

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge

Sacramento, California

February 26, 2015 at 1:30 p.m.

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1. [11-42305-E-7](#) CHRISTOPHER/JULIA AMENDED ORDER TO SHOW CAUSE -  
[15-2020](#) MCGLENISTER FAILURE TO PAY FEES  
HAMMERS V. MCGLENISTER ET AL 2-11-15 [[13](#)]

**Final Ruling:** No appearance at the February 26, 2015 hearing is required.  
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The Adversary Proceeding No. 15-02020 having previously been dismissed on February 17, 2015, the Order to Show Cause is discharged as moot.

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

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

The Order to Show Cause having been presented to the court, the Adversary Proceeding having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Order to Show Cause is discharged as moot, the Adversary Proceeding No. 15-02020 having been dismissed.

2. [10-44610-E-7](#) JAMES MACKLIN MOTION TO REOPEN ADVERSARY  
[11-2024](#) PROCEEDING  
MACKLIN V. DEUTSCHE BANK 1-22-15 [[374](#)]  
NATIONAL TRUST CO.  
ADV. CASE CLOSED 4/8/14

**Final Ruling:** No appearance at the February 26, 2015 hearing is required.  
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The court has continued this matter to 1:30 p.m. on March 24, 2015.

3. [10-44610-E-7](#) JAMES MACKLIN MOTION FOR RELIEF FROM ORDER  
[11-2024](#) JLM-1 1-22-15 [[380](#)]  
MACKLIN V. DEUTSCHE BANK  
NATIONAL TRUST CO.  
ADV. CASE CLOSED 4/8/14

**Final Ruling:** No appearance at the February 26, 2015 hearing is required.  
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The court has continued this matter to 1:30 p.m. on March 24, 2015.

4. [12-28312-E-13](#) MARIANNE GULLINGSRUD MOTION TO DISMISS ADVERSARY  
[14-2214](#) PROCEEDING  
GULLINGSRUD V. AURORA LOAN 1-14-15 [[18](#)]  
SERVICES, LLC ET AL

**Tentative Ruling:** The Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to Rule 12(b)(6) has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's tentative ruling.**  
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Local Rule 9014-1(f)(1) Motion - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor, Plaintiff-Debtor's Attorney, and Chapter 13 Trustee on January 14, 2015. By the court's calculation, 43 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to Rule 12(b)(6) has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

**The Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to Rule 12(b)(6) is denied without prejudice.**

Nationstar Mortgage LLC ("Defendant") filed the instant Motion to Dismiss Plaintiff's First Amended Complaint Pursuant to Rule 12(b)(6) on January 14, 2015. Dckt. 18. The Motion states with particularity (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007), the following grounds upon which the requested relief is based.

Defendant, Nationstar Mortgage LLC ("Defendant"), by and through their attorneys McCarthy Holthus, LLP hereby moves this Court to dismiss the First Amended Complaint filed by Marianne Gullingsrud ("Plaintiff") pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted against Defendant.

- a. Plaintiff's alleged main cause of action is for an Order compelling Defendant to accept transfer of ownership and the corresponding legal and financial responsibility of the property. The First Amended Complaint goes so far as to request the Court to force Defendant to execute documents to transfer legal title of the property to the Defendants.
- b. Plaintiff provides no legal authority or support for the relief sought. Plaintiff has not shown they have a Valid cause of action in which relief may be granted.
- c. This Motion is based upon the Notice of this Motion, the concurrently filed Motion and Memorandum of Points and Authorities in support thereof, matters upon which this court may judicially note and upon such other further evidence as the Court may be presented at the time of the hearing.

Motion, Dckt. 18.

#### **PLAINTIFF'S OPPOSITION**

Marianne Gullingsrud ("Plaintiff-Debtor") filed an opposition to the instant Motion on February 12, 2015. Dckt. 25. The Plaintiff-Debtor opposes on the following grounds:

1. Plaintiff-Debtor has met her standard of pleadings and dismissal is not proper.
2. To the extent that Plaintiff-Debtor seeks an order compelling Defendant to take title, that issue has been resolved. On January 15, 2015, the Florida court granted the judicial foreclosure and the property has since been foreclosed upon and title transferred out of Plaintiff-Debtor's name.
3. Plaintiff-Debtor has plead facts sufficient to maintain causes of action. Plaintiff-Debtor seeks a judicial declaration of the relative rights and responsibilities as to the parties in regards to the property and as to each other. The equitable ownership doctrine provides that a person/entity may be deemed

the equitable owner, subject to landowner liability, by performing some act typically undertaken by an actual property owner, such as paying property taxes. If Plaintiff-Debtor prevails in her argument that Defendant was/is at all times relevant the equitable owner of the property, the Defendant could be adjudicated as liable for all injuries and liabilities associated with the property.

4. Plaintiff-Debtor's causes of action related to indemnity are in fact ripe and pleaded sufficiently, even if not, a stay of that portion of the First Amended Complaint, not dismissal, is the appropriate remedy. Plaintiff-Debtor is requesting the court to determine that Defendant is the legal owner of the property pursuant to Florida law. If the court finds in Plaintiff-Debtor's favor, then a subsequent determination of indemnity would be appropriate. Plaintiff-Debtor concedes that the declaratory relief cause of action logically must be determined prior to any adjudication of indemnity claims.
5. Plaintiff-Debtor does not need to plead actual present injury in order to maintain a declaratory relief cause of action. Plaintiff-Debtor alleges she must only plead that an actual case of controversy exists. While the question of who owns the property has been resolved, the question of when the property became the legal obligation of Defendant remains in dispute. Plaintiff-Debtor contends that Defendant is the beneficial owner of the property from the moment it established control over the property or otherwise asserted itself as the owner thereto. Payment of property taxes is sufficient evidence under Florida law to determine beneficial ownership, and therefore property owner liability.
6. Since the filing of the First Amended Complaint, Plaintiff-Debtor has learned that she has in fact suffered legal damages which she alleges are the legal obligation. Plaintiff-Debtor located a collection letter in which she is being pursued by the local Homeowner's Association for past due HOA dues. Plaintiff-Debtor requests leave to amend.

## **DISCUSSION**

### Failure to Plead with Particularity

In federal court, Federal Rule of Civil Procedure 7 and Federal Rule of Bankruptcy Procedure 7007 govern law and motion practice in federal court. Rule 7(b) specifically requires,

Rule 7. Pleadings Allowed; Form of Motions and Other Papers

(b) Motions and Other Papers.

(1) In General. A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) state with particularity the grounds for seeking the order; and

(C) state the relief sought.

Fed. R. Civ. P. 7(b) [emphasis added].

Plaintiff's Motion fails to state grounds upon which the relief is based, but merely summarizes the general relief requested in the Complaint. This Motion fails to meet the pleading requirements of Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007. First, the Motion's only ground for relief is that "Plaintiff provides no legal authority or support for the relief sought." This is not sufficient under the requirements of the Rules. While the Defendant does provide a Memorandum of Points and Authorities, in which various grounds may or may not be woven between citations, quotations, arguments, and speculation, the Motion itself does not state with particularity the grounds for relief. In essence, the Defendant is requesting the court to mine the docket and Defendant's filing to piecemeal a proper motion under the Rules. FN.1. This is not the court's responsibility nor role.

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FN.1. The court is surprised at Defendant and Defendant's counsel failure to meet the requirement of Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007. Defendant and Defendant's counsel have appeared before the court numerous times and are fully aware of the pleading requirements of the Bankruptcy Courts.  
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Furthermore, the Motion states that it will be based upon "further evidence as the Court may be presented at the time of the hearing." This, however, is not permitted. The Defendant is not be able to present further evidence at the time of the hearing in support. As required by the rules, all evidence in support of the instant Motion should be filed in conjunction with the Motion. Any evidence presented at the time of hearing would be improper and would not be considered.

Failure to Meet Burden Under Fed. R. Civ. P. 12(b)(6)

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that complaints contain a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. Fed. R. Civ. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.*, citing to 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235-36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action").

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether a motion to dismiss is to be granted should be resolved in favor of the pleader. *Pond v. General Electric Co.*, 256 F.2d 824, 826-27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell*

*Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Rule 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 129 S.Ct 1937, 1954 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. See *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-66 (2007). ("[A] plaintiff's obligation to provide 'grounds' of his 'entitle[ment]' to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.").

In ruling on a 12(b)(6) motion to dismiss, the Court may consider "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court need not accept unreasonable inferences or conclusory deductions of fact cast in the form of factual allegations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the court required to "accept legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

Here, the Defendant has not met the necessary burden for dismissal to be proper under Fed. R. Civ. P. 12(b)(6). As discussed supra, Defendant's Motion fails to meet the pleading requirements and facially does not meet the burden of proof for the relief sought. Even reviewing the Memorandum of Points and Authorities, Defendant still does not meet this burden. The Points and Authorities, which appears to be more akin to a motion, is six pages in length, with what appears to be mostly conclusory statements that Plaintiff-Debtor has failed to state a claim which relief may be granted. This type of argumentation is not persuasive nor does it satisfy the burden of a 12(b)(6) motion.

**Plaintiff's Response - Intended Amended Complaint**

Declaratory relief is an equitable remedy distinctive in that it allows adjudication of rights and obligations on disputes regardless of whether claims for damages or injunction have arisen. See Declaratory Relief Act, 28 U.S.C. § 2201. FN.1. "In effect, it brings to the present a litigable controversy, which otherwise might only be tried in the future." *Societe de Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981). The party seeking declaratory relief must show (1) an actual controversy and (2) a matter within federal court subject matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 745 (1998). There is an implicit requirement that the actual controversy relate to a claim upon which relief can be granted. *Earnest v. Lowentritt*, 690 F.2d 1198, 1203 (5th Cir. 1982).

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FN.1. 28 U.S.C. §2201,

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions

brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

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The court may only grant declaratory relief where there is an actual controversy within its jurisdiction. *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). However, it is a controversy in which the litigation may not yet require the award of damages. *Id.*

In this Complaint, Plaintiff-Debtor seeks in the First Cause of Action the combined relief of Declaratory Judgment/Injunctive Relief/Specific Performance. Stating a right to injunctive relief and specific performance indicates that the cause of action has moved beyond injunctive relief (the parties asking "what-if" as to potential future actions) and instead to existing rights. What is requested in the First Cause of Action is a judgment determining the interests of the parties in the property and to enforce the alleged right of the Plaintiff-Debtor to transfer the property to Defendant.

The Second Cause of Action suffers from the same duality of relief. While asking for a "declaratory judgment," Plaintiff-Debtor also wants injunctive relief. It is asserted that Plaintiff-Debtor is responsible for expenses relating to the Property at issue. It is further asserted that Defendant has the existing obligation to indemnify Plaintiff-Debtor for these expenses, now and going forward. Plaintiff-Debtor seeks to obtain a judgment enforcing her rights of indemnification to date and going forward. This is not "declaratory relief," but enforcing existing rights which are asserted to have ripened into a cause of action.

It appears that the confusion has arisen by the use of the term "Declaratory Judgment" in the Complaint. The judgments requested are not for a declaration of what the respective rights and interests are of the parties before they take action in violation of those rights, but asserts active, ripened claims for damages and injunctive relief.

Plaintiff-Debtor acknowledges that with the completion of the foreclosure sale, the claims for injunctive relief have become moot (or so it appears). However, Plaintiff-Debtor states that she still has a claim for damages and indemnification. Plaintiff-Debtor in several part of the Opposition requests leave to amend.

In light of the status of this case, though denying the Motion, the court grants Plaintiff-Debtor's request to amend the complaint. This is necessary and appropriate to have the complaint which will be litigated reflect the actual status of the property and the prosecution of rights.

The Plaintiff-Debtor shall file an amended complaint on or before March 13, 2015. Defendant shall file and serve a responsive pleading to the amended complaint on or before April 3, 2015.

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

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

The Motion to Dismiss Plaintiff-Debtor's First Amended Complaint Pursuant to Rule 12(b)(6) filed by Defendant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is denied.

**IT IS FURTHER ORDERED** that Marianne Gullingsrud, the Plaintiff-Debtor, shall file an amended complaint on or before March 13, 2014. Nationstar Mortgage, LLC, and any other Defendants, shall file responsive pleadings to the amended complaint on or before April 3, 2015.

5. [10-26415-E-13](#) IGNACIO/ANNA ADAM  
[14-2145](#) PGM-1  
ADAM ET AL V. SUNTRUST  
MORTGAGE, INC.

MOTION FOR ENTRY OF DEFAULT  
JUDGMENT  
1-12-15 [[26](#)]

**Final Ruling:** No appearance at the February 26, 2015 hearing is required.  
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor, Defendant, Chapter 13 Trustee, and Office of the United States Trustee on January 12, 2015. By the court's calculation, 45 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion for Entry of Default Judgment is granted.**

Ignacio and Anna Adam ("Debtors-Plaintiffs") filed the instant Motion for Default Judgment on January 12, 2015. Dckt. 26.

Debtors-Plaintiffs filed an Chapter 13 petition on March 16, 2010. Case No. 10-264515. On June 11, 2010, the court granted Plaintiff-Debtors' Motion to Value the Collateral of Defendant and valued the claim at \$0.00. Case No. 10-264515, Dckt. 24. Plaintiff-Debtor state that on or about April 22, 2013, counsel for Plaintiff-Debtor notified Defendant that the Plaintiff-Debtors' case was paid in full and set to be discharged in thirty days by main and again by facsimile on April 24, 2013.

On July 8, 2013, the Plaintiff-Debtors received a discharge pursuant to 11 U.S.C. § 1328, to include the claim of Suntrust Mortgage, Inc.

Plaintiff-Debtor filed the instant Adversary Proceeding on May 29, 2014. The Complaint to Determine Value and Extent of Lien (No Monetary Recovery Sought) and Attorney Fees and Costs requested the following relief:

1. That the court issue an order finding the deed of trust recorded by Suntrust Mortgage, Inc. to be an unsecured lien and therefore to be treated as an unsecured claim that was

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discharged in the completed Chapter 13 case;

2. That the court issue an order finding that the deed of trust recorded by Suntrust Mortgage, Inc. has no further force and effect as a secured lien against the Debtors' residential property;
3. That pursuant to C.C.C. 2941(b)(2), 183 days having passed, Suntrust Mortgage, Inc. having failed to execute, record, or cause to be recorded, the full reconveyance thereby authorized this court, pursuant to Section 2934(a) to execute and acknowledge a substitution of Trustee and issuance of a full reconveyance, thereby authorizing a title insurance company to prepare and record a release of the obligation.
4. That the court order attorney fees and costs in bringing this action.

The summons and complaint were served on Defendant and Registered Agent. Service was made on Defendant within fourteen days of the date that the summons was issued.

At the status conference on September 10, 2014, it was determined that the Defendant was not properly served, as the service was to a PO Box. The summons was reissued and properly served on Defendant and Registered Agent on October 6, 2014.

Plaintiff-Debtors state that the Defendant was required to file an answer or other responsive pleading to the Complaint or a motion pursuant to Fed. R. Bankr. P. 7012 on or before October 31, 2014. The Defendant did not file an answer, a motion, or other responsive pleading.

An Entry of Default was entered by the Clerk of the Court on November 19, 2014. Dckt. 18.

#### **APPLICABLE LAW**

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *In re McGee*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.* at 770.

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 Moore's Federal Practice - Civil ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, as the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors which the court may consider in exercising its discretion include:

- (1) the possibility of prejudice to the plaintiff,
- (2) the merits of plaintiff's substantive claim,
- (3) the sufficiency of the complaint,

- (4) the sum of money at stake in the action,
- (5) the possibility of a dispute concerning material facts,
- (6) whether the default was due to excusable neglect, and
- (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

*Id.* at 1471-72 (citing 6 Moore's Federal Practice - Civil ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3rd ed.)).; *In re Kubick*, 171 B.R. at 661-662.

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. *See id.* at 775.

#### DISCUSSION

Applying these factors, the court finds that the Plaintiff will be prejudiced if the second deed of trust is not reconveyed, or the court does not enter judgment determining the Deed of Trust is void and the property held free of such purported interests thereunder. The continued existence of record of the Deed of Trust will cloud title and restrict Plaintiff's full and unfettered use of her real property and interests therein. The court recently discussed the effect of a completed Chapter 13 Plan and the effect on a secured claim determined by the court pursuant to 11 U.S.C. § 506(a) in *Martin v. CitiFinancial Services (In re Martin)*, 491 B.R. 122 (Bankr. E.D. Cal. 2013).

The court finds that the Complaint is sufficient and the requests for relief requested therein are meritorious. It has not been shown to the court there is or may be any dispute concerning material facts. Defendant has not contested any facts in this Adversary Proceeding, nor did it dispute facts presented in the Plaintiff's bankruptcy case regarding the motion to value Defendant's secured claim to have a value of \$0.00 or confirmation of the Chapter 13 Plan. Further, there is no evidence of excusable neglect by the Defendant. Although the Federal Rules of Civil Procedure favor decisions on the merits through the crucible of litigation, Defendant has been given several opportunities to respond and there is no indication that Defendant has a meritorious defense or disputes Plaintiff's right to judgment in this Adversary Proceeding. Failing to fulfill one's contractual and statutory obligations, and then failing to respond to judicial process, is not a basis for denying relief to an aggrieved plaintiff. The court finds it necessary and proper for the entry of a default judgment against the Defendant.

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

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

The Motion for Entry of Default Judgment filed by Plaintiff having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good

cause appearing,

**IT IS ORDERED** that the Motion for Entry of Default Judgment is granted. The court shall enter judgment determining that the second deed of trust, and any interest, lien or encumbrance pursuant thereto, held by Suntrust Mortgage, Inc. against the real property commonly known as 1486 Paddington Way, Plumas Lake, California, recorded on July 27, 2006, with the County Recorder for Yuba County, California, is void, unenforceable, and of no force and effect. Further, the judgment shall adjudicate and determine that Suntrust Mortgage, Inc. has no interest in the real property pursuant to the Deed of Trust.

Counsel for the Plaintiff shall prepare and lodge with the court a proposed judgment consistent with this Order. The judgment shall further provide that any attorneys' fees and costs allowed by the court shall be enforced as part of the judgment.

**IT IS FURTHERED ORDERED** that on or before March 20, 2015, Plaintiff shall file a costs bill and motion for attorneys' fees, if any. The motion for attorneys' fees, if any, shall clearly set forth the contractual or legal basis for an award of attorneys' fees.

6. [13-22028-E-13](#) FAITH EVANS  
[14-2105](#) BLG-2  
EVANS V. MOULTON ET AL

MOTION FOR TURNOVER OF FUNDS  
HELD IN TRUST BY HARRISON L.  
GOODWIN, ESQ. AND/OR MOTION FOR  
ORDER FOR ACCOUNTING OF  
PROPERTY  
1-26-15 [[35](#)]

**Tentative Ruling:** The Motion for Turnover has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's tentative ruling.**

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Local Rule 9014-1(f)(1) Motion - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on January 26, 2015. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

The Motion for Turnover has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

**The Motion for Turnover is granted.**

Faith Evans, Plaintiff-Debtor, ("Movant") in the above entitled case and moving party herein, seeks an order for turnover as to the property held in trust by Harrison L. Goodwin, Esq. in connection with the divorce case (DFR-0039659 in Place County, California) involving Movant to David Cusick, the Chapter 13 Trustee.

Movant alleges that Mr. Harrison is holding \$3,289.07 in trust on behalf of Movant.

Movant requests that within 14 days, Mr. Goodwin turnover the funds to the Trustee and that the Trustee hold the funds in the account with the proceeds from the sale of the liquor license until the court orders its disbursement into the plan. Movant further requests that within 14 days, Mr. Goodwin file and serve a current accounting in compliance with Fed. R. Bankr.

February 26, 2015 at 1:30 p.m.

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P. 6002.

**HARRISON GOODWIN'S NOTICE OF NON-OBJECTION**

Mr. Goodwin filed a Notice of Non-Objection on February 11, 2015. Dckt. 52.

Along with the non-objection, Mr. Goodwin filed a declaration. Dckt. 53. FN.1. Mr Goodwin states that he was the attorney for Dan Moulton, the Defendant in the instant case, until substituted out in 2014 and replaced by Robert McCann. Mr. Goodwin held certain monies that were held in his trust account per the Placer County Superior Court's order on February 11, 2013. Mr. Goodwin alleges that notice of such money allocations were given to Movant at her address which was provided to the court when she began representing herself after substituting Mr. David Brown out of the case in early 2013.

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FN.1. The court notes that Mr. Goodwin uses the wrong docket control number in filing his declaration. The information provided in the declaration concerns the motion to turnover funds he allegedly holds, not the funds Mr. Brown is holding. The court considers the declaration in connection with the instant Motion. The court urges Mr. Goodwin to be consciousness of properly filing responsive pleadings and correctly identifying the motion and docket control number.  
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Mr. Goodwin states that he provided the case file of Defendant to Mr. McCann and the remaining monies held in his trust account, as identified in Mr. Goodwin's February 21, 2013 accounting to Movant and Movant's counsel.

Mr. Goodwin states that no monies of the parties remain in his trust account.

**MOVANT'S REPLY**

Movant filed a response to Mr. Goodwin's non-objection and declaration on February 19, 2015. Dckt. 54.

Movant states that Mr. Goodwin stated in a letter to Movant's counsel on June 10, 2013 that Mr. Goodwin is retaining \$3,289.07 in his trust account and was unsure where to send the money. Dckt. 38, Exhibit B. Attached at the end of Exhibit B is a copy of a letter dated February 21, 2013 which states Mr. Goodwin is holding \$3,289.07 for Movant per the written accounting of the Order After Hearing of February 1, 2013.

Movant alleges that Mr. Goodwin knew of the bankruptcy filing at the latest on June 3, 2013. Movant argues that Mr. Goodwin acknowledged that the funds here held for Movant and therefore is property of the estate and subject to the stay. This made Mr. Goodwin a custodian according to the Movant.

While Movant and Mr. Goodwin do not provide a date of when Mr. Goodwin transferred the funds to Mr. McCann, Movant argues that she believes the check was dated September 11, 2014, more than a year after Movant alleges Mr. Goodwin knew of the pending bankruptcy.

Movant requests that the court makes a finding that the funds are property of the estate and were held by Mr. Goodwin as custodian at the time of the filing of the bankruptcy case. Movant further requests that the transfer to Mr. McCann was improper. Lastly, Movant requests that the court issue an Order to Show Cause as to why the funds were improperly transferred and for Mr. McCann to provide an accounting of the funds and to turnover the funds to the Chapter 13 Trustee.

#### **APPLICABLE LAW**

The filing of a bankruptcy petition under 11 U.S.C. §§ 301, 302 or 303 creates a bankruptcy estate. 11 U.S.C. § 541(a). Bankruptcy Code Section 541(a)(1) defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case."

11 U.S.C. § 543 provides, in relevant part:

(a) A custodian with knowledge of the commencement of a case under this title concerning the debtor may not make any disbursement from, or take any action in the administration of, property of the debtor, proceeds, product, offspring, rents, or profits of such property, or property of the estate, in the possession, custody, or control of such custodian, except such action as is necessary to preserve such property.

(b) A custodian shall--

(1) deliver to the trustee any property of the debtor held by or transferred to such custodian, or proceeds, product, offspring, rents, or profits of such property, that is in such custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case; and

(2) file an accounting of any property of the debtor, or proceeds, product, offspring, rents, or profits of such property, that, at any time, came into the possession, custody, or control of such custodian.

A custodian is defined as: (1) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title; (2) assignee under a general assignment for the benefit of the debtor's creditors; or (3) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors. 11 U.S.C. § 101(11). The term "custodian" is intended "to encompass a variety of pre-petition agents who had taken charge of the debtor's assets. . . . The categories of custodians [in the definition] are descriptive rather than exhaustive." *In re Cash Currency Exch., Inc.*, 762 F.2d 542, 553 (7th Cir. 1985).

To establish a right to turnover under § 543, it must be shown that the custodian has possession, custody, or control of property which is property of the debtor. The burden of proof rests on the party seeking turnover.

Pursuant to Fed. R. Bankr. P. 7065 and Fed. R. Civ. P. 65. Courts have developed a four factors to consider when determining whether a preliminary injunction is appropriate: (1) whether the plaintiff has shown a strong or substantial likelihood or probability of success on the merits; (2) whether the plaintiff has shown irreparable injury; (3) whether the issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing a preliminary injunction. See *Timbisha Shoshone Tribe v. Kennedy*, 687 F. Supp. 2d 1171, 1182 (E.D. Cal. 2009).

## DISCUSSION

The Movant appears to be seeking a mandatory injunction to have Mr. Harrison turnover the funds to be held by the Trustee pending further order of the court. Mr. Goodwin, a real party in interest to the instant Adversary Proceeding, filed a non-opposition, essentially consenting to the court granting an preliminary injunction for the turnover of the funds. In considering the factors, it appears they all weigh in favor of issuing the injunction.

However, as stated in Mr. Goodwin's declaration, Mr. Goodwin asserts that he is no longer holding the funds at issue in this instant Motion. Mr. Goodwin alleges that when Mr. McCann was substituted in as counsel for Defendant in the underlying state case, Mr. Goodwin transferred the funds held for Movant to Mr. McCann.

Mr. Goodwin does not provide any accounting or evidence of this transfer and the court is unable to determine if Mr. Goodwin transferred the full \$3,289.07 to Mr. McCann to be held in trust. Unfortunately, seeing that Mr. McCann is not named in the instant Motion nor in the Adversary Proceeding, the court does not have jurisdiction to order Mr. McCann to turnover the funds, at this time.

While it is not clear whether Mr. Goodwin qualifies as a custodian under the definition of 11 U.S.C. § 101(11), in the interest of the estate, to preserve any interest in the funds, if any exists, and to ensure judicial economy and ease in the turnover of these funds, the court orders the following:

1. Mr. Goodwin deliver any and all funds held in trust for Movant to David Cusick, the Chapter 13 Trustee on or before **March 5, 2015**.
2. Mr. Goodwin shall file on or before **March 5, 2015**, with this court a Notice of Transfer, providing a specific accounting of any funds transferred that were held in trust for the Movant, the name and location of the transferees, and the date of such transfer.
3. Mr. Goodwin shall serve Mr. McCann and any other transferee of any monies subject to this order that were in Mr. Goodwin's trust account and transferred by him to another person a copy of the court's order on this Motion.
4. Mr. McCann and any other transferee is authorized to turnover

any funds held in trust for Movant to David Cusick, the Chapter 13 Trustee, with all liens, interests, or claims remaining attached to the monies.

As to the Movant's request for the Order to Show Cause, the request is denied without prejudice. The Movant does not name Mr. Goodwin or Mr. McCann as a defendant in the instant Adversary Proceeding nor was Mr. McCann named in the instant Motion. The Movant appears to be requesting the court to implicitly amend the Movant's complaint to expand the scope of the relief sought. This is improper. If the Movant wishes to include any claims against both Mr. Goodwin and Mr. McCann, Movant may amend the complaint to name them as defendants.

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

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

The Motion for Turnover of Property filed by the Faith Evans having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion for Turnover of Property is granted.

**IT IS FURTHER ORDERED** that Harrison Goodwin shall deliver on or before **March 5, 2015**, possession of any monies held in trust on behalf of or for the benefit of Faith Evans or Daniel Moulton which relate to the matters in this Adversary Proceeding to David Cusick, the Chapter 13 Trustee, who shall hold such monies pending further order of the court. All liens, interests, and rights in such monies as they existed when held by Mr. Goodwin shall continue in full force and effect while such monies are held by the Chapter 13 Trustee pursuant to this Order.

**IT IS FURTHER ORDERED** that Harrison Goodwin shall file with this court on or before **March 5, 2015**, a Notice of Transfer which specifically states the amount of any funds held in trust on behalf of Faith Evans transferred, the name and location of the transferees, and the date of such transfers.

**IT IS FURTHER ORDERED** that Harrison Goodwin shall serve and file with the court a certificate of service thereof on or before **March 5, 2015**, a copy of this Order instant Order on Robert McCann and any other transferee of the funds held in trust on behalf of Faith Evans or Daniel Moulton which relate to the matters in this Adversary Proceeding.

**IT IS FURTHER ORDERED** that Robert McCann and any other transferee are authorized to deliver possession of any funds held in trust on behalf of or for the benefit of Faith Evans or Daniel Moulton which relate to the matters in this

Adversary Proceeding to David Cusick, the Chapter 13 Trustee, who shall hold such monies pending further order of the court. All liens, interests, and rights in such monies as they existed when held by Mr. McCann or other transferee shall continue in full force and effect while such monies are held by the Chapter 13 Trustee pursuant to this Order.

7. [13-22028-E-13](#) FAITH EVANS MOTION FOR TURNOVER OF FUNDS  
[14-2105](#) BLG-3 HELD IN TRUST BY DAVID L.  
EVANS V. MOULTON ET AL BROWN, ESQ. AND/OR MOTION FOR  
ORDER FOR ACCOUNTING OF  
PROPERTY  
1-26-15 [[40](#)]

**Final Ruling:** No appearance at the February 26, 2015 hearing is required.  
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on January 26, 2015. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

The Motion for Turnover has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion for Turnover is granted.**

Faith Evans, Plaintiff-Debtor, ("Movant") in the above entitled case and moving party herein, seeks an order for turnover as to the property held in trust by David L. Brown, Esq. in connection with the divorce case (DFR-0039659 in Place County, California) involving Movant to David Cusick, the Chapter 13 Trustee.

Movant alleges that Mr. Brown is holding \$2,375.72 in trust on behalf of Movant.

February 26, 2015 at 1:30 p.m.

- Page 18 of 25 -

Movant requests that within 14 days, Mr. Brown turnover the funds to the Trustee and that the Trustee hold the funds in the account with the proceeds from the sale of the liquor license until the court orders its disbursement into the plan. Movant further requests that within 14 days, Mr. Brown file and serve a current accounting in compliance with Fed. R. Bankr. P. 6002.

#### **DAVID BROWN'S NOTICE OF NON-OBJECTION AND ACCOUNTING**

David Brown filed a Notice of Non-Objection on February 5, 2015. Dckt. 51. Mr. Brown states that he has no objection to the instant Motion. Furthermore, Mr. Brown attaches as Exhibit A accounting of the funds held by him on behalf of the Movant. The total held is \$2,375.72 according to the accounting provided.

#### **HARRISON GOODWIN'S NOTICE OF NON-OBJECTION**

Harrison Goodwin filed a Notice of Non-Objection on February 11, 2015. Dckt. 52.

#### **APPLICABLE LAW**

The filing of a bankruptcy petition under 11 U.S.C. §§ 301, 302 or 303 creates a bankruptcy estate. 11 U.S.C. § 541(a). Bankruptcy Code Section 541(a)(1) defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case."

11 U.S.C. § 543 provides, in relevant part:

(a) A custodian with knowledge of the commencement of a case under this title concerning the debtor may not make any disbursement from, or take any action in the administration of, property of the debtor, proceeds, product, offspring, rents, or profits of such property, or property of the estate, in the possession, custody, or control of such custodian, except such action as is necessary to preserve such property.

(b) A custodian shall--

(1) deliver to the trustee any property of the debtor held by or transferred to such custodian, or proceeds, product, offspring, rents, or profits of such property, that is in such custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case; and

(2) file an accounting of any property of the debtor, or proceeds, product, offspring, rents, or profits of such property, that, at any time, came into the possession, custody, or control of such custodian.

A custodian is defined as: (1) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title; (2) assignee under a general assignment for the benefit of the debtor's creditors; or (3) trustee, receiver, or agent under applicable law, or under

a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors. 11 U.S.C. § 101(11). The term "custodian" is intended "to encompass a variety of pre-petition agents who had taken charge of the debtor's assets. . . . The categories of custodians [in the definition] are descriptive rather than exhaustive." In re Cash Currency Exch., Inc., 762 F.2d 542, 553 (7th Cir. 1985).

To establish a right to turnover under § 543, it must be shown that the custodian has possession, custody, or control of property which is property of the debtor. The burden of proof rests on the party seeking turnover.

Pursuant to Fed. R. Bankr. P. 7065 and Fed. R. Civ. P. 65. Courts have developed a four factors to consider when determining whether a preliminary injunction is appropriate: (1) whether the plaintiff has shown a strong or substantial likelihood or probability of success on the merits; (2) whether the plaintiff has shown irreparable injury; (3) whether the issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing a preliminary injunction. See *Timbisha Shoshone Tribe v. Kennedy*, 687 F. Supp. 2d 1171, 1182 (E.D. Cal. 2009).

## **DISCUSSION**

A review of the Motion and in light of the non-opposition, the court finds that the \$2,37.72 held in trust by Mr. Brown is property of the estate as defined by 11 U.S.C. § 541. As property of estate, Mr. Brown can be ordered to turnover the property to the Trustee.

The Movant appears to be seeking an injunction to have Mr. Brown turnover the funds to be held by the Trustee pending further order of the court. Mr. Brown, the a real party in interest to the instant Adversary Proceeding, filed a non-opposition, essentially consenting to the court granting an preliminary injunction for the turnover of the funds. In considering the factors, it appears they all weigh in favor of issuing the injunction.

While it is not clear whether Mr. Brown qualifies as a custodian under the definition of 11 U.S.C. § 101(11), in the interest of the estate and to preserve any interest in the funds, if any exists, the court finds that an issuance of an injunction for Mr. Brown to turnover the funds to the Trustee to hold.

Therefore, the Motion is granted and David Brown is ordered to turnover the \$2,375.72 held in trust on behalf of or for the benefit of Faith Evans or Daniel Moulton to David Cusick, the Chapter 13 Trustee.

While Mr. Brown has provided an accounting as an Exhibit to his Notice of Non-Objection, Mr. Brown has did not provide the accounting under penalty of perjury. To avoid any dispute concerning these representations, the court orders that Mr. Brown file a Notice of Accounting, signed under the penalty of perjury, with the court on or before March 5, 2015 which specifically states the amount of any funds held in trust on behalf of or for the benefit of Faith Evans or Daniel Moulton which relate to the matters in this Adversary

Proceeding.

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

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

The Motion for Turnover of Property filed by the Faith Evans having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion for Turnover of Property is granted.

**IT IS FURTHER ORDERED** that David Brown shall deliver on or before March 5, 2015, possession of the \$2,375.72 held in trust on behalf of or for the benefit of Faith Evans or Daniel Moulton which relate to the matters in this Adversary Proceeding to David Cusick, the Chapter 13 Trustee, who shall hold such monies pending further order of the court. All liens, interests, and rights in such monies as they existed when held by Mr. Brown shall continue in full force and effect while such monies are held by the Chapter 13 Trustee pursuant to this Order.

**IT IS FURTHER ORDERED** that Harrison Goodwin shall file with this court on or before **March 5, 2015**, a Notice of Accounting which specifically states the amount of any funds held in trust on behalf of or for the benefit of Faith Evans or Daniel Moulton which relate to the matters in this Adversary Proceeding.

8. [10-26240-E-13](#) STEVE/KRISTINE SCHARER  
[14-2253](#)  
SCHARER ET AL V. WELLS FARGO  
BANK, N.A.

CONTINUED STATUS CONFERENCE RE:  
AMENDED COMPLAINT  
10-9-14 [[12](#)]

**Final Ruling: No appearance at the February 26, 2015 Status Conference is required.**

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Plaintiff's Atty: Selwyn D. Whitehead  
Defendant's Atty: Regina J. McClendon; Lindsey E. Kress

Adv. Filed: 8/28/14  
Answer: none

Amd Cmplt Filed: 10/9/14  
Reissued Summons: 10/10/14  
Answer: none

Nature of Action:  
Dischargeability - other  
Other (e.g. other actions that would have been brought in state court if unrelated to the bankruptcy case)

**The Status Conference is continued to 1:30 p.m. on March 26, 2015, the Parties reporting that they are engaged in substantive, constructive settlement negotiations.**

Notes:

Continued from 1/21/15 to be conducted in conjunction with the hearing on the Motion to Dismiss the Complaint.

[LLL-3] Stipulation to Continue the Status Conference and the Hearing on Defendant's Motion to Dismiss the First Amended Complaint filed 2/11/15 [Dckt 34]; order pending [stipulation requests continuance to 3/26/15]

9. [10-26240-E-13](#) STEVE/KRISTINE SCHARER  
[14-2253](#) LLL-3  
SCHARER ET AL V. WELLS FARGO  
BANK, N.A.

MOTION TO DISMISS ADVERSARY  
PROCEEDING  
11-24-14 [[29](#)]

**Final Ruling:** No appearance at the February 26, 2015 hearing is required.  
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on November 24, 2014. By the court's calculation, 94 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion to Dismiss is continued to 1:30 p.m. on March 26, 2015.**

Wells Fargo Bank, N.A. filed a motion to Dismiss Steve and Kristine Scharer's ("Plaintiff-Debtors") First Amended Complaint for Failure to State a Claim on November 24, 2014. Dckt. 24.

On February 11, 2015, Wells Fargo Bank, N.A. filed a stipulation between Wells Fargo Bank, N.A. and Plaintiff-Debtors to continue the hearing on the Motion. Dckt. 34. The Stipulation states that the parties are currently discussing whether a resolution of the case may be possible. The parties state that they have agreed to continue the Motion to March 26, 2015.

The court finds that, in light of the filed Stipulation and the efforts of the parties to reach a settlement, the court continues the hearing to 1:30 p.m. on March 26, 2015.

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

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

The Motion to Dismiss filed by Wells Fargo Bank, N.A.

February 26, 2015 at 1:30 p.m.

having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is continued to 1:30 p.m. on March 26, 2015.

10. [14-23471](#)-E-11 ERROL/SUZANNE BURR CONTINUED MOTION FOR REMAND  
[14-2184](#) BSK-1 7-14-14 [[12](#)]  
BURR ET AL V. SHINE ET AL

**Final Ruling:** No appearance at the February 26, 2015 hearing is required.  
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Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and parties requesting special notice on July 14, 2014. By the court's calculation, 45 days' notice was provided. 28 days' notice is required.

The Motion for Remand has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

**The Motion to Remand is continued to 1:30 p.m. on April 23, 2015.**

Errol and Suzanne Burr ("Plaintiff-Debtors") removed a state court action to this court by Notice of Removal file don June 24, 2014. Dckt. 1.

On July 14, 2014, Raymond Shine ("Defendant-Shine") filed a Motion to Remand. Dckt. 12.

On August 12, 2014, the Chapter 11 Trustee, as the successor plaintiff to the Plaintiff-Debtors, ("Plaintiff-Trustee") filed a Motion by which Plaintiff-Trustee and Defendant-Shine requested that the hearing on the Motion to Remand be continued. Motion, Dckt. 20. The court granted the Motion and continued the hearing to 1:30 p.m. on October 9, 2014. Dckt. 22.

**February 26, 2015 at 1:30 p.m.**

On August 12, 2014, the Plaintiff-Trustee filed a Motion by which Plaintiff-Trustee and Defendant-Shine requested that the hearing on the Motion to Remand be continued. Motion, Dckt. 20. On September 26, 2014, the court granted the Motion and continued the hearing to 1:30 p.m. on November 6, 2014. Dckt. 28.

On August 12, 2014, the Plaintiff-Trustee filed a Motion by which Plaintiff-Trustee and Defendant-Shine requested that the hearing on the Motion to Remand be continued. Motion, Dckt. 20. The court grants this third motion and continues the hearing on the Motion to Remand to 1:30 p.m. on December 11, 2014.

On November 25, 2014, the Plaintiff-Trustee filed a Motion by which Plaintiff-Trustee and Defendant-Shine requested that the hearing on the Motion to Remand be continued. Motion, Dckt. 50. The court granted this fourth motion and continued the hearing on the Motion to Remand to 1:30 p.m. on January 8, 2015. Dckt. 52.

On December 19, 2014, the Plaintiff-Trustee filed a Motion by which Plaintiff-Trustee and Defendant-Shine requested that the hearing on the Motion to Remand be continued. Motion, Dckt. 55. The court granted this fifth motion and continued the hearing on the Motion to Remand to 1:30 p.m. on February 26, 2015. Dckt. 57.

On February 12, 2015, the Plaintiff-Trustee filed a Motion by which Plaintiff-Trustee and Defendant-Shine requested that the hearing on the Motion to Remand be continued. Motion, Dckt. 62. The court granted this sixth motion and continued the hearing on the Motion to Remand to 1:30 p.m. on April 23, 2015. Dckt. 64. The court further ordered that the deadline for the Trustee to file opposition, if any, is April 9, 2015. Further, the deadline for Defendant-Shine to file a reply if any, is April 16, 2015. Additionally, the court continued the status conference to 2:30 p.m. on May 27, 2015.

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

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

The Motion for Remand filed by Raymond E. Shine having been presented to the court, the Parties having requested that the hearing be continued, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the hearing on the Motion to Remand is continued to 1:30 p.m. on April 23, 2015.