UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re:

DELTA GROUP, LTD., Debtor. No. 93-56910-ASW Chapter 11

_____/

DELTA GROUP, LTD., Adversary No. 97-5171

Plaintiff,

vs.

LAWRENCE NOON,

Defendant.

_____/

AND RELATED COUNTERCLAIM

_____/

MEMORANDUM DECISION AFTER TRIAL

Delta Group, Ltd. ("Delta") is the Plaintiff and Counter-Defendant in the above-captioned Adversary Proceeding, and the Reorganized Debtor under a confirmed plan of reorganization in the above-captioned Chapter 11 case. Lawrence Noon ("Noon") is the Defendant and Counterclaimant in the Adversary Proceeding.

Before the Court are a complaint filed by Delta and a counterclaim filed by Noon. Delta's complaint seeks specific performance by Noon of a settlement agreement approved by this Court, cancellation of a cloud on title to certain real property, disallowance of Noon's claim filed in Delta's Chapter 11 case, damages for slander of title to the subject real property, and authorization to sell the subject real property free and clear of a lien claimed by Noon.[(1)] Noon's counterclaim seeks damages for Delta's breach of the Court-approved settlement agreement.

Delta is represented by Wayne A. Silver, Esq. ("Silver"); Noon is represented by Daniel L. Casas, Esq. ("Casas") of Reynolds Price Casas & Riley, LLP. The matters have been tried and submitted for decision following post-trial briefing. This Memorandum Decision constitutes the Court's findings of fact and conclusions of law, pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

I. FACTS

Delta called the following witnesses at trial:

David Schroder ("Schroder"), General Partner of Delta, which is a California limited partnership.

Thomas W. Redfern ("Redfern"), who was qualified as an expert concerning the market for apartment complexes on the Monterey Peninsula, and who acted as Delta's real estate broker.

Richard H. Soennichsen ("Soennichsen"), a former limited partner of Delta.

Noon, who is a firefighter employed by the city of San Jose for over twenty-five years, and a licensed California real estate broker for over ten years; he is a former General Partner of Delta and a current limited partner.

Noon called the following witnesses at trial:

Alan L. Zimmerman ("Zimmerman"), an attorney admitted to the California Bar who has not practiced law since 1990; he participated in Delta partnership affairs on behalf of his wife and her father, who are limited partners of Delta.

Glenn McCollum ("McCollum"), a limited partner of Delta.

Schroder.

Noon.

In 1982, Schroder and Noon formed a California limited partnership known as "Charlie Group" with themselves as General Partners, for the purpose of investing in an apartment complex on Olympia Avenue in Seaside, California ("the Charlie Property"). Delta was formed in late 1983 by Schroder and Noon as General Partners, for the purpose of investing in an apartment complex on Trinity Avenue in Seaside ("the Delta Property").

In August 1984, the limited partners of Delta voted to remove Noon as General Partner of Delta; in January 1985, the limited partners of Charlie Group voted to remove Noon as General Partner of Charlie Group. Schroder testified that Noon was removed from both posts because he did not satisfactorily manage the properties and refused to contribute additional funds as required by the partnership agreements. Soennichsen testified that Noon's "style" was to "throw money" at problems such as building maintenance and repair even though the partnerships were "thinly capitalized" and could not afford the expense, whereas such matters could have been addressed "much more efficiently and cheaper" with "a little know-how"; he also said that Noon refused to invest more when the partnerships were "out of money" as a result of Noon having spent too much on maintenance. In 1985, Schroder purchased Noon's interest as a general partner in Delta for approximately $26,000; Noon retained (and still does) his interest as a limited partner in Delta.

Noon was not paid for his partnership interests in Charlie Group and those were eventually compromised in litigation commenced by Noon, as discussed below.

In 1986, Noon filed a complaint in Santa Clara County Superior Court against Schroder, Charlie Group, and Delta, alleging breach of both partnership agreements and seeking relief in various forms. After non-binding arbitration and prior to trial, settlement was reached and approved by the State Court in 1988; an amended settlement was approved by the State Court in 1989 (collectively, "State Court Settlement"). The State Court Settlement provided for Noon to be given an exclusive brokerage listing of both the Charlie Property and the Delta Property, with Delta having the sole right to determine when to list the Delta Property for sale, and at what price; Noon's exclusive right to act as broker for the Delta Property was to expire if he did not produce a qualified buyer and close escrow within nine months after Delta listed the property, and Noon would thereupon have no further claim against Delta.

Noon listed the Charlie Property for sale and it was purchased for $725,000 by Schroder on October 13, 1989. Noon had produced an earlier offer from a Mr. Cooper for what Schroder described as "substantially less" than the listing price, which offer was not accepted by Charlie Group; Noon was paid the listing broker's commission on the sale even though he had not produced the ultimate buyer. Noon testified that he believed he earned that commission because Schroder would not have "stepped up" to buy but for the initial offer from Mr. Cooper; Schroder testified that he considered Noon to have done "nothing to market or sell" the property.

On October 20, 1989, a week after having been paid his commission as listing broker for sale of the Charlie Property, Noon caused a copy of the State Court Settlement to be recorded with the Monterey County Recorder; Schroder considered such recordation to create a claim of lien ("Lien") on both the Charlie Property (which was then owned by Schroder) and the Delta Property.

Noon testified that he caused the recordation to be made on advice of counsel as "the best way to protect my rights", "so that it was noticed by anyone with an interest in" the Delta Property and the Charlie Property and Schroder could not "go around me and deceive someone else". In deposition testimony concerning his reason for recordation, Noon stated that "I realize, you know, [Schroder] and I don't communicate well with each other at times. I don't know if it was intentional on his part or not, but the communications weren't there, so it's best to have good fences, and this was like a fence so that everybody was on record, and it seemed to be the best of -- best way to handle the situation." Noon acknowledged that, at the time the State Court Settlement was recorded, he had settled all claims against Charlie Group as reflected by the State Court Settlement and said that he no longer had any "formal" claim against Charlie Group. Noon also said that, when the State Court Settlement was recorded, he realized that recordation would "affect title" to the Charlie Property,

though he denied having intended to "cloud title" to that property by recording; he said that his recordation "definitely put a situation forth that had to be resolved". Schroder testified that, following Noon's recordation of the State Court Settlement, Schroder asked Noon to release the Lien as to the Charlie Property but Noon did not do so until eight years later, in January 1997.

Noon conceded that Schroder had asked him for such a partial release but it "just never got done"; he said that "we've been doing this dance for about 18 years now, that was part of the reason, this thing has a life of its own and just kept going and going". When asked whether he declined to release the Lien as to the Charlie Property in order to assure that he would be paid a commission for sale of the Delta Property, he replied: "I think that's part of the situation but not the whole situation. Definitely it was part of the issue but a lot of it has to do with things going back and forth and not -- I really don't think I'd have had a problem releasing Charlie Group's property if we'd had better communications going and we said 'OK let's get this thing done, boom, boom, boom', and we talked about it and got things resolved and saw where things were going". Noon said that he did not think he had been provided with a partial release for signature until one was presented to his attorney in May 1996, which he eventually did sign in January 1997.

On April 20, 1990, Schroder wrote to Noon on behalf of Delta, stating that Delta had decided to list the Delta Property for sale at $936,000 and asking that Noon forward a listing agreement. Schroder testified that the listing price was based on information received from two or

three realtors in Seaside, but said that Noon told Schroder that Noon thought the price was too high. On June 16, 1990, Schroder again wrote to Noon on behalf of Delta, referring to a meeting between them about listing the Delta Property and explaining that Schroder considered $936,000 to be a "very reasonable" initial listing price, since it was "slightly less" than 8.5 times gross rents from the property in March 1990, and the rents were expected to be increased soon, which would bring the $936,000 price down to 8.2 times gross rents. The letter went on to say that "in order to resolve your problems with the listing price, we are prepared to lower it to $885,000 (less than 7.8 times gross rents)" if Noon would agree that Delta need not reduce the price further or accept an offer that would close in more than thirty days and bore contingencies other than financing. The letter stated that, "per our prior stipulated agreement", Delta considered the April 20 date of its first letter to commence the nine month period of Noon's exclusive listing, "time is a wasting, and we have no intentions to have this ordeal drug out indefinitely", and asked Noon to give the matter "prompt attention" and forward a listing agreement for signature at Noon's "earliest convenience".

Schroder testified that Noon thought the reduced price of $885,000 was still too high and that, as far as Schroder was aware, Noon "made no effort" to sell the Delta Property during the nine months after April 20, placed no advertisements, did not list the property on the multiple listing service, and produced no offer; he said that Noon never provided him with a listing agreement to sign. Schroder testified that he considered Noon's exclusive right to sell the Delta Property under the State Court Settlement to have expired in January 1991, nine months after Delta notified Noon of its decision to list the property for sale at a specified price. Schroder then asked Noon for a release of the Lien as to both the Charlie Property and the Delta Property, but Noon refused.

Schroder testified that the Delta Property was encumbered by a first deed of trust that would mature on December 5, 1992 and require a balloon payment to be made at that time. He said that he talked to "several" lenders about refinancing, but Noon's Lien "caused difficulties" and lenders were not interested in the Delta Property unless the Lien was released. Schroder was unable to identify any

specific transaction that failed due to the existence of Noon's Lien, but said that lenders told him that there were "plenty of good properties" available and they did not want to spend time on a transaction involving a property with "problems".

Schroder testified that he attempted to restructure the first deed of trust on the Delta Property but that transaction "fell through" in April 1993. The mortgageholder then commenced foreclosure proceedings and Schroder said that he decided Delta should file Chapter 11 to preserve $300,000 equity in the Delta Property -- he considered bankruptcy to be necessary in order to stop the pending foreclosure while restructuring the first deed of trust and removing the "cloud" created by Noon's Lien. Delta filed its Chapter 11 petition on October 28, 1993 and acted as Debtor in Possession throughout the case. A modified second amended plan of reorganization ("Plan") was confirmed by an order of this Court on October 27, 1995, with an effective date of November 27, 1995.

Delta's Plan restructures the loan secured by the first deed of trust on the Delta Property and provides that, if that loan is not paid in full within three years after the Plan's effective date, the mortgage holder shall be free to foreclose on the Delta Property.

During the Chapter 11 case, Noon filed a proof of claim for $50,000 "approx.", consisting of a general unsecured claim for $8,000 "approx." and a secured claim for $42,000 "approx."; the claim is described as being based on "partner interest & commission" and refers to the State Court Settlement, but does not identify what collateral is held for the secured portion. This claim was compromised as part of Debtor's Plan ("Plan Settlement") as follows:

5.2 Class 2 disputed claim of Noon will be paid only if allowed by the Bankruptcy Court and only upon the sale of the [Delta] Property. Noon will be allowed to retain his lien on the [Delta] Property until paid or until the end of the term of the co-listing agreement, described below, whichever occurs earlier, and Noon shall sub- ordinate his lien in order for [Delta] to re- finance the Restructured Loan [on the Delta Property]. To the extent agreed upon and subject to Bankruptcy Court approval, the Noon claim will be compromised as set forth below.

Noon's previous right to list the [Delta] Property for sale will be reconfirmed in settlement of his claim, as modified as follows:

[Delta] agrees to co-list the [Delta] Property with Noon and a broker to be named who is experienced in selling income properties in the Seaside area. The co-listing broker shall be selected as soon as possible and in no event later than the Effective Date [of the Plan], and the term of the co-listing agreement shall be deemed to have commenced on the Effective Date, or upon the selection of the co-listing broker, whichever is earlier.

The co-listing shall be for nine (9) months with a six percent (6%) commission, to be divided equally between Noon and the broker to be named, with customary real estate commission splitting practices

to be applied. The term of the co-listing may be extended only by the Limited Partners [of Delta] having a majority in interest in profits and losses.

8.2 The [Delta] Property will be listed for sale as soon as practicable with a view to a sale within one year. The initial listing price shall be the appraised value of the [Delta] Property obtained in connection with the bankruptcy, ($830,000). The listing price shall be subject to adjustment or credit based upon the joint recommendation of the two listing brokers, subject to approval only by the Limited Partners [of Delta] having a majority in interest in profits and losses. Any sale proposed by the General Partner [of Delta] shall be subject to the approval of the Limited Partners [of Delta] having a majority in interest in profits and losses.

The provisions of Plan sections 5.2 and 8.2 were drafted by Noon's attorney Casas. Noon testified that, in negotiating and entering into the Plan Settlement, he understood its terms, including the provision for the $830,000 initial listing price to be reduced only by majority vote of Delta's limited partners. According to Noon, Silver said that Delta "needed that price [of $830,000] for the Bankruptcy Court" because the mortgage holder on the Delta Property would not accept the Plan if it provided for a lower initial listing price; he said that he understood that Delta would "just stick that number in and it didn't really mean anything", and it could be reduced "after the fact". In deposition testimony, Noon stated that he was not "completely positive" whether he and Silver had such a conversation.

The $830,000 appraisal referred to in the Plan Settlement was prepared in October 1994 to reflect the value of the Delta Property as of September 21, 1994 ("1994 Appraisal"); the appraiser was Craig Butorac, who is shown by the appraisal to hold a State certification, but not a State license. Delta's expert witness Redfern has been a licensed real estate broker since 1967, specializing in apartment sales and exchanges on the Monterey Peninsula since 1972; he is not a licensed appraiser but did handle appraisals for the Los Angeles County Tax Assessor from 1963 to 1969 and has taken "a couple" of appraisal courses since. He stated that he is knowledgeable in the various appraisal methods typically used, including the income approach and the use of a "gross multiplier" with respect to rents generated by properties such as apartment buildings. He testified that the market for apartment buildings in Seaside "has just picked up" after being "real slow" due to Ft. Ord closing in 1991-92; rents had been "flat" or decreasing for three or four years but began to increase in early or mid-1996, since the vacancy rate is "down dramatically" now that California State University at Monterey Bay has opened. He said that he would not agree to list a property for a price that was 20% or more "out of range", i.e., exceeding probable sale price by that much -- he considered the 1994 Appraisal to be less than 20% out of range as to the Delta Property's value in December 1995, based on his own knowledge of the marketplace and rents at that time.

Schroder testified that he thought the $830,000 value of the 1994 Appraisal was "reasonable, maybe a little bit low". Zimmerman testified that he "had no confidence in" the 1994 Appraisal and understood that Delta's interests were served by a high appraisal due to the dispute with the mortgageholder; he said that, in his experience, appraisals are numbers "all over the map". Noon did not consider the 1994 Appraisal to be supported by the market and said that he had seen appraisals made "for certain purposes" reporting prices that were too high and he "thought that's what was going on, for Bankruptcy Court purposes" -- he said that, when he entered into the Plan Settlement, he believed that the Delta Property was worth only some $650,000 if the selling price were adjusted to account for the expense of deferred maintenance, which he estimated at $130,000to $150,000. Soennichsen testified that he was

a contractor and had done "a little bit" of maintenance work on the Delta Property; he said that he drove by once in 1995 and did not think it had deteriorated "very much at all" in the past ten years -- he saw at least two repair reports between December 1995 and September 1996 and considered the prices quoted to be "extremely high", "way above what it could have been done for", and said that he would do the work himself for twenty percent less.

On September 7, 1995, Silver sent Casas the names of two brokers experienced with sales of apartment buildings in Seaside -- Redfern and Larry Scholink ("Scholink") -- and asked that Noon "contact them ASAP". On October 2, 1995, Silver sent Casas the name of a third broker -- Bill Pauley -- and asked for a response "ASAP". Schroder testified that he had given these names to Silver after speaking with each broker, and that he considered them qualified to handle the Delta Property; he said that he "most likely" told them that the listing price was to be $830,000.

Schroder said that he then heard nothing about Noon's choice of a co-listing broker until he received a copy of a letter from Noon to Silver dated February 14, 1996, stating that "your selection of Larry Scholink is acceptable". Schroder said that, when he received that letter, he was not aware that Scholink had written to Noon on December 7, 1995 to say that, after viewing the Delta Property and its operation statements, Scholink thought it would sell for less than $740,000 and would not be willing to list it for more than $750,000. Noon testified that, when he wrote his letter of February 14 accepting Scholink as the co-listing broker, he "knew [Scholink] had problems with the price [of $830,000], very definitely". Schroder testified that the Delta partnership agreement provided that limited partners could request the General Partner to call a partnership meeting and Schroder had never refused any such request, but neither Noon nor anyone else ever asked him to call a meeting to vote on reducing the initial listing price. Noon acknowledged that, as a limited partner, he had the right to request that a meeting be called and had made no such request -- he said that Schroder "always controlled the group", and that Noon was not "motivated" to have the initial listing price reduced immediately after receiving Scholink's December 7 letter because the market was "cold" during the winter months. Noon also stated that he considered it Schroder's responsibility either to find another broker who would agree to list at $830,000, or to take steps to reduce that price.

On March 4, 1996, Zimmerman sent a letter to all Delta partners. He testified that he did so in an effort to generate some progress toward a sale; Noon testified that he thought Zimmerman was the "solution to the problem" presented by the $830,000 initial listing price and he was willing to have Zimmerman act while Noon "stepped back and let cooler heads prevail". Zimmerman's letter stated that "progress towards listing the property was stopped dead in the water over the brokers' lack of willingness to take a listing at an inflated listing price", but that Scholink and Noon were willing to co-list the Delta Property initially at $850,000[(2)] if the limited partners would agree to reduce the price to $750,000 within two weeks. Zimmerman testified that he considered the basis for Scholink's proposed listing price to be of "great value", since it came from an unbiased third party whom Noon said was experienced and whom Zimmerman considered to be "very knowledgeable"; Zimmerman understood that Schroder also approved of Scholink, and Zimmerman therefore relied on Scholink's information. Zimmerman's letter enclosed a proposed co-listing agreement and asked that an enclosed "approval form" be signed and sent to Schroder by those who agreed to such a course of action. Schroder said that he did receive

some approval forms agreeing to Zimmerman's proposal, but they represented only 34% of limited partners' shares, whereas the Plan Settlement provided that the listing price could not be reduced from $830,000 without a majority vote (i.e., over 50%). Soennichsen testified that he did not recall whether he had voted on Zimmerman's proposal but said that he would have voted against it, based on the 1994 Appraisal, comparable properties, the fact that the market had improved "significantly in the last couple of years", and discussions that he had with Schroder; he said that he had not talked to any brokers about the subject. McCollum testified that he did not think that he voted to reduce the price, though he did talk to both Schroder and Noon and realized that they differed as to the valueof the Delta Property. Schroder testified that he did not know of Scholink's refusal to list at the $830,000 price until he received Zimmerman's March 4 letter, and he could not sign the co-listing agreement enclosed with that letter because it did not comply with the requirements of the Plan Settlement as to price and was also internally inconsistent, in that it stated the listing price as $830,000 in words and as $750,000 in figures.

On March 19, 1996, after receiving Zimmerman's letter, Schroder called a partnership meeting for April 10, 1996 in a letter to all limited partners stating that, while Zimmerman's letter" seems to imply" Schroder's agreement to Zimmerman's proposed reduction, "this is not necessarily true". The letter went on to say that a reduction as great as $80,000 should be discussed by all partners at a meeting where the brokers could provide further information and explain why the price should be reduced. Schroder testified that he asked both Noon and Scholink to attend the April 10 meeting and sent each of them a reminder by FAX on the morning of the meeting.

Schroder said that only four partners attended the meeting and that did not constitute a quorum, so no business could be conducted -- Scholink telephoned that he could not attend and Noon arrived about an hour after the meeting adjourned at 8:00 P.M., when everyone had departed except Schroder and Silver. Schroder said that he and Silver told Noon that Delta would like information from Noon and Scholink about recent sales, and Noon said that he would FAX it the next day but nothing was ever received. Noon testified that, prior to this meeting, he had videotaped the property and had talked to other brokers about comparable properties.

On May 1, 1996, Silver wrote to Linda Rose Mar, counsel for a majority of Delta's limited partners, asking her to "facilitate getting this property listed and on the market as quickly as possible". Silver wrote to Ms. Mar again on May 13, 1996, saying: "I therefore urge you to immediately contact your clients, advise them of the current situation, and make arrangements for a meeting among the limited partners, the brokers, and the general partner, together with all attorneys, to reach some sort of agreement on how to move forward at all possible speed", so that the Delta Property could be sold in time to avoid foreclosure when the first deed of trust matured three years after the November 1995 effective date of the Plan.

On May 13, 1996, Schroder wrote to all Delta partners about what had happened at the April 10 meeting, saying that he had not heard from Noon since that time and "it does not appear that a sale is very likely in the near future". That letter also stated that "several limited partners" have expressed a desire to "get out of" Delta because "they are tired of all the fighting", and asked that Schroder be advised if any partners wanted to sell their shares or buy additional shares.

A partnership meeting was held on September 4, 1996, called by limited partner Gerald Rosenberg without notice to Schroder or Silver; Schroder learned of the meeting in time to attend and did so. Schroder testified that Noon attended the meeting and Schroder wrote to all partners about the meeting on September 6, 1996, saying: "It was noted that the nine month listing period for the Noon/Scholink listing had expired. Mr. Noon acknowledged that the listing had expired but he still had not removed the cloud on the title of the partnership's property. He asked for us to have the partnership attorney, [Silver], draft a release and he would sign it. He further stated that he would step aside and would not interfere or participate in our future efforts to sell the property."

Soennichsen testified that he was present at this meeting and that Noon did make the statements attributed to him by Schroder's letter; Soennichsen said that Noon did not complain that Noon had been denied a fair chance to market the Delta Property, nor did Noon claim interference. Noon testified that he did not say that the listing had expired, and stated that he had "always said I'd remove the lien, but not release it"; he said that his claim had always been for money and had nothing to do with title, and he would have been willing to remove his Lien so long as his "financial position" could be "protected". McCollum testified that he was present at this meeting and that Noon said he would remove his lien "as long as his financial obligations were settled" and did not object to removing the Lien so that the Delta Property could be sold. At that meeting, the names of brokers were proposed by various limited partners in attendance and Schroder agreed to gather names of some others, to be considered for selection at a future meeting.

Schroder then called a partnership meeting for October 2, 1996 and testified that he took notes of that meeting, which say that "Noon stated listing had expired and he would sign amended release". Schroder said that Noon did not claim at either meeting that anyone had interfered with his ability to market the Delta Property for sale, or that he expected to be paid a commission whenever the property was sold. Schroder testified that Silver was present at this meeting and presented Noon with a proposed release of the Lien but Noon said that he "had some problems with it", so Noon, Zimmerman, and Silver "marked it up" until it was in a form acceptable to Noon, who then said he would sign a release in that form. Soennichsen was present at this meeting and corroborated Schroder's version of events concerning the proposed release. Noon testified that he was not sure when he was presented with the release prepared by Silver, but that he had shown it to Zimmerman and been told that it was "crap" and that Zimmerman did not think it should be signed without alteration -- according to Noon, one of the problems was that the release might be interpreted to dispose of Noon's limited partnership interest in Delta, rather than merely his Lien on the Delta Property. Zimmerman testified that Noon showed him the proposed release at the October 6 meeting and Zimmerman told Noon that its scope was "too wide", Zimmerman himself would not sign it, and Noon should consult an attorney about it. On October 7, 1996 Silver sent a revised release to Casas and asked to be advised "immediately" if it was not acceptable.

Soennichsen testified that Schroder asked him to intervene with Noon concerning the release, so Soennichsen contacted Zimmerman about it -- Zimmerman testified that he has always made it "abundantly clear" to all involved that he was acting as attorney for no one, and Noon testified that

Zimmerman had never represented him.

At the October 2, 1996 meeting, the partners present voted and selected Redfern to list the Delta Property. Schroder testified that he had interviewed Redfern prior to the meeting and Redfern wrote to Schroder on October 1, recommending a listing price of $849,900 and anticipating sale at a price from $825,000 to $775,000. Schroder said that he did not suggest a listing price to Redfern and just asked for a proposal based on the Delta Property's income and expenses. Redfern testified that Schroder had first talked to him in the autumn of 1995, looking for brokers to co-list the Delta Property with Noon under the Plan Settlement -- at that time, Schroder asked for the names of some brokers qualified to handle apartment buildings in Seaside and Redfern referred him to Scholink and Bill Pauley. In 1995, Redfern was uncertain whether he would be willing to co-list with Noon because Noon's office was not in the Monterey County area and Redfern's was, so Redfern feared that Redfern would do most of the work but have to divide the commission evenly with Noon; he said that he told Schroder he would be willing to discuss it with Noon and Noon did telephone Redfern once but did not call back after Redfern returned Noon's call and left a message. After the October 2, 1996 meeting, Redfern entered into a listing agreement with Delta, advertised the Delta Property in the Monterey Peninsula Herald and the San Jose Mercury News, put it on the multiple listing service, posted a sign, and contacted clients whom he knew to be interested in such investments. Redfern testified that, in addition to the offer that was finally accepted, he received two written offers and one oral one for $650,000 -- the first written offer started at $760,000 but was reduced to $650,000 due to the buyers' inexperience and reluctance to assume possible risks and burdens posed by deferred maintenance; the second written offer was for $740,000 and Delta countered at $770,000, which was not accepted. Redfern's listing was due to expire on August 30, 1997 and was extended to December 31, 1997. An offer was made in November 1997 by a Mr. Khalsa for $760,000 without credits for deferred maintenance, which offer was accepted; escrow closed in February 1998 with Delta paying a 6% brokerage commission, half to Redfern and half to the buyer's broker. Redfern testified that Mr. Khalsa was a building contractor who owned other properties in the area, an experienced investor with the ability to perform repairs and deferred maintenance himself, "the perfect buyer, the perfect match" for the Delta Property. Redfern testified that the existence of Noon's Lien did not hamper Redfern's sales efforts because, while potential buyers did inquire about it, he assured them that the Lien would have to be removed as a condition of sale; he said that Noon's Lien was "typical" of encumbrances that come to light during a marketing process and he did not consider it an impediment to finding a buyer, though it would have to be released in order for a sale to close.

Noon never did sign a release of his Lien on the Delta Property and, on April 1, 1997, Delta filed its complaint in this Court -- Schroder testified that, since Noon would not release his Lien, Schroder felt there was "no choice" but litigation to remove the cloud on title to the Delta Property that was created by existence of Noon's Lien. On April 14, Silver wrote to Casas, saying that Delta would file a motion seeking to sell the Delta Property free and clear of Noon's Lien if the Lien was not released. On July 8, Noon signed a stipulation in this Adversary Proceeding, releasing his Lien and providing for Noon to hold a lien on 3% of the proceeds of sale of the Delta Property; that stipulation was approved by an order of

this Court on September 1, 1997. Pursuant to such order, $22,800 of the sale proceeds is being held subject to Noon's lien, pending resolution of this litigation.

During the marketing process, on April 28, 1997, Schroder wrote to Delta's limited partners and told them of the offer that had been received for $650,000. The letter stated that Schroder considered the offer too low and would not accept it as a partner, but that the partners should vote on whether to accept. The letter also asked the partners to vote on whether they would like to sell their shares or buy other available shares, with prices based on the existing $650,000 offer.

Schroder testified that his limited partner's interest in Delta was originally 4.5% but increased to approximately 45% after he bought additional shares following his April 28 letter. Soennichsen testified that he elected to, and did, sell his shares of approximately 3% to Schroder, though Schroder's letter "clearly stated" that the $650,000 value was below the value of the Delta Property, because "I wanted to be done with it". McCollum testified that he did not elect to sell because he had lost money in two prior partnerships formed by Schroder and did not trust Schroder "or what he was doing" and felt that Schroder was "trying to put one over on me" -- he said that Schroder also offered to buy out the limited partners in the other two partnerships and Schroder ultimately profited while the limited partners took losses (he acknowledged that he received tax credits for his partnership losses).

During the Chapter 11 case, a majority of Delta's limited partners retained counsel and asserted claims against Delta and Schroder, alleging that Schroder had caused Delta to become indebted to him and/or to pay him for loans and certain services in contravention of the Delta partnership agreement. These claims were compromised as part of Debtor's Plan. Zimmerman testified that, prior to such compromise, Schroder faced the threat of removal as Delta's General Partner and/or suit by the limited partners and Zimmerman believed that Schroder finally agreed to sell the Delta Property only because of such pressure; in Zimmerman's opinion, Schroder "didn't really want to sell and was trying to put a roadblock into selling it, we had to twist his arm. He had twelve years and didn't sell, it took tremendous amount of effort to get him to agree to sell". Noon also testified that he believed Schroder had never wanted to sell the Delta Property, and that Schroder had therefore "inflated" the listing price, both in 1990 under the State Court Settlement and again under the Plan Settlement, to "hurt the market" for the property.

II. ANALYSIS

Delta seeks Noon's specific performance of the Plan Settlement, cancellation of Noon's cloud on title,[(3)] disallowance of Noon's claim filed in Delta's Chapter 11 case, and damages for slander of title to the Delta Property -- Noon seeks damages for Delta's breach of the Court-approved settlement agreement.

A. Specific Performance,

Cancellation of Cloud on Title, and Disallowance of Claim

If the Plan Settlement is enforced, Noon's lien on the proceeds of sale from the Delta Property will be extinguished, since the Plan Settlement provides that Noon "will be allowed to retain his lien on the [Delta] Property [which lien has now been transferred to the proceeds of sale of such property] until paid or until the end of the term of the co-listing agreement, described below, whichever occurs earlier" (emphasis supplied). If, as Delta argues, the co-listing agreement expired nine months after the Plan's effective date of November 27, 1995 (i.e., on August 27, 1996), Noon's unpaid lien was extinguished by such expiration, pursuant to the terms of the Plan Settlement. If the Plan Settlement is enforced, another result will be that Noon will have no allowable unsecured claim against Delta, since Noon's claim filed in the Chapter 11 case was compromised by the Plan Settlement.

Under California law, "the specific performance of an obligation may be compelled", California Civil Code ("CC") §3384. Where the obligation arises from an agreement: the terms of the agreement must be "sufficiently certain to make the precise act which is to be done clearly ascertainable", CC §3390(5); the agreement must be supported by "adequate consideration", CC §3391(1); the agreement must be "just and reasonable" as to the party whose performance is sought to be compelled, CC §3391(2); and the other party to the agreement must have "fully and fairly" performed all conditions precedent on its part. Specific performance is an equitable remedy, see Prince, et al. v. Lamb, et al., 128 Cal. 120, 60 P. 689 (1900); Advanced Micro Devices, Inc. v. Intel Corp., 9 Cal.4th 362, 36 Cal.Rptr.2d 581 (1994) (In Bank).

Further, bankruptcy courts, as courts of equity, have inherent powers to enforce settlement agreements approved by them, see In re Springpark Associates, 623 F.2d 1377 (9th Cir. 1980), cert. denied, 449 U.S. 956, 101 S.Ct. 364 (1980); In re City Equities Anaheim, Ltd., 22 F.3d 954 (9th Cir. 1994). Under federal law:

> In order to be enforced, the settlement agreement must meet two requirements. First, it must be a completed agreement. Callie v. Near, 829 F.2d 888, 890-891 (9th Cir.1987). Second, both parties must have either agreed to the terms of the settlement or authorized their respective counsel to settle the dispute. Harrop v. Western Airlines, Inc., 550 F.2d 1143, 1144-45 (9th Cir. 1977).

Alipio v. Secretary of the Army, 1998 WL 231021, 3 (N.D.Cal.)

Noon does not dispute the existence of any elements under either the State or federal test, but argues that the Plan Settlement should not be enforced against him because Delta, through Schroder, did not perform its own duties under the Plan Settlement, inasmuch as Schroder failed to act in good faith pursuant to a covenant implied by law in all contracts.

> If the cooperation of the other party is necessary for successful performance of an obligation, a promise to give that cooperation, and not to do anything which prevents realization of the fruits

> of performance, will often be implied. This is sometimes referred to as an implied covenant of good faith and fair dealing[.] [original emphasis]

1 Witkin Summary of California Law (9th ed. supp. 1997), Contracts §743, 674; and see cases cited therein. Noon's position is that Schroder did not really want to sell the Delta Property and therefore failed to cooperate as necessary to permit Noon to act under the Plan Settlement, which made it "impossible" or "impracticable" for Noon to proceed and thereby effectively prevented Noon from performing.

There is some evidence tending to show that Schroder may not have wished to sell the Delta Property, as Noon and Zimmerman surmised, consisting primarily of the fact that Schroder was not particularly aggressive toward accomplishing a sale once the Plan Settlement had been achieved. Schroder gave Noon the names of three potential co-listing brokers by October 2, 1995 and then did not hear from Noon until February 14, 1996 that Noon had approved one of them -- during that period of over four months, Schroder does not appear to have followed up with Noon about selecting a co-listing broker and getting the property on the market. Schroder claimed to have learned for the first time that Scholink, the co-listing broker selected by Noon, would not agree to use the initial listing price fixed by the Plan Settlement when Schroder received Zimmerman's letter of March 4, 1996 and, on March 19, called a meeting for April 10 to address that problem -- he did urge Noon and Scholink to attend that meeting and asked Noon immediately after that meeting to send him some information (which Noon did not do), but he then seems to have done nothing further about getting the property marketed until after August 27, 1997, the date on which Delta contends the co-listing agreement expired according to the terms of the Plan Settlement. By contrast, once the August 27 expiration date had passed, Schroder became more active: he attended a meeting on September 4, 1996 that was called by a limited partner, he interviewed Redfern about listing the property, he called a meeting for October 2 at which Redfern was selected, he listed the property with Redfern, he considered offers that were received, he made counteroffers, he called for a partnership vote on at least one offer, he extended Redfern's listing in August 1997, he accepted an offer in November 1997, and the property was sold early in 1998.

Schroder was not entirely inactive prior to August 25, 1996, but he was not as active as a diligent seller is likely to have been and he became notably more active once Noon's rights under the Plan Settlement had (in Schroder's opinion) expired.

Nevertheless, Noon was hardly at the mercy of Schroder and the evidence does not support a conclusion that Schroder's acts or omissions interfered with, much less prevented, Noon's ability to perform. Whether Schroder was determined not to sell, or disinclined to sell, or ambivalent about selling, or apathetic while the November 1998 foreclosure deadline was over two years away, or distracted by other matters, or frustrated with Noon, or any number of things, he has not been shown to have refused to cooperate in listing or selling the Delta Property, nor to have affirmatively interfered with Noon's ability to proceed. To the contrary, Noon himself at all times had both the right and the power to do what had to be done to get the property listed, either by finding a co-listing broker who would agree to the $830,000 initial listing price required by the Plan Settlement (instead of adhering to his choice of Scholink, whom he knew did not agree), or by obtaining a majority partnership vote to

reduce the initial listing price to an amount acceptable to Scholink, neither of which appears to have been unfairly burdensome to Noon. As to finding a new co-listing broker: two other brokers had already been approved by Schroder and one of them (Redfern) testified that he would have been willing to list at $830,000 if the commission division were not disproportionate to the division of labor; the evidence showed that $830,000 was not a hopelessly unrealistic starting price (it was supported by Delta's expert witness Redfern and Noon did not produce any contrary expert opinion), and there was no evidence that it would have been "impossible" or "impracticable" for Noon to find an acceptable co-listing broker who would agree to use that amount as an initial listing price. As to having the $830,000 price reduced: Noon testified that he had a videotape and information from brokers supporting his opinion of a lower value, which might have convinced a majority of partners to vote for a reduction in the initial listing price had Noon requested that a meeting be called for that purpose and made an effort to convince voters, or attended the April 10 meeting on time and armed with his information; after Zimmerman's proposal failed to pass, Noon could have asked Zimmerman to act on behalf of his wife and/or her father to request that Schroder call a meeting for the purpose of trying to convince more limited partners to vote for the proposal. However, Noon took no action and instead relied on his opinion that it was Schroder's responsibility to act, even though the Plan Settlement does not allocate such duties to Schroder and there is no evidence of any agreement between Noon and Schroder doing so, nor is there evidence of facts or events that might reasonably have led Noon to conclude that Schroder was handing things so that it was unnecessary for Noon to act -- the parties have cited no authority imposing specific duties upon sellers as a matter of law under facts such as these, nor has the Court found any.

Noon learned on December 7, 1995 that Scholink, Noon's chosen co-listing broker, would not proceed with an initial listing price of $830,000, and Noon agreed with Scholink that such a price was too high -- yet Noon did not immediately tell Schroder of Scholink's decision and instead wrote to Silver on February 14, 1996, over two months later, announcing his selection of Scholink as co-listing broker and saying nothing about the fact that Scholink refused to act under the terms of the Plan Settlement. Noon said that he and Schroder did not "communicate well", but he also said that he knew he had the right to ask Schroder to call a partnership meeting to vote on reducing the price, and did not do so -- he did not say that he had reason to think that such a request would be ignored, and Schroder testified without contradiction that Schroder had never refused a limited partner's request to call a meeting. Noon said that Schroder "controlled the group", by which he may have meant that Schroder would exert undue influence over the voters,[(4)] but it is unlikely that Noon, an experienced businessman represented by counsel, would have agreed to the Plan Settlement with its requirement of a majority vote for reduction of the initial listing price if he had reason to believe that an honest vote would be impossible to obtain. Even if Noon's testimony about Silver leading Noon to believe that the $830,000 figure "didn't really mean anything" were taken at face value,[(5)] Noon himself does not contend that anyone ever suggested to him that the formality of a partnership vote was not a prerequisite to reducing that figure. The Court notes that, when Zimmerman, Noon's chosen emissary, proposed that the initial listing price be $830,000 and that such price be reduced to $750,000 two weeks later, the proposal was accepted by a vote of only 34%, rather than the 51% required by the Plan Settlement -- the evidence does not show that Schroder did anything improper to influence the vote and even Noon's witness McCollum (who

said that he did not trust Schroder) testified that he did not think he voted to reduce the initial listing price, despite having heard the differing views of both Schroder and Noon.

If Noon had given Schroder a co-listing agreement that complied with the terms of the Plan Settlement and Schroder had failed or refused to sign it, then it might have been said that Schroder prevented Noon from performing. Or, if Noon had requested a partnership meeting to vote on reducing the listing price and Schroder had refused to call one, or refused to let the voters hear what Noon had to say, or lied to the voters, or coerced the voters in some way, such actions might have prevented Noon from being able to proceed. But Schroder has not been shown to have done anything like that -- at the worst, Schroder has been shown to have waited for Noon to act, without having lulled or misled Noon into a state of inaction, while having no contractual duty to do anything specific. Meanwhile, even though Noon had every incentive to make the most of the nine month period available to him under the Plan Agreement, he did very little to resolve the impasse with Scholink and did not even do what Schroder asked him to do (e.g., attend the April 10 meeting to explain why the price should be reduced, provide information concerning recent sales), nor did he promptly present Schroder with the proposed co-listing agreement for Scholink. Under these circumstances, Schroder's conduct does not constitute a bad faith lack of cooperation and it has not been shown to have prevented Noon from performing under the Plan Settlement.

Accordingly, Delta is entitled to have the Plan Settlement enforced, with the result that Noon's lien upon the proceeds of sale of the Delta Property is extinguished and Noon's claim is disallowed.

B. Slander of Title

Delta seeks damages for slander of title, which offense consists of Noon's failure to remove his Lien from the Delta Property, both after Noon's right to a co-listing agreement under the Plan Settlement expired on August 27, 1996 and prior to that time. The damages sought by Delta are: general damages of $50,000, representing the extent to which "vendibility" of the Delta Property was impaired by the existence of Noon's Lien; attorney's fees incurred by Delta, first to remove the Lien from the Delta Property, and now to remove Noon's lien from proceeds; and punitive damages in the amount of Noon's limited partnership interest in Delta (which Delta states in briefs is "approximately" $22,000, but as to which there was no evidence presented at trial).

Noon correctly points out that he no longer holds a lien on real property in the form of the Delta Property, and now holds only a lien on personal property in the form of the proceeds of sale of the Delta Property. Nevertheless, California law recognizes an action for slander of title with respect to personal property, see Apel v. Burman, 159 Cal.App.3d 1209, 206 Cal.Rptr. 259 (1984)("Apel"); Chrysler Credit Corp. v. Ostly, 42 Cal.App.3d 663 (1974).

(1) Damages for Impairment of Vendibility

Slander of title is a tort:

California has adopted the definition of the tort set forth in section 624 of the Restatement of Torts, which provides:

> "One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land ... under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused." [citations omitted] The elements of the tort are (1) publication, (2) absence of justification, (3) falsity and (4) direct pecuniary loss. [citations omitted]

Seeley v. Seymour, et al., 190 Cal.App.3d 844, 857-858, 237 Cal.Rptr. 282 (1987) ("Seeley"). Noon does not dispute that the element of publication exists, but does contest the existence of each other element.

With respect to absence of justification, Noon argues that his Lien was created on advice of counsel and Delta argues that it was Noon who directed Casas to record the State Court Settlement. Noon's testimony was that his attorney advised recordation as the "best way to protect my rights" -- it may well be that, having given such advice, Casas did not then proceed to record until he received Noon's authorization to do so, but Noon's testimony supports the conclusion that the recordation was made on the advice of counsel. However, the record does not establish that, once the State Court Settlement was recorded on October 20, 1989, Noon was thereafter continuously advised by counsel to refrain from releasing his Lien on the Delta Property despite numerous requests to do so, the furnishing of two forms of written release (one with revisions requested by Noon), and Noon's own statements (corroborated by several witnesses) that he would do so. It was not until Noon had been sued that he followed through and signed a stipulation for his Lien to be removed from the Delta Property in exchange for receiving a new lien on the proceeds of sale. Noon's maintenance of his Lien on the Delta Property when he had no rights toward that property was reminiscent of his conduct toward his Lien on the Charlie Property, which he admitted he left intact after he no longer had any claims against Charlie Group. Noon is neither naive nor inexperienced in real property matters -- he is a layman and was entitled to rely on the advice of counsel to record the State Court Settlement in the first place, but he has not demonstrated that he maintained his Lien thereafter on advice of counsel and the evidence does not suggest any other justification for one such as Noon to have continued to maintain his Lien at any time other than the periods set forth below.

With respect to falsity, Noon argues that there was nothing false about his asserting a right to be paid a commission for sale of the Delta Property. That was true during the nine month period following the effective date of Delta's Plan, but it was not true after that period ended on August 27, 1996 and it was not even true at all times prior to that period. After August 27, 1996, Noon's right to receive a commission for sale of the Delta Property, which right was created by the Plan Settlement, lapsed pursuant to the terms of the Plan Settlement -- prior to the Plan Settlement, Noon's right to receive a commission for sale of the Delta Property arose under the State Court Settlement and had lapsed on January 21, 1991 pursuant to the terms of the State Court Settlement (nine months after April 20, 1990,

the date on which Delta notified Noon to list the Delta Property at a price fixed by Delta, as provided by the State Court Settlement).

With respect to direct pecuniary loss caused by the existence of the Lien, Noon argues that there is no support for the $50,000 in damages claimed for impaired vendibility. It is true that Delta did not prove the loss of a specific dollar amount arising from impaired vendibility, but Delta did establish actual impairment of vendibility, from which the existence of some pecuniary loss in an unestablished amount can be inferred. Schroder testified plausibly and without contradiction that "several" lenders refused to consider refinance transactions due to the existence of Noon's Lien, and Redfern testified plausibly and without contradiction that Noon's Lien would have to be removed before the property could be sold (although the property could be marketed prior to removal) – by the time a sale was ready to close, the Lien had been removed pursuant to Noon's stipulation, but it is clear that the continued existence of the Lien would not only have impeded sale, it would in all probability have prevented sale. In any event, pecuniary loss can consist of something other than the monetary aspect of impaired vendibility, such as attorney's fees, which are a proper element of damages for slander of title when they are incurred in an action to remove the slanderous recordation, Apel -- as discussed below, Delta has incurred such attorney's fees in an as yet unascertained amount.

Accordingly, Delta has established the elements of the tort of slander of title, but has not demonstrated a measureable amount of damages based on impairment of vendibility.

(2) Damages for Attorney's Fees

Insofar as Delta's attorney's fees are concerned, two issues are presented: (1) whether Noon should be liable for Delta's attorney's fees if Noon had a good faith belief that he was justified in maintaining his Lien; and (2) whether Delta should be permitted to recover attorney's fees incurred after Noon agreed that his Lien could be removed from the Delta Property and transferred to the proceeds of sale.

With respect to the first issue, the lack of justification is an element of the tort itself. As discussed above, Noon may have been justified in having the Lien recorded on advice of counsel, but he was not justified in maintaining it beyond certain points and he did not establish a reasonable basis upon which to entertain a good faith belief in such justification.

With respect to the second issue, Delta points out that transforming Noon's Lien from a real property encumbrance into an encumbrance on personal property did not fully resolve all problems -- Noon has never agreed to release the proceeds that are now encumbered by him, and Delta has been forced to proceed with the litigation that was originally commenced to remove the Lien from the real property, in order to gain access to the proceeds of sale. Delta claims to have found no authority in support of the proposition that otherwise appropriate damages for slander of title in the form of attorney's fees can be avoided merely by a defendant's agreement, made after litigation has already been commenced, to transfer the offending encumbrance from real property to the property's proceeds of sale, while the defendant requires the plaintiff to continue litigation in order to remove the encumbrance that now

burdens proceeds rather than real property. Noon claims to have found no authority for the proposition that, in the absence of a specific contractual or statutory right, one is entitled to recover attorney's fees for removal of a stipulated lien upon real property sale proceeds. The Court has found no authority on point.

As a practical matter, Delta's goal of freeing the proceeds of sale from Noon's stipulated lien upon them is not accomplished by an action to remove a cloud upon title or to quiet title. Rather, as set forth above, Noon's lien on proceeds is eliminated by virtue of enforcing the Plan Settlement, which provides for Noon's Lien on the Delta Property to be extinguished at a certain point; since that Lien on real property has now been replaced by the existing lien on proceeds, the lien on proceeds must likewise be extinguished if the Plan Settlement is enforced. California law treats attorney's fees as an element of damages caused by slander of title only to the extent that they are incurred in an action to remove the slanderous encumbrance. Delta did bring such an action in April 1997, at which time Noon's Lien on the real property existed, but that claim for relief ceased to be necessary once the Lien on real property had been removed by the order of September 1, 1997, pursuant to Noon's stipulation -- thereafter, Delta's action was moot except to the extent that it sought specific performance of the Plan Settlement (which relief would necessarily lead to removal of Noon's lien on proceeds). California law does not provide for recovery of attorney's fees as an element of damages caused by slander of title when the fees are incurred in an action for specific performance, which is what Delta's action was after September 1, 1997. There appears to be no authority for deviating, in a case such as this, from the American Rule against fee shifting, and Delta is therefore entitled to recover attorney's fees and costs only to the extent that they were incurred to commence this action and prosecute it through the time that the stipulated order was obtained, which removed Noon's Lien from the Delta Property.

(3) Punitive Damages

Delta also seeks punitive damages for Noon's slander of title. Punitive damages are governed by CC §3294:

> (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.
>
> ...
>
> (c) As used in this section, the following definitions shall apply:
>
> > (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

This statute applies to torts and slander of title is a tort, Seeley. Delta does not allege either oppression or fraud, and the evidence would not support any such allegations if made. Delta does argue that Noon acted with the requisite malice in refusing to remove his Lien from the Delta Property, pointing out Noon's history of leaving his Lien on the Charlie Property long after he knew (by his own admission) that he no longer had any claim against that entity. While Noon's conduct has hardly been a model of professionalism, the Court does not consider it to have been "despicable" within the meaning of CC §3294(c)(1), nor does the Court consider that an actual intent to injure was proven by clear and convincing evidence as required by the statute. Noon's attitude was unquestionably cavalier and he skated close to the edge in his dealings with both the Charlie Group and Delta, but he did rely at least to some extent on advice of counsel and the Court is not persuaded that punitive damages are warranted.

C. Breach by Delta

Noon seeks damages "in the approximate amount of" $22,000 for Delta's breach of the covenant of good faith implied by law in the Plan Settlement. As discussed above, Noon has not established that Delta breached the covenant of good faith and fair dealing that is implied by law in the Plan Settlement.

CONCLUSION

For the reasons set for above:

Delta is entitled to specific performance of the Plan Settlement, together with the resultant removal of Noon's lien on proceeds and disallowance of Noon's claim; and

Delta is also entitled to damages for Noon's slander of title, in the form of attorney's fees and costs incurred to bring this action and prosecute it up to September 1, 1997; and

Delta is not entitled to punitive damages; and

Noon is not entitled to judgment against Delta for breach of the Plan Settlement.

Counsel for Delta shall submit a form of judgment so providing, after review by counsel for Noon. If the parties cannot agree on the amount of attorney's fees and costs awarded to Delta, the matter may be restored to calendar upon the request of either party to have that issue determined by the Court.

Dated: April _12_, 1999

_____

ARTHUR S. WEISSBRODT

United States Bankruptcy Judge

1. Delta's complaint is now moot as to sale free and clear of lien since, at time of trial, the subject real property had been sold by stipulation of the parties and Noon's claim of lien had been transferred to the proceeds of sale.

2. Elsewhere in his letter, Zimmerman refers to the $830,000 initial listing price set by the Plan Settlement and it appears that his reference to $850,000 is intended as $830,000.

3. Since the Delta Property has now been sold and Noon's lien transferred to proceeds, the "title" subject to a cloud is title to the proceeds.

4. Schroder testified that he has never held a majority of shares, so it is unclear just what Noon did mean by saying that Schroder "controlled the group".

5. Silver offered to testify concerning what he said to Noon, and Casas opposed the offer. The dispute was resolved by a stipulation that neither party would urge that any inference should be drawn from Silver's failure to testify about the subject.