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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

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9 Gary L. Sprute and Sue E Sprute, husband)  
and wife,

No. CV-09-2324-PHX-LOA

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Plaintiffs,

**ORDER**

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vs.

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13 First American Title Insurance Co., a)  
California corporation,

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Defendant.

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This Court has received notification that Plaintiffs Gary L. Sprute and Sue E. Sprute have filed a Petition in the United States Bankruptcy Court for the District of Arizona under Chapter 7 of the Bankruptcy Code (Case No. 2:10-bk-15174-RJH). See, Notice of Filing Bankruptcy, docket # 21, filed herein on June 3, 2010.

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The filing of a bankruptcy petition creates an estate in bankruptcy. 11 U.S.C. § 301(b) (“The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter) and § 541 (governing the property of a bankruptcy estate); *In re Raintree Healthcare Corp.*, 431 F.3d 685, 688 (9<sup>th</sup> Cir. 2005). The property of a bankruptcy estate consists of “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). Moreover, “prepetition causes of action . . . are assets included within the meaning of property of the estate.” *Hernandez v. Downey Sav. & Loan Ass’n, F.A.*, 2009 WL 704381, at \* 3

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1 (S.D.Cal. 2009) (citing *Cusano v. Klein*, 264 F.3d 936, 945 (9<sup>th</sup> Cir. 2001)). *See e.g.*,  
2 *Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d 705, 708 (9<sup>th</sup> Cir. 1986).

3           Here, Plaintiffs filed suit in the Superior Court of Arizona, Maricopa  
4 County on September 30, 2009 and Defendant removed it to this District Court on  
5 November 4, 2009. (docket # 1 at 1, 3) Plaintiffs filed for Chapter 7 bankruptcy on May  
6 17, 2010, in the United States Bankruptcy Court, District of Arizona petition Case No.  
7 2:10-bk-15174-RJH. Plaintiffs' prepetition claims, which include those in this lawsuit,  
8 are therefore property of the bankruptcy estate. *Barger v. City of Cartersville*, 348 F.3d  
9 1289, 1292 (11<sup>th</sup> Cir. 2003). A bankruptcy trustee is the estate's representative, and has  
10 the capacity to sue and be sued. 11 U.S.C. § 323 (2009). "Because the bankruptcy  
11 trustee controls the bankruptcy estate, [s/he] is the real party in interest in the suits that  
12 belong to the estate." *Griffin v. Allstate Ins., Co.*, 920 F.Supp. 127, 130 (C.D.Cal. 1996).  
13 After filing a Chapter 7 bankruptcy petition, a debtor may not prosecute a cause of action  
14 belonging to the bankruptcy estate absent a showing that petitioner's claims were exempt  
15 from the bankruptcy estate or abandoned by the bankruptcy trustee. *Cobb v. Aurora Loan*  
16 *Services, LLC.*, 408 B.R. 351, 354 (E.D. Ca. 2009) (citing, among others, *Hernandez*,  
17 2009 WL 704381, at \* 5 and *Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789  
18 F.2d 705, 708 (9<sup>th</sup> Cir. 1986)); Fed.R.Civ.P. 17(a) ("An action must be prosecuted in the  
19 name of the real party in interest.").

20           On the existing record, the Court cannot determine whether Plaintiffs'  
21 prepetition claims set forth in this action are exempt from the bankruptcy estate or  
22 whether this cause of action has been abandoned by the bankruptcy trustee. 11 U.S.C. §  
23 522 (specifying the federal property exemptions available to debtors); 11 U.S.C. § 554(a)  
24 (stating that abandonment of bankruptcy estate property may occur by the trustee after  
25 notice to creditors and a hearing); 11 U.S.C. § 554(b) (stating that abandonment of  
26 bankruptcy estate property may occur on request of a party in interest after notice and a  
27 hearing); 11 U.S.C. § 554(c) (abandonment of bankruptcy estate property may occur  
28 when the case is closed and the trustee has not otherwise administered the property).

1 As discussed above, Plaintiffs are not the real parties in interest to this case  
2 as required by Fed.R.Civ.P. 17. The bankruptcy case reflects that David A. Birdsell is the  
3 Trustee in Plaintiffs' bankruptcy case. Thus, Plaintiffs must substitute or join Bankruptcy  
4 Trustee David A. Birdsell, or show the Trustee's ratification of this action, pursuant to  
5 Fed.R.Civ.P. 17(a) (3).<sup>1</sup> Alternatively, Plaintiffs may promptly amend their Complaint to  
6 allege their lawsuit is exempt from the bankruptcy estate or has been abandoned by the  
7 Bankruptcy Trustee. Plaintiffs must take the foregoing actions on or before **Monday,**  
8 **October 4, 2010** or their District Court case may be dismissed.

9 On the Court's own motion,,

10 **IT IS ORDERED** placing this case on inactive status until **Monday,**  
11 **October 4, 2010.**

12 **IT IS FURTHER ORDERED** that on or before **Monday, October 4, 2010,**  
13 Plaintiffs shall substitute or join the Bankruptcy Trustee, or show the Trustee's  
14 ratification of this lawsuit, pursuant to Fed.R.Civ.P. 17(a)(3); *or alternatively,* Plaintiffs  
15 shall amend their Complaint to allege the lawsuit is exempt from their bankruptcy estate  
16 or has been abandoned by the Bankruptcy Trustee.

17 **IT IS FURTHER ORDERED** that Plaintiffs' failure to comply with this  
18 Order may result in dismissal of this cause of action pursuant to Fed.R.Civ.P. 41(b) for  
19 lack of prosecution.

20 Any party may ask the Court to schedule an informal status conference  
21 before the deadline expires to inform the Court what action, if any, has been undertaken  
22 in the Bankruptcy Court that would permit this case to proceed.

23 **IT IS FURTHER ORDERED** that Plaintiffs' counsel shall use proper  
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25 <sup>1</sup> Federal Rule of Civil Procedure 17(a) states that "[e]very action shall be prosecuted  
26 in the name of the real party in interest." *Id.* It also provides that "[t]he court may not  
27 dismiss an action for failure to prosecute in the name of the real party in interest until, after  
28 an objection, a reasonable time has been for the real party in interest to ratify, join, or be  
substituted into the action." *Id.*

1 capitalization in all future captions as mandated by LRCiv 7.1(a)(3).

2 **IT IS FURTHER ORDERED** that the Clerk of Court shall mail a copy of  
3 this Order to David A. Birdsell, Bankruptcy Trustee, P.O. 216 N. Center, Mesa, AZ  
4 85201.

5 Dated this 7<sup>th</sup> day of June, 2010.

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8 Lawrence O. Anderson  
9 United States Magistrate Judge  
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