Entered on Docket
March 20, 2009

Hon. Mike K. Nakagawa
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re	Case No. BK-S-05-10630-MKN
LANCE T. OTTERSTEIN,	Chapter 7
Debtor.	Date: March 18, 2009 Time: 2:30 p.m.

MEMORANDUM DECISION ON DEBTOR'S MOTION FOR STAY PENDING APPEAL

This matter was heard on March 18, 2009, and the appearances of counsel were noted on the record.

BACKGROUND

Lance T. Otterstein ("Debtor") seeks a stay pending his appeal from the court's Order on Debtor's Motion for Violation of the Automatic Stay and Motion to Set Aside the Orders Vacating Dismissal, Reopening Case, and Converting Case to Chapter 7, entered January 14, 2009 (Docket No. 134). Concurrently with the entry of that order ("Combined Motion Order"), the court entered its Memorandum Decision on Debtor's Motion for Violation of the Automatic Stay and Motion to Set Aside the Orders Vacating Dismissal, Reopening Case, and Converting Case to Chapter 7 (Docket No. 133)[1], a copy of which is appended to the instant memorandum and incorporated by reference.

As set forth in the appended memorandum decision, the Combined Motion Order denied

[1] Hereafter "Memorandum Decision on Combined Motion." To the extent possible, the court will use the same defined terms in the instant memorandum decision that were used in the Memorandum Decision on Combined Motion.

the Debtor's request to set aside certain previous orders entered in the case ("Prior Orders"). The latter orders were entered after it was determined that the Debtor had settled a prepetition personal injury claim that was property of the bankruptcy estate, and which was reserved for payment of his unsecured creditors under his confirmed Chapter 13 plan, without notice to the assigned Chapter 13 trustee, to the Debtor's creditors, or to the court. Moreover, in addition to settling the claim without court approval, cash proceeds from the settlement in the amount of $500,000 were disbursed to various parties, including the Debtor's prior bankruptcy counsel (who also had been appointed as special counsel in the case), various other parties, and to the Debtor himself. In addition to the cash settlement, the Debtor also reached a settlement with another party in the personal injury dispute for a stipulated judgment in the amount of $5.5 million. That settlement also was not approved by the bankruptcy court nor was it disclosed to the Chapter 13 trustee, the creditors, or the court. All of this occurred while the Debtor's bankruptcy proceeding was still pending.[2]

As to the Combined Motion Order, the Debtor filed a notice of appeal on January 26, 2009 (Docket No. 152) and a Motion for Stay Pending Appeal ("Stay Motion") on February 9, 2009 (Docket No. 165). Opposition to the Stay Motion was filed by creditor Cadlerock Joint Venture ("Cadlerock Opposition") (Docket No. 171) and the Chapter 7 trustee, Yvette Weinstein ("Trustee Opposition") (Docket No. 173). Debtor filed a reply to the oppositions ("Reply") (Docket No. 180).[3] Oral arguments were presented on March 18, 2009.

APPLICABLE LEGAL STANDARDS FOR A STAY PENDING APPEAL

Federal Rule of Bankruptcy Procedure ("FRBP") 8005 provides in relevant part that the

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[2] Debtor's initial bankruptcy case was filed in February 2005 ("Otterstein 1") and was dismissed in November 2007. The dismissal order subsequently was set aside after the aforementioned activities came to light. By the time the activities were presented to the court in a motion filed by creditor Cadlerock Joint Venture, L.P. ("Cadlerock"), Debtor had filed another Chapter 13 proceeding in August 2008 ("Otterstein 2") but had not sought or obtained an order continuing the automatic stay under 11 U.S.C. section 362(c)(3).

[3] Debtor's Reply was filed on March 17, 2009, and was untimely under Local Rule 9014(d)(2). Counsel for both Cadlerock and the Trustee, however, had opportunity to address the Reply at oral argument.

court "may suspend ...or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest." In Natural Resources Defense Council, Inc. v. Winter, 516 F.3d 1103 (9th Cir. 2008), the Ninth Circuit described as follows the elements considered in determining whether to issue a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." 516 F.3d at 1105 quoting Golden Gate Restaurant Association v. City and County of San Francisco, 512 F.3d 1112, 1115 (9th Cir 2008).[4] These factors also are addressed when a stay pending appeal is sought under FRBP 8005 with respect to an order or judgment issued by a bankruptcy court. See In re Thomason, 2007 WL 2257662 at *2 (Bkrtcy.D.Idaho 2007); Acton v. Fullmer (In re Fullmer), 323 B.R. 287, 292 (Bkrtcy.D.Nev. 2005). The burden of demonstrating each of these elements rests with the party seeking the stay pending appeal. See Westfall v. MII Liquidation, Inc., 2007 WL 1989697 at *1 (S.D.Cal. 2007); In re Irwin, 338 B.R. 839, 843 (E.D.Cal. 2006).

DISCUSSION

In his Stay Motion, the Debtor initially argues that the court should apply a sliding scale test for preliminary injunctive relief utilized in the Ninth Circuit. See Stay Motion at 6:25 to 7:11, citing Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983)[5]. That test, however, recently was rejected by the Supreme Court in favor of a traditional four factor test for preliminary injunctive relief. See Winter v. Natural Resources Defense Council, Inc., __ U.S. __, 129 S.Ct.

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[4] The portion quoted from the Golden Gate Restaurant opinion was in turn a quotation from the Supreme Court's decision in Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

[5] The "sliding scale" test permitted a preliminary injunction to be issued if the plaintiff established facts falling within the outer reaches "of a single continuum". At one end of the so-called continuum, a plaintiff is required to show "both a probability of success on the merits and the possibility of irreparable injury" and at the other end "that serious legal questions are raised and that the balance of hardships tips sharply in its favor." Lopez v. Heckler, supra, 713 F.2d at 1435, citing Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197, 1201 (9th Cir. 1980).

365, 375 (2008).[6] Debtor then argues for application of the usual considerations for a stay pending appeal that mirror the elements discussed above. See Stay Motion at 7:14-21.

In connection with those elements, Debtor argues (1) that there are unique issues in this case for which he has a strong likelihood of success on the merits - either as to his argument that the automatic stay in Otterstein 2 was violated or that consolidation of Otterstein 1 and Otterstein 2 was improper, (2) that he will be irreparably harmed by having to respond to unnecessary, costly and time-consuming requests for unspecified items from an unidentified source if a stay is not granted, (3) that there will be no harm to the Trustee or creditors since the Debtor has no money to pay creditors, and (4) that a stay will do no harm to the public interest. See Stay Motion at 7:22 to 8:19.

Debtor then argues that a balance of hardships, presumably under the "sliding scale" approach, tips heavily in his favor. Id. at 8:20-25. Under this argument, Debtor apparently is suggesting that he only needs to show that "serious legal questions are raised" rather than a likelihood of success on the merits.

In its opposition, Cadlerock essentially argues that the Debtor has demonstrated none of the four elements for a stay pending appeal. First, Debtor does not address any of the legal grounds on which the court rejected his assertion that the automatic stay in Otterstein 2 had been violated by either Cadlerock or the Prior Orders, nor did he ever provide sufficient evidence to support his requests for relief. See Cadlerock Opposition at 3:18 to 4:5. Second, Cadlerock argues that the Debtor's assertions of unexplained irreparable harm pale in comparison to creditors who were denied the proceeds of the settlement that was not disclosed by the Debtor or

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[6] Instead of a sliding scale that permits a preliminary injunction to be granted if the plaintiff demonstrates a strong likelihood of success on the merits and only a possibility of irreparable harm, the Court in Winter reiterated that "A plaintiff...must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." 129 S.Ct. at 374.

his prior counsel in Otterstein 1. Id. at 4:6-14.[7] Third, Cadlerock contends that a stay will cause substantial injury to other parties by a delay in recovering the settlement funds. Id. at 4:18-22. Finally, it argues that the public interest will be harmed by a stay since, amongst other things, $500,000 in settlement proceeds already have been lost through the misdeeds of the Debtor and his counsel, the latter of whom also was appointed as special counsel to the Otterstein 1 bankruptcy estate. Id. at 4:23 to 5:6.

The Trustee similarly argues that the Debtor has established none of the factors considered in entering a stay pending appeal. She argues that the Debtor has not demonstrated a likelihood of success on the merits of any appeal, see Trustee Opposition at 6:7 to 9:18, that irreparable harm does not arise from requiring the Debtor to comply with the statutory duties of a bankruptcy debtor imposed by the Bankruptcy Code, id. at 9:19 to 10:10, that substantial harm will be visited upon the bankruptcy estate from any delay in pursuing the avoidance actions commenced by the Trustee or the insurance bad faith claim belonging to the estate, id. at 10:12-21, and that the public interest in preventing the abuses involved in the instant case "does not translate into a concern for injunctive relief." Id. at 10:23-26, citing In re Fullmer, supra.[8]

On the current record, it is clear that Debtor has made no showing, as he must, of any likelihood of success on appeal of the Combined Motion Order. While he obviously disagrees with the result, he has not articulated a legal or factual basis suggesting a successful appeal.[9] At

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[7] Cadlerock also suggests that it may be in the Debtor's best interests to allow the Trustee to pursue a professional negligence claim against the Debtor's former counsel in Otterstein 1. Id. at 4:13-17.

[8] At oral argument, Trustee's counsel also asserted that the Debtor should be required to post a $1.5 million bond as a condition of any stay pending appeal. In response, Debtor's counsel argued that the appeal of the Combined Motion Order does not involve a money judgment and a bond therefore is not required. These differences need not be resolved, however, since a stay is not appropriate in this case. Moreover, the court notes that requiring such a bond likely would be the equivalent of granting no stay at all for most individual Chapter 7 debtors.

[9] Debtor's Reply focuses on whether the court should have granted retroactive relief by annulling the automatic stay arising in Otterstein 2. See Reply at 1:28 to 2:9. While the record would have supported relief on such a basis, it was unnecessary grant such relief since the court had determined that the automatic stay in Otterstein 2 had not been violated. See Memorandum

oral argument, Debtor's current counsel suggested that there are legal uncertainties since Otterstein 1 was filed before the enactment of BAPCPA[10] and Otterstein 2 was commenced after BAPCPA, none of which was raised in the Debtor's Combined Motion. Counsel also restated his position that the automatic stay in Otterstein 2 was violated and that issues might exist if retroactive relief from stay had been granted. Repetition of the same arguments or advancing new ones, however, does not establish a likelihood of success on appeal. Additionally, the Debtor has not alluded to any evidence that could have been offered that would have militated against the entry of the Prior Orders or which was not considered in issuing the Combined Motion Order.[11] As to irreparable injury, the Debtor has not identified anyone who is making any requests of him for which it is unreasonably burdensome to respond. To the extent it is the Trustee making requests for any information or materials required under the Bankruptcy Code, the court concludes that a debtor's compliance with such requests does not constitute irreparable injury, especially for a debtor who at least twice has sought bankruptcy protection. Moreover, to the extent any such requests are made, the Debtor is not precluded from seeking a protective order if warranted under the circumstances.

Debtor's assertion that he has no money and therefore creditors will not be substantially injured by a stay pending appeal is similar to his prior argument that Cadlerock would not be prejudiced if the Prior Orders were set aside. The court rejected that argument previously, see Memorandum Decision on Combined Motion at 19:21 to 20:7, and does so again. More

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Decision on Combined Motion at 22:8 to 23:1.

[10] "BAPCPA" is a common reference to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The majority of its provisions apply to cases filed on or after October 17, 2005. Otterstein 1 was filed on February 1, 2005, and Otterstein 2 was filed on August 13, 2008.

[11] Debtor suggests that the Prior Orders were entered on a default basis due to his counsel's confusion that led to no opposition being filed. See Reply at 2:12-14. As the court previously noted, however, the Prior Orders were not entered on a default basis at all, but were based on the undisputed facts appearing in the record. See Memorandum Decision on Combined Motion at 18:15 to 19:10.

importantly, the argument ignores the estate's interest in the funds improperly received by the Debtor's prior counsel in Otterstein 1 and by other parties from the proceeds of the undisclosed and unauthorized settlement of the estate's personal injury claim. Those funds remain at large and the Debtor has made no showing that they are safe from placement beyond the reach of the Trustee.[12]

Finally, while the Trustee apparently believes that the public interest is not a concern with respect to the Debtor's request for a stay pending appeal, the court does not share that view. Here, the Debtor has twice sought bankruptcy protection from his creditors, has through several judicial proceedings sought and obtained recovery for his personal injuries and economic losses, and on all of these occasions has had the advice of legal counsel, often the same counsel. Not only have the resources of his creditors, three bankruptcy trustees, and other parties in interest been expended as a result of the Debtor's activities, but substantial and limited judicial resources as well. Moreover, unlike the situation in Fullmer, supra, the impact of the relief requested goes far beyond the immediate parties to the Debtor's appeal. The public interest is a significant concern in this matter and the Debtor has not shown how the public interest is left unharmed by a stay that would, amongst other things, prevent efforts to recover the missing settlement proceeds.

Based on the foregoing, the court concludes that the Debtor has not met his burden of demonstrating that the relevant elements support the issuance of a stay pending appeal.[13]

CONCLUSION

Debtor's Motion for Stay Pending Appeal will be denied for the reasons set forth above. A separate order has been entered concurrently herewith.

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[12] At oral argument, Debtor's current counsel asserted that the attorneys who improperly settled the estate's personal injury claim and distributed the proceeds must have insurance. There is no evidence in the record to support that assertion and the same attorneys have not offered to return proceeds of a claim that indisputably was property of the Otterstein 1 estate.

[13] Even if the "sliding scale" analysis were employed, see Stay Motion at 8:20-25, the court also would conclude that the Debtor has failed to demonstrate a probability of success on the merits and a possibility of irreparable injury on one end of the scale, or that the balance of hardships tips sharply in his favor and that serious legal questions are raised on the other end of the scale.

APPENDIX

Hon. Mike K. Nakagawa
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re LANCE T. OTTERSTEIN, Debtor.	Case No. 05-10630-MKN Chapter 7 Date: December 10, 2008 Time: 2:30 p.m.

MEMORANDUM DECISION ON DEBTOR'S MOTION FOR VIOLATION OF THE AUTOMATIC STAY AND MOTION TO SET ASIDE THE ORDERS VACATING DISMISSAL, REOPENING CASE, AND CONVERTING CASE TO CHAPTER 7

The request of Lance Otterstein ("Debtor") for sanctions against creditor Cadlerock Joint Venture, L.P., ("Cadlerock") and to vacate the court's previous orders in this bankruptcy case was heard on December 10, 2008. The appearances of counsel were noted on the record. After oral arguments were presented, the matters were taken under submission.

BACKGROUND

Debtor filed a voluntary Chapter 13 petition on February 1, 2005 ("Otterstein 1"). (Dkt#1)[1] He was represented by Aaron & Paternoster, LP ("A&P Firm"). Kathleen Leavitt was appointed as the trustee to administer the case ("Chapter 13 Trustee"). Along with the petition, Debtor filed his schedules of assets and liabilities, as well as a statement of financial affairs.

[1] "Dkt#" refers to the number assigned to the document filed with the court in the case and which appears on the docket maintained by the clerk.

Item 20 of Debtor's Schedule "B" listed his interest in a "Pending PI case with Aaron & Paternoster, LTD., against Murray Transportation" as having an "unknown" value. Item 4(a) of Debtor's Statement of Financial Affairs disclosed the personal injury action ("PI Claim") as pending in the District Court for Clark County, Nevada ("State Court), denominated Case No. 03A465654C. Debtor did not claim any interest in the PI Claim as exempt on his Schedule "C".

On February 8, 2005, Debtor filed a proposed Chapter 13 Plan #1 (Dkt# 8) which proposed to pay a total of $5,400 over a three-year period.

On April 1, 2005, Debtor filed an application to employ the A&P Firm ("Employment Application") (Dkt# 12) as special counsel to prosecute the PI Claim. The Employment Application provides that the PI Claim is property of the bankruptcy estate.

On April 14, 2005, Cadlerock filed an objection to the Debtor's proposed Plan (Dkt# 22) on grounds that it did not account for the value of the PI Claim in its proposed distribution to creditors.

On April 19, 2005, Debtor filed an amended proposed Chapter 13 Plan #2 (Dkt#28) which provided that the Debtor would make a total of $1,800 in monthly payments (at $150.00 per month) whereupon an additional $199,787 would be paid commencing in April 2006 "when debtor receives funds from Personal Injury suit..."

On June 1, 2005, an order was entered (Dkt# 30) granting the Employment Application and the A&P Firm was employed as special counsel to the estate.

On June 15, 2005, an order was entered (Dkt# 31) confirming Debtor's proposed Chapter 13 Plan #2 ("Plan").

On June 10, 2007, a "Trustee's Directive" (Dkt#58) was issued by the Chapter 13 Trustee requiring that information be provided as to the "status of personal injury litigation proceeds of $199,787 per confirmation order." The Certificate of Service (Dkt# 60) shows that the directive

was mailed to the Debtor and to the A&P Firm.[2]

On September 5, 2007, the Chapter 13 Trustee filed a motion to dismiss the bankruptcy case ("Dismissal Motion")(Dkt# 62), identifying as "cause" the Debtor's failure to make plan payment, to provide tax returns, and "status of personal injury litigation." Neither the Debtor nor the A&P Firm responded to the Dismissal Motion or appeared at the hearing. An order dismissing the case ("Dismissal Order")(Dkt# 66) was entered on November 1, 2007.

On August 13, 2008, Debtor commenced a new Chapter 13 proceeding, denominated Case No. 08-19108 ("Otterstein 2"). In that proceeding, Debtor is represented by the law firm of Haines & Krieger.

On October 13, 2008, in Otterstein 1, Cadlerock filed a Motion to Set Aside Court Order Dismissing Case and Motion to Convert Case to a Chapter 7 ("Cadlerock Motion")(Dkt# 74).[3] The motion alleged that the Debtor, with the assistance of the A&P Firm, had settled the PI Claim for $500,000 in cash from one defendant (Murray Transportation) in October 2006, and

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[2] It is well-established that a proof of mailing creates a rebuttable presumption that the mailed document was received by the addressee. See In re Bucknum, 951 F.2d 204, 206-07 (9th Cir. 1991). The presumption is not rebutted simply by submitting an affidavit denying receipt of the document; rather, the presumption must be overcome by clear and convincing evidence. See In re State Line Hotel, Inc., 323 B.R. 703, 709 n.5 (B.A.P. 9th Cir. 2005). Evidence to buttress such denial must be included, such as, for example, testimony from an employee that the document was not sent, or proof that other listed parties did not receive the document. See In re Bucknum, supra, 951 F.2d at 207 n.1, citing In re Ricketts, 80 B.R. 495, 498-99 (B.A.P. 9th Cir. 1987). Both the Debtor and the A&P Firm are presumed to have received by mail those matters properly addressed to them and neither have offered evidence to overcome the presumption. Prior to issuing the Trustee's Directive, the Chapter 13 Trustee had sent three separate default notices with respect to the monthly payments required by the Plan. (Dkt#s 51, 53 and 56) It appears that the Debtor made sporadic payments in response to the notices and made installment payments beyond the period for monthly payments to be made under the confirmed Plan.

[3] Because the same document includes two separate motions, it also appears as Docket No. 80. The Cadlerock Motion was accompanied by a Declaration of Brian D. Shapiro ("Shapiro Declaration 1") (Dkt#75) to which is attached copies of documents that were filed in Otterstein 1 as well as in the State Court litigation of the PI Claim. A supplemental Declaration of Brian D. Shapiro ("Shapiro Declaration 2")(Dkt# 79) also was filed in support of the Cadlerock Motion.

had settled with another defendant (Michael Thieman) for a stipulated judgment in the amount of $5.5 million in February 2007. Both settlements were completed without disclosure to the Chapter 13 Trustee or the bankruptcy court and without obtaining bankruptcy court approval. It further alleged that the proceeds of the $500,000 settlement had been paid to the Debtor. The Cadlerock Motion sought relief from the Dismissal Order based on fraud, misrepresentation or misconduct by the Debtor and the A&P Firm. Alternatively, it sought relief based on extraordinary circumstances.

On October 14, 2008, an order shortening time was entered (Dkt# 81) and a hearing on the Cadlerock Motion was scheduled for the morning on October 27, 2008.[4] Only counsel for Cadlerock appeared at the morning hearing and it was postponed to the afternoon at which time counsel for Cadlerock, the Debtor in both Otterstein 1[5] and Otterstein 2, the Office of the United States Trustee ("US Trustee"), and the Chapter 13 trustees in both cases appeared. After indicating its intention to reopen Otterstein 1 and converting the case to Chapter 7, the court continued the hearing to the following day. At the continued hearing on October 28, 2008, the court granted the request to set aside the Dismissal Order and continued the matter to November 5, 2008, as to whether the case should be converted to Chapter 7. Also on October 28, 2008, an order was entered reassigning Otterstein 2 so that both proceedings would be considered by the same judge.

On October 29, 2008, an order was entered (Dkt#87) granting the Cadlerock Motion insofar as it set aside the Dismissal Order. The same order also consolidated Otterstein1 and

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[4] The certificate of service (Dkt# 82) indicates that the Cadlerock Motion, supporting documents and the order shortening time were served by first class mail on the Debtor, the A&P Firm, the Chapter 13 Trustee, the Office of the United States Trustee, and on the creditors appearing on the mailing matrix in Otterstein 1, no later than October 14, 2008.

[5] The A&P Firm appeared through attorney Christian Griffin, Esq.

Otterstein 2.[6]

At the continued hearing on November 5, 2008, the US Trustee recommended that the case be converted and the court granted the balance of the Cadlerock Motion, thereby converting the consolidated proceedings to Chapter 7.[7] Yvette Weinstein was appointed as the bankruptcy trustee ("Chapter 7 Trustee") in the consolidated Chapter 7 case. On November 14, 2008, an order of conversion was entered (Dkt# 96).

On November 5, 2008, Cadlerock filed a Motion for an Order of Civil Contempt and to Comply with Turnover of Documents and Testimony at 2004 Exam re: Lance Otterstein ("Cadlerock Contempt Motion") (Dkt#89). On November 24, 2008, the Debtor filed a combined Motion for Violation of the Automatic Stay and Motion to Set Aside the Orders Vacating Dismissal, Reopening Case, and Converting Case to Chapter 7 ("Combined Motion") (Dkt# 109). Both the Cadlerock Contempt Motion and the Debtor's Combined Motion were scheduled to be heard on December 10, 2008.

No written opposition was filed to the Cadlerock Contempt Motion. Cadlerock, however, did file opposition ("Cadlerock Opposition")[8] (Dkt#126) to the Combined Motion, and so did the

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[6] On October 30, 2008, a supplemental order was entered reopening Otterstein1 (Dkt# 88).

[7] At the hearing, the A&P Firm represented that the Debtor was not at fault for the settlement because the Debtor thought that Otterstein 1 had been dismissed. This is curious since the record indicates that the Debtor made payments on his Plan to the Chapter 13 Trustee until April 2007, see Notice of Default in Chapter 13 Plan Payments and Demand for Cure filed May 15, 2007 (Dkt# 56), well after he had already received funds from the Murray Transportation settlement and after the State Court had entered its order approving it as a good faith settlement. Notwithstanding counsel's representation, the court converted the case without prejudice to the Debtor seeking reconsideration.

[8] The Cadlerock Opposition is accompanied by the Declaration of Brian D. Shapiro ("Shapiro Declaration 3") (Dkt#127) to which is attached a variety of copies of documents filed with the court as well as materials obtained through discovery. Attached as Exhibits A, B, C, F, G, I, J and M are copies of additional documents filed in Otterstein 1. To the same declaration are attached a copy of the case commencement notice in Otterstein 2 (Exhibit D), a copy of a letter dated October 9, 2008, to counsel in both Otterstein 1 and Otterstein 2 regarding

Chapter 7 Trustee ("Trustee Opposition") (Dkt# 122). Debtor filed replies to both oppositions ("Reply Cadlerock" and "Reply Trustee" respectively) (Dkt ## 129 and 130). The Cadlerock Contempt Motion is the subject of a separate order.

APPLICABLE LEGAL STANDARDS[9]

Section 362(k)(1) provides that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." Section 362(k)(1) has the same language that was included in former Section 362(h) before the 2005 amendments to the Bankruptcy Code. Because the relevant language in Section 362(k)(1) is identical, the case law developed under prior Section 362(h) will be applied. See In re McLaughlin, 2007 WL 3229166 at *4 n.22 (Bkrtcy.D.Az.October 30, 2007).

An individual that is "injured" by a stay violation bears the burden of proving his or her actual damages. See In re Fernandez, 227 B.R. 174, 180-81 (B.A.P. 9th Cir. 1998). See, e.g., In re Roman, 283 B.R. 1, 8 (B.A.P. 9th Cir. 2002)(debtor submitted a declaration attesting, inter alia, to a $5.00 expense incurred in traveling to her attorney's office to obtain advice regarding a lawsuit filed in violation of the automatic stay). An "individual" who can seek damages for violation of the automatic stay does not include a bankruptcy trustee. See In re Pace, 67 F.3d 187, 193 (9th Cir. 1995); Knupfer v. Lundblade (In re Dyer), 322 F.3d 1178 (9th Cir. 2003). For a violation of the automatic stay to be "willful", the creditor must know of the existence of the

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Cadlerock's request for an order shortening time to hear the Cadlerock Motion (Exhibit E), a copy of an e-mail sent by counsel in Otterstein 1 following the October 28, 2008 hearing (Exhibit H), a copy of a "Settlement Memorandum" indicating the receipt and disbursement of the $500,000 settlement proceeds (Exhibit K), and a copy of various checks representing the receipt and partial disbursement of the proceeds (Exhibit L).

[9] All references to "Section" in this memorandum decision are to the current provisions of Title 11 of the United States Code as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), unless otherwise indicated. All references to "Rule" are to the Federal Rules of Bankruptcy Procedure unless otherwise indicated. All references to "FRCP" are to the Federal Rules of Civil Procedure unless otherwise indicated.

automatic stay and its actions taken in violation of the stay must be intentional. See In re Williams, 323 B.R. 691, 702 (B.A.P. 9th Cir. 2005). No specific intent to violate the automatic stay or to injure the individual needs to be proven. See In re Campion, 294 B.R. 313, 316 (B.A.P. 9th Cir. 2003).

Rule 7055 incorporates by reference FRCP 55(c), which provides that a "court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b)." The moving party has the burden of demonstrating facts to establish the existence of good cause. See TCI Group Life Insurance Plan v. Knoebber, 244 F.3d 691, 697 (9th Cir. 2001), overruled on other grounds, Egelhoff v. Egelhoff ex. rel. Breiner, 532 U.S. 141, 147-50, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001). The factors assessed when determining good cause include (1) whether the defendant's culpable conduct led to the default, (2) whether the defendant has meritorious defenses, and (3) whether setting aside the default would result in prejudice to the plaintiff. 244 F.3d at 696. The moving party's lack of culpability may establish good cause under FRCP 55(c) and ordinarily is sufficient to demonstrate excusable neglect within the meaning of FRCP 60(b)(1). Id.

Rule 9024 incorporates by reference FRCP60(b) with minor exceptions. FRCP 60(b)(1) provides in pertinent part that "on motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ...mistake, inadvertence, surprise, or excusable neglect...." Not unexpectedly, the burden rests on the moving party to show justification for its oversight, error or omission. See B. Russell, Bankruptcy Evidence Manual § 301.98 (2006 Edition). To obtain such relief, the movant must justify its actions or show that the mistake was unexpected and unavoidable rather than just careless. See In re M/V Peacock, 809 F.2d 1403, 1405 (9th Cir. 1987); In re Staff Investment Co., 146 B.R. 256, 263 (Bkrtcy.E.D.Cal. 1993). Where a party is blameless, negligence by the party's attorney may qualify as a mistake authorizing relief under Rule 60(b)(1). See Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808,

811 (4th Cir. 1988)(relief granted where debtor's attorney mistakenly believed that no answer needed to be filed, meritorious defenses existed, and prompt relief was sought). Cf., In re Heyman, 116 F.3d 91, 94 (4th Cir. 1997)(relief denied where bankruptcy trustee was not blameless in permitting dismissal of collection action).

A four-part balancing test typically is applied in determining the existence of excusable neglect under FRCP 60(b)(1). See In re Walker, 332 B.R. 820, 829 (Bkrtcy.D.Nev. 2005). In that test, "all relevant circumstances" are considered, including (1) the danger of prejudice to the opposing party, (2) the impact on the judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) the good faith of the movant. Id. at 830, citing Pioneer Investment Services v. Brunswick Associates, 507 U.S. 380, 395, 113 S.Ct. 1489, 1497, 123 L.Ed.2d 74 (1993) and Pincay v. Andrews, 389 F.3d 853, 855 (9th Cir. 2004).

FRCP 60(b)(3) also allows for relief from an order or judgment "obtained by fraud, misrepresentation, or other misconduct of an adverse party." The moving party must present clear and convincing evidence establishing that the adverse party's misconduct prevented the movant from fully and fairly presenting a defense. See Casey v. Albertson's Inc., 362 F.3d 1254, 1260 (9th Cir. 2004); In re Wylie, 349 B.R. 204, 213 (B.A.P. 9th Cir. 2006). The culpable conduct must be attributable to the adverse party rather than the moving party itself. See Latshaw v. Trainer Wortham & Co., 452 F.3d 1097, 1102 (9th Cir. 2006). Relief under FRCP 60(b)(3) lies at the discretion of the trial court. See Dixon v. Commissioner of Internal Revenue, 316 F.3d 1041, 1046 (9th Cir. 2003), citing England v. Doyle, 281 F.2d 304, 310 (9th Cir. 1960).

FRCP 60(b)(4) authorizes relief from orders or judgments that are void. An order or judgment is not void even if it was entered in error. See Tomlin v. McDaniel, 865 F.2d 209, 210 (9th Cir. 1989). Rather, an order or judgment is void only if the court that rendered it lacked personal jurisdiction or subject matter jurisdiction, see, e.g., Wages v. Internal Revenue Service, 915 F.2d 1230, 1234-35 (9th Cir. 1990), or if it was rendered in a manner inconsistent with due

process. See generally, 11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 2862 (2008). If an order or judgment is void, relief under FRCP 60(b)(4) is mandatory. See Thomas P. Gonzalez Corp. v. Consejo Nacional, 614 F.2d 1247, 1256 (9th Cir. 1980).

FRCP 60(b)(6) authorizes relief for "any other reason justifying relief from the operation of a judgment." A motion under Rule 60(b)(6), however, must be based on some ground not encompassed by subsections (1) through (5) of Rule 60(b). See Lyon v. Agusta S.P.A., 252 F.3d 1078, 1088 (9th Cir. 2001). To permit relief from counsel's error under Rule 60(b)(6), the conduct must reach a level of "gross negligence". See, e.g., Community Dental Services v. Tani, 282 F.3d 1164 (9th Cir. 2002)(default judgment set aside where defendant's counsel "virtually abandoned" client by disobeying court orders, failing to serve an answer, and failing to file written response to preliminary injunction and default judgment motions, while assuring client that case was going smoothly)[10]; James v. United States, 215 F.R.D. 590 (E.D.Cal. 2002)(default set aside where attorney abandoned client by failing to respond to motion to dismiss, failing to meet administrative deadlines, failing to respond to discovery, failing to advise client of deadlines, failing to advise the client of the case being dismissed, and leaving the state after the California State Bar took over his practice).

DISCUSSION[11]

Although strangely titled as a "motion for violation of the automatic stay", Debtor actually is seeking an award of sanctions against Cadlerock for an alleged violation of the automatic stay that arose in Otterstein 2. In addition to sanctioning Cadlerock, Debtor also seeks to vacate the order that granted Cadlerock's motion to vacate the Dismissal Order, the order that reopened Otterstein1, and the order that converted the consolidated proceedings to Chapter 7.

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[10] It is questionable whether the gross negligence of counsel is even a basis for relief under Rule 60(b)(6) outside the context of default judgments. See Latshaw v. Trainer Wortham & Company, supra, 452 F.3d at 1103-04.

[11] No objections to the admissibility or consideration of any of the materials filed by the parties or in the bankruptcy case was made.

A. Debtor's Request for Sanctions for Violation of the Automatic Stay.

Otterstein 2 was commenced on August 13, 2008. Pursuant to Section 362(c)(3)(A), the automatic stay elapses after 30 days with respect to the debtor if the debtor had a prior bankruptcy case that was dismissed within the previous year. The automatic stay continues beyond 30 days in the subsequent case only if a party in interest timely requests a continuation of the stay pursuant to Section 362(c)(3)(B).

In Otterstein 2, the automatic stay triggered by the filing of the Debtor's second bankruptcy petition was in place from August 13, 2008 through September 12, 2008 because Otterstein 1 had been dismissed within one year. Neither the Debtor nor any other interested party sought to keep the automatic stay in place with respect to the Debtor. It therefore elapsed as a matter of law on September 12, 2008. As a result, when the Cadlerock Motion was filed on October 13, 2008, the automatic stay was not in effect as to the Debtor. Cadlerock therefore did not violate the automatic stay as to the Debtor when it filed its motion. Because the automatic stay in Otterstein 2 remained in place as to the bankruptcy estate[12], however, consideration must be given to whether Debtor's request for sanctions nevertheless should be allowed. For several reasons, such sanctions must be denied.

First, the court finds that the Debtor has not been "injured" within the meaning of Section 362(k)(1). The Cadlerock Motion in effect brought into the consolidated bankruptcy estate assets that were committed to plan payments in Otterstein 1 and which were not distributed to the Debtor's creditors. Debtor's alleged injury is at most the legal detriment occasioned by his own conduct. Second, even if an injury were cognizable in these circumstances, Debtor has offered no evidentiary basis on which to find that he has sustained any injury whatsoever. Neither of the affidavits of counsel accompanying the Combined Motion describe in any manner

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[12] See Reply Cadlerock at 2:9-13, citing In re Jones, 339 B.R. 360, 365 (Bkrtcy.E.D.N.C. 2006) and In re Jumpp, 356 B.R. 789, 792 (B.A.P. 1st Cir. 2006).

how or to what extent that the Debtor has suffered damages.[13] Although the Debtor has hired new counsel to represent him with respect to the Cadlerock Motion, the A&P Firm paid the retainer, not the Debtor. See Disclosure of Compensation of Attorney for Debtor (Dkt# 117).[14] Likewise, there is no affidavit or declaration from the Debtor himself setting forth any injury that he has sustained.

Third, and most important, the Cadlerock Motion did not seek to enforce a judgment against property of the Otterstein 2 estate in violation of Section 362(a)(2), did not seek to obtain or exercise control over property of the Otterstein 2 estate in violation of Section 362(a)(3), and did not seek to create, perfect or enforce a lien against property of the Otterstein 2 estate in violation of Section 362(a)(4).[15] The Cadlerock Motion merely sought to vacate the Dismissal Order in Otterstein 1. It did not violate the automatic stay in Otterstein 2 as to either the Debtor or as to the bankruptcy estate.

Finally, the court notes that the most natural parties who might seek sanctions, i.e., individual creditors in Otterstein 2, are not barred from seeking sanctions under Section

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[13] The Affidavit of David Krieger, Esq. ("Krieger Affidavit") attached as Exhibit "A" to the Combined Motion recites that he is counsel of record to the Debtor only in Otterstein 2 and did not believe he should respond to the Cadlerock Motion because it was captioned only in Otterstein 1. Counsel made the same representation at the November 5, 2008 hearing. The Affidavit of Matthew E. Aaron, Esq. ("Aaron Affidavit") attached as Exhibit "B" to the Combined Motion recites that he was counsel of record to the Debtor in Otterstein 1 only until the case was dismissed, but for some reason believed that attorney Krieger would respond to the Cadlerock Motion.

[14] At the December 10, 2008 hearing, Debtor's new counsel argued that his retention was evidence of damages to his client because the A&P Firm might seek reimbursement from the Debtor. Beyond the additional conflicts now created - the A&P Firm is now a postpetition creditor of the Debtor and is now acting in a fashion materially adverse to an estate that it remains as special counsel - there is no evidence that the Debtor agreed to such payment or is even aware of it. Moreover, there is no indication that the source of the funds used by the A&P Firm to pay that retainer is separate from the proceeds of the Murray Transportation settlement.

[15] Sections 362(a)(1, 5, 6, 7 and 8) are directed to actions against the debtor or property of the debtor.

362(k)(1) upon a future showing of cognizable injury.

Based on the foregoing, the court finds no basis on which to grant sanctions in favor of the Debtor.

B. Debtor's Request to Vacate the Prior Orders.

The remaining aspect of the Combined Motion seeks relief from the three orders that granted the Cadlerock Motion: the October 29, 2008 order vacating the Dismissal Order, the October 30, 2008 supplemental order reopening Otterstein 1, and the November 14, 2008 order converting both cases to Chapter 7.[16]

1. Relief Under FRCP 55(c).

Debtor argues that the Prior Orders were entered on a default basis[17] and that he has meritorious defenses that would have resulted in a denial of the Cadlerock Motion. See Combined Motion at 8:7 to 12:4. Equating "good cause" under FRCP 55(c) to excusable neglect under FRCP 60(b)(1), Debtor argues (1) that he engaged in no culpable conduct that led to the asserted default, (2) that he has meritorious defenses to the Cadlerock Motion, and (3) that Cadlerock will not be prejudiced if the Prior Orders are vacated.

As to the Debtor's culpability, the court agrees that the failure to file a response to the Cadlerock Motion might be attributable to confusion of his counsel in Otterstein 1. The Aaron Affidavit, however, makes no assertion that counsel did not receive the Cadlerock Motion or that he never read it. Even a cursory reading of the motion indicates that it addresses not only the conduct of the Debtor but also conduct of the A&P Firm as special counsel to the bankruptcy estate.[18] It strains credulity to suggest that counsel in Otterstein 2 would be tasked to respond

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[16] All three orders are referred to as the "Prior Orders" unless otherwise indicated.

[17] As discussed below, the Cadlerock Motion was granted on the merits rather than for lack of a response by either the Debtor or the A&P Firm.

[18] The written materials submitted with the Cadlerock Motion, none of which have been objected to by the Debtor, consist mainly of the documents filed in Otterstein 1 (Exhibits 1, 2, 3, 4, 5, 6 and 7), materials filed in connection with the State Court litigation of the PI Claim

instead of counsel of record in the very case in which the Cadlerock Motion was filed. Moreover, there is no affidavit or declaration from the Debtor attesting to his understanding of whether counsel and what counsel would be responding to the motion.

Likewise, the court somewhat agrees that Cadlerock might not be prejudiced if the Prior Orders are vacated. Clearly the Otterstein 2 proceeding includes as property of the estate any claims and causes of action belonging to the Debtor at the time the Otterstein 2 bankruptcy petition was filed. See Sierra Switchboard Co. v. Westinghouse Electric Corp., 789 F.2d 705, 707 (9th Cir. 1986). See, e.g., Smith v. Arthur Andersen LLP, 421 F.3d 989 (9th Cir. 2005). To the extent that the Debtor has any claims against his prior counsel arising from the events in Otterstein 1, such claims belong to the bankruptcy estate even though they were not listed by the Debtor in his schedules in Otterstein 2. If Cadlerock's or any other party's claims were not discharged by completion of the confirmed Plan in Otterstein 1, a viable source of payment in the form of a claim against prior counsel may exist in the Otterstein 2 estate. This source is in addition to other scheduled assets in Otterstein 2, including the insurance bad faith claim that the Debtor apparently values at $1 million.

More important, however, is the Debtor's argument regarding his proffered defenses to the Cadlerock Motion. Debtor contends that he has three "substantive defenses": (1) that Otterstein 1 was dismissed not by the Debtor, but on the motion of the Chapter 13 Trustee, (2) that Cadlerock never opposed the Dismissal Motion after being given notice, and (3) that Cadlerock waited more than a year after the Dismissal Motion was filed to seek relief. See Combined Motion at 10:22 to 11:22.

Indeed, the record demonstrates that the Dismissal Order was obtained on the Chapter 13 Trustee's motion. That dismissal, however, occurred after the Chapter 13 Trustee sent a

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(Exhibits 8, 9, 10, 11, 12 and 13), pleadings filed in a proceeding for declaratory relief commenced in the United States District Court for the District of Nevada ("Declaratory Relief Action") (Exhibits 14, 15 and 16), and materials filed in Otterstein 2 (Exhibits 16, 17 and 18). Exhibits 1 through 11 and 16 through 18 are attached to Shapiro Declaration 1 while Exhibits 12 through 15 are attached to Shapiro Declaration 2.

Trustee's Directive to both the Debtor and the A&P Firm on June 10, 2007, requesting information as to the status of the PI Claim. Debtor and his counsel had previously filed the Employment Application acknowledging the PI Claim as property of the bankruptcy estate. The order approving such employment specifically referenced Debtor's agreement that the proceeds of the PI Claim are property of the bankruptcy estate. Debtor through his counsel filed the proposed plan to include distribution of proceeds from the PI Claim only after Cadlerock had filed an objection to the initial plan that did not include such proceeds. The order confirming the Plan references the PI Claim as part of the liquidation value of the estate. This record establishes beyond dispute that both the Debtor and the A&P Firm were aware that the proceeds of the PI Claim were property of the Otterstein 1 estate committed to payment of creditors under the Plan.

While some responsibility can be assigned to the Chapter 13 Trustee for not following up on the Trustee's Directive, greater responsibility must be attributed to the A&P Firm as special counsel to the bankruptcy estate, as well as upon the Debtor himself. It is well-established that a debtor-in-possession has a fiduciary relationship to his creditors. See In re Woodson, 839 F.2d 610, 614 (9th Cir. 1988).[19] It also is well-established that counsel to a bankruptcy estate under Section 327 has a fiduciary duty to creditors of the estate, including a duty of undivided loyalty throughout counsel's appointment. See Rome v. Braunstein, 19 F.3d 54, 57 (1st Cir. 1994); First Interstate Bank of Nevada v. CIC Investment Corp. (In re CIC Investment), 192 B.R. 549, 553-54 (B.A.P. 9th Cir. 1996); In re Wheatfield Business Park L.L.C., 286 B.R. 412, 417-18 (Bkrtcy.C.D.Cal. 2002). The applicable rules of professional conduct governing practice in the State of Nevada also impose numerous duties regarding conflicts of interests and the safekeeping of client property. See, e.g., Nev. R. Prof. Conduct, Rules 1.7 (former Supreme Court Rule 157),

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[19] With respect to the debtor's postpetition receipt of a payment on a life insurance policy that was property of the debtor's bankruptcy estate, the Woodson court observed: "[Debtor's] failure to notify his creditors of the $1 million in a timely fashion is especially troubling because [Debtor] is not an ordinary litigant. As debtor in possession he is the trustee of his own estate and therefore stands in a fiduciary relationship to his creditors." 839 F.2d at 614.

1.8 (former Supreme Court Rule 158) and 1.15 (former Supreme Court Rule 165) (2006).[20]

At oral argument, Debtor's counsel argued that the PI Claim was "not the trustee's case" but was retained for prosecution by the Debtor, presumably under Section 1306(b).[21] There is authority to support the Debtor's argument. See generally Keith M. Lundin, Chapter 13 Bankruptcy, 3d Edition, § 44.1 at 44-5 (2007 Supp.). However, while a Chapter 13 debtor may have standing to prosecute claims belonging to the estate, including claims involving the exercise of the bankruptcy trustee's avoiding powers, see Houston v. Eiler (In re Cohen), 305 B.R. 886, 900 (B.A.P. 9th Cir. 2004), a debtor may use the proceeds of such claims only after notice and a hearing. Id. at 897-98.[22] Neither the Debtor nor the A&P Firm provided notice to the creditors of the Otterstein 1 estate, the Chapter 13 Trustee, or to the court of their intended use of proceeds of the Murray Transportation settlement.

The A&P Firm also is one of counsel of record for the Debtor in the Declaratory Relief

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[20] For example, NRPC Rule 1.15(d) provides that: "Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property." In this case, there is no dispute that the Murray Transportation settlement funds were property of the Otterstein 1 estate and no dispute that the Trustee's Demand for information was sent to both the A&P Firm and to the Debtor.

[21] That section provides that "Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate." 11 U.S.C. § 1306(b).

[22] As the panel in Cohen observed: "The reference to § 363(b) in § 1303 is crucial with respect to the question of debtor standing to avoid transfers. One concern that immediately arises is whether such avoiding powers would transmogrify their purpose by allowing the debtor to pocket proceeds of avoiding actions without there being any benefit to the estate or creditors. Here, the net proceeds are committed to the plan. By subjecting the debtor to the trustee's rights and duties under § 363(b), the Bankruptcy Code constrains a debtor's ability to utilize proceeds of avoiding actions by imposing a requirement that they be used only after 'notice and a hearing,' which subjects such matters to control of the court."

Action[23] and one of its employees apparently served the Debtor's answer to the complaint. Paragraphs 26 and 27 of the complaint allege that the PI Claim was settled for the amount of $500,000 and that the Debtor was paid that amount by the Murray Transportation's liability carrier. Paragraphs 28 and 30 of the complaint allege that co-defendant Michael Thieman confessed judgment in the amount of $5.5 million[24] and that the judgment was entered in the state court action. All of these allegations of the complaint in the Declaratory Relief Action are admitted in Paragraphs 28, 29, 30 and 32 of the Debtor's answer.

The copy of the Settlement Memorandum indicates that it was signed by the Debtor on June 26, 2006. It sets forth $200,000 in attorney's fees and $34,019.95 in costs to be disbursed to the A&P Firm, various amounts disbursed to other parties, and a balance of $127,790.39 to the Debtor. The check copies include a $500,000 check dated June 21, 2006, from an insurance administrator made payable to Gerald Gillock, one of co-counsel to the A&P Firm in the state court litigation.[25] The other copies include checks from attorney Gillock made payable to the Debtor in the amounts of $77,790.39, $50,000.00, and $1,770.14[26], i.e., a total amount of $129,560.44. The latter checks are dated June 28, 2006 and October 3, 2006. Assuming that

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[23] That action is entitled Sentry Select Insurance Company v. Dean Meyer, et al., denominated Case No. 2:07-cv-01049-RLH-LRL. Before Otterstein 1 was dismissed, the complaint for declaratory relief was filed on August 10, 2007 and also named the Debtor as a co-defendant. As against the Debtor, the filing of the Declaratory Relief Action may be voided as a violation of the automatic stay in Otterstein 1, absent retroactive relief annulling the stay.

[24] The record indicates that defendant Thieman accepted Debtor's offer of judgment in that amount.

[25] As noted by Cadlerock, see Cadlerock Opposition at 6:5-10, the docket in Otterstein 1 does not reflect that attorney Gillock was authorized to act as special counsel to the bankruptcy estate. Moreover, the Employment Application never disclosed the co-counsel relationship.

[26] This figure equals the two amounts listed on the Settlement Memorandum as being "pd to client 10/6/06."

these disbursements were made only after the settlement check cleared[27], it appears that substantially all of the cash proceeds of the settlement were received and disbursed by the end of June 2006.

On October 26, 2006, Murray Transportation filed in State Court a motion for a determination that its $500,000 settlement with the Debtor was entered in good faith. On February 20, 2007, the A&P Firm filed a motion for entry of findings of fact and conclusions of law to support the confessed judgment against Michael Thieman. Orders granting both motions were entered by the State Court on March 19, 2007.

While the Debtor was seeking State Court approval of the judgment against Michael Thieman in conjunction with court approval of the Murray Transportation settlement, at no time did he seek approval of the settlement from the bankruptcy court of a claim he knew belonged to his bankruptcy estate. At no time did the A&P Firm, as special counsel to the estate, seek bankruptcy court approval of the $200,000 in attorney's fees apparently reflected in the Settlement Memorandum as being paid from the settlement proceeds. At no time did the Debtor seek bankruptcy court approval of his receipt of $127,790.39 as reflected by the Settlement Memorandum while not paying the liquidation value of the PI Claim under his confirmed Plan.

Apparently, all of these events had occurred by the time the Debtor and the A&P Firm had received the Trustee's Directive demanding information as to the status of the PI Claim. Instead of informing the Chapter 13 Trustee of their conduct, neither responded. Not surprisingly, neither responded to the Dismissal Motion as well. While the court is troubled by the Chapter 13 Trustee's failure to make further inquiry, those concerns are overshadowed by the active participation of the Debtor and the A&P Firm in taking for themselves assets committed to creditors under the Plan. While it might have been a different situation had the Debtor and the

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[27] The disbursement includes the amount of $12,000 to be paid to Mr. Chris Aaron, Esq., who apparently is not a member of the A&P Firm. The claims register in Otterstein 1 does not reflect a proof of claim being filed by such an individual.

A&P Firm failed to report a misuse of estate assets by another party, that is not the case here.

Debtor's additional arguments that Cadlerock never opposed the Chapter 13 Trustee's Dismissal Motion and waited more than a year after that motion was filed are equally unpersuasive. Debtor has presented no evidence that Cadlerock was even aware of the Murray Transportation settlement or of the Michael Thieman judgment at the time the Dismissal Motion was filed. Moreover, even if Cadlerock had been aware in time sufficient to oppose the Dismissal Motion, it would not be barred from seeking relief.[28] That the Cadlerock Motion was filed a year after the Dismissal Motion is of no consequence since the Dismissal Order was not entered until November 1, 2007, i.e., less than a year previously. The Cadlerock Motion was timely under Rule 9024 and FRCP 60(c)(1). Moreover, while laches may apply even where a party timely seeks relief under an applicable statute of limitations, see In re Beaty, 306 F.3d 914, 924-25 (9th Cir. 2002), the equitable defense of laches is not available unless the defendant demonstrates his own good faith. In this proceeding, no evidence has been presented by the Debtor that disputes the material allegations of the Cadlerock Motion.

Finally, the court notes that the Debtor's operating premise is simply incorrect: the Cadlerock Motion was not granted because of any default in filing a response. Rather, the record accompanying the motion was sufficient alone to justify vacating the Dismissal Order under FRCP 60(b)(3). Debtor's unauthorized settlement of the PI Claim and his unauthorized use of the proceeds of the Murray Transportation settlement, combined with his failure of disclosure, has not been disputed. Such misconduct prevented Cadlerock or any other creditor in Otterstein 1 from presenting substantive opposition to the Dismissal Motion. Similarly, reopening

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[28] Debtor argues that Cadlerock knew of the Murray Transportation settlement as early as August 11, 2008, when it filed a reply in connection with a contempt proceeding in a separate collection action pending in the State Court, denominated Case No. A488145. See Reply Cadlerock at 3:26 to 4:3 and Exhibit "B" thereto. At oral argument, Debtor's new counsel represented that Cadlerock filed in the collection proceeding a notice of the Debtor's commencement of Otterstein 2. He also argued that Cadlerock must have been aware of the settlement some time in advance of filing either the reply or the notice.

Otterstein 1 and conversion of both bankruptcy proceedings to Chapter 7 was supported by the same record. The Cadlerock Motion was granted on the undisputed record before the court and not on a default basis.[29]

This conclusion is further supported by the evidence presented in connection with the Combined Motion. Debtor's purported "meritorious defenses" to the Cadlerock Motion neither address nor contest any of the salient facts giving rise to the Prior Orders. Debtor has presented no evidence disputing that he settled the PI Claim for $500,000, that the settlement proceeds were disbursed in violation of his confirmed Plan, that he did not inform the Chapter 13 Trustee of either event, and that he engaged in such conduct without court approval. In essence, Debtor has utterly failed to meet his burden of demonstrating good cause for relief under FRCP 55(c).

2. Relief Under FRCP 60(b)(1).

Debtor also seeks relief from the Prior Orders based on "excusable neglect" under FRCP 60(b)(1). Relying on the factors set forth in Pioneer Investment Services, supra, he argues that Cadlerock will not be prejudiced because it would still have an opportunity to pursue the merits of its request to vacate the Dismissal Order. See Combined Motion at 13:5-18. Debtor further argues that there will be minimal impact on judicial proceedings because he has moved promptly to seek reconsideration of the Prior Orders. Id. at 13:19-24. He argues that he acted in good faith in that his failure to respond to the Cadlerock Motion was due to confusion by his counsel. Id. at 13:25 to 14:5. Finally, Debtor asserts that his counsel was to blame for not filing a response to the Cadlerock Motion. Id. at 14:6-12.

Debtor's assertion of a lack of prejudice rings hollow in this case. As previously

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[29] At oral argument, Debtor's new counsel offered a hypothetical where a bankruptcy debtor, represented by counsel, had (1) lost on a relief from stay motion on his residence, and (2) had his case dismissed. Thereafter, the same debtor would ask to have the dismissal order vacated to have the automatic stay reimposed in order to unwind a foreclosure sale on the residence. In that situation, counsel argued that relief would never be granted and that the situation is comparable to the Cadlerock Motion. While novel, the argument fails because the situation in this case is not comparable at all.

discussed, Debtor apparently received a disbursement of at least $129,560.44 from the proceeds of the Murray Transportation settlement by the end of 2006. The schedules he filed in Otterstein 2 showed only minimal assets when he filed his latest bankruptcy petition on August 13, 2008.[30] His schedule of current expenditures showed average monthly expenses of only $1,843.33. The statement of financial affairs he filed in Otterstein 2 does not explain where the settlement funds went.[31] Under these circumstances, further delay prejudices not merely Cadlerock but also jeopardizes the interests of all creditors of the bankruptcy estate.[32]

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[30] The Otterstein 2 schedules show no real property assets and personal property assets of only $2,000 (plus an insurance bad faith claim valued at $1 million).

[31] At the hearing on December 10, 2008, the Debtor's new counsel represented that his client had already spent the proceeds he received from the Murray Transportation settlement by the time Otterstein 2 was filed. There is no declaration from the Debtor to support this representation.

[32] At oral argument, new counsel for the Debtor argued that creditors who were not paid under the Plan were not harmed since after Otterstein 1 was dismissed, the creditor claims would increase and the Debtor did not receive a discharge. It is, of course, ridiculous to suggest that creditors are better off continuing to pursue the Debtor for payment of their ever increasing claims in the hopes of he would have a source other than the PI Claim to make payments. According to his motion in State Court for findings of fact and conclusions of law to support the stipulated judgment against Michael Thieman, the Debtor is permanently disabled. See Plaintiff's Motion for Findings of Fact and Conclusions of Law, etc., at 16:1-3, attached as Exhibit 11 to Shapiro Declaration 1. In Otterstein 2, Debtor indicated that he had no income in 2007 or 2008, and no current income, other than loans "from pending law suit", which presumably is the insurance bad faith claim. While the Debtor might ultimately prevail on his insurance bad faith claim, there is no assurance that he will. A risk of nonpayment to creditors that did not exist under the Plan, now exists because the Debtor and the A&P Firm used the Murray Transportation settlement proceeds without authorization. More importantly, prior to dismissal of Otterstein 1, the case remained open and the Debtor had not received his discharge. Thus, the automatic stay prevented creditors from pursuing their claims against the Debtor or from collecting against property of the estate, including proceeds of the PI Claim. By using the proceeds of the Murray Transportation settlement without disclosure to the Chapter 13 Trustee, the creditors of the estate, or the court, the Debtor and the A&P Firm effectively prevented the imposition of conditions on the Dismissal Order pursuant to Section 349. Now, the Debtor apparently has spent the settlement funds that were property of the Otterstein 1 bankruptcy estate and has commenced Otterstein 2 to keep his creditors at bay once again. If ever there is a poster child for BAPCPA, this case may be it.

The impact on these judicial proceedings is relatively minor given the alacrity with which Debtor has sought relief from the Prior Orders. Given the possibility that the proceeds of the Murray Transportation settlement continue to be dissipated by the Debtor as well as the A&P Firm, however, the outcome of the proceedings may be greatly effected.

Noticeably absent from the record is an affidavit or declaration from the Debtor attesting to his reliance, good faith or otherwise, on his bankruptcy counsel to oppose the Cadlerock Motion. The A&P Firm purportedly believed that it no longer represented the Debtor after Otterstein 1 was dismissed, see Aaron Affidavit at ¶ 3, even though the Cadlerock Motion specifically implicated the A&P Firm in its representation as Debtor's counsel and as special counsel to the Otterstein 1 bankruptcy estate. If the court accepts counsel's explanation as reasonable, it likely would be unreasonable for the Debtor to also assert that he relied on such counsel to respond to the Cadlerock Motion. Without any testimony from the Debtor, however, no justifiable reason for his failure to respond can be gleaned from the record.

Debtor has failed to meet his burden of demonstrating his entitlement to relief under FRCP 60(b)(1).[33]

3. Relief Under FRCP 60(b)(3).

Debtor further claims that "Cadlerock misrepresented its own conduct in this case", see Combined Motion at 14:16, because Cadlerock could have found out about the Murray Transportation settlement but waited more than a year after the Dismissal Motion was filed by the Chapter 13 Trustee. Id. at 14:19-25. On that basis, he argues that he is entitled to relief under FRCP 60(b)(3).

Debtor provides no explanation, however, why any such conduct by Cadlerock would have prevented him from defending the Cadlerock Motion. Moreover, it appears that the

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[33] As previously discussed at 18-19, supra, the Cadlerock Motion was not granted based on a default that might be excused for good cause under FRCP 55(c). Similarly, Debtor's request for relief from default under FRCP 60(b)(1) does not address the basis for order granting relief from the Dismissal Order.

culpability of the Debtor and the A&P Firm with respect to the settlement and its proceeds far exceeds any that could be attributed to Cadlerock. As previously noted, Debtor has presented no basis, much less a clear and convincing evidence, to suggest that Cadlerock was aware of the Murray Transportation settlement or the disbursement of its proceeds prior to the filing of the Cadlerock Motion.

Debtor also has failed to meet his burden for relief under FRCP 60(b)(3).

4. Relief Under FRCP 60(b)(4).

Debtor also asserts that the Prior Orders are void within the meaning of FRCP 60(b)(4) because the Cadlerock Motion violated the automatic stay in the Otterstein 2 proceeding. See Combined Motion at 15:7-12. As previously discussed, the Cadlerock Motion did not violate the automatic stay in Otterstein 2 as to the Debtor since it was no longer in effect as to the Debtor after September 12, 2008. Moreover, as previously discussed, the Cadlerock Motion did not seek any relief against property of the Otterstein 2 bankruptcy estate prohibited by Sections 362(a)(2, 3 and 4). Neither the Cadlerock Motion nor the Prior Orders are void.[34]

Moreover, to the extent that the automatic stay in Otterstein 2 was applicable, annulment of the stay on a retroactive basis, see Schwartz v. United States (In re Schwartz), 954 F.2d 569,

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[34] While the Debtor apparently asserts that entry of the Prior Orders was inconsistent with due process in connection with his argument under FRCP 60(b)(6), see Combined Motion at 16:6-9, the record indicates that the Debtor was properly served with the Cadlerock Motion. See discussion at n.2, supra. Additionally, prior to filing the Cadlerock Motion, its counsel faxed a letter dated October 9, 2008, addressed to Debtor's counsel in both Otterstein 1 and Otterstein 2, that advised counsel of Cadlerock's intention to seek relief based on the unauthorized settlement of the PI Claim. See Exhibit E to Shapiro Declaration 3. Moreover, even after only Cadlerock's counsel appeared at the scheduled hearing, the court continued the hearing to the afternoon to allow the Debtor and his counsel to appear. Thereafter, the hearing was continued to the following morning. Rather than submitting or offering any evidence to dispute the allegations or materials accompanying the Cadlerock Motion, Debtor and the A&P Firm offered nothing. The only comment from the A&P Firm at the October 28, 2008 hearing, was that a settlement of the Debtor's claim in connection with the Declaratory Relief Action might be more than sufficient to make up for the loss of the proceeds of the Murray Transportation settlement.

573 (9th Cir. 1992), would be appropriate under the circumstances.[35]

No basis for relief under FRCP 60(b)(4) has been shown in this case.

5. Relief Under FRCP 60(b)(6).

Having argued that relief from the Prior Orders should be granted under FRCP 60(b)(1), FRCP 60(b)(3), and FRCP 60(b)(4), Debtor also argues that he is entitled to relief for "any other reason" under FRCP 60(b)(6). See Combined Motion at 15:16-18. Ignoring for the moment that relief under FRCP 60(b)(6) is not available in such circumstances, see Lyon v. Augusta S.P.A., supra, the Debtor correctly observes that relief under FRCP 60(b)(6) is reserved for extraordinary circumstances. See Combined Motion at 16:2-3, citing Ashford v. Stewart, 657 F.2d 1053, 1055 (9th Cir. 1981). Nonetheless, Debtor merely repeats his arguments that Cadlerock waited too long after the Dismissal Motion was filed, see Combined Motion at 16:10-12, that he has meritorious defenses, id. at 16:17, that there was excusable neglect, id. at 16:17 to 17:24, and that the Prior Orders are void. Id. at 17:25.

For the reasons previously set forth, none of the Debtor's arguments are persuasive and none rise to the level of extraordinary circumstances required by FRCP 60(b)(6). Moreover, because each of the Debtor's arguments are encompassed, if at all, by the other provisions of FRCP 60(b), none are grounds for relief under FRCP 60(b)(6).[36]

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[35] The Chapter 7 Trustee suggests that retroactive annulment of the automatic stay is appropriate in any event. See Trustee Opposition at 3:12-17. Debtor argues that such relief is limited to only "extreme circumstances." See Reply Trustee at 2:1-3, citing In re Kissinger, 72 F.3d 107 (9th Cir. 1995). On the present record, a finding of extreme circumstances would not be difficult.

[36] At the end of his written argument, Debtor contends that "cause" for conversion to Chapter 7 had not been demonstrated by Cadlerock. See Combined Motion at 18:6-7. Debtor apparently argues that the interest of the Otterstein 1 estate in the PI Claim was abandoned upon dismissal of the case, that the PI Claim revested in the Debtor, and that vacating the Dismissal Order would not bring the PI Claim back into the bankruptcy estate. Id. at 18:17 to 19:6. None of the authorities cited by the Debtor, however, compel such a conclusion. Moreover, no argument is presented that such a conclusion constitutes grounds for relief from the Prior Orders under FRCP 55(c) or FRCP 60(b).

CONCLUSION

The Combined Motion will be denied to the extent it seeks sanctions against Cadlerock under Section 362(k)(1). The balance of the Combined Motion will be denied to the extent it seeks relief from the Prior Orders under FRCP 55(c) and FRCP 60(b). A separate order has been entered concurrently herewith.

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