

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

May 15, 2018, at 1:30 p.m.

1. [18-21627](#)-E-13 **JAMES/KIMBERLY STETLER** **MOTION FOR RELIEF FROM**
MET-1 **Susan Dodds** **AUTOMATIC STAY**
 4-11-18 [15](#)

BANK OF THE WEST VS.

Final Ruling: No appearance at the May 15, 2018 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on April 11, 2018. By the court's calculation, 34 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

<p>The Motion for Relief from the Automatic Stay is granted.</p>

Bank of the West ("Movant") seeks relief from the automatic stay with respect to assets identified as a 2016 Lund Rebel XS Boat, VIN ending in K516; a 2016 Mercury Motor, Serial No. ending in 0725; and a 2016 Shorelander Single Axle Trailer, VIN ending in 5131 ("Property"). The moving party has provided the Declaration of Catherine Worth to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by James Stetler and Kimberly Stetler ("Debtor").

May 15, 2018, at 1:30 p.m.

The Worth Declaration provides testimony that Debtor has not made one post-petition payment and two pre-petition payments. Movant asserts that the Property was repossessed pre-petition.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$22,820.98, as stated in the Worth Declaration.

DEBTOR'S NON-OPPOSITION

Debtor filed a Non-Opposition on April 25, 2018. Dckt. 21. Debtor asserts that the Property was repossessed before this case was filed and that Creditor's claim was listed on Schedule F as repossessed. Debtor does not oppose the court granting relief from the automatic stay.

DISCUSSION

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay because Debtor and the Estate have not made post-petition payments and because the Property was repossessed pre-petition. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

A debtor has no equity in property when the liens against the property exceed the property's value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective rehabilitation. 11 U.S.C. § 362(g)(2); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988); 3 COLLIER ON BANKRUPTCY ¶ 362.07[4][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (stating that Chapter 13 debtors are rehabilitated, not reorganized). Based upon the evidence submitted to the court, and no opposition or showing having been made by Debtor or David Cusick ("the Chapter 13 Trustee"), the court determines that there is no equity in the Property for either Debtor or the Estate, and the property is not necessary for any effective rehabilitation in this Chapter 13 case.

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court on the grounds that there is no equity for the Estate in the Property, that the Property is depreciating in value, that Movant is in possession, and that the Chapter 13 Plan in this case does not provide for the claim secured by the Property.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is granted.

No other or additional relief is granted by the court.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief from the Automatic Stay filed by Bank of the West (“Movant”) having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and all other creditors having lien rights against the Property, under its security agreement, loan documents granting it a lien in the asset identified as a 2016 Lund Rebel XS Boat, VIN ending in K516; a 2016 Mercury Motor, Serial No. ending in 0725; and a 2016 Shorelander Single Axle Trailer, VIN ending in 5131 (“Property”), and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of the Property to the obligation secured thereby.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived for cause.

No other or additional relief is granted.

NATIONSTAR MORTGAGE, LLC VS.

Final Ruling: No appearance at the May 15, 2018 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee on April 4, 2018. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Relief from the Automatic Stay is granted.

Wilmington Trust, National Association, not in its individual capacity but solely as successor trustee to Citibank, N.A. as Trustee to Lehman XS Trust Mortgage Pass-Through Certificates, Series 2005-6 in interest ("Movant") seeks relief from the automatic stay with respect to real property commonly known as 18740 Vista Del Canon E #79, Newhall, California ("Property"), alleged to be property of Fernando Ortiz and Susana Ortiz ("Debtor"). Movant has provided the Declaration of Mary Gracia to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Gracia Declaration states that the Property has been subject to a number of unauthorized transfers, summarized as follows:

- A. On April 7, 2010, Claudio Aguirre and Clara Aguirre transferred all interest to The Vista Trust (Exhibit 5, Dckt. 133);
- B. On January 5, 2011, The Vista Trust, Claudio Aguirre a single man (Trustee of The Vista Trust), Rene Jurado a single man, Luis Morales a single man, and Ramon Armbrula a single man transferred interests to

Claudio Aguirre a single man, Mario Vivanco a single man as to undivided 5% interest, **Fernando Ortiz a single man as to undivided 5% interest**, Rosa M Quiroz a single woman as to undivided 5% interest as joint tenants (Exhibit 6, *id.*);

- C. On November 30, 2011, The Vista Trust and Claudio Aguirre a single man (Trustee of The Vista Trust) transferred interests to The Vista Trust, Rene Jurado a single man as to undivided 5% interest, Luis Morales a single man as to undivided 5% interest, and Ramon Armbrula a single man as to undivided 5% interest as joint tenants (Exhibit 7, *id.*);
- D. On March 17, 2013, Claudio Aguirre a single man, Mario Vivanco a single man, **Fernando Ortiz a single man**, and Rosa M Quiroa a single woman transferred interests to Claudio Aguirre a single man, Antonio Avila a single man as to undivided 5% interest, Francisca Avila a single woman as to undivided 5% interest, Jorgina Valdivieso a single woman as to undivided 5% interest, and Rene Jurado a single man as to undivided 5% interest as joint tenants (Exhibit 8, *id.*); and
- E. On August 7, 2013, Claudio Aguirre a single man, Antonio Avila a single man, Francisca Avila a single woman, and Jorgina Valdivieso a single woman transferred interests to Claudio Aguirre a single man (Exhibit 9, *id.*).

The Gracia Declaration also provides testimony that during the same timespan there have been bankruptcy filings in the Central District of California that led to quick dismissals for Francisca Avila, Jorgina Valdivieso, and Claudio Aguirre and Maria Cortez aka Maria Cortez-Aguirre. *See* Exhibits 10–12, *Id.*

DEBTOR’S NON-OPPOSITION

Debtor filed a Non-Opposition on April 12, 2018. Dckt. 136. Debtor asserts that they do not own the Property and that if it was transferred to them, such a transfer was done without their knowledge. Debtor requests that the Motion be granted.

CHAPTER 13 TRUSTEE’S NON-OPPOSITION

David Cusick (“the Chapter 13 Trustee”) filed a Non-Opposition on April 20, 2018. Dckt. 139. He states that neither Movant nor the Property are included in the schedules or the confirmed plan, and he notes that the Grant Deed listed as Exhibit 6 shows a Fernando Ortiz as holding an undivided 5% interest.

CO-DEBTOR’S DECLARATION

Co-Debtor Fernando Ortiz filed a Declaration on May 1, 2018. Dckt. 142. He alleges that this case has been “hijacked.” Co-Debtor states that he is not the person mentioned in the grant deed and that “it is clear that this Fernando Ortiz is a different Fernando Ortiz.” *Id.* at 2:4–5. Co-Debtor states that he was

not a single man in 2011—as listed on the grant deed—and that he has been married since February 17, 1996.

DISCUSSION

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because “cause” is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff’d sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including multiple transfers and filing of cases that affect the Property. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432.

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.

Prospective Relief from Future Stays

11 U.S.C. § 362(d)(4) allows the court to grant relief from the stay when the court finds that the petition was filed as a part of a scheme to delay, hinder, or defraud creditors that involved either (i) transfer of all or part ownership or interest in the property without consent of the secured creditors or court approval or (ii) multiple bankruptcy cases affecting particular property. 3 COLLIER ON BANKRUPTCY ¶ 362.07 (Alan n. Resnick & Henry H. Sommer eds. 16th ed.).

Certain patterns and conduct that have been characterized as bad faith include recent transfers of assets, a debtor’s inability to reorganize, and unnecessary delays by serial filings. *Id.* The bad faith action here appears to be the numerous bankruptcy cases and property transfers to prevent Movant from exercising its non-bankruptcy rights. What is not clear is whether the Fernando Ortiz mentioned in the grant deeds is the same person who is a debtor in this case. The prior cases from the Central District of California presented by Movant are:

- A. Case No. 2:13-bk-16925 (Francisca Avila)
 - 1. Filed: March 18, 2013
 - 2. Chapter 13
 - 3. Dismissal Date: May 17, 2013

4. Reason for Dismissal: Failure to file information
- B. Case No. 2:13-bk-23603 (Jorgina Valdivieso)
1. Filed: May 23, 2013
 2. Chapter 13
 3. Dismissal Date: July 15, 2013
 4. Reason for Dismissal: Failure to file information
- C. Case No. 2:13-bk-35072 (Claudio Aguirre and Maria Cortez)
1. Filed: October 15, 2013
 2. Chapter 13
 3. Dismissal Date: February 21, 2014
 4. Reason for Dismissal: Other reason

Relief pursuant to 11 U.S.C. § 362(d)(4) may be granted if the court finds that two elements have been met. The filing of the present case must be part of a scheme, and it must contain improper transfers or multiple cases affecting the same property. With respect to the elements, the court cannot determine that the filing of the current Chapter 13 case in the Eastern District of California was part of a scheme by Debtor to hinder and delay Movant from conducting a nonjudicial foreclosure sale by filing multiple bankruptcy cases.

The fact that a debtor commences a bankruptcy case to stop a foreclosure sale is neither shocking nor *per se* bad faith. The automatic stay was created to stabilize the financial crisis and allow all parties, debtor and creditors, to take stock of the situation. There have been a series of case filings and property transfers touching the Property, but the filing of the current Chapter 13 case very well could be unrelated to that scheme. Debtor has not tried to claim any interest in the Property.

It is not clear what Creditor, and its predecessors, have done since 2014 from the last Central District Court case that was dismissed. The name Fernando Ortiz does appear to be a more common name in California, and the implication of the stay in this case, which was filed in October 2014 and has only become an issue in May 2018, may be a result of this Debtor having the Hispanic version of “Tom Smith” for a name.

A necessary element of granting relief pursuant to 11 U.S.C. § 362(d)(4) is that the “[f]iling of the petition [in the case then before the court] was part of a scheme to delay, hinder, or defraud creditors . . .” There is no evidence of that in this case. Possibly, Movant or its predecessors in interest could have filed the motion seeking § 362(d)(4) relief in one of the Central District cases. However, that does not appear to have been done or such relief sought in what appears to be the series of cases filed to fractionalize the interests to create a series of automatic stays.

The court finds that, for the Petition filed in this case, proper grounds do not exist for issuing an order pursuant to 11 U.S.C. § 362(d)(4). That relief is denied without prejudice, there being no clear connection to Debtor in this case.

Request for Attorneys' Fees

In the Motion, almost as if an afterthought, Movant requests that it be allowed attorneys' fees. The Motion does not allege any contractual or statutory grounds for such fees. No dollar amount is requested for such fees. No evidence is provided of Movant having incurred any attorneys' fees or having any obligation to pay attorneys' fees. Based on the pleadings, the court would either: (1) have to award attorneys' fees based on grounds made out of whole cloth, or (2) research all of the documents and California statutes and draft for Movant grounds for attorneys' fees, and then make up a number for the amount of such fees out of whole cloth. The court is not inclined to do either.

Movant may seek prevailing party attorney's fees pursuant to Federal Rule of Civil Procedure 54 and Federal Rules of Bankruptcy Procedure 7054, 9014. In doing so, Movant should consider the amount of reasonable attorney's fees that could properly be awarded in light of having failed to do so in the current Motion, thereby creating the need for an otherwise unnecessary second motion.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests, for no particular reason, that the court grant relief from the Rule as adopted by the United States Supreme Court. With no grounds for such relief specified, the court will not grant additional relief merely stated in the prayer.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is not granted.

No other or additional relief is granted by the court.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief from the Automatic Stay filed by Wilmington Trust, National Association, not in its individual capacity but solely as successor trustee to Citibank, N.A. as Trustee to Lehman XS Trust Mortgage Pass-Through Certificates, Series 2005-6 in interest ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Wilmington Trust, National Association, not in its individual capacity but solely as successor trustee to Citibank, N.A. as Trustee to Lehman XS Trust Mortgage Pass-Through Certificates, Series 2005-6 in interest, its agents, representatives, and successors, and trustee under the trust deed, and any other

beneficiary or trustee, and their respective agents and successors under any trust deed that is recorded against the Property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale to obtain possession of the real property commonly known as 18740 Vista Del Canon E #79, Newhall, California.

IT IS FURTHER ORDERED that the relief requested pursuant to 11 U.S.C. § 362(d)(4) with this order granting relief from the stay is denied without prejudice.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is not waived for cause.

No other or additional relief is granted.

3. [10-32967](#)-E-7 **GINA COOPER** **STATUS CONFERENCE RE: MOTION**
 DPR-1 **David Ritzinger** **FOR SANCTIONS FOR VIOLATION OF**
 THE DISCHARGE INJUNCTION
 MOTION FOR TEMPORARY AND/OR
 RESTRAINING ORDER
 4-30-18 [[197](#)]

Debtor's Atty: David P. Ritzinger

Notes:

Set by order of the court dated 5/4/18 [Dckt 208]. No telephonic appearances permitted.

The Status Conference is XXXXXXXXXXXX.
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Gina Cooper, the Chapter 7 Debtor, received her discharge in this bankruptcy case on August 26, 2010. Discharge Order, Dckt. 53. From the court's review of the Docket, several contested matters were prosecuted by the Debtor and the Chapter 7 Trustee after the entry of the discharge concerning the estate's asserted interests in a limited partnership as property of the Chapter 7 Bankruptcy Estate. Those disputes were ultimately resolved by a Stipulation between the Chapter 7 Trustee (represented by J. Russell Cunningham), the Debtor (represented by Mary Ellen Terranella, Esq.), and Orchard Crossing Apartments, LP (the limited partnership) and Orchard Crossing Apartments, Inc. (the general partner) (represented by Pamela Jackson, Esq.). Settlement Agreement, Exhibit A; Dckt. 148. Debtor's Chapter 7 case was closed on August 5, 2013.

On April 30 2018, this bankruptcy case was reopened at the request of Debtor. Order, Dckt. 196. That same day, Debtor filed a motion to have Mary Ellen Terranella, Esq., Terry A. Duree, Esq., and Bret A. Yaple, Esq., and each of them held in contempt for violation of the discharge injunction. Motion, Dckt. 197. The allegations upon which the asserted violation of the discharge injunction is based center on state court litigation commenced by Mary Ellen Terranella, as the plaintiff, represented by Messrs. Duree and Yaple, asserting rights for payment of attorney's fees for legal services rendered in connection with the bankruptcy case. The state court action asserts claims based on contract and "common counts" (which are not specified) in the state court complaint. Exhibit A to Debtor Declaration, Dckt. 10.

The Motion (a contested matter pursuant to Fed. R. Bankr. P. 9014) also includes in its title that Debtor is seeking, by this Motion (contested matter) "A Restraining Order¹ Enjoining Mary Ellen Terranella, Terry A. Duree, and Bret A. Yaple From Proceeding With The Civil Action Against Debtor Now Pending in the Superior Court Of California For The County of Solano (FRBP 9020)." Motion, p. 1:18.5-23. The prayer in the Motion (Contested Matter) requests the entry of a "Restraining Order" pursuant to the Motion (Contested Matter). No request is made for any injunctive relief beyond a "restraining order."

The Memorandum of Points and Authorities filed by Debtor in support of this Motion provides various statutory and case law authorities relating to the discharge injunction and violation thereof. Dckt. 202. No discussion of the legal basis for the court issuing a "restraining order" or other injunctive relief pursuant to this Contested Matter, or otherwise, as it relates to the discharge injunction is included in the Points and Authorities.

The reference in the title of the Motion to Federal Rule of Bankruptcy Procedure 9020, which provides:

Rule 9014 (contested matters) governs a motion for an order of contempt made by the United States trustee or a party in interest.

This Rule does not address the issuance of injunctive relief by the court. However, in Federal Rule of Bankruptcy Procedure 7001 it is provided that injunctive relief shall be sought through an adversary proceeding.

POST-PETITION FEES OF DEBTOR IN BANKRUPTCY CASE

In the Motion, Debtor states that an adversary proceeding was commenced by the Chapter 7 Trustee, for which Mary Ellen Terranella did not represent the Debtor. Motion ¶ 6, Dckt. 197. The Motion further alleges that Debtor was represented by Pamela Jackson, Esq. in that adversary proceeding. As noted above, the court has identified one adversary proceeding filed by the Chapter 7 Trustee in Debtor's case, that

¹ The term "restraining order" is used as a term of art in Federal Rule of Civil Procedure 65(b) and Federal Rule of Bankruptcy Procedure 7065 for the court to issue a "temporary restraining order" that expires after fourteen days, which must be replaced by a "preliminary injunction" and ultimately a mandatory or prohibitory "injunction" for such continuing relief to be in effect. It may be that Movant is using the term "restraining order" as a synonym for "prohibitory injunction" barring future action by a party.

being Hopper v. Orchard Crossing Apartments, LP v. Orchard Crossing, Inc., Adv. 10-32967 (“Adversary Proceeding”). Debtor is not a named defendant in the Adversary Proceeding. Pamela Jackson, Esq. was the attorney of record for Orchard Crossing Apartments, LP. Adversary Proceeding; Answer, Dckt. 7. No responsive pleadings were filed for and no attorney appeared as counsel of record for Orchard Crossing, Inc. based on a review of the court’s file for the Adversary Proceeding.

The Complaint in the Adversary Proceeding asserts claims for avoiding the transfers of real and personal property constituting the apartments themselves by the Debtor into Orchard Crossing Apartments, LP, as well as dissolution of said partnership.

The Chapter 7 Trustee’s Status Report in the Adversary Proceeding states that Orchard Crossing Apartments, LP is 99.999% owned by the Chapter 7 bankruptcy estate (asserting that Debtor’s 99.999% ownership interest at the time the case was commenced became and continued to be property of the Bankruptcy Estate). Pursuant thereto, the Adversary Proceeding was commenced for the Bankruptcy Estate to recover the transfers of Debtor’s interest in the apartment assets Debtor transferred into the Orchard Crossing Apartments, LP as avoidable transfers.

Reviewing the Docket in the Adversary Proceeding, the court issued a Scheduling Order on March 18, 2011, and the next document filed in the Adversary Proceeding between the Trustee and Orchard Crossing Apartments, LP is an order dismissing the Adversary Proceeding, filed in July 13, 2011. Adversary Proceeding, Dckt. 16.

POST DISCHARGE CHAPTER 7 BANKRUPTCY CASE PROCEEDINGS

Motion to Compel Abandonment

(Commenced by Debtor, represented by Mary Ellen Terranella)

and

Motion for Turnover

(Commenced by Chapter 7 Trustee, represented by J. Russell Cunningham)

While the surface of the “litigation pond” in the Adversary Proceeding appears calm (the court being unable to see how fast the litigation feet of the Chapter 7 Trustee’s counsel and Ms. Jackson were paddling below the surface), the post-discharge litigation shown on the Docket in the Chapter 7 Bankruptcy Case tells a different story.

On July 3, 2010 (one month before the discharge was entered) Debtor filed a Motion to Compel the Chapter 7 Trustee to abandon “said property of the bankruptcy estate,” which is described in the Motion as:

Debtor disclosed in Schedule A real property located at 7025 Pleasant Hills Ranch Road, Vacaville, CA. and at 651 E. Travis Boulevard, which property is owned by Orchard Crossing Apartments, LP of which debtor is a 99.998% owner, and 420 Trotter, Vallejo, CA, which debtor quitclaimed off title pursuant to a marital property settlement agreement, but listed as she is still on both the first and second notes and deeds of trust. Debtor disclosed in Schedule B and amended Schedule B personal property including bank accounts at Bank of America and Wells Fargo Bank,

household goods, clothing, jewelry, the ownership interest in Orchard Crossing, LP, an uncollectible receivable from RTI Investments, which debtor does not exempt, a 2006 Range Rover, a 2005 Mercedes Benz SL 500, a 2002 Mercedes Benz S500, a tractor, 6 dogs, post petition earnings, to the extent they are deemed "distributions", and a burial plot.

Motion to Compel ¶ 2, Dckt. 17. The attorney for Debtor for the Motion to Compel is Mary Ellen Terranella. Debtor's Declaration in Support of the Motion (Dckt. 19) lists Ms. Terranella as counsel for Debtor.

The Chapter 7 Trustee filed an Opposition to the Motion to Compel. Dckt. 29.

On July 6, 2010, the Chapter 7 Trustee then filed a Motion For Turnover of Property of the Bankruptcy Estate - specifically the Debtor's interest in the Orchard Crossing Apartments, LP and the distributions made on such interests. Motion for Turnover, Dckt. 24. Debtor (represented by Mary Ellen Terranella) filed her Opposition (Dckt. 72), Declaration (Dckt. 74), and Exhibits (Dckt. 73) on September 28, 2010.

A Stipulation to Continue the hearing on the Motion to Compel (signed by J. Russell Cunningham as counsel for the Chapter 7 Trustee and Mary Ellen Terranella as counsel for Debtor) was filed on September 3, 2010, to continue the hearing on the Debtor's Motion to Compel and a related motion (addressed below) by the Chapter 7 Trustee for turnover of property of the bankruptcy estate. Dckt. 55. The Stipulation states that the parties have previously continued the hearings for both motions to "accommodate appraisal and related discovery" for the two motions. Stipulation ¶ F, Dckt. F. Further, that the non-expert discovery for the two motions had been completed, with the expert discovery still pending. Stipulation ¶¶ G, H; *Id.*

On September 28, 2010, The Chapter 7 Trustee filed supplemental pleadings consisting of:

- A. Twelve-page Supplemental Opposition (Dckt. 65)
- B. Declaration of Appraiser (Dckt. 66)
- C. Fifty-seven page appraisal report (Dckt. 67),
- D. Trustee's Declaration (Dckt. 68).
- E. One hundred eighty-two pages of exhibits (Dckts. 69, 70) in opposition to the Motion to Compel.

Additionally, on September 28, 2010, Orchard Crossing Apartments, LP filed its "Joinder" in Opposition to the Motion for Turnover. Dckt. 80. Counsel of record appearing for Orchard Crossing Apartments, LP for the Motion to Compel (Contested Matter) is Pamela Jackson.

In response to the Motion to Compel and the Motion for Turnover, the Redevelopment Agency of the City of Fairfield filed pleadings in the form of its Statement of Position with respect to the two Motions. These consist of:

- A. Statement of Position. Dckt. 76.
- B. Declaration of Senior Housing Finance Project Manager. Dckt. 77.
- C. Seventy-seven pages of exhibits. Dckt. 78.

On September 28, 2010, Debtor, represented by Mary Ellen Terranella, filed her Supplemental Opposition pleadings to the Motion to Compel and in Support of Motion to Abandon. These Opposition pleadings are:

- A. Declaration of Enrolled Agent licensed by the Internal Revenue Service Linda Feil. Dckt. 82.
- B. Supplemental Declaration of Debtor. Dckt. 83.
- C. Declaration of Appraiser Lee Bartholomew. Dckt. 84.
- D. Declaration of Manager Romeo Dante Shaw. Dckt. 85.
- E. Supplemental Points and Authorities. Dckt 86.

The Chapter 7 Trustee then filed his Reply Brief to the Opposition to Motion to Compel (Dckt. 93) and forty pages of exhibits (deposition transcripts) in reply (Dckt. 94).

Debtor, represented by Mary Ellen Terranella, then filed supplemental reply briefs, declarations, and exhibits, consisting of:

- A. Reply to Supplemental Opposition to Motion to Compel Abandonment. Dckt. 97.
- B. Supplemental Declaration of Debtor. Dckt. 98.
- C. Supplemental Exhibits in Reply to Opposition to Motion to Compel. Dckts. 99, 100, 101.

The Chapter 7 Trustee, represented by J. Russell Cunningham, and the Debtor, represented by Mary Ellen Terranella, executed Stipulations to continue the hearings on the two motion and consenting to participate in the court's Bankruptcy Dispute Mediation Resolution Program (mediation). Dckts. 118, 122. The Chapter 7 Trustee and Debtor, each continuing to be represented by the same attorneys, filed their Disclosure of Expert Witness Statements for the two Motions. Dckts. 128, 130. The two Motions were set for evidentiary hearings.

Motion to Approve Compromise and Settlement

On May 24, 2011, the Chapter 7 Trustee, represented by J. Russell Cunningham, filed a Motion to Approve Compromise that resolved the Motion to Compel Abandonment, Motion for Turnover, and the Adversary Proceeding. Dckt. 145. The Settlement Agreement filed as Exhibit A in support of the Motion to Approve Compromise (Dckt. 145) provides that it is between at dispute was ultimately resolved by a Stipulation between:

- A. The Debtor (approved as to form by Mary Ellen Terranella, Esq., counsel for Debtor);
- B. Orchard crossing Apartments, LP (the limited partnership) and Orchard Crossing Apartments, Inc., the general partner, (approved as to form by Pamela Jackson, Esq., attorney for the limited partnership and corporation); and
- C. The Chapter 7 Trustee (approved as to form by J. Russell Cunningham as attorney for the Trustee).

RELATING TO DEBTOR ATTORNEY'S FEES

Congress has placed in the hands of the federal judges issues relating to the attorney's fees debtors are obligated to pay for services rendered in a bankruptcy case or in connection with a bankruptcy case under Title 11 (the Bankruptcy Code).

§ 329. Debtor's transactions with attorneys

(a) **Any attorney representing a debtor** in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, **shall file with the [federal] court a statement of the compensation paid or agreed to be paid**, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the [federal] court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to--

(1) the estate, if the property transferred

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

In the present Motion For Contempt and Restraining Order, Debtor directly asserts a dispute concerning the fees in representing the Debtor by Ms. Terranella in this case. This falls directly within the mandate imposed by Congress in 11 U.S.C. § 329. From the Motion, it appears that Debtor is affirmatively pleading for such relief and determination by the bankruptcy court in this case pursuant to 11 U.S.C. § 329.² It is not clear whether Debtor contemplates a new proceeding or having the state court action removed to this court.

MAY 15, 2018 STATUS CONFERENCE

At the Status Conference, **XXXXXXXXXXXXXXXXXXXX**.

² The Hon. Christopher M. Klein has provided an extensive discussion of the application of 11 U.S.C. § 329 in his recent decision in *Sundquist v. Bank of America, N.A.*, 576 B.R. 858, 875–84 (Bankr. E.D. Cal. 2017).