UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

Honorable Fredrick E. Clement
Fresno Federal Courthouse
2500 Tulare Street, 5th Floor
Courtroom 11, Department A
Fresno, California

PRE-HEARING DISPOSITIONS

DAY: **WEDNESDAY**
DATE: **JANUARY 25, 2017**
CALENDAR: **10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS**

GENERAL DESIGNATIONS

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

ORAL ARGUMENT

For matters that are called, the court may determine in its discretion whether the resolution of such matter requires oral argument. *See Morrow v. Topping*, 437 F.2d 1155, 1156-57 (9th Cir. 1971); *accord* LBR 9014-1(h). When the court has published a tentative ruling for a matter that is called, the court shall not accept oral argument from any attorney appearing on such matter who is unfamiliar with such tentative ruling or its grounds.

COURT'S ERRORS IN FINAL RULINGS

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 60(a), as incorporated by Federal Rules of Bankruptcy Procedure 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

1. 16-11001-A-7 DONNIE WILLIAMS
16-1059
WILLIAMS V. WILLIAMS
WILLIAM EDWARDS/Atty. for pl.
RESPONSIVE PLEADING

CONTINUED STATUS CONFERENCE RE: COMPLAINT
5-29-16 [1]

No tentative ruling.

2. 15-14833-A-7 FRED ALLEN
16-1035
STERLING PACIFIC LENDING, INC. V. ALLEN
PETER FEAR/Atty. for pl.
RESPONSIVE PLEADING

PRETRIAL CONFERENCE RE: AMENDED COMPLAINT
6-15-16 [16]

No tentative ruling.

3. 15-14834-A-7 JEFFREY KEMMER
16-1031
STERLING PACIFIC LENDING, INC. V. KEMMER
PETER FEAR/Atty. for pl.
RESPONSIVE PLEADING

PRETRIAL CONFERENCE RE: AMENDED COMPLAINT
6-15-16 [15]

No tentative ruling.

4. 16-10046-A-7 KATHY KNOKE
16-1048
LOANME, INC. V. KNOKE
DAVID BRODY/Atty. for pl.
RESPONSIVE PLEADING

CONTINUED PRE-TRIAL CONFERENCE RE: COMPLAINT
4-18-16 [1]

Final Ruling

At the suggestion of the parties, this matter is continued to March 1, 2017, at 10:00 a.m. in Fresno. Not later than 14 days prior to the continued pretrial conference the parties shall file a joint status report.

5. 11-17165-A-7 OAKHURST LODGE, INC., A CALIFORNIA CORPORATION
15-1017
OAKHURST LODGE, INC. V. FIRST-CITIZENS BANK & TRUST
DONNA STANDARD/Atty. for pl.
ORDER #257, RESPONSIVE PLEADING

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
4-6-16 [151]

No tentative ruling.

6. 11-17165-A-7 OAKHURST LODGE, INC., A CALIFORNIA CORPORATION
15-1017 AJM-4
OAKHURST LODGE, INC. V. FIRST-CITIZENS BANK & TRUST
AARON MALO/Atty. for mv.
ORDER #257, RESPONSIVE PLEADING

CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
5-17-16 [176]

Tentative Ruling

Motion: Dismiss Complaint
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied
Order: Civil minute order

First Citizens Bank & Trust ("FCB") moves under Rule 12(b)(1), i.e. lack of subject-matter jurisdiction, to dismiss the First Amended Complaint filed by Oakhurst Lodge, Inc. ("OLI"). It does so arguing that (1) dismissal of the OLI bankruptcy precludes pursuit of contempt for violation of the stay; and (2) OLI lacks standing to pursue the stay violation because it is property of the estate and only the Chapter 7 trustee may bring actions on the part of the estate. OLI opposes the motion.

DISCUSSION

The history of the underlying Chapter 11, later converted to Chapter 7, and of the alleged acts giving rise to liability, are set forth in this court's previous ruling on the FCB and Total Lender Solutions, Inc. ("TLS") motion to dismiss. Civil minutes, January 27, 2016, ECF # 107. Those minutes, and in particular the "FACTS" * 1-4, as alleged in the complaint, are incorporated by reference in this ruling.

Dismissal and Jurisdiction

Bankruptcy courts have jurisdiction over cases and proceedings arising under, arising in, or related to a case filed under title 11. 28 U.S.C. §§ 157(a)-(c)(1), 1334(b).

This court has jurisdiction over this adversary proceeding. Jurisdiction is core. Proceedings "arising under" title 11 are those "causes of action created or determined by statutory provisions" of title 11. *In re Wilshire Courtyard*, 729 F.3d 1279, 1285 (9th Cir. 2013). Contempt for violation of the stay is a core proceeding, as it arises under title 11. 11 U.S.C. § 362(a); *In re Zumbrun*, 88 BR 250,

253 (9th Cir. BAP 1988) ("such a proceeding is a core proceeding because the automatic stay is a creature peculiar to federal bankruptcy law and it plays a fundamental role in the administration of the Bankruptcy Code").

Plan confirmation does not end this court's core jurisdiction. "Nothing in the statutes granting bankruptcy court jurisdiction (28 USC §§ 157, 1334) "cuts off" that jurisdiction upon confirmation of a Chapter 11, 12 or 13 plan. As a result, the bankruptcy court continues to have jurisdiction over "core" matters postconfirmation. [See *In re Seven Fields Develop. Corp.* (3rd Cir. 2007) 505 F3d 237, 260—creditors' postconfirmation malpractice action against accounting firm was subject to bankruptcy court's core jurisdiction; *In re Insilco Technologies, Inc.* (BC D DE 2005) 330 BR 512, 519-520—bankruptcy court had core jurisdiction over preference and fraudulent conveyance claims brought by trustee postconfirmation]." March, Ahart & Shapiro, *California Practice Guide: Bankruptcy*, § 1:985 (Rutter Group 2016).

Nor does dismissal or closure end core jurisdiction. "Nothing in the statutes granting bankruptcy court jurisdiction (28 USC §§ 157, 1334) "cuts off" that jurisdiction when a bankruptcy case is closed. The bankruptcy court's core jurisdiction may be "dormant" after case closure, but it still exists. [*In re John Richards Homes Bldg. Co.*, LLC (ED MI 2009) 405 BR 192, 210 (collecting cases)—"there is much support for the proposition that bankruptcy courts retain jurisdiction over core proceedings beyond the dismissal or closure of the underlying bankruptcy case"]." March, Ahart & Shapiro, *California Practice Guide: Bankruptcy*, § 1:991 (Rutter Group 2016).

Because the contempt arises directly from a violation of 11 U.S.C. § 362(a) this court believes, and finds, that its jurisdiction is core.

But even if this court did not have core jurisdiction, the adversary proceeding is "related to" a case under title 11. Proceedings that are not core but "the outcome of [which] could conceivably have any effect on the estate being administered" fall under the court's "related to" jurisdiction. *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1193 (9th Cir. 2005). Where, as here, the proceeding is post-confirmation, related to jurisdiction shrinks and requires that the matter have a close nexus to matters "affecting the interpretation, implementation, consummation, execution, or administration of the confirmed plan." *In re Wilshire Courtyard*, 729 F.3d 1279 (9th Cir. 2013).

Here, the plan contemplates continued operation of Oakhurst Lodge and payment of creditors from business operations. Plan, Articles I, VI § 7.01, November 9, 2011, ECF # 79. FCB's foreclosure precluded OLI from performing the plan. As a consequence, even if this court only enjoyed related to jurisdiction (which it does not), FCB's actions have the close nexus to plan implementation, giving this court jurisdiction.

Finally, as this court noted one year ago, the dismissal of this case and OLI's inability to vacate the dismissal order in no way precludes this court from awarding OLI relief. "[C]onversion, dismissal or closure of the case does not moot the stay violation or deprive this court of jurisdiction. *Davis v. C.G. Courington (In re Davis)*, 177 B.R. 907 (1995) (dismissal of underlying case does not moot stay action for damages flowing from the violation and does not deprive the

court of jurisdiction). One bankruptcy treatise explains this principle in the dismissal context: "Dismissal of a bankruptcy case after the stay has been violated does not undo or vacate the violation. The right of the debtor/bankruptcy estate to pursue the violator for damages survives dismissal. [*In re Davis* (9th Cir. BAP 1995) 177 BR 907, 911-912—bankruptcy court retains jurisdiction over claim for violation of stay; *In re Johnson* (10th Cir. BAP 2008) 390 BR 414, 419—damages caused by willful violation of automatic stay "do not evaporate once the stay is no longer in force"]." March, Ahart & Shapiro, *California Practice Guide: Bankruptcy* § 8:875 (Rutter Group 2015). Civil minutes * 6, January 27, 2016, ECF # 107.

Standing

FCB argues that only the Chapter 7 trustee, and not debtor, has standing to pursue this stay violation action. FCB correctly argues that once the case converted to Chapter 7, the trustee, and the trustee alone, had the right to administer estate property, i.e. the (wrongfully foreclosed) hotel, and to seek redress for violations of 11 U.S.C. § 362(a)(2)-(5). Where FCB's analysis goes awry is its failure to recognize that a single act may violate not only the trustee's right to administer estate property, but also the debtor's right to be left alone and, in the case of Chapter 11, to seek to reorganize. 11 U.S.C. § 362(a)(1),(6)-(7). And these breathing room and reorganization rights belong exclusively to the debtor, and not to the estate.

"In a Chapter 11 bankruptcy, the stay arises on the filing of a petition. 11 U.S.C. §§ 362(a), 103(a). The stay has two distinct parts: (1) an in personam component, which protects the debtor, 11 U.S.C. § 362(a)(1), (6)-(7); and (2) an in rem component, which protects property of the estate, 11 U.S.C. § 362(a)(2)-(5).." Civil minutes * 6, January 27, 2016, ECF # 107. In this case, both the estate and OLI's rights under 11 U.S.C. § 362(a) were impinged.

The bankruptcy code defines the duration of the stay. "Except as provided in subsections (d), (e), (f), and (h) of this section--(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;(2) the stay of any other act under subsection (a) of this section continues until the earliest of--(A) the time the case is closed;(B) the time the case is dismissed; or(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied." 11 U.S.C. § 362(c).

As to the estate

The estate's rights were injured. Notwithstanding confirmation, the hotel that was the subject of the foreclosure remained property of the estate. That is true because the plan specifically provided that property remain in the estate until such date as discharge was entered (which never occurred). The plan provided: "Revesting of Assets. *Subject to the provisions of the Plan and the Confirmation Order, the property of the Estate shall not vest in the Reorganized Debtor until discharge is entered.* As of the Discharge Date, all such property shall be free and clear of all Claims, Liens and Equity Interest, except as otherwise provided in the Plan or the Confirmation Order. From and after the Discharge Date, the Reorganized Debtor shall be free of any restriction imposed by the Bankruptcy Court, the

Bankruptcy Code and the Bankruptcy Rules, other than the obligations set forth in this Plan." Plan § 15.01, November 9, 2011, ECF # 79. After plan confirmation but before conversion to Chapter 7, FCB foreclosed its liens against the hotel. Doing so violated 11 U.S.C. § 362(a)(3), which precludes creditors from "acts to obtain possession of property of the estate. . . .or to exercise control over property of the estate." While OLI originally held these rights, when the case converted to Chapter 7, the trustee Robert Hawkins succeeded to the rights of the debtor in possession to estate property, including the (wrongfully foreclosed) hotel. 11 U.S.C. § 323(a)(trustee is the estate representative). But soon thereafter, the trustee abandoned any interest he had in the hotel. Notice of Intent to Abandon, February 14, 2013, ECF # 182. When the trustee did so, he lost his rights to administer the hotel as an asset of the estate. 11 U.S.C. 554(a).

But the trustee's abandonment was limited to the 60 unit hotel, fixtures and equipment. *Id.* Because the trustee held no other rights with respect to the hotel foreclosure, the trustee did not, and could not, abandon any other stay violation rights. As a consequence, insofar as the hotel (which was estate property) is concerned, the estate lost its right to administer the asset, and the Chapter 7 trustee would not now have standing to recover it.

As to the debtor

The debtor in possession, OLI, was also injured by the foreclosure. The stay arose on the date OLI filed its petition, June 22, 2011, and lifted when the Chapter 7 trustee dismissed the case, June 1, 2013. 11 U.S.C. 362(c)(2).

Between those dates, FCB foreclosed OLI's hotel. Foreclosure of the hotel that remained part of the estate, Plan § 15.01, November 9, 2011, ECF # 79, and formed the basis of the debtor's plan of reorganization plan violated not only the estate's rights but also the debtor's right to be left alone during the bankruptcy process. Title 11 U.S.C. § 362(a)(1),(6). Those subsections provide, " [A] petition filed under section 301 . . . .of this title . . . .operates as a stay, applicable to all entities, of--(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title. . .(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." These rights are separate and apart from the estate's rights and protect the debtor's right to be free of collection efforts.

These rights belong exclusively to the debtor in possession, and not to the estate. Stay violations for collection activities are not property of the estate because they occur postpetition. 11 U.S.C. § 541(a)(1),(2). And none of the provisions of 541(a) that capture property acquired by the debtor after the petition or by the estate are implicated here. 11 U.S.C. § 541(a)(5)-(7); *In re Neidorf*, 534 B.R. 369 (9th Cir. 2015)(declining to include in the estate the debtor's right to a post-petition mortgage settlement that did not arise until years after her Chapter 7 was filed). Moreover, conversion from Chapter 11 to Chapter 7 did not alter the date of the commencement of the case, which could have allowed the trustee to

augment the estate with these rights. 11 U.S.C. 348(a). The simple point is that the Chapter 7 trustee never held these rights, and they have always belonged to OLI.

More importantly, OLI took the necessary affirmative steps to preserve these rights to itself. The confirmed plan provided, "Preservation of Claims and Rights. Except as expressly set forth herein, nothing in this Plan shall be deemed to constitute a waiver of the powers of the Debtor as a debtor in possession under the Bankruptcy Code, the Bankruptcy rules [sic] or the Local Rules and *the Debtor and the Reorganized Debtor as applicable shall retain after the Confirmation Date and after the Effective Date all powers granted by the Bankruptcy Code, the Bankruptcy Rules and Local Rules . . . .**Except as otherwise provided in the Plan or the Confirmation Order, the Debtor and the Reorganized Debtor reserve any and all of their Claims and rights against any and all third parties, whether such Claims arose before, on or after the Petition Date, the Confirmation Date, the Effective Date and/or the Distribution Date.*** (emphasis added). " Plan § 7.03, November 9, 2011, ECF # 79. And it is these rights, that have never belonged to the Chapter 7 trustee, that OLI now properly asserts.

For each of these reasons, the motion will be denied.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

First-Citizens Bank & Trust Company's motion to dismiss for lack of subject-matter jurisdiction has been presented to the court,

IT IS ORDERED that the motion is denied;

IT IS FURTHER ORDERED that First-Citizens Bank & Trust shall file an answer not later than February 8, 2017; and

IT IS FURTHER ORDERED that the parties shall not enlarge time without order of this court and, if First-Citizens Bank & Trust Company fails to answer within the time specified herein, Oakhurst Lodge, Inc. shall forthwith and without delay seek the entry of default of the non-responding party.

7. 11-17165-A-7 15-1017 — OAKHURST LODGE, INC., A CALIFORNIA CORPORATION AJM-5 — CONTINUED MOTION TO STRIKE 5-17-16 [179]

OAKHURST LODGE, INC. V.
FIRST-CITIZENS BANK & TRUST
AARON MALO/Atty. for mv.
ORDER #257, RESPONSIVE PLEADING

Tentative Ruling

Motion: Dismiss Complaint
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied
Order: Civil minute order

FCB moves to strike OLI's (1) request for punitive sanctions of $1,500 per day; and (2) civil contempt damages after March 1, 2013 (the day the Chapter 7 trustee abandoned Oakhurst Lodge). OLI opposes the motion.

DISCUSSION

Rule 12(f) states, "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. Proc. 12(f), *incorporated by* Fed. R. Bankr. P. 7012(b).

FCB argues that the fourth cause of action must be stricken in its entirety because it only seeks to impose punitive damages or, in the alternative, that no damages be allowed after March 1, 2013 (the date the trustee abandon his interest in the hotel).

Punitive Damages

FCB correctly notes that punitive damages may not be awarded in a contempt action under 11 U.S.C. § 362. *In re Dyer*, 322 F.3d 1178, 1192 (9th Cir. 2003).

As that court said, "[T]he contempt authority conferred on bankruptcy courts under § 105(a) is a civil contempt authority. As such, it authorizes only civil sanctions as available remedies. We recently explained the difference between civil sanctions and criminal sanctions: **Civil penalties must either be compensatory or designed to coerce compliance**. *F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1137–38 (9th Cir.2001). In contrast, "a flat unconditional fine totaling even as little as $50" could be criminal "if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance," and the fine is not compensatory. Id. at 1138 (citation omitted). See also *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827–34, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994). This is so regardless of whether the non-compensatory fine is payable to the court or to the complainant. *Hanshaw*, 244 F.3d at 1138 n. 7. Whether the fine is payable to the complainant may, however, be one relevant factor in determining whether the fine is compensatory or

punitive."

Here, the remedy prayed is coercive, not punitive. As pled, OLI "requests [that] the court penalize Defendants for their contemptuous behavior and should be required to pay sanctions and/or penalty in an amount **not less than $1,500.00 per day, per count of contempt, from the date of the first violation, July 5, 2012, until all contempt has been purged** by Defendants FCBT and TLS **and the premise restored to Plaintiff.**" First Amended Complaint ¶ 50, April 6, 2016, ECF # 151. The complaint is less than artful, and the use of the words "penalize," "sanctions" and "penalty" confuse the issue. But the thrust of the plea is that coercive, allowing FCB to avoid future penalties by compliance with the stay.

Beyond that, FCB's motion does not accurately represent OLI's complaint. It argues that the fourth cause of action "seeks **only** to impose punitive civil contempt damages. . ." Memorandum of Points and Authorities 4:7-9, May 17, 2016, ECF # 180. (emphasis original). That is not the case. The fourth cause of action also seeks attorney fees. First Amended Complaint, prayer fourth cause of action, April 6, 2016, ECF # 151.

March 1, 2013

FCB argues that the stay violation ceased as on March 1, 2013, when the trustee abandoned the hotel. FCB is partly right; the violation as to the estate ceased when the trustee abandoned the hotel. But as to the debtor the stay violation commenced no later than July 10, 2012 (the recordation of the Notice of Default), Complaint ¶ 36, April 6, 2016, ECF # 151, and continued until dismissal of the case on June 1, 2013.

"In a Chapter 11 bankruptcy, the stay arises on the filing of a petition. 11 U.S.C. §§ 362(a), 103(a). The stay has two distinct parts: (1) an in personam component, which protects the debtor, 11 U.S.C. § 362(a)(1), (6)-(7); and (2) an in rem component, which protects property of the estate, 11 U.S.C. § 362(a)(2)-(5).." Civil minutes * 6, January 27, 2016, ECF # 107. In this case, both the estate and OLI's rights under 11 U.S.C. § 362(a) were impinged.

The bankruptcy code defines the duration of the stay. "Except as provided in subsections (d), (e), (f), and (h) of this section--(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;(2) the stay of any other act under subsection (a) of this section continues until the earliest of--(A) the time the case is closed;(B) the time the case is dismissed; or(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied." 11 U.S.C. § 362(c).

As to the estate

The estate's rights were injured. Notwithstanding confirmation, the hotel that was the subject of the foreclosure remained property of the estate. That is true because the plan specifically provided that property remain in the estate until such date as discharge was entered (which never occurred). The plan provided: "Revesting of Assets.

Subject to the provisions of the Plan and the Confirmation Order, the property of the Estate shall not vest in the Reorganized Debtor until discharge is entered. As of the Discharge Date, all such property shall be free and clear of all Claims, Liens and Equity Interest, except as otherwise provided in the Plan or the Confirmation Order. From and after the Discharge Date, the Reorganized Debtor shall be free of any restriction imposed by the Bankruptcy Court, the Bankruptcy Code and the Bankruptcy Rules, other than the obligations set forth in this Plan." Plan § 15.01, November 9, 2011, ECF # 79. After plan confirmation but before conversion to Chapter 7, FCB foreclosed its liens against the hotel. Doing so violated 11 U.S.C. § 362(a)(3), which precludes creditors from "acts to obtain possession of property of the estate. . . .or to exercise control over property of the estate." While OLI originally held these rights, when the case converted to Chapter 7, the trustee Robert Hawkins succeeded to the rights of the debtor in possession to estate property, including the (wrongfully foreclosed) hotel. 11 U.S.C. § 323(a)(trustee is the estate representative). But soon thereafter, the trustee abandoned any interest he had in the hotel. Notice of Intent to Abandon, February 14, 2013, ECF # 182. When the trustee did so, it lost its rights to administer the hotel as an asset of the estate. 11 U.S.C. 554(a).

But the trustee's abandonment was limited to the 60 unit hotel, fixtures and equipment. *Id.* Because the trustee held no other rights with respect to the hotel foreclosure, the trustee did not, and could not, abandon any other stay violation rights. As a consequence, insofar as the hotel (which was estate property) is concerned, the estate lost its right to administer the asset, and the Chapter 7 trustee would not now have standing to recover it.

As a result, the trustee's abandonment on or about March 1, 2013, may well fix the last day for violation of the stay insofar as the estate is concerned. But it does not define the stay violation period as to the debtor.

As to the debtor

The debtor in possession, OLI, was also injured by the foreclosure. The stay arose on the date OLI filed its petition, June 22, 2011, and lifted when the Chapter 7 trustee forced dismissal of the case, June 1, 2013. 11 U.S.C. 362(c)(2).

Between those dates, FCB foreclosed OLI's hotel. Foreclosure of the hotel that remained part of the estate, Plan § 15.01, November 9, 2011, ECF # 79, and formed the basis of the debtor's plan of reorganization plan violated not only the estate's rights but also the debtor's right to be left alone during the bankruptcy process. Title 11 U.S.C. § 362(a)(a)(1),(6). Those subsections provide, " [A] petition filed under section 301 . . of this title . . . .operates as a stay, applicable to all entities, of--(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title. . .(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title."

These rights are separate and apart from the estate's rights and protect the debtor's right to be free of collection efforts. These rights belong exclusively to the debtor in possession, and not to the estate. Stay violations for collection activities are not property of the estate because they occur postpetition. 11 U.S.C. § 541(a)(1),(2). And none of the provisions of 541(a) that capture property acquired by the debtor after the petition or by the estate are implicated here. 11 U.S.C. 541(a)(5)-(7); *In re Neidorf*, 534 B.R. 369 (9th Cir. 2015)(declining to include in the estate of the debtor's right to a post-petition mortgage settlement that did not arise until years after her Chapter 7 was filed). Moreover, conversion from Chapter 11 to Chapter 7 did not alter the date of the commencement of the case, allowing the trustee to augment the estate with these rights. 11 U.S.C. 348(a). The simple point is that the Chapter 7 trustee never held these rights and they have always belonged to OLI.

More importantly, OLI took the necessary affirmative steps to preserve these rights to itself. The confirmed plan provided, "Preservation of Claims and Rights. Except as expressly set forth herein, nothing in this Plan shall be deemed to constitute a waiver of the powers of the Debtor as a debtor in possession under the Bankruptcy Code, the Bankruptcy rules [sic] or the Local Rules and *the Debtor and the Reorganized Debtor as applicable shall retain after the Confirmation Date and after the Effective Date all powers granted by the Bankruptcy Code, the Bankruptcy Rules and Local Rules . . . .**Except as otherwise provided in the Plan or the Confirmation Order, the Debtor and the Reorganized Debtor reserve any and all of their Claims and rights against any and all third parties, whether such Claims arose before, on or after the Petition Date, the Confirmation Date, the Effective Date and/or the Distribution Date.*** (emphasis added). " Plan § 7.03, November 9, 2011, ECF # 79. And it is these rights, that have never belonged to the Chapter 7 trustee, that OLI now properly asserts.

As a consequence, FCB incorrectly fixes the date the stay violation ceased as March 1, 2013. The court believes that appropriate period for violation of the stay is June 10, 2012, through June 1, 2013.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

First-Citizens Bank & Trust's motion to strike has been presented to the court,

IT IS ORDERED that the motion is denied.

8. 11-17165-A-7 OAKHURST LODGE, INC., A CONTINUED MOTION TO DISMISS
15-1017 CALIFORNIA CORPORATION CASE
NLG-5 5-17-16 [182]

OAKHURST LODGE, INC. V.
FIRST-CITIZENS BANK & TRUST
NICHOLE GLOWIN/Atty. for mv.
ORDER #257, RESPONSIVE
PLEADING

Tentative Ruling

Motion: Dismiss Complaint
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied
Order: Civil minute order

Total Lender Solutions ("TLS") moves under Rule 12(b)(1), i.e. lack of subject-matter jurisdiction, and Rule 12(b)(6), i.e. failure to state a claim upon which relief can be granted, to dismiss the First Amended Complaint filed by Oakhurst Lodge, Inc. ("OLI"). It does so arguing (1) impossibility; (2) lacks of standing; (3) failure to state a claim; (4) application of the doctrines of res judicata and collateral estoppel; (5) improperly pleads punitive damages; and (6) inability to prove compensatory damages. OLI opposes the motion.

DISCUSSION

The history of the underlying Chapter 11, later converted to Chapter 7, and of the alleged acts giving rise to liability, are set forth in this court's previous ruling on the FCB and Total Lender Solutions, Inc. ("TLS") motion to dismiss. Civil minutes, January 27, 2016, ECF # 107. Those minutes, and in particular the "FACTS" * 1-4, as alleged in the complaint, are incorporated by reference in this ruling.

Rule 12(b)(1): Jurisdiction and Standing

FCB argues that only the Chapter 7 trustee, and not debtor, has standing to pursue this stay violation action. FCB correctly argues that once the case converted to Chapter 7, the trustee, and the trustee alone, had the right to administer estate property, i.e. the (wrongfully foreclosed) hotel, and to seek redress for violations of 11 U.S.C. § 362(a)(2)-(5). Where FCB's analysis goes awry is its failure to recognize that a single act may violate not only the trustee's right to administer estate property, but also the debtor's right to be left alone and, in the case of Chapter 11, to seek to reorganize. 11 U.S.C. § 362(a)(1),(6)-(7). And these breath room and reorganization rights belong exclusively to the debtor, and not to the estate.

"In a Chapter 11 bankruptcy, the stay arises on the filing of a petition. 11 U.S.C. §§ 362(a), 103(a). The stay has two distinct parts: (1) an in personam component, which protects the debtor, 11 U.S.C. § 362(a)(1), (6)-(7); and (2) an in rem component, which protects property of the estate, 11 U.S.C. § 362(a)(2)-(5).." Civil minutes * 6, January 27, 2016, ECF # 107. In this case, both the

estate and OLI's rights under 11 U.S.C. § 362(a) were impinged.

The bankruptcy code defines the duration of the stay. "Except as provided in subsections (d), (e), (f), and (h) of this section--(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;(2) the stay of any other act under subsection (a) of this section continues until the earliest of--(A) the time the case is closed;(B) the time the case is dismissed; or(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied." 11 U.S.C. § 362(c).

As to the estate

The estate's rights were injured. Notwithstanding confirmation, the hotel that was the subject of the foreclosure remained property of the estate. That is true because the plan specifically provided that property remain in the estate until such date as discharge was entered (which never occurred). The plan provided: "Revesting of Assets. *Subject to the provisions of the Plan and the Confirmation Order, the property of the Estate shall not vest in the Reorganized Debtor until discharge is entered*. As of the Discharge Date, all such property shall be free and clear of all Claims, Liens and Equity Interest, except as otherwise provided in the Plan or the Confirmation Order. From and after the Discharge Date, the Reorganized Debtor shall be free of any restriction imposed by the Bankruptcy Court, the Bankruptcy Code and the Bankruptcy Rules, other than the obligations set forth in this Plan." Plan § 15.01, November 9, 2011, ECF # 79. After plan confirmation but before conversion to Chapter 7, FCB foreclosed its liens against the hotel. Doing so violated 11 U.S.C. § 362(a)(3), which precludes creditors from "acts to obtain possession of property of the estate. . . .or to exercise control over property of the estate." While OLI originally held these rights, when the case converted to Chapter 7, the trustee Robert Hawkins succeeded to the rights of the debtor in possession to estate property, including the (wrongfully foreclosed) hotel. 11 U.S.C. § 323(a)(trustee is the estate representative). But soon thereafter, the trustee abandoned any interest he had in the hotel. Notice of Intent to Abandon, February 14, 2013, ECF # 182. When the trustee did so, it lost its rights to administer the hotel as an asset of the estate. 11 U.S.C. 554(a).

But the trustee's abandonment was limited to the 60 unit hotel, fixtures and equipment. *Id.* Because the trustee held no other rights with respect to the hotel foreclosure, the trustee did not, and could not, abandon any other stay violation rights. As a consequence, insofar as the hotel (which was estate property) is concerned, the estate lost its right to administer the asset, and the Chapter 7 trustee would not now have standing to recover it.

As to the debtor

The debtor in possession, OLI, was also injured by the foreclosure. The stay arose on the date OLI filed its petition, June 22, 2011, and lifted when the Chapter 7 trustee forced dismissal of the case, June 1, 2013. 11 U.S.C. 362(c)(2).

Between those dates, FCB foreclosed OLI's hotel. Foreclosure of the hotel that remained part of the estate, Plan § 15.01, November 9, 2011, ECF # 79, and formed the basis of the debtor's plan of reorganization plan violated not only the estate's rights but also the debtor's right to be left alone during the bankruptcy process. Title 11 U.S.C. § 362(a)(a)(1),(6). Those subsections provide, " [A] petition filed under section 301 . . . .of this title . . . .operates as a stay, applicable to all entities, of--(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title. . .(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." These rights are separate and apart from the estate's rights and protect the debtor's right to be free of collection efforts.

These rights belong exclusively to the debtor in possession, and not to the estate. Stay violations for collection activities are not property of the estate because they occur postpetition. 11 U.S.C. § 541(a)(1),(2). And none of the provisions of 541(a) that capture property acquired by the debtor after the petition or by the estate are implicated here. 11 U.S.C. 541(a)(5)-(7); *In re Neidorf*, 534 B.R. 369 (9th Cir. 2015)(declining to include in the estate of the debtor's right to a post-petition mortgage settlement that did not arise until years after her Chapter 7 was filed). Moreover, conversion from Chapter 11 to Chapter 7 did not alter the date of the commencement of the case, allowing the trustee to augment the estate with these rights. 11 U.S.C. 348(a). The simple point is that the Chapter 7 trustee never held these rights and they have always belonged to OLI.

More importantly, OLI took the necessary affirmative steps to preserve these rights to itself. The confirmed plan provided, "Preservation of Claims and Rights. Except as expressly set forth herein, nothing in this Plan shall be deemed to constitute a waiver of the powers of the Debtor as a debtor in possession under the Bankruptcy Code, the Bankruptcy rules [sic] or the Local Rules and *the Debtor and the Reorganized Debtor as applicable shall retain after the Confirmation Date and after the Effective Date all powers granted by the Bankruptcy Code, the Bankruptcy Rules and Local Rules . . . .**Except as otherwise provided in the Plan or the Confirmation Order, the Debtor and the Reorganized Debtor reserve any and all of their Claims and rights against any and all third parties, whether such Claims arose before, on or after the Petition Date, the Confirmation Date, the Effective Date and/or the Distribution Date.*** (emphasis added). " Plan § 7.03,

November 9, 2011, ECF # 79. And it is these rights, that have never belonged to the Chapter 7 trustee, that OLI now properly asserts.

Rule 12(b)(6): Failure to State a Claim Upon Which Relief Can Be Granted

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121–22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

The Supreme Court has established the minimum requirements for pleading sufficient facts. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts all factual allegations as true and construes them, along with all reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). The court need not, however, accept legal conclusions as true. *Iqbal*, 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

In addition to looking at the facts alleged in the complaint, the court may also consider some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curium) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

Impossibility

TLS argues that relief is impossible under the circumstances because (1) proceeds of the stay violation must be paid to the estate for the benefit of creditors; (2) the case has been dismissed and the dismissal order not vacated; and (3) any such request to vacate the dismissal order would be denied as untimely.

Notwithstanding the motion, which appears to seek dismissal of the entire complaint, the court construes the motion as directed only to the fourth cause of action, i.e. contempt, of the First Amended Complaint, April 6, 2016, ECF # 182. The court does so because it specifically ordered that any future Rule 12(b)(1) motion be addressed only to that cause of action. Order, ¶¶ 2-3, April 29, 2016, ECF # 174.

More importantly, TLS' argument conflates the right to pursue contempt for violation of the stay with where the proceeds of that action must be directed, whether to creditors or otherwise. It is beyond question that a debtor may pursue a stay violation even without reopening the underlying case. *In re Stanwyck*, 450 B.R. 181, 192-193 (Bankr. C.D. Cal. 2011); *Menk v. Lapaglia (In re Menk)*, 241 B.R. 896, 906 (9th Cir. BAP 1999); *Johnson v. Smith (In re Johnson)*, 575 F.3d 1079, 1084 (20th Cir. 2009); *Koehler v. Grant*, 213 B.R. 567 (8th Cir. BAP 1997).

Finally, TLS has not demonstrated that the order converting and/or dismissing the case cannot be vacated. Rule 60(b) allows the court to vacate an order for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6), incorporated by Fed. R. Bankr. P. 9024. Rule 60(b)(6) is subject only to a reasonableness time limitation. Rule 60(c)1).

Res Judicata

TLS argues that the default judgment entered in the unlawful detainer action filed by First-Citizens Bank & Trust is res judicata on title defect issues.

In most instances, merger and bar ("res judicata") does not preclude an aggrieved party from litigating a title defect after an unlawful detainer action. *Cheney v. Trauzettel*, 9 Cal.2d 158, 160 (1937). As one commentator noted, "Since title disputes generally are not properly before the court in a summary proceeding for possession, they are not conclusively determined by the judgment and may be litigated in a subsequent action. [See *Vella v. Hudgins, supra*, 20 C3d at 255, 257-258, 142 CR at 416, 417-418—question of fraudulent acquisition of title not foreclosed by adverse judgment in prior UD (although pleaded as a defense in the UD, it was not "fully and fairly" litigated); *Gonzales v. Gem Properties, Inc.* (1974) 37 CA3d 1029, 1036-1037, 112 CR 884, 889—subsequent quiet title action not barred by UD judgment]." Friedman, Garcia & Hoy, *California Practice Guide: Landlord-Tenant* § 9:414 (Rutter Group 2016).

A very limited exception exists where the unlawful detainer action was brought under California Code of Civil Procedure 1161a (as it was here). In such instances, res judicata will be invoked the party against whom res judicata is to be invoked was given a "full and fair" opportunity to litigate the issue. *Vella v. Hudgins*, 20 Cal.3d 251, 256-257 (1977). The same commentator stated, "But the result may be otherwise where the parties, in the prior UD, deliberately chose to waive speedy resolution of the issue of possession in favor of an extensive adjudication of their conflicting title claims. Though a title dispute is not ordinarily cognizable in a UD, the court is "invested with jurisdiction to deal with any issues the disputants agreed to try" and when a "fair opportunity to litigate" the matter is provided, the resulting judgment will be res judicata on the claim. [*Vella v. Hudgins, supra*, 20 C3d at 257, 142 CR at 417; see *Wood v. Herson* (1974) 39 CA3d 737, 740-742, 114 CR 365, 366-367—suit for

specific performance of contract to convey barred by prior UD judgment because essential issue—tenants' claim of fraud—had been fully and fairly disposed of in prior UD (distinguished in *Vella, supra,* as a "highly atypical" UD proceeding)]." Friedman, Garcia & Hoy, *California Practice Guide: Landlord-Tenant* § 9:414 (Rutter Group 2016). The party seeking to invoke claim preclusion bears the burden of proof on the issue. *Paladini v. Municipal Markets Co.*, 185 Cal. 672, 674 (1921).

No such full and fair opportunity to litigate was presented here, at least as expressed in the complaint. The unlawful detainer complaint does not mention OLI's bankruptcy. Exh. 14 to Exhibits in Support of First Amended Complaint, April 7, 2016, ECF # 150. Judgment was taken by default. Id. at Exh. 15. Service defects are alleged by the plaintiff. First Amended Complaint ¶ 19(F), April 7, 2016, ECF 151.

Collateral Estoppel

TLS makes a similar argument under the doctrine of collateral estoppel, i.e. the unlawful detainer action conclusively establishes that the "foreclosure complied with applicable state law." Memorandum of Points and Authorities 12:24-13:6, May 17, 2016, ECF # 184.

This court does not agree. The elements necessary to invoke collateral estoppel, aka issue preclusion, are well known. "Under California law, collateral estoppel only applies if certain threshold requirements are met: First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. *Harmon v. Kobrin (In re Harmon)*, 250 F.3d 1240, 1245 (9th Cir.2001)." *In re Cantrell*, 329 F.3d 1119, 1123 (9th Cir. 2003).

Where the underlying judgment was taken by default, additional requirements apply. "California law does, however, place two limitations on this general principle. The first is that collateral estoppel applies only if the defendant "has been personally served with summons or has actual knowledge of the existence of the litigation." *In re Harmon*, 250 F.3d at 1247 (quoting *Williams*, 223 P.2d at 254). Collateral estoppel, therefore, only applies to a default judgment to the extent that the defendant had actual notice of the proceedings and a "full and fair opportunity to litigate." Id. at 1247 n. 6." *Id.*

As pled, collateral estoppel is not an impediment to OLI's action. First, there has been no showing of personal service or actual knowledge of the existence of the litigation, which is required where, as here, the judgment was obtained by default. Exh. 14 & 15 Exhibits in Support of First Amended Complaint, April 7, 2016, ECF # 150. Much to the contrary, the pleadings suggest service was not properly effectuated. First Amended Complaint ¶ 19(F), April 7, 2016, ECF 151.

Second, there is no showing that the issue of the applicability was actually litigated. In fact, the unlawful detainer complaint makes no reference to the bankruptcy or the stay. Exh. 14 to Exhibits in

Support of First Amended Complaint, April 7, 2016, ECF # 150.

Finally, even if it had been raised, any decision that the stay was not applicable is not binding on this court. *In re Birting Fisheries, Inc.*, 300 B.R. 489, 499 (B.A.P. 9th Cir. 2003), summarized the law this way, "In *Gruntz*, the Ninth Circuit further explained that exclusive jurisdiction exists over "core" proceedings. See *Gruntz*, 202 F.3d at 1081 ("[T]he separation of 'core' and 'non-core' proceedings ... creates a distinction between those judicial acts deriving from the plenary Article I bankruptcy power and those subject to general Article III federal court jurisdiction."); see also 28 U.S.C. § 157. A " 'core proceeding' is one 'that invokes a substantive right provided by title 11 or ... a proceeding that, by its nature, could arise only in the context of a bankruptcy case.' " *Gruntz*, 202 F.3d at 1081 (quoting *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir.1987)). Put another way, "core" proceedings are those that "arise under the Bankruptcy Code or arise in a bankruptcy case." *McCowan v. Fraley (In re McCowan)*, 296 B.R. 1, 3 (9th Cir. BAP 2003)."

The *Birting* court went on, "That is not to say, however, that a nonbankruptcy court lacks jurisdiction over all bankruptcy issues which may arise in the nonbankruptcy forum. In addition to its exclusive § 1334(a) jurisdiction, a bankruptcy court also has "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." *500 28 U.S.C. § 1334(b) (emphasis added). This statute appears to contradict the aforementioned definition of exclusive authority, for nonexclusive jurisdiction might also apply to some "core" proceedings which "arise under" the Code or "arise in" bankruptcy cases. See 28 U.S.C. §§ 157(b)(1), 1334(b)." *Birting*, 300 B.R. at 499-500.

The *Birting* court concluded by saying, "In *Gruntz*, the Ninth Circuit explained that 28 U.S.C. § 1334(b) does not create jurisdiction in nonbankruptcy courts over core bankruptcy matters, and thus any argument that the state had concurrent jurisdiction was 'unavailing.' *Gruntz,* 202 F.3d at 1082–83. Nonetheless, it concluded that a state court judgment could be given preclusive effect in bankruptcy court if it 'does not involve a core proceeding that implicates substantive rights under title 11.' *Id.* at 1084. *Gruntz* held that the normal rules of preclusion, including the *Rooker–Feldman* doctrine, did not apply to the state court's order modifying the automatic stay, because modification of the stay 'is vested exclusively in the bankruptcy court' under § 362. . . . In the Ninth Circuit, therefore, bankruptcy courts are not bound by incorrect state court judgments in core matters that fall within a bankruptcy court's 'arising under' jurisdiction. See *McGhan*, 288 F.3d at 1180; *Pavelich*, 229 B.R. at 784 ('the state court has jurisdiction to construe the bankruptcy discharge correctly, but not incorrectly'). See also *Gruntz*, 202 F.3d at 1083 ('even assuming that the states had concurrent jurisdiction, their judgment would have to defer to the plenary power vested in the federal courts over bankruptcy proceedings')." *Birting*, 300 B.R. at 500.

The simple point is this. Even if the state court did consider the issue of the applicability of the stay, this court has already ruled that the foreclosure violated the stay, Civil minutes, January 27, 2016, ECF # 107, and this court is not bound by a state court's decision about the applicability of the stay, if erroneous.

Punitive Damages

TLS seeks to strike the punitive damages portion of the fourth cause of action (contempt).

"A Rule 12(b)(6) motion cannot be used to challenge just certain allegations within a claim while the underlying claim is not itself challenged. Rather, such a challenge must be made by motion to strike under Rule 12(f). [*Thompson v. Paul* (D AZ 2009) 657 F.Supp.2d 1113, 1129—court willing to construe 12(b)(6) motion as 12(f) motion; but see *Hill v. Opus Corp.* (CD CA 2011) 841 F.Supp.2d 1070, 1082—Rule 12(b)(6) motion granted as to part of single claim that was preempted by ERISA." Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial*, Attacking the Pleadings, Motions to Dismiss § 9:188.1 (Rutter Group 2016).

Because this motion challenges only a portion of the fourth cause of action to the First Amendment Complaint, April 6, 2016, ECF # 151, it is procedurally improper and will be addressed in the contemporaneously filed motion to strike.

No Actual Damages

TLS argues that OLI will not be able to "prove" damages at trial because the debtor's schedules and statements show the hotel was oversecured and because the monthly operating reports show continued losses.

This court disagrees. First, such a finding would require consideration of documents not properly considered in a Rule 12(b)(6) motion. In addition to looking at the facts alleged in the complaint, the court may also consider some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curium) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)).

Second, and more importantly, TLS's motion does not adequately address the finding of feasibility as a part of plan confirmation, 11 U.S.C. § 1129(a)(11). As a part of the confirmation process this court has already found that the plan was feasible and that the debtor could fund the plan and payment to creditors from hotel operations. Plan § 7.01, November 9, 2011, ECF # 79. Since the plan provides for payment to creditors in full (sometimes at reduced interest rates) and since the only source of payment (other than two relatively small, e.g. $50,000, capital contributions from Steven Marshall and Jack Patel), it necessarily follows that the court found that the reorganized debtor had demonstrated that hotel operations would be profitable after bankruptcy. This alone is sufficient to defeat the Rule 12(b)

motion.

For each of these reasons, the motion will be denied.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Total Lender Solutions, Inc.'s dismiss for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted has been presented to the court,

IT IS ORDERED that the motion is denied;

IT IS FURTHER ORDERED that Total Lender Solutions, Inc. shall file an answer not later than February 8, 2017; and

IT IS FURTHER ORDERED that the parties shall not enlarge time without order of this court and, if Total Lenders Solutions, Inc. fails to answer within the time specified herein, Oakhurst Lodge, Inc. shall forthwith and without delay seek the entry of default of the non-responding party.

9.	11-17165-A-7 15-1017	OAKHURST LODGE, INC., A CALIFORNIA CORPORATION NLG-6	CONTINUED MOTION TO STRIKE 5-17-16 [188]

OAKHURST LODGE, INC. V.
FIRST-CITIZENS BANK & TRUST
NICHOLE GLOWIN/Atty. for mv.
ORDER #257, RESPONSIVE PLEADING

Tentative Ruling

Motion: Dismiss Complaint
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied
Order: Civil minute order

TLS moves to strike OLI's (1) request for punitive sanctions of $1,500 per day; and (2) civil contempt damages after March 1, 2013 (the day the Chapter 7 trustee abandoned Oakhurst Lodge). OLI opposes the motion.

DISCUSSION

Rule 12(f) states, "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. Proc. 12(f), *incorporated by* Fed. R. Bankr. P. 7012(b).

TLS argues that the fourth cause of action must be stricken in its entirety because it only seeks to impose punitive damages or, in the alternative, that no damages be allowed after March 1, 2013 (the date the trustee abandon his interest in the hotel).

Punitive Damages

TLS correctly notes that punitive damages may not be awarded in a contempt action under 11 U.S.C. § 362. *In re Dyer*, 322 F.3d 1178, 1192 (9th Cir. 2003).

As that court said, "[T]he contempt authority conferred on bankruptcy courts under § 105(a) is a civil contempt authority. As such, it authorizes only civil sanctions as available remedies. We recently explained the difference between civil sanctions and criminal sanctions: **Civil penalties must either be compensatory or designed to coerce compliance**. *F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1137–38 (9th Cir.2001). In contrast, "a flat unconditional fine totaling even as little as $50" could be criminal "if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance," and the fine is not compensatory. Id. at 1138 (citation omitted). See also *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827–34, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994). This is so regardless of whether the non-compensatory fine is payable to the court or to the complainant. *Hanshaw*, 244 F.3d at 1138 n. 7. Whether the fine is payable to the complainant may, however, be one relevant factor in determining whether the fine is compensatory or punitive."

Here, the remedy prayed is coercive, not punitive. As pled, OLI "requests [that] the court penalize Defendants for their contemptuous behavior and should be required to pay sanctions and/or penalty in an amount **not less than $1,500.00 per day, per count of contempt, from the date of the first violation, July 5, 2012, until all contempt has been purged** by Defendants TLS and TLS **and the premise restored to Plaintiff**." First Amended Complaint ¶ 50, April 6, 2016, ECF # 151. The complaint is less than artful, and the use of the words "penalize," "sanctions" and "penalty" confuse the issue. But the thrust of the plea is that coercive, allowing TLS to avoid future penalties by compliance with the stay.

Beyond that, TLS's motion does not accurately represent OLI's complaint. It argues that the fourth cause of action "seeks **only** to impose punitive civil contempt damages. . ." Memorandum of Points and Authorities 4:7-9, May 17, 2016, ECF # 180. (emphasis original). That is not the case. The fourth cause of action also seeks attorney fees. First Amended Complaint, prayer fourth cause of action, April 6, 2016, ECF # 151.

March 1, 2013

TLS argues that the stay violation ceased as on March 1, 2013, when the trustee abandoned the hotel. TLS is partly right; the violation as to the estate ceased when the trustee abandoned the hotel. But as to the debtor the stay violation commenced no later than July 10, 2012

(the recordation of the Notice of Default), Complaint ¶ 36, April 6, 2016, ECF # 151, and continued until dismissal of the case on June 1, 2013.

"In a Chapter 11 bankruptcy, the stay arises on the filing of a petition. 11 U.S.C. §§ 362(a), 103(a). The stay has two distinct parts: (1) an in personam component, which protects the debtor, 11 U.S.C. § 362(a)(1), (6)-(7); and (2) an in rem component, which protects property of the estate, 11 U.S.C. § 362(a)(2)-(5).." Civil minutes * 6, January 27, 2016, ECF # 107. In this case, both the estate and OLI's rights under 11 U.S.C. § 362(a) were impinged.

The bankruptcy code defines the duration of the stay. "Except as provided in subsections (d), (e), (f), and (h) of this section--(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;(2) the stay of any other act under subsection (a) of this section continues until the earliest of--(A) the time the case is closed;(B) the time the case is dismissed; or(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied." 11 U.S.C. § 362(c).

As to the estate

The estate's rights were injured. Notwithstanding confirmation, the hotel that was the subject of the foreclosure remained property of the estate. That is true because the plan specifically provided that property remain in the estate until such date as discharge was entered (which never occurred). The plan provided: "Revesting of Assets. *Subject to the provisions of the Plan and the Confirmation Order, the property of the Estate shall not vest in the Reorganized Debtor until discharge is entered*. As of the Discharge Date, all such property shall be free and clear of all Claims, Liens and Equity Interest, except as otherwise provided in the Plan or the Confirmation Order. From and after the Discharge Date, the Reorganized Debtor shall be free of any restriction imposed by the Bankruptcy Court, the Bankruptcy Code and the Bankruptcy Rules, other than the obligations set forth in this Plan." Plan § 15.01, November 9, 2011, ECF # 79. After plan confirmation but before conversion to Chapter 7, TLS foreclosed its liens against the hotel. Doing so violated 11 U.S.C. § 362(a)(3), which precludes creditors from "acts to obtain possession of property of the estate. . . .or to exercise control over property of the estate." While OLI originally held these rights, when the case converted to Chapter 7, the trustee Robert Hawkins succeeded to the rights of the debtor in possession to estate property, including the (wrongfully foreclosed) hotel. 11 U.S.C. § 323(a)(trustee is the estate representative). But soon thereafter, the trustee abandoned any interest he had in the hotel. Notice of Intent to Abandon, February 14, 2013, ECF # 182. When the trustee did so, it lost its rights to administer the hotel as an asset of the estate. 11 U.S.C. 554(a).

But the trustee's abandonment was limited to the 60 unit hotel, fixtures and equipment. *Id.* Because the trustee held no other rights with respect to the hotel foreclosure, the trustee did not, and could not, abandon any other stay violation rights. As a consequence, insofar as the hotel (which was estate property) is concerned, the estate lost its right to administer the asset, and the Chapter 7 trustee would not now have standing to recover it.

As a result, the trustee's abandonment on or about March 1, 2013, may well fix the last day for violation of the stay insofar as the estate is concerned. But it does not define the stay violation period as to the debtor.

As to the debtor

The debtor in possession, OLI, was also injured by the foreclosure. The stay arose on the date OLI filed its petition, June 22, 2011, and lifted when the Chapter 7 trustee forced dismissal of the case, June 1, 2013. 11 U.S.C. 362(c)(2).

Between those dates, TLS foreclosed OLI's hotel. Foreclosure of the hotel that remained part of the estate, Plan § 15.01, November 9, 2011, ECF # 79, and formed the basis of the debtor's plan of reorganization plan violated not only the estate's rights but also the debtor's right to be left alone during the bankruptcy process. Title 11 U.S.C. § 362(a)(a)(1),(6). Those subsections provide, " [A] petition filed under section 301 . . of this title . . . .operates as a stay, applicable to all entities, of--(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title. . .(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title."

These rights are separate and apart from the estate's rights and protect the debtor's right to be free of collection efforts. These rights belong exclusively to the debtor in possession, and not to the estate. Stay violations for collection activities are not property of the estate because they occur postpetition. 11 U.S.C. § 541(a)(1),(2). And none of the provisions of 541(a) that capture property acquired by the debtor after the petition or by the estate are implicated here. 11 U.S.C. 541(a)(5)-(7); *In re Neidorf*, 534 B.R. 369 (9th Cir. 2015)(declining to include in the estate of the debtor's right to a post-petition mortgage settlement that did not arise until years after her Chapter 7 was filed). Moreover, conversion from Chapter 11 to Chapter 7 did not alter the date of the commencement of the case, allowing the trustee to augment the estate with these rights. 11 U.S.C. 348(a). The simple point is that the Chapter 7 trustee never held these rights and they have always belonged to OLI.

More importantly, OLI took the necessary affirmative steps to preserve these rights to itself. The confirmed plan provided, "Preservation of Claims and Rights. Except as expressly set forth herein, nothing in this Plan shall be deemed to constitute a waiver of the powers of the Debtor as a debtor in possession under the Bankruptcy Code, the Bankruptcy rules [sic] or the Local Rules and *the Debtor and the Reorganized Debtor as applicable shall retain after the Confirmation Date and after the Effective Date all powers granted by the Bankruptcy Code, the Bankruptcy Rules and Local Rules . . . .**Except as otherwise provided in the Plan or the Confirmation Order, the Debtor and the Reorganized Debtor reserve any and all of their Claims and rights against any and all third parties, whether such Claims arose before, on or after the Petition Date, the Confirmation Date, the Effective***

Date and/or the Distribution Date. (emphasis added). " Plan § 7.03, November 9, 2011, ECF # 79. And it is these rights, that have never belonged to the Chapter 7 trustee, that OLI now properly asserts.

As a consequence, TLS incorrectly fixes the date the stay violation ceased as March 1, 2013. The court believes that appropriate period for violation of the stay is June 10, 2012, through June 1, 2013.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Total Lender Solutions, Inc.'s motion to strike has been presented to the court,

IT IS ORDERED that the motion is denied.

10. 16-11674-A-7 JEFF/MICKI PRINS — STATUS CONFERENCE RE: COMPLAINT
16-1105 — 11-30-16 [1]
U.S. TRUSTEE V. PRINS ET AL
GREGORY POWELL/Atty. for pl.
RESPONSIVE PLEADING

No tentative ruling.

11. 14-11478-A-7 LANCE/JANICE ST PIERRE — CONTINUED STATUS CONFERENCE RE: COMPLAINT
16-1033 — 3-18-16 [1]
GREAT AMERICAN INSURANCE COMPANY V. ST. PIERRE ET AL
ROBERT BERENS/Atty. for pl.
RESPONSIVE PLEADING

Final Ruling

The status conference is concluded. No appearance is necessary. The plaintiff may dismiss the adversary proceeding at this time or may until performance of the agreement by the defendants.

12. 14-11478-A-7 LANCE/JANICE ST PIERRE
16-1033 RJB-2
GREAT AMERICAN INSURANCE COMPANY V. ST. PIERRE ET AL

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH LANCE WILLIAM ST. PIERRE AND JANICE DENISE ST. PIERRE
12-6-16 [35]

ROBERT BERENS/Atty. for mv.

Final Ruling

Motion: Approve Compromise of Controversy
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted
Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the responding party is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

APPROVAL OF COMPROMISE

In determining whether to approve a compromise under Federal Rule of Bankruptcy Procedure 9019, the court determines whether the compromise was negotiated in good faith and whether the party proposing the compromise reasonably believes that the compromise is the best that can be negotiated under the facts. *In re A & C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1982). More than mere good faith negotiation of a compromise is required. The court must also find that the compromise is fair and equitable. *Id.* "Fair and equitable" involves a consideration of four factors: (i) the probability of success in the litigation; (ii) the difficulties to be encountered in collection; (iii) the complexity of the litigation, and expense, delay and inconvenience necessarily attendant to litigation; and (iv) the paramount interest of creditors and a proper deference to the creditors' expressed wishes, if any. *Id.* The party proposing the compromise bears the burden of persuading the court that the compromise is fair and equitable and should be approved. *Id.*

The movant requests approval of a compromise that settles under 11 U.S.C. § 523(a)(3). The compromise is reflected in the settlement agreement attached to the motion as an exhibit and filed at docket no. 37. Based on the motion and supporting papers, the court finds that the compromise presented for the court's approval is fair and equitable considering the relevant *A & C Properties* factors. The compromise or settlement will be approved.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Great American Insurance Company's motion to approve a compromise has been presented to the court. Having entered the default of respondent for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the motion,

IT IS ORDERED that the motion is granted. The court hereby approves the compromise that is reflected in the settlement agreement attached to the motion as Exhibit A and filed at docket no. 37.