor, causing damages to a  
 28 prepetition creditor in the form of costs and attorney's fees; those costs and attorney's fees were  
 awarded to the prepetition creditor under Section 362(k). Id. at 291-92. That interpretation of  
 Section 362(k) appears to be consistent with the Ninth Circuit's post-Pecan Groves observation  
 that the automatic stay also is designed to protect the interests of creditors from acts taken by  
 other creditors. See Nat'l Env'tl. Waste Corp., 129 F.3d at 1054, citing H.Rep. No. 95-595, 95th  
 Cong., 1st Sess. 340 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 6297

1 and of the opportunity to object, has not been given.<sup>24</sup>

2 (“The automatic stay also provides creditor protection. Without it, certain creditors would be  
3 able to pursue their own remedies against the debtor’s property. Those who acted first would  
4 obtain payment of their claims in preference to and to the detriment of other creditors.  
5 Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are  
6 treated equally. A race of diligence by creditors for the debtor’s assets prevents that.”). By  
7 contrast, a bankruptcy trustee is not considered to be an individual who is eligible to seek  
8 sanctions under Section 362(k). See Havelock v. Taxel (In re Pace), 67 F.3d 187, 193 (9th Cir.  
1995). Thus, in spite of the language in Pecan Groves, debtors and creditors can seek to enforce  
the automatic stay by obtaining damages under Section 362(k), while the assigned bankruptcy  
trustee cannot.

9 Fifteen years after International Forex was decided, the BAP issued an unpublished  
10 decision in Lei v. Yan (In re Demas Wai Yan), 2015 WL 845570 (B.A.P. 9th Cir. Feb. 19, 2015).  
11 Without even mentioning the published decision in International Forex, the BAP did exactly  
12 what Judge Adler cautioned against: it overstated the holding in Pecan Groves to deny a Chapter  
13 7 creditor standing to recover damages from a debtor who violated the automatic stay by  
14 prosecuting claims against the individual creditor that were property of the Chapter 7 estate.  
15 2015 WL 845570, at \*4. The BAP reasoned that because creditors had received equal  
16 distribution from a fully administered estate, the creditor in question did not have standing to  
17 recover damages from the debtor under Section 362(k). Id. That conclusion appears to be a non-  
18 sequitur, however, because nothing in the language of Section 362(k) imposes such a limit on an  
19 individual who actually has been “injured by a willful violation” of the automatic stay.

20 Rote application of the Pecan Groves holding leads to the anomalous situation where the  
21 same act in violation of the automatic stay is void for some parties but not void for others. This  
22 situation creates the risk that led the Ninth Circuit panel in Schwartz to conclude that acts in  
23 violation of the stay are *void ab initio* rather merely voidable: “Concluding that acts in violation  
24 of the automatic stay were merely voidable would have the effect of encouraging the possibility  
25 that violators of the automatic stay may profit from their disregard for the law, provided it goes  
26 undiscovered for a sufficient period of time. This may be an acceptable risk to some creditors  
27 when it is measured against a delayed pro rata distribution.” 954 F.2d at 572, quoting In re  
28 Garcia, 109 B.R. 335, 340 (N.D. Ill. 1989). This appears to be exactly what has occurred in the  
instant case. Unlike Schrödinger’s Cat, an act in violation of the automatic stay should be either  
void or not void for all purposes, but not both. See Labor Plus, LLC, and its Successor Wynn  
Las Vegas, LLC, et al., 366 NLRB No. 109, 2018 WL 3007488, at \*3 n.8 (N.L.R.B. June 14,  
2018)(McFerran, dissenting) (“‘Schrödinger’s Cat’ is a thought experiment proposed by  
physicist Erwin Schrödinger in 1935, in which he postulated that under the theory of quantum  
physics, it would be possible for a cat in a closed box to be both simultaneously alive and dead  
until the moment that it is observed.”).

24 <sup>24</sup> If the originally assigned Chapter 7 trustee is unavailable, nothing prevents the party  
25 seeking relief in a closed proceeding from requesting the UST to appoint a new trustee.  
26 Appointment of a new trustee may be particularly appropriate when the moving party is seeking  
27 relief from an automatic stay violation that resulted in the removal of property from the  
28 bankruptcy estate. Chapter 7 trustees in this judicial district, including Rosenberg, frequently  
sought and obtained court authorization to complete “short sales” of over-encumbered residential

1 **Third, the doctrine of unclean hands warrants denial of retroactive relief from stay.**

2 Unclean hands is an equitable doctrine that bars a party from seeking equitable relief,  
 3 reflecting the equitable maxim that “he who seeks equity must do equity.” See Manufacturers’  
 4 Fin. Co. v. McKey, 294 U.S. 442, 451 (1935). “In applying the doctrine, what is material is not  
 5 that the plaintiff’s hands are dirty, but that he dirtied them in acquiring the right he now asserts,  
 6 or that the manner of dirtying renders inequitable the assertion of such rights against the  
 7 defendants.” Ellenburg v. Brockway, Inc., 763 F.2d 1091, 1097 (9th Cir. 1985) (emphasis  
 8 added). It “requires balancing the alleged wrongdoing of the plaintiff against that of the  
 9 defendant and ‘weigh[ing] the substance of the right asserted by [the] plaintiff against the  
 10 transgression which, it is contended, serves to foreclose that right.” Northbay Wellness Grp.,  
 11 Inc. v. Beyries, 789 F.3d 956, 959 (9th Cir. 2015). The doctrine is designed to preserve the  
 12 dignity of the court by preventing it from becoming a participant in inequitable conduct. See In  
 13 re Rose, 565 B.R. 178, 182 (Bankr. D. Nev. 2017), citing Precision Inst. Mfg. Co. v. Automotive  
 14 Maintenance Mach. Co., 324 U.S. 804, 813 (1945).

15 SFR engaged the legal services of Rosenberg while Rosenberg was the Chapter 7 trustee  
 16 of the Leeds estate and while SFR acquired the Leeds Residence from the Leeds estate. SFR  
 17 acquired the Leeds Residence for \$42,000, compared to the \$307,554 value attested by the  
 18 former owner, Leeds. Rosenberg violated his fiduciary duties as the Chapter 7 trustee of the  
 19 Leeds estate. As a licensed attorney, Rosenberg also likely violated his duties to SFR under  
 20 Rules 1.1<sup>25</sup> and 1.7(a)(2)<sup>26</sup> of the Nevada Rules of Professional Conduct. Rosenberg also likely

21  
 22 properties upon the priority lender’s agreement to carve out a small portion of the sale proceeds  
 23 for the bankruptcy estate. In a circumstance where a prior foreclosure sale is *void ab initio*, a  
 24 new Chapter 7 trustee could exercise his or her business judgment as to whether to simply  
 25 abandon the likely over-encumbered property again, or to attempt to negotiate a short sale with  
 26 the residential lender prior to the foreclosure of a priority assessment lien by an HOA.

27 <sup>25</sup> Rule 1.1 requires a lawyer to “provide competent representation to a client” that  
 28 includes “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the  
 representation.”

<sup>26</sup> Rule 1.7(a)(2) prohibits attorneys from representing a client if it involves a “concurrent  
 conflict of interest” that may include “a significant risk that the representation...will be

1 violated his duty to SFR and the UST under Rule 1.11(d)<sup>27</sup> of the Nevada Rules of Professional  
2 Conduct.

3 Bankruptcy courts are courts of equity and this court has exercised its discretion in  
4 numerous cases where retroactive relief from the automatic stay has been sought. See, e.g., In re  
5 Victor H. Wheatley, Case No. 12-22310-MKN, Order on Motion for Relief from Stay re: 1304  
6 Rawhide Street Las Vegas, Nevada, Docket No. 85, July 31, 2015 (granting homeowners  
7 association motion, joined by purchaser, to annul automatic stay to validate sale); In re Lynn C.  
8 Burke, Case No. 12-12508-MKN, Order on Ex Parte Motion to Reopen Bankruptcy Case for the  
9 Purpose of Retroactively Annuling the Automatic Stay, Docket No. 45, April 15, 2016 (granting  
10 purchaser's motion to annul automatic stay that had no prior notice of the bankruptcy  
11 proceeding); In re Wayne Alan Haddad and Debra Ann Haddad, Case No. 11-13184-MKN,  
12 Order on Ex Parte Motion to Reopen Bankruptcy Case for the Purpose of Retroactively  
13 Annuling the Automatic Stay, Docket No. 36, May 19, 2015 (granting purchaser's motion to  
14 annul automatic stay that had no prior notice of the bankruptcy proceeding and overruling  
15 objection by debtors as to the impact of reopening on their credit history). But see In re Gary  
16 Lee Smith and Nancy Margaret Smith, Case No. 14-10601-MKN, Order on Motion to Lift Stay  
17 and Order on Countermotion for Sanctions and Award of Attorney's Fees, Docket No. 78,  
18 December 4, 2014 (denying retroactive relief from stay to permit creditor to continue with  
19 postpetition lawsuit alleging negligence claim dischargeable in debtors' Chapter 13 proceeding);  
20 In re Danuta Chorzepa and Tadeusz Chorzepa, Case No. 11-27142-MKN, (Amended) Order on  
21 SFR Investments Pool 1, LLC's Motion to Retroactively Annul the Automatic Stay, Docket No.

22 materially limited by the lawyer's responsibilities to...a third person or by a personal interest of  
23 the lawyer."

24 <sup>27</sup> Rule 1.11 is entitled "Special Conflicts of Interest for Former and Current Government  
25 Officers and Employees." Subsection (d) provides that "a lawyer currently serving as a public  
26 officer or employee...(2) Shall not (i) Participate in a matter in which the lawyer participated  
27 personally and substantially while in private practice...unless the appropriate government agency  
28 gives its informed consent, confirmed in writing..." (Emphasis added.) Subsection (e) defines  
the term "matter" as including "(1) Any judicial or other proceeding...involving a specific party  
or parties, and (2) Any other matter covered by the conflict of interest rules of the appropriate  
government agency."

1 56, May 17, 2018 (denying purchaser's motion to annul automatic stay where automatic stay in  
2 debtors' second bankruptcy case had expired under Section 362(c)(3)(A) prior to HOA's  
3 commencement of foreclosure sale process). But the record in those cases did not raise the same  
4 concerns present in this proceeding nor the same arguments raised in opposition to annulment of  
5 the automatic stay.

6 Under the facts acknowledged by SFR, it acquired the Leeds Residence while engaging  
7 the assistance of Rosenberg, which violated his fiduciary duties to the bankruptcy estate.  
8 Additionally, Rosenberg likely violated his professional responsibility as an attorney to notify  
9 the UST and to obtain its written consent before providing legal services to SFR. By annulling  
10 the automatic stay in this instance, the court would become a participant in Rosenberg's and  
11 SFR's inequitable conduct. That this court will not do.

12 **Finally, application of the Fjeldsted Factors separately warrants denial of the**  
13 **Annulment Motion.**<sup>28</sup>

14 Most of the previously categorized "debtor factors" do not favor retroactive relief from  
15 stay. Leeds has filed only one bankruptcy case and is not a repeat filer attempting to hinder and  
16 delay creditors. She has not sought a Chapter 13 super-discharge and has complied with  
17 applicable bankruptcy law. If the stay is not annulled, however, the prospect of injury to Leeds  
18 arises because legal title to the Leeds Residence has been restored to her. Moreover, Leeds  
19 would be on title to real property that she does not occupy, encumbered by a deed of trust  
20 securing a discharged loan that is hopelessly in default. A subsequent foreclosure or other  
21 resolution of the various claims could jeopardize the fresh start she commenced on September  
22 20, 2011, when she received her Chapter 7 discharge.

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23 <sup>28</sup> SFR's assertion at the hearing that Rosenberg's knowledge of the Leeds bankruptcy  
24 should not be imputed to SFR is unpersuasive. Ordinarily, a lawyer is a client's agent and clients  
25 are considered to have notice of all facts known to their lawyer-agent. See Cmty. Dental Servs.  
26 v. Tani, 282 F.3d 1164, 1168 (9th Cir. 2002); Garcia v. Citicorp Trust Bank FSB, 2009 WL  
27 3103793, at \*1 (D. Nev. Sep. 23, 2009). Where the attorney ceases representation of the client  
28 and obtains knowledge of a bankruptcy in the course of representation of a different client, the  
attorney's knowledge will not be imputed to the former client. See, e.g., Perle v. Fiero (In re  
Perle), 725 F.3d 1023 (9th Cir. 2013). In this case, Rosenberg was both the trustee in the Leeds  
case and also counsel to an entity that was acquiring property that was an asset of the same  
bankruptcy estate.

1 None of the “non-debtor factors” favor retroactive relief from stay under the  
2 circumstances of this case. No one disputes that Butler HOA violated by the automatic stay  
3 when it foreclosed on the Leeds Residence. No one disputes that Butler HOA could have  
4 obtained relief from stay during the Leeds bankruptcy proceeding and then proceeded to  
5 complete a valid foreclosure sale. No one disputes that if BOA had filed a notice of default on  
6 its deed of trust during the Leeds bankruptcy proceeding without first obtaining relief from stay,  
7 any subsequent foreclosure sale would have been void. No one disputes that BOA could have  
8 obtained relief from stay during the Leeds bankruptcy proceeding and then proceeded to  
9 complete a valid foreclosure sale. No one disputes that BOA could have satisfied the priority  
10 portion of the Butler HOA lien to prevent the foreclosure sale from being completed. No one  
11 disputes that Rosenberg was legal counsel to SFR at the time SFR purchased the Leeds  
12 Residence. As between two creditors, i.e., BOA and Butler HOA, the extent of prejudice is  
13 extreme: annulment of the stay wipes out BOA’s lien under Nevada law, the parties would seek  
14 relief from the summary judgment ruling in the Interpleader Action, and BOA is prevented from  
15 seeking recovery from Leeds.<sup>29</sup> If the stay is not annulled, the HOA foreclosure sale is void, the  
16 parties would proceed in accordance with the judgment in the Interpleader Action, and BOA is  
17 still prevented from seeking recovery from Leeds. As between the two creditors and SFR, there  
18 was no bona fide purchaser without knowledge because Rosenberg was the Chapter 7 trustee of  
19 the bankruptcy estate as well as counsel to SFR when SFR purchased the Leeds Residence.

20 Most of the “common factors” do not favor retroactive relief from stay. Annuling the  
21 stay to restore parties to the “status quo ante” actually would result in Leeds returning to legal  
22 title to the Leeds Residence, Butler HOA having an unpaid priority assessment lien, BOA having  
23 a deed of trust securing a loan that was discharged by Leeds, and SFR having no legal interest in

---

24 <sup>29</sup> None of the cases denying standing to a creditor to challenge a violation of the  
25 automatic stay involve creditors whose consensual liens are permitted to be wiped out through a  
26 foreclosure sale by another creditor given statutory priority under state law. In such  
27 circumstances, a foreclosure by a reckless HOA has no natural enemies other than the wiped out  
28 lien creditor: the individual debtor who lacks the ability to pay the HOA assessments nor the  
mortgage has no incentive to oppose retroactive relief from stay, and the assigned bankruptcy  
trustee who has no interest in an over-encumbered asset also has no incentive to oppose  
retroactive relief.

1 the Leeds Residence.<sup>30</sup> From a conceptual standpoint, the process is relatively easy but that is  
2 not what SFR seeks. Instead, it seeks to restore Butler HOA to a position that it never sought,  
3 never obtained, and does not now seek: the ability to complete a foreclosure of its previous  
4 priority lien. Under the circumstances, SFR's request comes at little or no cost to Leeds or  
5 Butler HOA, but at a substantial economic and legal cost to BOA. Moreover, neither Leeds nor  
6 Butler HOA has taken any steps to set aside the foreclosure sale or to seek annulment of the  
7 automatic stay.

8 The remaining "neutral factor" is itself neutral under the circumstances of this  
9 proceeding. The Annulment Motion is the only request being made in an otherwise completed  
10 Chapter 7 proceeding. The outcome of the request has no additional impact on the economies or  
11 efficiencies of the federal courts because an order on a motion for relief from stay under Section  
12 362(d), whether granted or denied, is appealable. See In re Zapata, 656 F.App'x., 357, 358 (9th  
13 Cir. 2016); Buenaventura v. Chau (In re Chau), 2014 WL 547901, at \*2 (D. Nev. Feb. 11, 2014).  
14 The outcome of SFR's instant request may have an impact on the Interpleader Action, but the  
15 record establishes that the State Court effectively concluded the litigation by granting summary  
16 judgment in favor of BOA. See discussion at 4-5, supra. Even if this bankruptcy court enters an  
17 order granting the Annulment Motion, SFR would be required to seek relief from the summary  
18 judgment order entered by the State Court. Thus, retroactive relief from stay also may have no  
19 effect on judicial economies of the state courts.

20 Under these circumstances, when balancing the equities through application of the  
21 Fjelsted Factors, the court also concludes that retroactive relief from stay is inappropriate.<sup>31</sup>

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22 <sup>30</sup> The "status quo ante" is a term of art referring to the conditions that existed before the  
23 challenged action took place. See, e.g., Czyzewski v. Jevic Holding Corp., 137 S.Ct. 973, 985-  
24 86 (2017) (structured Chapter 11 dismissal did not restore status quo ante, but distributed  
debtor's assets in violation of bankruptcy priority scheme).

25 <sup>31</sup> The court is concerned about the impact to Leeds from the HOA foreclosure sale being  
26 void. See discussion at 20-21, supra. After Leeds received her Chapter 7 discharge on  
27 September 20, 2011, the HOA foreclosed on the Leeds Residence on May 8, 2013. In granting  
summary judgment in favor of BOA, the State Court determined that the HOA foreclosure sale is  
28 void and BOA's deed of trust against the Leeds Residence remains valid. See discussion at 5,  
supra. Unless Leeds voluntarily conveys title to the residence to BOA, a foreclosure sale by

1 For all of the reasons set forth above,

2 **IT IS HEREBY ORDERED** that SFR Investment Pool 1, LLC'S Motion to  
3 Retroactively Annul the Automatic Stay, Docket No. 77, be, and the same hereby is, **DENIED**.

4  
5 Copies sent via CM/ECF ELECTRONIC FILING

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BOA is likely to ensue. Instead of a post-discharge foreclosure occurring as of May 8, 2013, Leeds faces the prospect of a much more recent foreclosure sale appearing in her credit history. If Leeds is injured by a new foreclosure, the cause arguably would be traceable to the HOA's violation of the automatic stay.