

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE

*In re*

KINGSPORT ELECTRIC  
SUPPLY, INC.,

Debtor.

No. 98-22666  
Chapter 7

FIRST AMERICAN NATIONAL BANK,

Plaintiff,

vs.

Adv. Pro. No. 99-2002

EUGENE HARRELL, individually  
and d/b/a McDONALD'S ELECTRIC  
SUPPLY; ELIZABETH HARRELL,  
individually and d/b/a  
McDONALD'S ELECTRIC SUPPLY;  
LELAND HARRELL; ANGELA  
HARRELL; MICHAEL HARRELL;  
L&A INVESTMENTS, a Tennessee  
general partnership comprised  
of Eugene Harrell and Leland  
Harrell; and McDONALD'S  
GOLF CLUB, INC.,

Defendants.

M E M O R A N D U M

APPEARANCES:

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**MARCIA PHILLIPS PARSONS**  
**UNITED STATES BANKRUPTCY JUDGE**

This adversary proceeding is before the court on a motion to strike jury demand filed by the plaintiff, First American National Bank ("First American"), and the response in opposition filed by the defendants, Eugene and Elizabeth Harrell, individually and doing business as McDonald's Electrical Supply. The court having concluded that this proceeding is legal in nature even though certain equitable remedies are sought in addition to the legal one of damages, and that Mr. Harrell has not waived his right to a jury trial, the motion to strike will be denied.

I.

The underlying bankruptcy case was commenced under chapter 11 on October 20, 1998, and was converted to chapter 7 upon the debtor's motion on December 18, 1998. This adversary proceeding was initiated upon the filing of First American's original complaint on January 26, 1999, naming as defendants, Eugene Harrell, Leland Harrell and Wayne Walls, chapter 7 trustee. In the opening paragraph of the complaint, First American alleges

that this action is "for conversion and injunctive relief precluding the continued unauthorized use of property which constitutes the Collateral of First American National Bank and property of the estate." The gist of the cause of action is that Eugene Harrell, the president and sole shareholder of the debtor, and his son, Leland Harrell, the debtor's vice-president, allegedly caused the debtor's inventory which First American claims as collateral to be moved to another location where the Harrells operated a business known as McDonald's Electrical Supply.

An application for a temporary restraining order or temporary injunction was filed along with the complaint. After a hearing upon the application on January 29, 1999, during which Eugene Harrell testified without representation of counsel, a temporary injunction was issued on January 29, 1999, enjoining Eugene and Leland Harrell and others in active concert or participation with them "from concealing, selling, moving or disbursing any electrical supplies or inventory" located at McDonald's Electric Supply. First American was directed to post a bond in the amount of \$200,000.00 and the court set a status conference for February 9, 1999, to consider any modifications to the injunction. On that date additional evidence was received, including the testimony of Eugene Harrell again, but

this time his counsel was present. Upon conclusion of that hearing, the court determined that the injunction should remain in effect until the trial of this matter. First American, however, was required to increase the bond to \$300,000.00.

First American filed an amended complaint on February 9, 1999, which named as additional defendants Eugene Harrell's wife, Elizabeth, his son Michael, his daughter-in-law and Leland Harrell's wife, Angela, along with L&A Investments and McDonald's Golf Club, Inc., entities in which Eugene Harrell allegedly has ownership interests. Count I of the amended complaint is a conversion claim wherein First American alleges "that any property of the Debtor taken by the Harrells and/or their respective partners, agents or employees constitutes the tort of conversion of First American's Collateral" and that "First American is entitled to recover ... the value of the property converted...." Count II of the amended complaint seeks a turnover and an accounting based upon the allegations "that the Harrells and/or their respective partners, agents or employees are in possession, custody or control of property of the estate and should be ordered by the Court to deliver to and account for same including any proceeds or products derived therefrom." Count III of the amended complaint alleges that "First American has been and will continue to be irreparably

harmd by the Harrells and/or their respective partners, agents or employees' unauthorized use and/or disposition of the Collateral unless enjoined from such further action" and requests that a temporary injunction be issued. In Count IV of the amended complaint, "First American requests that the Court declare the rights of the parties with respect to any ownership interest of or security interest in the inventory of electrical supplies located and currently stored at the Guntown Road location and known as McDonald's Electric Supply." Finally, Count V of the amended complaint is one for "fraud, intentional misrepresentation and deceit" against Eugene Harrell as a result of his actions and inactions concerning the alleged transfer of First American's collateral to McDonald's Electric Supply.

Pursuant to a stipulation of dismissal filed on April 6, 1999, Wayne Walls, the chapter 7 trustee, was dismissed as a defendant from the adversary proceeding. This action was taken as a result of the approved compromise in the debtor's bankruptcy case whereby the estate's interest in the inventory located at the debtor's former place of business and at McDonald's Electric Supply was abandoned and First American was granted relief from the stay.

On July 9, 1999, Eugene and Elizabeth Harrell, individually and d/b/a McDonald's Electric Supply, filed a joint answer,

denying the material allegations of the amended complaint and asserting that this court lacks subject matter jurisdiction over the controversy because it is a "non-core proceeding" involving "nondebtor parties over ownership of or rights in certain items of personal property, the adjudication of which should be left to the State Court applying State law." Mr. and Mrs. Harrell also filed a counterclaim against First American alleging that its actions in obtaining the temporary restraining order and preliminary injunction which prohibited the sale of inventory from McDonald's Electric Supply "forc[ed] the closure ... of McDonald's Electric Supply" and "depriv[ed] [the Harrells] of the use of their property without cause and without compensation." In conjunction with their answer and counterclaim, Eugene and Elizabeth Harrell filed a demand for "a jury trial of the issues in this case for the reason that the cause of action is for money damages, compensatory and punitive, arising from an alleged conversion of personal property in which Plaintiff claims a security interest and for fraud, intentional misrepresentation and deceit, all of which would have been brought by law."

The pending motion to strike jury demand filed by First American presents two grounds. First American contends that even though it "seeks monetary damages in this case, the suit is

equitable in nature with the damage claims being clearly intertwined with the equitable relief. Given that the relief is equitable in nature and First American seeks an equitable remedy, the Harrells are not entitled to a jury trial." First American also states that "Eugene Harrell's prior appearance and testimony with and without the assistance of counsel in evidentiary hearings in this case without a jury present constitutes a waiver of his right to a jury trial by consenting explicitly or tacitly to the jurisdiction of the Bankruptcy Court." In response, Eugene and Elizabeth Harrell dispute First American's characterization of the dispute as sounding in equity and contend that the alleged "torts of conversion and fraud ... are actions at law." Mr. and Mrs. Harrell deny that Mr. Harrell waived his right to a jury trial by his participation in the hearings on the injunction, noting these hearings were held on an expedited basis prior to the expiration of the time for filing a response to the initial complaint.

## II.

An analysis of the right to a jury trial in the bankruptcy context necessarily begins with the Seventh Amendment and the Supreme Court's seminal decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 109 S. Ct. 2782 (1989). The Seventh

Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The Supreme Court observed in *Granfinanciera* that the phrase "Suits at common law" means cases involving legal, as opposed to equitable, rights and set forth a three-part test for determining whether a right to a jury trial exists. *Stalford v. Blue Mack Transport, Inc. (In re Lands End Leasing, Inc.)*, 193 B.R. 426, 431 (Bankr. D.N.J. 1996)(citing *Granfinanciera*, 492 U.S. at 41-43, 109 S. Ct. at 2790-91).

First, the court must compare the action to actions brought in the 18th century England before the fusion of the courts of law and equity. Secondly, and more importantly, the court must determine whether the remedy sought is legal or equitable in nature. Lastly, where the preceding analysis yields the right to a jury trial, the court must ascertain whether Congress may or has assigned resolution of the specific claim to a non-Article III tribunal that does not employ a jury as a factfinder.

*Id.* (citing *Granfinanciera*, 492 U.S. at 43, 109 S. Ct. at 2791).

The third and last *Granfinanciera* factor turns on whether the cause of action involves a matter of "public" or "private" rights. *Granfinanciera*, 492 U.S. at 42 n.4, 109 S. Ct. at 2790 n.4. Notwithstanding that an action is legal in nature and seeks damages as a remedy, the Seventh Amendment may not protect a litigant's right to a jury trial if public rights are

involved. *Id.* Because there is no allegation that the instant action involves public rights,<sup>1</sup> this court's analysis as to whether Eugene and Elizabeth Harrell are entitled to a jury trial will be limited to the first two *Granfinanciera* factors. The Supreme Court indicated that in undertaking this analysis, the second factor, *i.e.*, the remedy sought, "carries more weight." *Martino v. Weisman (In re Elegant Equine, Inc.)*, 155 B.R. 189, 191 (Bankr. N.D. Ill. 1993)(citing *Granfinanciera*, 492 U.S. at 42, 109 S. Ct. at 2790).

In considering a demand for jury trial, a court is not bound by the labeling of the claims used by the litigants, but must examine the substance of the pleadings. See *Owens-Illinois, Inc. v. Lake Shore Land Co.*, 610 F.2d 1185, 1189 (3rd Cir. 1979). Furthermore, "[w]hen a proceeding involves a mixture of legal and equitable claims, the question is not the character of the entire proceeding as legal or equitable, but the character of particular issues as legal or equitable." *Smith v. Bandy (In*

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<sup>1</sup>"Private rights are described as 'the liability of one individual to another under the law as defined.'" *Leslie Salt Co. v. Marshland Dev., Inc. (In re Marshland Dev., Inc.)*, 129 B.R. 626, 630 n.8 (Bankr. N.D. Cal. 1991)(quoting *Granfinanciera*, 492 U.S. at 51 n.8, 109 S. Ct. at 2797 n.8). "Public rights are described as 'statutory rights that are integral parts of a public regulatory scheme and whose adjudication Congress has assigned to an administrative agency or specialized court of equity.'" *Id.* at 631 n.9 (quoting *Granfinanciera*, 492 U.S. at 55 n.10, 109 S. Ct. at 2797 n.10).

*re Bandy*), 237 B.R. 661, 664 (Bankr. E.D. Tenn. 1999).

First American asserts in Count I of the amended complaint that the defendants have wrongfully converted its collateral and as a remedy seeks, *inter alia*, monetary damages for "the value of the Collateral converted." Traditionally, conversion actions are legal actions to which the right to jury trial attaches. *Hassett v. BancOhio Nat'l Bank (In re CIS Corp.)*, 172 B.R. 748, 762-63 (S.D.N.Y. 1994); *Valley Steel Prod. Co. v. DARCO Supply, Inc. (In re Valley Steel Prod. Co.)*, 147 B.R. 189, 191 (Bankr. E.D. Mo. 1992). Furthermore, the remedy of money damages is legal in nature. *Granfinanciera*, 492 U.S. at 47-48, 109 S. Ct. at 2793; *Beeline Eng'g & Constr., Inc. v. Monek (In re Beeline Eng'g & Constr., Inc.)*, 139 B.R. 1025, 1027 (Bankr. S.D. Fla. 1992).

A similar result is reached with regard to Count V wherein First American seeks \$1 million in actual and punitive damages from Eugene Harrell for fraud, intentional misrepresentation and deceit. At common law, whether a lawsuit for fraud sounded in law or equity depended primarily on the relief sought. *In re Bandy*, 237 B.R. at 664. Because damages are a legal remedy, a suit to recover damages based on fraud is an action at law, rather than a suit in equity. *Id.*; *In re Lands End Leasing*, 193

B.R. at 433.

Thus, based on the foregoing analysis, it appears that First American's motion to strike should be denied because Eugene and Elizabeth Harrell, absent a waiver of the right, clearly are entitled to a jury trial with regard to the conversion and fraud claims set forth in Counts I and V. First American concedes in its memorandum of law that the conversion and fraud actions are legal rather equitable in nature but asserts that these legal claims are only incidental to and intertwined with the equitable relief sought in the remainder of the complaint, the accounting, turnover, and injunction. First American argues that because it is only seeking damages to the extent the recovery of the property converted is insufficient to make it whole, this action is primarily equitable in nature to which no right to a jury trial should attach.

There is some support for First American's position. In *Elegant Equine*, the court held that a bankruptcy trustee who had been sued for money damages for an alleged breach of his fiduciary duties was not entitled to a jury trial because the money damages were clearly intertwined with the equitable relief of an accounting for damages to the estate caused by the trustee's breach. *In re Elegant Equine, Inc.*, 155 B.R. at 192. As authority for its holding, the court cited the Supreme Court

case of *Terry* for the proposition that monetary relief need not always be characterized as legal and that where "damages sought [are] incidental to or intertwined with equitable relief, the damages should be characterized as equitable." *Id.* at 192 (citing *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 569-71, 110 S. Ct. 1339, 1347-48 (1990)).

The facts of *Elegant Equine*, however, are distinguishable from the instant case. In *Elegant Equine* the court noted that under the first part of the *Granfinanciera* test, the suit against the trustee for breach of fiduciary duty was an action in equity at common law. *In re Elegant Equine, Inc.*, 155 B.R. at 192. Because the action itself was an equitable one and the legal remedy of damages was incidental to the equitable remedy of an accounting of the assets which the trustee had allegedly mishandled on behalf of the estate, both the action and remedy were equitable. Thus, no right to a jury trial existed under the two-part *Granfinanciera* test.

The instant case, on the other hand, involves actions at law rather than equity. The essence of First American's lawsuit against the defendants is that they converted First American's collateral for their own use and, as previously discussed, conversion actions are suits at law, not in equity. Furthermore, it appears that contrary to First American's

assertion, the relief sought in the form of turnover of the property converted is incidental to the legal remedy of monetary damages since as a general rule, suits in equity cannot be sustained when a complete and adequate remedy exists at law. See *Crocker v. Namer (In re AVN Corp.)*, 235 B.R. 417, 421 (Bankr. W.D. Tenn. 1999)(citing *Granfinanciera*, 492 U.S. at 48, 109 S. Ct. at 2794).

Additionally, while the Supreme Court did note in *Terry* that "a monetary award 'incidental to or intertwined with injunctive relief' may be equitable," *Terry*, 494 U.S. at 571, 110 S. Ct. at 1348; the high court expressly stated in *Tull*, the opinion from which *Terry* quotes, that "if a 'legal claim is joined with an equitable claim, the right to the jury trial on the legal claim, including all issues common to both claims remains intact. This right cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought.'" *Tull v. U.S.*, 481 U.S. 412, 425, 107 S. Ct. 1831, 1839 (1987)(quoting *Curtis v. Loether*, 415 U.S. 189, 196 n.11, 94 S. Ct. 1005, 1009 n.11 (1974)). See also *In re Bandy*, 237 B.R. at 664 (a court can neither deny a jury trial on the basis that the proceeding is predominantly equitable nor deny a jury trial of legal issues on the ground that they are merely incidental to the equitable

issues).

Based on these Supreme Court cases, lower courts have recognized that simply adding an equitable remedy to a legal cause of action will not change the action from one at law into one in equity. See *In re AVN Corp.*, 235 B.R. at 421-22; *In re Beeline Eng'g & Constr., Inc.*, 139 B.R. at 1027. For example, in *Beeline Engineering* the chapter 11 debtor in possession filed a fraudulent conveyance action wherein it requested an accounting, a determination of whether the automobile conveyed was property of the estate, turnover of the automobile and/or damages for its reasonable value. *In re Beeline Eng'g & Constr., Inc.*, 139 B.R. at 1026. The court noted that although the relief demanded was both legal and equitable in nature, the essence of the relief sought was legal rather than equitable since the traditional relief sought and granted for a fraudulent conveyance is an award of damages. "The complainant can not thwart a defendant's Seventh Amendment right to a jury trial by annexing an equitable remedy to a legal or statutory cause of action." *Id.* at 1027. "To allow a litigant to couch a legal remedy in equitable terms in order to circumvent a party's right to a jury trial would run counter to the protection afforded litigants by the Seventh Amendment." *Id.*

Similarly, in the recent case of *AVN Corp.* decided by Judge

Latta of the Western District of Tennessee, the chapter 11 trustee sought a judgment for certain real and personalty purportedly fraudulently conveyed and the imposition of a constructive trust and continuing lien against the real property to secure payment of the judgment. *In re AVN Corp.*, 235 B.R. at 419. The court noted that notwithstanding the trustee's request for both legal and equitable remedies, the essence of the action sounded in law rather than equity to which the right to jury trial attached. "The complaint plainly seeks the type of relief traditionally provided by courts of law, and the remedies available at law are capable of providing the estate with complete and adequate relief. Annexing an equitable remedy to a legal or statutory cause of action will not transform the legal nature of an action into an action at equity." *Id.* at 421-22. Likewise in the present case, the fact that First American has asked for an accounting, a turnover of property converted and injunctive relief does not negate the Harrells' right to a jury trial on the legal actions against them.

Furthermore, this court is not convinced that all of First American's remaining causes of actions are equitable in nature as it contends. Although requests for an accounting and injunctive relief are historically equitable in nature, the injunctive count is somewhat misleading because this is not a

case where it is appropriate to grant a permanent injunction, even though one has been requested in the prayer for relief. First American sought and was granted a temporary injunction in order to maintain the status quo until the ownership of the inventory located at McDonald's Electric Supply could be determined by the court. Once the ownership issue is resolved, it will no longer be necessary to enjoin the sale or disposition of the inventory or any other property of First American. Thus, the injunctive relief claim will become moot and will not need to be decided by either a judge or jury.

With respect to the declaratory judgment cause of action, the court must first ascertain the nature of the action in which the issue would have arisen absent the declaratory judgment procedure. *Northgate Homes, Inc. v. City of Dayton*, 126 F.3d 1095, 1099 (8th Cir. 1997). If there would have been a right to a jury trial on the issue had it arisen in an action other than one for declaratory judgment, then there is a right to a jury trial in the declaratory judgment action. *Id.* In the present case, the "other action" in which the ownership issue would have most likely arisen is a turnover action which First American has raised in Count II of the complaint. When the entitlement to inventory is in dispute as it is in the present case, the court must necessarily decide the ownership issue before ordering a

turnover. Accordingly, the declaratory judgment action is equitable in nature only if the turnover action is likewise equitable.

Although clearly a turnover is an equitable remedy, see *Anderson v. Simchon (In re S. Textile Knitters, Inc.)*, 236 B.R. 207, 213 (Bankr. D.S.C. 1999), and *In re Lands End Leasing*, 193 B.R. at 432; courts have differed on whether a turnover action itself is one at law or equity. As a general rule, the courts have held that turnover in the context of fraudulent conveyances is an action at law to which the right to a jury trial attaches, even if the remedy sought is the return of the fraudulently conveyed property rather than monetary damages. See *In re AVN Corp.*, 235 B.R. at 421; *In re Beeline Eng'g & Constr., Inc.*, 139 B.R. at 1026-27.<sup>2</sup>

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<sup>2</sup>Such a holding appears to be consistent with *dicta* in *Granfinanciera* wherein the Supreme Court questioned whether the fraudulent conveyance action before it would be equitable rather than legal in nature even if the remedy sought had been the recovery of the actual property conveyed rather than monetary damages. *Granfinanciera*, 492 U.S. at 47 n.5, 109 S. Ct. at 2793 n.5. The court noted that "[a]lthough there is scholarly support for the claim that actions to recover real property are quintessentially equitable actions," it had stated in *Whitehead* that "where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law.... The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both  
(continued...)

On the other hand, various courts have held that a turnover action based on section 549 of the Bankruptcy Code is "equitable in nature because it is intended to preserve the bankruptcy estate upon its inception." See *In re Lands End Leasing*, 193 B.R. at 432 and cases cited therein. But also see *Calaiaro v. Roberts (In re Roberts)*, 126 B.R. 678, 682 (Bankr. W.D. Pa. 1991)(court reasoned that because trustee's § 549 claim was essentially a postpetition fraudulent conveyance action, it was an action at law under *Granfinanciera's* analysis). A turnover action based on section 542 of the Bankruptcy Code is generally equitable in nature to the extent there is no legitimate dispute over the ownership of the property and the action is simply one to collect rather than recognize a debt. Compare *Keller v. Blinder (In re Blinder, Robinson & Co.)*, 146 B.R. 28, 31 (D. Colo. 1992)(defendants in action by trustee seeking return of estate property not entitled to jury trial where trustee had already established that assets were property of estate in earlier proceeding), with *In re CIS Corp*, 172 B.R. at 756 (because turnover action was "fundamentally an action to determine disputed ownership in property," it sounded in law

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<sup>2</sup>(...continued)  
parties have a constitutional right to call for a jury." *Id.* (quoting *Whitehead v. Shattuck*, 138 U.S. 146, 151, 11 S. Ct. 276, 277 (1891)).

rather than equity).

In determining whether the turnover count in the present case is an action at law or in equity it must be remembered that the plaintiff in this case is neither the trustee or a debtor in possession. Despite First American's request that property of the estate be turned over to it, the disputed property is no longer property of the estate since the trustee has abandoned all interest in the property. Thus, this is really not a turnover cause of action in the traditional bankruptcy sense of the word, but an action by a secured creditor to recover its collateral which it believes has been wrongfully converted. As such this case is legal in nature notwithstanding the equitable remedies sought. See *In re CIS Corp.*, 172 B.R. at 762 ("It is basic law that actions for the recovery of property, even where title to the property is disputed, are actions traditionally at law affording the right to a jury trial."). Accordingly, Eugene and Elizabeth Harrell are entitled to a jury trial in this adversary proceeding<sup>3</sup> absent a waiver of that right.

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<sup>3</sup>However, with respect to the Harrells' counterclaim wherein they allege that they are entitled to recover for the damages they sustained as a result of the injunction being wrongfully imposed, no right to jury trial attaches. See *Alabama Mills v. Mitchell*, 159 F.Supp. 637 (D.D.C. 1958).

### III.

The court turns next to First American's argument that Eugene Harrell waived his right to a jury trial by participating in the hearings on the temporary injunction. The majority of cases cited by First American in support of this proposition address the question of whether an individual debtor waives his right to a jury trial in adversary proceedings against him by the mere fact that he has sought bankruptcy relief. See, e.g., *N.I.S. v. Hallahan (Matter of Hallahan)*, 936 F.2d 1496, 1505 (7th Cir. 1991) ("A defendant or potential defendant to an action at law cannot initiate bankruptcy proceedings, thus forcing creditors to come to bankruptcy court to collect their claims, and simultaneously complain that the bankruptcy forum denies him or her a jury trial."); *Haden v. Edwards (In re Edwards)*, 104 B.R. 890, 893 (Bankr. E.D. Tenn. 1989) ("The debtor, by the filing of his bankruptcy petition, voluntarily subjected himself to the equitable powers of the bankruptcy court and, assuming, arguendo, the right to a jury trial in the first instance, he has also arguably waived that right."). Other cited cases address the implied waiver of the right to a jury trial by a creditor who files a proof of claim, see, e.g., *Langenkamp v. Culp*, 498 U.S. 42, 111 S. Ct. 330 (1990); or an equity security holder who files a proof of interest. See *In re AVN Corp.*, 235

B.R. at 422-25. Mr. Harrell is neither the debtor in this case nor has he filed a proof of claim. Because waivers of the constitutional right to a jury trial are not to be lightly inferred, this court must closely scrutinize any asserted waiver. *Jackson v. Wessel (In re Jackson)*, 118 B.R. 243, 248 (E.D. Pa. 1990).

First American argues that Eugene Harrell, the president and sole shareholder of the debtor, waived his right to a jury trial or consented to the bankruptcy court's equitable jurisdiction in this proceeding by filing the petition on behalf of the debtor while at the same time conveying the debtor's property to himself. First American also maintains that Mr. Harrell waived his jury trial right by appearing at the two injunction hearings held on January 29 and February 9, 1999.

Neither of these contentions provide a basis for holding that Eugene Harrell has waived his right to a jury trial in this matter. An officer or shareholder of a corporation does not waive his individual jury trial right simply by acting on behalf of the corporation. To conclude that the right was lost because of Mr. Harrell's alleged conversion of the debtor's property would require the court to conclusively presume the validity of the charges in First American's complaint which the court is not prepared to do. Furthermore, this court does not find that Mr.

Harrell's participation in the injunction hearings before this court constituted a waiver of his right to a jury trial. The first hearing was held on an emergency basis on less than twenty-four hours notice and within three days of the filing of the complaint. The second hearing was held ten days later and prior to the time an answer to the original complaint was even due. Far more than this minimal participation is needed in order for the court to conclude that the jury trial right was waived. See *Land Lease Trucks, Inc. v. Mays*, 1994 WL 28667 at \*2 (6th Cir., Jan. 31, 1994)(defendant's participation in bench trial was a waiver of jury trial on issues); *In re AVN Corp.*, 235 B.R. at 424-25 (in addition to filing of proof of interest, equity security holder's conduct throughout bankruptcy case, such as filing of numerous motions and objections, invoked court's equity jurisdiction). Accordingly, the court finds no merit to the argument that Mr. Harrell has waived his jury trial right in this proceeding.

#### IV.

In accordance with the foregoing, an order will be entered denying First American's motion to strike jury demand and directing the parties to file a statement pursuant to Fed. R. Bankr. P. 9015(b) advising whether they consent to having the

jury trial conducted by a bankruptcy judge.

FILED: November 10, 1999

BY THE COURT

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MARCIA PHILLIPS PARSONS  
UNITED STATES BANKRUPTCY JUDGE