

U.S. COURTS

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The Honorable Terry L. Myers
Chapter 7

1 John R. Rizzardi, WSBA No. 9388
2 Admitted Pro Hac Vice
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8 UNITED STATES BANKRUPTCY COURT FOR THE
9 DISTRICT OF IDAHO

10 In re:

NO. 02-20218

11 FRANK L. CHAPIN and
12 SYDNEY L. GUTIERREZ-CHAPIN,
13 Debtors.

MOTION FOR ORDER CLARIFYING
INAPPLICABILITY OF AUTOMATIC STAY

14 COMES NOW, Dr. Frederick Leaf ("Leaf"), by and through his attorneys of record, John
15 R. Rizzardi and Cairncross & Hempelmann, P.S., and moves this court for entry of an order
16 clarifying the inapplicability of the automatic stay pursuant to 11 U.S.C. § 105 and § 362(a) and
17 other applicable statutes.

18 The motion is supported is supported by the Declarations of John R. Rizzardi and Dr.
19 Frederick Leaf.

20 I. SUMMARY OF MOTION

21 As this court is aware, the Debtors' Chapter 11 proceeding was converted to a Chapter 7
22 proceeding on August 8, 2003 when this court granted Leaf's Motion for Conversion. Barry
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MOTION FOR ORDER CLARIFYING
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ORIGINAL

1 Zimmerman was appointed the Chapter 7 Trustee, and he, in turn, requested the appointment of
2 James Magnuson as his attorney.

3 Mr. Zimmerman has taken the position that the automatic stay in this proceeding may
4 extend to certain non-debtor entities. Due to Mr. Zimmerman's assertion, Judge Stephen Verby
5 of the Idaho District Court, Bonner County, in Cause No. CV-02-01655 entitled Frederick A.
6 Leaf v. Financial Management Services, et al. has refused to enter a judgment in favor of Dr.
7 Leaf. This motion requests the entry of an order clarifying the inapplicability of the automatic
8 stay so that Judge Verby can proceed to enter the judgment.

9 II. APPLICABLE FACTS

10 A judgment was entered against Leaf by the Washington Superior Court, Spokane
11 County, in October, 2002 in the amount of \$915,000, plus interest and, eventually, legal fees.
12 No judgment was entered against the Debtors, as all actions against them were stayed. Dr. Leaf
13 determined, however, that funds controlled by the Debtor, Frank Chapin, had been transferred to
14 the following entities: FMS, Inc.; S and F, LLC, HooDoo Mountain Ranchette Trust; and Frank
15 Chapin, P.A. (collectively the "Non-Debtor Entities"). Attached to the Declaration of John
16 Rizzardi are the pleadings submitted to the Idaho District Court, which include the Declaration
17 of Paul Fruci, CPA, verifying the tracing of the amounts to the Non-Debtor Entities.

18 Dr. Leaf filed the Idaho District Court lawsuit against the Non-Debtor Entities on
19 December 11, 2002. As set forth in the pleadings attached as Exhibits A-1 through A-4 to the
20 Declaration of John Rizzardi, the Non-Debtor Entities were properly served.

21 There were no appearances or answers filed by any of the Non-Debtor Entities.

22 Dr. Leaf took no action to prosecute the state proceedings because he was attempting to
23 resolve his claims with the Debtors. Those efforts failed.

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1 As a result, on or about August 14, 2003, Dr. Leaf caused to be filed the Motion for
2 Default and his request for entry of judgment. Judge Verby entered the Default Order on
3 September 4, 2003. See Exhibit B, Declaration of John Rizzardi. Judge Verby was prepared to
4 enter the judgment but refused to do so after receipt of a letter from Mr. Zimmerman's counsel.
5 See Exhibit C, Declaration of John Rizzardi.

6 Efforts to convince Mr. Zimmerman to acknowledge the inapplicability of the automatic
7 stay have not been successful. Mr. Zimmerman maintained his stance even after being advised
8 that the Bankruptcy Court Clerk's office had erred in its designation of the Debtor as Frank
9 Chapin, P.A., and that this error had been corrected. See Exhibits D and E, Declaration of John
10 Rizzardi.

11 The Non-Debtor Entities are not Debtors in this or any pending bankruptcy proceeding.
12 The Debtor's petition confirms this fact. See Exhibit F, Declaration of John Rizzardi. As
13 verified by the Debtors in all original and amended Schedule B forms, the Debtors own an
14 interest in the Non-Debtor Entities. See Exhibit G, Declaration of Rizzardi. This position is
15 verified in the court-approved Disclosure Statement filed in the Chapter 11 proceeding. When
16 this court ordered the Chapter 11 proceedings converted, it converted the case of Frank Chapin
17 and Sydney Gutierrez-Chapin and no other entity.

18 III. LEGAL ARGUMENT

19 The automatic stay in the Debtors' bankruptcy case does not apply to prevent the
20 collection of debts or recovery of assets owned by, or litigation against, non-bankrupt
21 corporations, partnerships, limited liability companies, or trusts, because such assets do not
22 constitute property of their bankruptcy estate.

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1 The filing of a petition in bankruptcy commences a bankruptcy case. See 11 U.S.C. §
2 301. Commencement of the case creates an estate, which is comprised of “all legal or equitable
3 interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1).

4 Furthermore, the petition operates as an “automatic stay” against all entities, prohibiting
5 commencement of continuation of a “judicial, administrative, or other action against the debtor,”
6 11 U.S.C. § 362(a)(1), “any act to exercise control over property of the estate,” 11 U.S.C. §
7 362(a)(3), and “any act to collect, assess, or recover a claim against the debtor that arose before
8 the commencement of the case,” 11 U.S.C. § 362(a)(6). With certain exceptions not relevant to
9 the definition of the automatic stay or property of the estate, the conversion of a case from
10 Chapter 11 to Chapter 7 does not change the date of the filing of the petition or the
11 commencement of the case. See 11 U.S.C. § 348(a).

12 Assets owned by a corporation or other recognized entity are not property of an
13 individual shareholder’s bankruptcy case. See In re Russell, 121 B.R. 16, 17-18 (Bankr. W.D.
14 Ark. 1990)(finding that funds of non-bankrupt corporation were not property of estate of 82%
15 individual shareholder). “A corporation has a separate legal existence from its shareholders, and
16 the corporation, not its shareholders, owns the corporate assets and owes the corporate debts.”
17 Id. at 17.

18 The same principle applies to partnerships in which the debtor is a general or limited
19 partner. “A partnership is a distinct legal entity separate from the partners who formed it.” In re
20 Wallen, 43 B.R. 408, 409 (Bankr. D. Idaho 1984); see also In re Capps, 135 B.R. 821, 824-25
21 (Bankr. E.D. Tenn. 1992); In re Weiss, 111 F.3d 1159, 1166 (4th Cir. 1997)(holding that debtor
22 partner has only indirect interest in partnership’s assets and therefore such assets are not property
23 of debtor’s estate); In re Palumbo, 154 B.R. 357 (Bankr. S.D. Fla. 1992)(finding that real

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1 property owned by partnership in which individual debtor had 97% interest was not property of
2 the estate); In re Olszewski, 124 B.R. 743, 746 (Bankr. S.D. Ohio 1991). Only when the
3 partnership itself is a debtor in a bankruptcy case are the partnership's assets property of a
4 bankruptcy estate – the partnership's bankruptcy estate. Otherwise, the bankruptcy court has no
5 control over the partnership's assets where one of the partners is in bankruptcy. See In re
6 Wallen, 43 B.R. at 410.

7 By extension, specific property owned by a limited liability company is likewise not
8 property of the estate of a limited liability company's member. Limited liability companies
9 share the characteristic of corporations and partnerships of being legal entities distinct from their
10 owners. See In re DeLuca, 194 B.R. 79, 88 (Bankr. E.D. Va. 1996)(holding that members have
11 no direct interest in property of LLC).

12 However, the debtor's interest in the corporation/partnership/LLC, as opposed to the
13 entity's specific assets, is property of the estate. See In re Smith, 185 B.R. 285, 290 (Bankr. S.D.
14 Ill. 1995)(limited partnership interest); In re Weiss, 111 F.3d at 1167.

15 The automatic stay does not prohibit collection actions against non-bankrupt entities and
16 their property, notwithstanding the debtor's ownership interest in the entity. See In re Johnson,
17 209 B.R. 499 (Bankr. D. Neb. 1997)(holding that levy against personal property of non-bankrupt
18 corporation in which debtor owns stock did not violate automatic stay, Section 362(a)(6)); see In
19 re Winer, 158 B.R. 736, 743 (N.D. Ill. 1993)(confirming principle that "Section 362(a) does not
20 proscribe actions brought against nondebtor entities, even where there is a close nexus between
21 those nondebtors and their bankrupt affiliates"); Personal Designs, Inc. v. Guymar, Inc., 80 B.R.
22 29 (E.D. Pa. 1987)(holding that automatic stay does not preclude entry of default judgment
23 against non-bankrupt corporation, of whose stock debtor holds 100%). The automatic stay also

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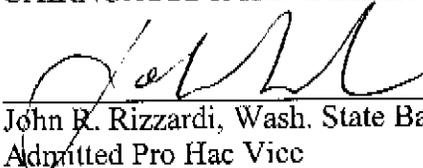
1 does not preclude collection actions against a trust that is subject to Section 541(c)(2) of the
2 Bankruptcy Code. See In re Hemdon, 289 B.R. 629, 632 (Bankr. E.D. Mich. 2003).

3 **IV. CONCLUSION**

4 There is no basis for the trustee's assertion that the automatic stay in these proceedings
5 prevents the Idaho District Court from entering the default judgment. For the reasons set forth
6 above, Dr. Leaf requests entry of the proposed order confirming the inapplicability of the
7 automatic stay.

8
9 Dated this 1st day of October, 2003.

10 CAIRNCROSS & HEMPELMANN, P.S.

11 
12 _____
13 John R. Rizzardi, Wash. State Bar No. 09388
14 Admitted Pro Hac Vice
15 Attorneys for Frederick A. Leaf