UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

April 14, 2016 at 1:30 p.m.

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1. **10-28701-E-13 STANLEY/JANELLE ORR** **MOTION TO VACATE ENTRY OF**
15-2250 GED-1 **DEFAULT O.S.T.**
ORR ET AL V. NATIONSTAR MORTGAGE, LLC ET AL **3-31-16 [34]**

Tentative Ruling: The Motion to Vacate Default (Dckt. 34), Motion for Entry of Default Judgment against The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificate Holders of CWHEQ Inc., Home Equity Loan Asset Backed Certificates, Series 2007-S2 (Dckt. 17) and Motion for Entry of Default Judgment against Nationstar Mortgage, LLC (Dckt. 23) was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion.

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, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(iii).

Local Rule 9014-1(f)(3) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Defendants, parties requesting special notice on March 31, 2016. By the court's calculation, 12 days' notice was provided.

The Motion to Vacate Default (Dckt. 34), Motion for Entry of Default Judgment against The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificate Holders of CWHEQ Inc., Home Equity Loan Asset Backed Certificates, Series 2007-S2 (Dckt. 17) and Motion for Entry of Default Judgment against Nationstar Mortgage, LLC (Dckt. 23) was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in

interest were not required to file a written response or opposition to the motion. At the hearing ----------.

Motion to Vacate Entry of Default is granted and the defaults entered on January 28, 2016 against Nationstar Mortgage, LLC and The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificate Holders of CWHEQ Inc., Home Equity Loan Asset Backed Certificates, Series 2007-S2 (Dckt. 10 and 12, respectively) are vacated.

Nationstar Mortgage, LLC and The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificate Holders of CWHEQ Inc., Home Equity Loan Asset Backed Certificates, Series 2007-S2 ("Defendant") filed the instant Motion to Vacate Entry of Default on March 31, 2016. Dckt. 34. The Motion was set pursuant to an Order Shortening Time. Dckt. 38.

Set on the same calendar are two Motions for Entry of Default Judgment filed by Stanley Allen Orr and Janelle Clair Orr ("Plaintiffs-Debtor"), based on the entry of default filed on January 28, 2016. Dckts. 17 and 23.

COMPLAINT

The Complaint was filed on December 23, 2015 by Stanley Allen Orr and Janelle Claire Orr ("Plaintiffs-Debtor"). Dckt. 1. The Adversary Proceeding No. 15-2250 named Nationstar Mortgage LLC and The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of CWHEQ Inc. Home Equity Loan Asset Backed Certificates Series 2007-S2 as Defendants. The Complaint provides for the following causes of action:

1. Declaratory Relief/Quiet Title

    a. Plaintiff-Debtor requests that contained in any judgment is language equivalent to a Deed of Reconveyance that directs that title be reconveyed (returned) to the Plaintiff-Debtor which includes "all right, title and interest" acquired by said Deed of Trust to Defendant related to the Second Deed of Trust they hold.

    b. Requests attorney's fees as allowed for in the contract and California Civil Code § 1717.

2. Violation of California Civil Code § 2941(d)

    a. Requests damages equal to all attorneys fees and costs, as allowed for in the contract between the parties, they will sustain as a result of bringing the instant action and a statutory penalty of $500.00.

3. California Fair Debt Collection Practices Act Violations

   a. Violations of Rosenthal Fair Debt Collection Practices Act; California Civil Code §§ 1788-1788.32

   b. Defendants have a history of failing to reconvey deeds of trust required to be removed upon completion of Chapter 13 cases and requiring debtors to file adversary proceedings.

   c. Defendants violation is a wilful disregard of the rights of the Plaintiff-Debtor and the Plaintiff-Debtor is entitled to actual damages, a statutory penalty of no less than $100.00 and no more than $1,000.00 and actual attorney fees.

4. Unfair Practices under California Business & Professions Code Section 17200, et seq.

   a. Plaintiff-Debtor asserts that the Defendants have engaged in deceptive business practices with respect to demanding payments from Plaintiff-Debtor.

   b. Plaintiff-Debtor asserts that the Defendants have engaged in deceptive business practices with respect to their business of owning and servicing loans as they improperly assess fees and misallocate payments.

   c. Plaintiff-Debtor argues that they are entitled to injunctive relief and attorney's fees as available under California Business and Professions Code § 17200 and related sections.

5. Slander of Title

   a. Defendants falsely allege an ownership interest in the property of Plaintiff-Debtor by keeping the deed of trust of record.

   b. Plaintiff-Debtor have damages in an ongoing amount in the form of having to secure a new loan to pay off the high interest rate first mortgage; higher interest rates; and updated appraisals and costs.

   c. Plaintiff-Debtor requests damages in the amount of $1,000,000.00 as punitive damages for "outrageous conduct of the Defendants."

6. Attorney's Fees

   a. While not mandatory (with the most recent amendment to Fed. R. Bank. P. 7008(b)), Plaintiff-Debtor clearly states a claim attorneys' fees.

On January 26, 2016, the defaults of Nationstar Mortgage, LLC (Dckt. 10) and Bank of New York Mellon, Trustee, (Dckt. 12) were entered. This Motion to Vacate the two defaults was filed on March 31, 2016. Dckt. 34.

The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 7007, upon which the request for relief is based:

A. "PLEASE TAKE NOTICE that on April 14, 2016 at 1:30 p.m. or as soon thereafter as this matter may be heard in Department E of the above-entitled Court located at 501 I Street, 6th Floor, Sacramento, California, 95814, Defendants Nationstar Mortgage, LLC ("Nationstar") and The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificate Holders of CWHEQ Inc., Home Equity Loan Asset Backed Certificates, Series 2007-S2 ("BONY"), will move this Court for entry of Order vacating the Court's Order of Default entered on January 28, 2016."

B. "Please be advised counsel for Defendants herein advised the Court's clerk concerning the filing of this Motion, as well as Defendants' concurrently filed Opposition to the Motion for Default Judgment filed by adversary Plaintiffs herein, Stanley Allen Orr and Janelle Clair Orr ("Plaintiffs"), set for hearing in this Court on April 14, 2016, at 1:30 pm. Defendants request the Court order a briefing schedule such that the related matters will be decided at the same time. A motion for an order shortening time has also been filed."

C. "This Motion for entry of an Order vacating the Court's previously entered Entry of Default is made on the grounds that Defendants did not engage in culpable conduct that led to the default that Defendants have a meritorious defense, and Plaintiffs would not be prejudiced by vacatur of the Order of default, therefore warranting the vacatur of the January 28, 2016 Entry of Default."

D. "This motion is and shall be based upon this notice of motion and motion, the memorandum of points and authorities, filed and served currently, the Nationstar declaration and exhibits, filed and served concurrently, all pleadings and papers on file in this matter, and upon such other matters of which this Court may take judicial notice."

E. "WHEREFORE, the defendants, Nationstar and The Bank of New York Mellon pray that this Court vacate the entry of default Order entered on January 28, 2016, and for such further relief as this Court deems just.

Dckt. 34.

Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007 require that the motion shall state with particularity the grounds upon which the relief is requested. As provided in Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents, the motion

is a separate pleading from the points and authorities, which is separate from each declaration, which is separate from the exhibits document (with all exhibits permitted to be included in one document to be referenced by the other pleadings).

The "grounds" stated with particularity in this Motion consist of the statement,

> "This motion is and shall be based upon this notice of motion and motion, the memorandum of points and authorities, filed and served currently, the Nationstar declaration and exhibits, filed and served concurrently, all pleadings and papers on file in this matter, and upon such other matters of which this Court may take judicial notice."

Motion, p. 2:23-27.

In substance, the Motion instructs the court to canvas all of the other pleadings in the file for this Adversary Proceeding and whatever else the court wants to take notice of, assemble whatever grounds the court believes should be stated in the Motion, then state those grounds for the Defendant, and finally, rule on the grounds which the court states for Defendant (based on what the court believes Defendant would want stated, if Defendant had complied with F. R. Civ. P. 7(b)) the grounds.

Defendant has filed a "Points and Authorities" in support of the Motion. Dckt. 35. The first two pages of the "Points and Authorities" contain or legal points or authorities, but contains extensive factual allegations - the type of allegations which should be stated as "grounds" in the Motion.

Then beginning on page 5 of the "Points and Authorities," the factual allegations of facts begin again. The actual legal points and authorities are modest - and well focused - by Defendant, but scattered among various allegations and contentions.

The pleading title "Points and Authorities" is a combined motion and points and authorities in which the grounds upon which the motion is based are buried in detailed citations, quotations, legal arguments, and factual arguments (the pleading being a "Mothorities") in which the court and Plaintiff are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Defendant. The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party.

The court has also observed that the more complex the Mothorities in which the grounds are hidden, the more likely it is that no proper grounds exist. Rather, the moving party is attempting to beguile the court and other party.

In such situations, the court routinely denies the motion without prejudice and without hearing. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a

moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a differential application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiff and defendants, or case and adversary proceedings. The rules are simple and uniformly applied.

However, the court will waive the defect for purposes of the instant Motion. The Parties are at an early juncture, and as discussed, not one in which the law favors summarily determining the matter procedurally and precluding parties the ability, if they chose to properly and diligently prosecute the litigation, to have a determination on the merits.

Defendant and Defendant's counsel should not anticipate that the court will routinely waive the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, Federal Rules of Evidence, and Local Bankruptcy Rules to fit Defendant's modification of such Rules. The court will not be so lenient in the future with failures to properly comply with the rules.

Defendant's Mothorities

Shifting through the Mothorities, the court distills out the following "grounds" upon which Defendant relies as the basis for the relief requested.

To begin, the Defendant states that they do not contest the fact that the subject lien was "stripped" via Plaintiff-Debtor's underlying bankruptcy proceeding. Defendant Nationstar states that it has already caused the Reconveyance of that loan to issue and be recorded with the Place County Recorder, which was sent to the Placer County Recorder on January 8, 2016 and recorded by the County on January 20, 2016. The Defendants assert that the relief requested by Plaintiff-Debtor's complaint have thus been satisfied.

Defendant Nationstar alleges that it did not respond to the Complaint when initially served because there was a management change in the bankruptcy litigation group that took place around the same time the Complaint was served. Due to this change, Defendant Nationstar argues that it was not until the Defendant was served the Motions for Entry of Default Judgment.

Defendant states that once receiving notice of its default, Defendant hired counsel to present the following Motion. Defendant states that Defendant is hopeful that they can resolve any remaining issues in the complaint, especially given the reconveyance has been recorded.

As to the grounds to vacate the default, Defendant Nationstar asserts that it has not engaged in culpable conduct that led to its default. Defendant Nationstar asserts that it only failed to answer because of administrative error.

Next, Defendants argue that they have meritorious defense as to the Complaint. Defendant Nationstar asserts that because the reconveyance has taken place, there is no cause of action remaining.

Plaintiff-Debtor's Motion for Default Judgment acknowledges that Defendant Nationstar caused the reconveyance to be issued and recorded.

Plaintiff-Debtor argues, however, that the substitution of trustee that accompanied the Reconveyance was not properly prepared, and thus the Reconveyance that was recorded was ineffective. Plaintiff-Debtor's claim the real party in interest, Defendant BONY, should have executed the substitution and not Defendant Nationstar. Plaintiff-Debtors claim that the lien remains a cloud on title which the Plaintiff-Debtor alleges entitles them to damages.

Defendant argues that Defendant BONY appointed Defendant Nationstar as its attorney in fact via a Limited Power of Attorney dated June 10, 2015. Defendant asserts that the power of attorney was executed seven months before execution of the Substitution of Trustee and the Reconveyance of Plaintiff-Debtors' loan on January 8, 2016. Defendant argues that based on that Power of Attorney Defendant Nationstar was authorized to sign the Substitution of Trustee and the Reconveyance.

Lastly, Defendants assert that no prejudice will come to Plaintiff-Debtor by setting aside the entry of default. Defendant asserts that there is no prejudice because the Motion was filed about two months after the entry of default and the reconveyance has been recorded.

Applicable Law

Pursuant to Fed. R. Civ. P. 55(c), incorporated herein by Fed. R. Bankr. P. 7055, the court may set aside the defendant's default for good cause shown. The factors the court is to consider are (1) whether the defendant engaged in culpable conduct that led to the default; (2) whether the defendant had a meritorious defense; or (3) whether setting aside the default would prejudice the plaintiff. *Franchise Holding II, LLC v. Huntington Rests. Group, Inc*., 375 F.3d 922, 925-26 (9th Cir. 2004). These factors are in the disjunctive; the court may deny a motion to set aside a default if any of the three factors is shown. Id. at 926. However, the court is not required to do so. *Brandt v. Am. Bankers Ins. Co*., 653 F.3d 1108, 1112 (9th Cir. 2011). The defendant bears the burden of demonstrating that at least one of these factors favors setting aside the default. *Franchise Holding II*, 375 F.3d at 926. But it is not extremely heavy and "judgment by default is a drastic step appropriate only in extreme circumstances; a case should, whenever possible, be decided on the merits." *Id*. at 1091.

Discussion

As discussed supra, the burden for a Motion to Vacate Default is lesser than the burden imposed by a Motion to Vacate pursuant to Fed. R. Civ. P. 60(b). The Defendants must show "good cause" to set aside the default. Here, the Defendants allege that they failed to respond timely because of a management change at Defendant Nationstar led to the complaint and deadline for response to "fall through the cracks."

Pursuant to the factors listed by the Ninth Circuit, the Defendants have made a sufficient showing of good cause that the default was entered due to an inadvertence on behalf of the Defendants during a management change. A review of the pleadings and the Defendant Nationstar's declaration, there does not appear to have been a wilful and intentional avoidance in answering the Complaint. Rather, it appears that during the shift in management, some files were mishandled and were not properly calendared with deadlines.

While the court does recognize that the Plaintiff-Debtor has filed and served Motions for Entry of Default Judgment for each of the Defendant's on February 29, 2016, there does not appear to be any prejudice to the Plaintiff-Debtor if the court were to vacate the default.

Federal courts operate on the premise that judgment should be decided on the merits whenever possible. While there is a technical default here by the Defendants, the entry of such default was an inadvertent oversight by the Defendants rather than a purposeful strategic move.

Therefore, the court finding good cause to vacate the default and the court not finding the Plaintiff-Debtor prejudiced by such, the Motion to Vacate Default is granted. The defaults entered on January 28, 2016 against Nationstar Mortgage, LLC and The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificate Holders of CWHEQ Inc., Home Equity Loan Asset Backed Certificates, Series 2007-S2 (Dckt. 10 and 12, respectively) are vacated.

Nationstar Mortgage, LLC and The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificate Holders of CWHEQ Inc., Home Equity Loan Asset Backed Certificates, Series 2007-S2, and each of them, shall file and serve their respective responsive pleadings to the Complaint on or before May 4, 2016.

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 Vacate Default (Dckt. 34), Motion for Entry of Default Judgment against The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificate Holders of CWHEQ Inc., Home Equity Loan Asset Backed Certificates, Series 2007-S2 (Dckt. 17) and Motion for Entry of Default Judgment against Nationstar Mortgage, LLC (Dckt. 23) 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 to Vacate Entry of Default is granted and the defaults entered on January 28, 2016 against Nationstar Mortgage, LLC and The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificate Holders of CWHEQ Inc., Home Equity Loan Asset Backed Certificates, Series 2007-S2 (Dckt. 10 and 12, respectively) are vacated.
>
> **IT IS FURTHER ORDERED** that Nationstar Mortgage, LLC and The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificate Holders of CWHEQ Inc., Home Equity Loan Asset Backed Certificates, Series 2007-S2, and each of them, shall file and serve their respective responsive pleadings to the Complaint on or before May 4, 2016.

2. 10-28701-E-13 STANLEY/JANELLE ORR **MOTION FOR ENTRY OF DEFAULT**
15-2250 PLC-2 **JUDGMENT**
ORR ET AL V. NATIONSTAR MORTGAGE, LLC ET AL **2-29-16 [17]**

Tentative Ruling: 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).

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.

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 Defendants Nationstar Mortgage, LLC and Bank of New York Mellon, Trustee, on February 29, 2016. By the court's calculation, 59 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) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor 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 as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The Motion for Entry of Default Judgment is denied without prejudice.

MOTIONS FOR ENTRY OF DEFAULT JUDGMENT

On February 29, 2016, the Plaintiff-Debtor filed Motions for Default Judgments against Defendant Nationstar and BONY, respectively. Dckt. 17 and 23.

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.

As a first step, prior to the court can determine if default judgment is proper, there must be a default entry. Pursuant to a separate motion filed by the Defendants (DCN: GED-1, Dckt. 34), the Defendants have made a showing of good cause that the default was entered due to inadvertent oversight of Defendants transition to new management system. The court vacated the defaults in light of the Motion to Vacate Default set on an order shortening time.

Therefore, the court having vacated the defaults of Defendants Nationstar Mortgage, LLC and The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificate Holders of CWHEQ Inc., Home Equity Loan Asset Backed Certificates, Series 2007-S2, the Motions for Default Judgment are denied without prejudice.

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 Janelle and Stanley Orr, Plaintiff-Debtor having been presented to the court, the court having vacated the defaults on both Defendants, 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 denied without prejudice.

3. 10-28701-E-13 STANLEY/JANELLE ORR
15-2250 PLC-3
ORR ET AL V. NATIONSTAR MORTGAGE, LLC ET AL

MOTION FOR ENTRY OF DEFAULT JUDGMENT
2-29-16 [23]

Tentative Ruling: 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).

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.

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 Defendants Nationstar Mortgage, LLC and Bank of New York Mellon, Trustee, on February 29, 2016. By the court's calculation, 59 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) and Federal Rule of Bankruptcy Procedure 4003(b). The failure of the Debtor 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 as consent to the granting of the motion. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The Motion for Entry of Default Judgment is denied without prejudice.

MOTIONS FOR ENTRY OF DEFAULT JUDGMENT

On February 29, 2016, the Plaintiff-Debtor filed Motions for Default Judgments against Defendant Nationstar and BONY, respectively. Dckt. 17 and 23.

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.

As a first step, prior to the court can determine if default judgment is proper, there must be a default entry. Pursuant to a separate motion filed by the Defendants (DCN: GED-1, Dckt. 34), the Defendants have made a showing of good cause that the default was entered due to inadvertent oversight of Defendants transition to new management system. The court vacated the defaults in light of the Motion to Vacate Default set on an order shortening time.

Therefore, the court having vacated the defaults of Defendants Nationstar Mortgage, LLC and The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificate Holders of CWHEQ Inc., Home Equity Loan Asset Backed Certificates, Series 2007-S2, the Motions for Default Judgment are denied without prejudice.

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 Janelle and Stanley Orr, Plaintiff-Debtor having been presented to the court, the court having vacated the defaults on both Defendants, 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 denied without prejudice.

4. 15-28108-E-11 WILLARD BLANKENSHIP
16-2010
KLETCHKO ET AL V. BLANKENSHIP ET AL

MOTION TO DISMISS SECOND AMENDED COMPLAINT
3-1-16 [19]

Tentative Ruling: 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).

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.

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 Plaintiffs' counsel, Debtor's counsel, and the Office of the United States Trustee on February 29, 2016. By the court's calculation, 45 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). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss is granted and Defendants Stanley Lieber, Howard Williams, Gary Labin, and Lieber Williams and Labin LLP are dismissed without prejudice from Adversary Proceeding No. 16-02010.

Stanley Lieber, Howard Williams, Gary Labin, and Lieber Williams and Labin LLP ("Defendant") filed the instant Motion to Dismiss Second Amended Complaint. Dckt. 19.

The Motion states the following grounds with particularity pursuant to Federal Rule of Bankruptcy Procedure 7007, upon which the request for relief is based:

A. "PLEASE TAKE NOTICE that on April 14, 2016 at 1:30 p.m. or as soon thereafter as this matter may be heard in the above-entitled court located at 501 I Street, 6th Floor, Sacramento, California, 95814, Defendants, Stanley Lieber, Howard Williams, Gary Labin, and Lieber Williams and Labin LLP, will move this Court to dismiss Plaintiffs' Second Amended Complaint for failure to state a claim, pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure and Rule 12(b)(6) of the Federal Rules of Civil Procedure.

B. "This motion is based upon the attached Memorandum of Points and Authorities, Declaration in Support, the complete files and records in this action, and upon such oral and documentary evidence as may be allowed at the hearing of this motion."

Dckt. 19.

This "Motion" fails to comply with the basic law and motion pleading requirement of Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007. Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007 require that the motion shall state with particularity the grounds upon which the relief is requested. As provided in Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents, the motion is a separate pleading from the points and authorities, which is separate from each declaration, which is separate from the exhibits document (with all exhibits permitted to be included in one document to be referenced by the other pleadings).

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013 (which requires the same "state with particularity in the motion" requirement), the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The Twombly pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. Id. A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." Id. It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plan statement" standard for a complaint.

Law-and-motion practice demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law-and-motion process. These include, sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing. The same is true in Adversary Proceedings - such as now, when Defendants want the Complaint dismissed and Plaintiff barred from having a determination on the merits of the claims.

The court in *Weatherford* considered the impact on the other parties in the bankruptcy case and the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

Weatherford, 434 B.R. at 649-650; see also In re White, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts which will be proved at the hearing).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the particularity of pleading requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] shall state with particularity the grounds therefor, and shall set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's Federal Practice, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819-820 (7th Cir. 1977).

Not pleading with particularity the grounds in the motion can be used as a tool to abuse the other parties to the proceeding, hiding from those parties the grounds upon which the motion is based in densely drafted points

and authorities – buried between extensive citations, quotations, legal arguments and factual arguments. Noncompliance with Bankruptcy Rule 9013 may be a further abusive practice in an attempt to circumvent the provisions of Bankruptcy Rule 9011 to try and float baseless contentions in an effort to mislead the other parties and the court. By hiding the possible grounds in the citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning the actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

For the present Motion, Defendant states that the grounds for relief consist of:

> "This motion is based upon the attached Memorandum of Points and Authorities, Declaration in Support, the **complete files and records in this action**, and upon **such oral and documentary evidence as may be allowed** at the hearing of this motion."

Motion, p. 2:6-8; Dckt. 19 [emphasis added].

In substance, Defendant instructs the court to canvas all of the other pleadings in the file for this Adversary Proceeding and whatever else the court wants to take notice of, assemble whatever grounds the court believes should be stated in the Motion, then state those grounds for the Defendant, and finally, rule on the grounds which the court states for Defendant (based on what the court believes Defendant would want stated, if Defendant had complied with F. R. Civ. P. 7(b)) the grounds.

Defendant has filed a "Points and Authorities" in support of the Motion. Dckt. 22. The first three pages of the "Points and Authorities" contain no legal points or authorities, but contains extensive factual allegations - the type of allegations which should be stated as "grounds" in the Motion. Then beginning on page 7 of the "Points and Authorities," the factual allegations of facts begin again. The actual legal points and authorities are modest - and well focused - by Defendant, but scattered among various allegations and contentions.

The pleading title "Points and Authorities" is a combined motion and points and authorities in which the grounds upon which the motion is based are buried in detailed citations, quotations, legal arguments, and factual arguments (the pleading being a "Mothorities") in which the court and Plaintiff are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Defendant. The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party.

The court has also observed that the more complex the Mothorities in which the grounds are hidden, the more likely it is that no proper grounds exist. Rather, the moving party is attempting to beguile the court and other

party.

In such situations, the court routinely denies the motion without prejudice and without hearing. Law and motion practice in federal court, and especially in bankruptcy court, is not a treasure hunt process by which a moving party makes it unnecessarily difficult for the court and other parties to see and understand the particular grounds (the basic allegations) upon which the relief is based. The court does not provide a differential application of the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules as between creditors and debtors, plaintiff and defendants, or case and adversary proceedings. The rules are simple and uniformly applied.

However, in light of the Plaintiffs having filed an opposition to the instant Motion, the court will waive the defect for purposes of the instant Motion. The court will not be so lenient in the future with failures to properly comply with the Local Bankruptcy Rules and Federal Bankruptcy Rules of Procedure.

FAILURE TO PROVIDE DOCKET CONTROL NUMBER

Defendant's failure to comply with the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and Local Bankruptcy Rules is not limited to the failure to comply with these basic pleading rules. To manage the tremendous law and motion practice in bankruptcy court, a moving party is required to designate a "Docket Control Number" for that motion. L.B.R. 9014-1(c). This Docket Control Number is then used on all pleadings related to that motion and organized in the court's files using that number. The absence of a Docket Control Number creates an unnecessarily confusing situation for the court and other parties.

DEFENDANT'S MOTHORITIES

In conjunction with the Motion, the Defendant filed a "Memorandum of Points and Authorities," which is actually a "Mothorities" (a mash-up of the required grounds from the motion with the legal points and authorities, arguments, contentions, and speculation of Defendant). Dckt. 22. The Defendant begins by asserting that the Second Amended Adversary Complaint contains no cause of action against the Defendants. The Defendant asserts that the only allegation related to Defendant in the Second Amended Complaint is the statement that Willard Blankenship ("Debtor") transferred funds to Defendants Stanley Lieber and Lieber Williams and Labin, LLP which belong to the bankruptcy estate.

<u>The Second Amended Complaint Fails to State a Claim Against Defendants Howard Williams and Gary Labin</u>

The Defendant argues that Defendants Gary Labin and Defendant Howard Williams, partners with Defendant Lieber, Williams & Labin, LLP, are only named in the caption and nowhere else in the Complaint. The Defendant asserts that, after two amendments to the complaint, the Plaintiffs have been unable to present a single claim against Howard Williams and Gary Labin. Furthermore, the Defendant highlights that there is no relief sought against Howard Williams and Gary Labin in the prayer.

The Second Amended Complaint Fails to State a Claim Against Defendants Stanley Lieber and Lieber, Williams & Labin, LLP

The Defendant next argues that the only allegations related to Stanley Lieber and Lieber, Williams & Labin, LLP is contained in the "Factual Background" of the complaint and states:

> Additionally, Debtor has been paying his attorney's fees to his prior counsel, Stanley P. Lieber of Lieber Williams & Labin, LLP, through the sale of his personal property as well as through a lien taken out on the Davis property, which Debtor has admitted. As such, the Lieber firm has been the recipient of preferentially transferred funds which belong to the Bankruptcy estate.

Dckt. 11, ¶ 8. The Defendant argues that there is no other mention of the Defendants elsewhere in the Complaint nor in the prayer. The Defendant argues that the Plaintiffs did not even attempt to state a cause of action.

PLAINTIFF'S OPPOSITION

Michael Kletchko and Patrick Ruedin ("Plaintiff") filed an opposition to the instant Motion on March 31, 2016. Dckt. 28. The Plaintiff asserts that Labin and Williams are named in the complaint because they are the principals of Lieber, Williams & Labin. The Plaintiff alleges that the Defendants have been paid attorney's fees by the Debtor through the use of money of the estate.

First, the Plaintiff asserts that the Defendants failed to indicate in their Notice of Hearing under what rule the Motion is being made. The Plaintiff argues that the Defendants failed to properly comply with Local Bankr. R. 9014-1(d)(3) because the Notice does not contain information as to any requirements of opposition, the deadline for responses, etc. The Plaintiff argues that on this ground alone, the Motion should be denied.

Next, the Plaintiff asserts that Attorney Galperin is engaged in the unauthorized practice of law because he was not admitted to the Eastern District of California when he filed the Motion.

Third, the Plaintiff argues that the Defendants failed to Meet and confer prior to filing the Motion. Additionally, the Plaintiff argues that the Defendants refused to provide evidence refuting the legal presumption that the Plaintiff alleges has arisen that the payments to Defendants must be characterized as preferential.

Fourth, the Plaintiff argues that the there are sufficient facts in the Complaint to constitute a claim. The Plaintiff asserts that when the Debtor made payments to Defendants, the Debtor used proceeds from the very property that he named in his Plan to use for the reverse mortgage and the homestead exemption. The Plaintiff asserts that these facts are enough to show that Defendants were the recipients of funds that belong to the estate. The Plaintiffs offer the following "logic chart":

1. "Debtor pulled out as much money as he could (amounting to over

$100,00) from the David Property, and used that to pay Defendants;"

2. "Debtor then filed Bankruptcy (eight (8) [sic] months later, and is attempting to use a homestead exemption to safeguard an additional $175,000 from the Davis Property; and"

3. "Debtor now wants to take out a reverse mortgage on the Davis Property, which will further deplete any remaining equity in the property, obliterating any chance Plaintiffs and other creditors have of receiving any monies toward payment of their judgment."

Based on this "chart," the Plaintiff argues:

> It is clear that Debtor has implemented a pattern of conduct aimed at defrauding this Court and delaying Plaintiffs and other creditors as much as possible, beginning with pulling out the equity line on the Davis Property to pay Defendants, who have acted in conspiracy with Debtor.

Dckt. 28, pg. 7.

Fifth, the Plaintiffs argue that the Debtor has not and will not join Defendants to the Adversary Proceedings, which allegedly warrants the Plaintiffs to bring the instant action against the Defendants. The Plaintiffs argue that because the Debtor is acting as a Debtor-in-Possession and has failed to bring suit on its own against the Defendants for the alleged preferential transfer, the Plaintiffs has "derivative standing" to assert that claim.

Lastly, the Plaintiff asserts that, if the court finds the complaint insufficient, the Plaintiffs should be given leave to amend.

PLAINTIFF'S EVIDENTIARY OBJECTIONS TO THE DECLARATION OF YURY GALPERIN

Accompanying the Plaintiffs' Opposition, the Plaintiffs filed Evidentiary Objections to the Declaration of Yury Galperin. Dckt. 32. In general, the Plaintiff objects on the following grounds:

1. Evidence outside of the pleadings are impermissible on a Fed. R. Civ. P. 12(b)(6) Motion.

2. Mr. Galperin is not admitted to practice before the United States Bankruptcy Court for the Eastern District of California; and

3. Mr. Galperin's declaration is not properly signed under penalty of perjury.

Specifically, the Plaintiffs object to the following paragraphs in the Declaration (Dckt. 21):

Paragraph and Line	Grounds for objection

Paragraph 4, line 8-13	Lacks foundation; lacks personal knowledge; Declarant is not the custodian of records.
Paragraph 5, line 14-20	Relevance; lacks foundation; lacks personal knowledge; contradicted by the testimony of Kent Salverson, Marc Lazo and Charles Stec.
Paragraph 6, line 21-23	Lacks foundation; lacks personal knowledge; contradicted by California Limited Liability Law; contradicted by admission of counsels' involvement in paragraphs 2 and 4.
Paragraph 7, line 24-27	Lacks foundation; lacks personal knowledge; improper testimony; inadmissible opinion; conjecture.

DEFENDANTS' REPLY

The Defendants filed a reply on April 7, 2016. Dckt. 34. The Defendants reiterate their assertion that there is no cause of action alleged in the Second Amended Complaint against the Defendants.

The Defendants notes that while the Plaintiffs claim some sort of defraud scheme (as outlined in supra in Plaintiffs' Opposition), the Complaint does not contain any of the conclusory allegations.

The Defendants argue that they represented Debtor in litigation and were compensated for their services – final payment beings received by Defendants Lieber and Lieber Williams & Labin from Debtor in February, 2015.

Next, the Defendants argue that there is no evidence that the Debtor has been paying his attorney's fees to his prior counsel, Defendants, in this case. The Defendants argues that this is completely in contrast with the Declaration of Mr. Galperin and is merely a tactic by the Plaintiffs to be litigious.

Third, the Defendants argues that the Plaintiffs have sued a limited liability law partnership and have named individual partners as defendants. The Defendants asserts that there is no allegation made by the Plaintiffs of fraud or alter ego actions to hold the partners liable individually.

Fourth, the Defendants state the no intent to defraud has been shown or alleged. The Defendants argue that there are no allegations of any intent to defraud in the Complaint nor Opposition. Further, if any money was ever paid to Debtor's trial counsel, it would have been for ongoing services and would have occurred many months before the bankruptcy filing.

Fifth, the Defendant argues that the Plaintiffs' counsel's evidentiary objections are deceptive because it is objecting to statements not made by or submitted by the Defendants.

In conclusion, the Defendants sum up their grounds for the instant Motion as follows:

> Plaintiffs' Second Amended Complaint should be dismissed without leave to amend as to Defendants due to Plaintiffs' multiple amendments of the complaint, as well as the fact that there are no allegations against Defendants that Plaintiffs could possibly amend in order to state a claim. No allegations of intent to defraud are made; no dates of any alleged payments are made; no amounts of payments are alleged; no counter declaration was submitted to contradict Defendants' declaration of not receiving any payments from the Debtor or anyone else for that matter since the beginning of the trial. Finally, individual partners of a limited liability partnership are named without any basis in doing so.

Dckt. 34.

APPLICABLE LAW

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).

In Adversary Proceedings, Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007 govern law and motion practice. Rule 7(b) states:

> (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.
>
> (2) Form. The rules governing captions and other matters of form in pleadings apply to motions and other papers.

Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007.

Federal Rule of Civil Procedure 8(a) requires that pleadings which include a claim for relief must contain "(1) a short and plain statement of the grounds for the court's jurisdiction... (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought." Fed. R. Civ. P. 8(a). This rule expressly applies to adversary proceedings in bankruptcy court, as well as some additional requirements which are not relevant for the instant motion. Fed. R. Bankr. P. 7008(a).

The "notice pleading requirements" of Rule 8(a) apply to any cause of action in a complaint. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104 (9th Cir. 2003). When certain claims – like fraud – are made, the required elements in Rule 8(a) must be plead with more specificity. Id. at 1105; Fed. R. Civ. P. 9. To properly plead a claim in which fraud is an essential element, the complaint "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "Particularity" can be satisfied by stating in the complaint "the who, what , when, where, and how" of the wrongful conduct. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997). The policy behind the heightened specificity is to allow defendants a better opportunity to defend themselves against specific fraud allegations, which can be harmful to a defendant's reputation if the charges are unsubstantiated. *Bly-Magee v. Cal.*, 236 F.3d 1014, 1018–1019 (9th Cir. 2001).

11 U.S.C. § 523 Standard

11 U.S.C. § 523(a)(2) – Fraud

In order to prevail on § 523(a)(2)(A) exception to discharge claim, the moving party needs to prove by a preponderance of the evidence:

> (1) that the debtor made material misrepresentations;
>
> (2) that the debtor knew the misrepresentations were false at the time they were made;
>
> (3) that the debtor made the misrepresentations with the intention and purpose of deceiving the creditor;
>
> (4) that the creditor justifiably relied on such misrepresentations and
>
> (5) that the creditor sustained a loss or injury as a proximate result of the misrepresentation having been made."

In re Vidov, No. CC-13-1421-KiBlPa, 2014 Bankr. LEXIS 3268, at *8 (B.A.P. 9th Cir. July 31, 2014). Fraud for purposes of § 523(a)(2)(A) includes actual fraud as well as false pretenses and representations. 4 COLLIER ON BANKRUPTCY ¶ 523.08 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.)

11 U.S.C. § 523(a)(6) - Willful and Malicious Injury

Under § 523(a)(6), a debt will be excepted from discharge when it results from "willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). "A simple breach of contract is not the type of injury addressed by § 523(a)(6)" but instead it must be "[a]n intentional breach. . . accompanied by malicious and willful tortuous conduct." *In re Riso*, 978 F.2d 1151, 1154 (9th Cir. 1992) (emphasis original). In order for § 523(a)(6) to apply, "a breach of contract must be accompanied by some form of tortuous conduct that gives rise to willful and malicious injury." *In re Jercich*, 238 F.3d 1202, 1206 (9th Cir. 2001)(internal quotations omitted).

For the underlying claim to be considered tortuous conduct for § 523(a)(6), California state tort law provides that "[c]onduct amounting to a breach of contract becomes tortuous only when it also violates an independent duty arising from principles." Id. (citing *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 514 (1994)). Tort recovery for the bad faith breach of a contract is permitted only when, "in addition to the breach of the covenant [of good faith and fair dealing] a defendant's conduct violates a fundamental public policy of the state." *Id.* (citing *Rattan v. United Servs. Auto. Assoc.*, 84 Cal. App. 4th 715 (2001)).

The Supreme Court has clarified that "it is insufficient under §523(a)(6) to show that the debtor acted willfully and that the injury was negligently or recklessly inflicted; instead, it must be shown not only that the debtor acted willfully, but also that the debtor inflicted the injury willfully and maliciously rather than recklessly or negligently." Id. (citing

Kawaauhau v. Geiger, 238 F.3d 1202, 1207 (1998)). To prove malicious injury, the party seeking to except a debt from being discharged must show that the debtor: (1) committed a wrongful act; (2) done intentionally; (3) which necessarily causes injury; and (4) was done without just cause or excuse. *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1144-45 (9th Cir. 2002); *Littleton v. Transamerica Commercial Finance*, 942 F.2d 551, 554 (1991).

DISCUSSION

Review of Complaint

To begin, the court begins with a review of the complaint, which the Plaintiffs have titled "Second Amended Complaint Objecting to Discharge of Debts." Dckt. 11. The Plaintiffs assert that they are filing the instant Adversary pursuant to 11 U.S.C. § 727(a)(2)(A) and (B) and 11 U.S.C. § 523(a)(2) and (6).

The Plaintiffs are Michael Kletchki and Patrick Ruedin, creditors of William Blankenship, the Debtor in the pending Chapter 11 case (Bankr. E.D. Cal. No. 15-28108). Plaintiffs are not the Debtor in Possession in that case, nor are they the bankruptcy trustee in that case.

The Plaintiffs are seeking for the court to determine that the judgment held by the Plaintiffs against the Debtor are non-dischargeable because of the Debtor's fraud through the misrepresentations during the sale of the real property commonly known as 31401 Holly Drive, Laguna Beach, California.

In the entire complaint, the Defendants Stanley Lieber, Howard Williams, Gary Labin, and Lieber Williams and Labin LLP are only referenced once in the Factual Background section as follows:

> Additionally, Debtor has been paying his attorney's fees to his prior counsel, Stanley P. Lieber of Lieber Williams & Labin, LLP, through the sale of his personal property as well as through a lien taken out on the Davis property, which Debtor has admitted. As such, the Lieber firm has been the recipient of preferentially transferred funds which belong to the Bankruptcy estate.

Dckt. 11, ¶ 8. Nowhere else in the Complaint are Defendants Stanley Lieber, Howard Williams, Gary Labin, and Lieber Williams and Labin LLP referenced.

The Complaint Fails to State a Claim Against Defendants Stanley Lieber, Howard Williams, Gary Labin, and Lieber Williams and Labin LLP

For Plaintiffs, even if they proved every allegation in the Complaint it would not establish a basis for the court determining that the Defendants owe a debt to the Plaintiffs and that the debt is nondischargeable in the Defendant-Debtor's case.

The cause of action under 523(a)(2) requires that the moving party to show an intentional and purposeful misrepresentation, among other elements. Here, Plaintiff has made generalized allegations of facts only against the Defendant-Debtor.

Nowhere does Plaintiff allege that Defendants Stanley Lieber, Howard Williams, Gary Labin, and Lieber Williams and Labin LLP are subject to claims for nondischargeability of debt and denial of discharge as debtors in a bankruptcy case. Further, no allegations of fraud are asserted against the non-bankruptcy debtor Defendant.

Plaintiff fairs no better under the theory under § 523(a)(6). Again, Plaintiff fails to assert that Defendants Stanley Lieber, Howard Williams, Gary Labin, and Lieber Williams and Labin LLP engaged in wilful and malicious conduct for which their respective discharges in bankruptcy should be denied. Defendant is not a bankruptcy debtor and is not seeking a discharge of debt.

Plaintiffs provide bare-bones cause of actions that simply alleges fraudulent and misleading representations made by the Defendant-Debtor but does not anywhere in the pleadings assert that the Defendants Stanley Lieber, Howard Williams, Gary Labin, and Lieber Williams and Labin LLP

> "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, ibid.; *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (CA7 1994), a plaintiff's obligation to provide the "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,..."

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009),

> "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* [*Twombly*], at 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Ibid. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (brackets omitted)."

As the Complaint currently stands, even taking the Plaintiffs' allegations as true, does not provide sufficient information to find that either under 11 U.S.C. § 523(a)(2) or 11 U.S.C. § 523(a)(6) the judgment from the state court case is excepted from discharge as to this these Defendants who are not debtors in a bankruptcy case.

Use of the Word "Preference" in Second Amended Complaint Does Not Defeat this Motion

Plaintiff appears to argue that because the Defendant-Debtor has not yet filed a cause of action against Defendants Stanley Lieber, Howard Williams,

Gary Labin, and Lieber Williams and Labin LLP for the alleged preferential payment, that the Plaintiff now has "derivative standing" to bring suit.

First, the Complaint does not state a cause of action for avoidance of a preferential payment – the sole cause(s) of action in the Complaint are for non-dischargeability of the Plaintiff's judgment.

Second, the Plaintiffs provide absolutely no legal basis for the premise that the Plaintiffs, as secured creditors, are able to "step in the shoes" of the Defendant-Debtor and prosecute claims of the estate. The Plaintiffs have not ever received authorization of the court to bring a preference action against Defendants Stanley Lieber, Howard Williams, Gary Labin, and Lieber Williams and Labin LLP. This is improper. The Plaintiffs cannot just name defendants in a complaint without having an actual claim against them.

Congress has expressly provided for who may bring an adversary proceeding to avoid a preferential transfer. 11 U.S.C. § 547(b) states:

> "(b) Except as provided in subsections (c) and (I) of this section, **the trustee** may avoid any transfer of an interest of the debtor in property– [stating the required elements of a bankruptcy avoidable preference]"

In 11 U.S.C. § 547(c) Congress provides exceptions to the power of the trustee to avoid a transfer which might otherwise be within the elements specified in 11 U.S.C. § 547(b). In 11 U.S.C. § 547(i) Congress also limited the scope of avoiding preferential transfers in transactions involving insiders and non-insiders.

A creditor or creditor's committee may seek to be allowed to stand in the shoes of the trustee and bring such litigation under certain circumstances. But the creditor must first obtain authorization from the bankruptcy judge.

> "We agreed with the bankruptcy court's reasoning that a creditor 'has a right to proceed on behalf of the estate,' **with permission of the court**, where the trustee 'defaults in the performance of any duty, such as seeking to set aside a fraudulent transfer.' *In re Automated Business Sys.*, 642 F.2d at 200...We established in that case that a creditor could initiate an avoidance action **with the permission of the court**, after making a demand upon the trustee and if the trustee defaulted in his duty."

Canadian Pac. Forest Prods. v. J.D. Irving, Ltd. (In re Gibson Group), 66 F.3d 1436, 1443 (6th Cir. 1995) [emphasis added].

> "While the circumstances under which a creditors' committee may sue are not explicitly spelled out in the Code, the bankruptcy courts have generally required that the claim be colorable, that the debtor-in-possession have refused unjustifiably to pursue the claim, **and that the committee first receive leave to sue from the bankruptcy court**. *In re Louisiana World Exposition*, 832 F.2d at 1397 (citing cases)."

Louisiana World Exposition v. Federal Insurance Company, 858 F.2d 233, 247 (5th Cir. 19 [emphasis added].

> "We also adopt the Second Circuit's standard for establishing derivative standing when the trustee (or debtor-in-possession) consents:
>
> > 'A creditor [] . . . may acquire standing to pursue the debtor's claims if (1) the [creditor] has the consent of the debtor in possession or trustee, and (2) **the [bankruptcy] court finds** that suit by the [creditor] is (a) in the *best interest* of the bankruptcy estate, and (b) is necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings.'
>
> *In re Commodore Int'l Ltd.*, 262 F.3d at 100 (*emphasis* added, internal quotation marks omitted)."

PW Enterprises, Inc., a Nevada Corporation, Appellant, v. North Dakota Racing Commission, (In re: Racing Services, Inc.), 540 F.3d 892, 902 (8th Cir. 2008) [**emphasis** added].

In a Chapter 11 case, the Debtor in Possession is vested with the power of the trustee to avoid transfers, including alleged preferences. 11 U.S.C. § 1107.

The court has not authorized Plaintiff to displace the Debtor in Possession, usurp the power of the Debtor in Possession, and have the Debtor in Possession shirk his duties and obligations. In the Sur-Reply (Dckt. 35), Plaintiff alludes to a possible malpractice claim which is property of the bankruptcy estate. Again, it is the Debtor in Possession who is the responsible fiduciary to prosecute that action. 11 U.S.C. § 1107.

Therefore, Plaintiff now asserts that Plaintiff wants to further amend the Complaint to litigate the rights of the bankruptcy estate in lieu of the fiduciary Debtor in Possession. Such is not proper or permitted. Plaintiff does not have the standing, absent the court so authorizing, to take the place of the Debtor in Possession.

Sandbox Litigation

It appears that the litigation practices of Plaintiff and Defendant in State Court may well not meet the minimum expectation of conduct of parties and counsel in federal court. A review of the "Mothorities" discloses the following which indicates a toxic, less than professional, relationship between these parties in State Court:

A. "Plaintiffs, and their counsel, Marc Y. Lazo (hereinafter referred to as "Lazo") have been harassing Defendants due to their representation of Blankenship in an Orange County Superior Court matter by making multiple false statements to the Court therein, and even by threats of violence." Mothorities, p. 4:15-18; Dckt. 22.

B. "Plaintiffs and Lazo now seek to continue their harassment by

filing the instant baseless Second Amended Complaint which fails to state a claim against any of the moving parties herein, and contains outright lies." P. 4:18-21; *Id.*

C. " This harassment included threats of violence against Galperin, both in writing and orally, and misrepresentations to the Court in the Orange County case regarding Lieber. Lazo's conduct was so egregious that the Court in the Orange County Case required that an additional bailiff be present at all times to prevent any potential violence between counsel." P. 5:5-8; *Id.*

In the Declaration of Yury Galperin, he testifies under penalty of perjury:

A. "Plaintiffs, and their counsel, Marc Y. Lazo have been harassing me, Defendant, Stanley Lieber, and Lieber Williams & Labin, LLP since their involvement in the Orange County Superior Court case number 30-2010-00399196, in which Mr. Lieber and I represented the Debtor herein, Willard Blankenship, by making multiple false statements to the Court therein, and even by threatening violence against me and Mr. Lieber. The harassment was so severe that the Court in the Orange County matter required an extra bailiff present during the trial to prevent violence between counsel." Declaration, ¶ 5; Dckt. 21.

Plaintiffs respond to these contentions, stating in the Opposition to the "Mothorities:"

A. "Defendants even take it one step further and falsely state that an additional bailiff was required in the courtroom during the Orange County Case due to Mr. Lazo's purported threats of physical violence, which a review of the trial transcript will indicate is entirely false. (Lazo Decl. ¶3; Stec Decl. ¶4; Salveson Decl. ¶4)." Opposition, p. 2:23-25, 3:1; Dckt. 28.

B. "Moreover, Defendants fail to include Lieber's commission of an assault on Lazo during a recess of the Orange County Case. (Lazo Decl. ¶3; Stec Decl. ¶4; Salveson Decl. ¶4) In fact, following the trial, Lazo received an unsolicited email from one of the jurors who noted that Defendant Lieber's conduct was outright repulsive. (Lazo Decl. ¶4)." P. 3:2-5; *Id.*

C. "Here, Galperin, Defendants' counsel in this case, used his trained discretion to draft the Motion while not being admitted in the United States Bankruptcy Court, Eastern District of California. This is a blatant violation of the Local Bankruptcy Rules and the California Rules of Professional Conduct. As such, Defendants' Motion must be denied." P. 4:22-25; *Id.*

D. "Defendants failed to meet and confer with Plaintiffs prior to filing the Motion." P. 5:8-9; *Id.*

E. "It is clear that Debtor has implemented a pattern of conduct

aimed at defrauding this Court and delaying Plaintiffs and other creditors as much as possible, beginning with pulling out the equity line on the Davis Property to pay Defendants, who have acted in conspiracy with Debtor." P. 7:6-8; *Id.*

The attorney for Plaintiff has also provided his Declaration, in which he testifies under penalty of perjury:

A. "During the trial of the Orange County Case, Defendant Lieber repeatedly made insinuating remarks to me, called me an 'idiot,' and ripped a document from my hand in front of the court." Declaration, ¶ 3; *Id.*

B. "At one point, Defendant Lieber walked toward me during a break and ordered me to move out of his way and purposely pushed me out of his way." *Id.*

C. "In addition to Defendant Lieber's harassment, Debtor and his son continuously gave me menacing looks and Debtor even verbally threatened me with violence in front of his counsel who then denied the remark." *Id.*

D. " Due to these instances, the trial court brought in an additional bailiff to ensure order in the court on one of the 15 days of the trial." *Id.*

In the Declaration of Kent Salveson, an attorney who was Plaintiffs' expert witness in the State Court Action, he testifies under penalty of perjury (some of which is repeating the exact testimony of Plaintiffs' counsel):

A. "During the Orange County Case, Defendant Lieber repeatedly made insinuating remarks to Marc Lazo, called him an 'idiot,' and ripped a document out of his hand in front of the Court." Declaration, ¶ 4; Dckt. 30.

B. "At one point, Defendant Lieber walked toward Mr. Lazo during a break and ordered him to move out of his way, purposely brushing up against him in a threatening manner." *Id.*

C. "Debtor even threatened Mr. Lazo with violence in front of his counsel." *Id.*

D. "Due to these instances, the trial court brought in an additional bailiff to ensure order in the court on one of the 15 days of the trial." *Id.*

Several things are clear. First, the issues between the parties have become personal issues between the attorneys. Proper, ethical, litigation appears to have become secondary to personal attacks and perceived, or allegations of, perceived threats.

Second, Plaintiffs do not have standing to assert, litigate, and possible prejudice the rights and property of the bankruptcy estate. It is for the Debtor in Possession, as the fiduciary of the bankruptcy estate, exercising the powers of a bankruptcy trustee, who must litigate these issues.

Third, due to the long, hostile, history between the attorneys for Plaintiffs, Plaintiffs, Debtor, and Attorneys for Debtor, it will not be the Plaintiffs who would be authorized to exercise the fiduciary powers of the Debtor in Possession. No request has been made of the court and the court will not, *sua sponte*, turn over property of the estate to these Plaintiffs.

Finally, the information disclosed by Plaintiffs, Plaintiffs' counsel, Defendants, and Defendants' counsel may well show that the appointment of a Chapter 11 Trustee is necessary and proper. These parties and their attorney have become so embroiled in personal, vitriolic attacks, the rights and interests of the estate appear secondary.

The Motion is granted and the Second Amended Complaint is dismissed without prejudice as to the following named Defendants:

A. Stanley Lieber,

B. Howard Williams,

C. Gary Labin, and

D. Lieber, Williams, and Labin, LLP

Leave to file a further amended complaint must be by noticed motion, with a copy of the proposed further amended complaint filed as an exhibit in support of any such motion.

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 Defendants 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 granted and Second Amended Complaint is dismissed without prejudice as to Defendants: (1) Stanley Lieber, (2) Howard Williams, (3) Gary Labin, and (4) Lieber, Williams, and Labin, LLP.
>
> **IT IS FURTHER ORDERED** that leave to file a further amended complaint must be by noticed motion, with a copy of the proposed further amended complaint filed as an exhibit in support of any such motion..

5. 15-25446-E-13 DONALD MAH
16-2026 NLG-1
MAH V. SELECT PORTFOLIO SERVICING, INC. ET AL

MOTION TO DISMISS ADVERSARY PROCEEDING
3-11-16 [11]

Tentative Ruling: 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).

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.

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, Office of the U.S. Trustee, Chapter 13 Trustee, and several other non-parties to this Adversary Proceeding on March 11, 2016. By the court's calculation, 34 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). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss is granted and the Adversary Proceeding is dismissed without prejudice.

U.S. Bank, National Association, as Trustee on behalf of the holders of the Home Equity Asset Trust 2007-2, Home Equity Pass-Through Certificates, Series 2007-2; Select Portfolio Servicing, Inc.; Bill Cock, an individual; Matt Faila, an individual, and Mortgage Electronic Registration Systems, In., erroneously sued herein as MERS Corp. ("Defendants") filed the instant Motion to Dismiss the Adversary Complaint on March 11, 2016. Dckt. 11.

The Motion states the following grounds with particularity pursuant to Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007, upon which the request for relief is based:

A. The Defendants "will move this Court for an Order dismissing the Complaint of Plaintiff, DONALD MAH ("Plaintiff") without leave to amend," pursuant to Fed. R. Civ. P. 12(b)(1) and

(b)(6).

B. "Such Motion will be brought on the grounds that 1) this Court lacks subject matter jurisdiction; 2) Plaintiff's entire complaint is barred by the doctrine of res judicata and collateral estoppel and 3) Plaintiff has failed to plead the essential facts which give rise to his claims against Defendants."

C. "This Motion will be based upon this Notice of Motion, the Motion, the supporting Memorandum of Points and Authorities and the Request for Judicial Notice filed concurrently herewith, the complete files and records in this action, the oral argument of counsel, if any, and such other and further evidence as the court might deem proper."

Dckt. 11.

Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007 require that the motion shall state with particularity the grounds upon which the relief is requested. As provided in Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents, the motion is a separate pleading from the points and authorities, which is separate from each declaration, which is separate from the exhibits document (with all exhibits permitted to be included in one document to be referenced by the other pleadings).

In substance, the Motion instructs the court to canvas all of the other pleadings in the file for this Adversary Proceeding and whatever else the court wants to take notice of, assemble whatever grounds the court believes should be stated in the Motion, then state those grounds for the Defendant, and finally, rule on the grounds which the court states for Defendant (based on what the court believes Defendant would want stated, if Defendant had complied with F. R. Civ. P. 7(b)) the grounds.

Defendant has filed a thirty-four page "Points and Authorities" in support of the Motion. Dckt. 35. The two pages two through four of the "Points and Authorities" contain or legal points or authorities, but contains extensive factual allegations - the type of allegations which should be stated as "grounds" in the Motion. Then, continuing through the next twenty-nine pages, additional facts are alleged in the "Points and Authorities," sprinkled in between the citations, quotations, arguments, speculation, and contentions.

The pleading title "Points and Authorities" is a combined motion and points and authorities in which the grounds upon which the motion is based are buried in detailed citations, quotations, legal arguments, and factual arguments (the pleading being a "Mothorities") in which the court and Plaintiff are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Defendant. The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party.

In light of the court having dismissed the Plaintiff-Debtor's underlying bankruptcy case, the court waives this fundamental defect in pleading. FN.1.

FN.1. The court finds it shocking that attorneys for Defendants, who regularly appear in this court, engage in such wholesale failure to comply with the Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and Local Bankruptcy Rules. This counsel has already run afoul of fundamental issues such as correctly identifying its client and the real party in interest for his federal court to properly exercise federal judicial power. It may be that corrective action is required by the court if the court concludes that the attorneys in this law firm have a practice of doing it the way that want, "hang the rules that apply only to mere pedestrian attorneys."

PLAINTIFF-DEBTOR'S OPPOSITION

Donald Mah ("Plaintiff-Debtor") filed an opposition to the instant Motion on March 30, 2016. Dckt. 17. FN.2.

FN.2. The court notes that the Plaintiff-Debtor filed an Opposition also on April 4, 2016. Dckt. 20. However, a review of both papers show that they are identical and signed the same date (March 28, 2016). As such, the court will determine that the Opposition filed on April 4, 2016 was duplicative.

Plaintiff-Debtor opposes the Motion on the ground that the court no longer has jurisdiction to make decisions concerning Plaintiff-Debtor's adversary complaint upon the bankruptcy case being dismissed on February 17, 2016. The Plaintiff-Debtor assets that the court had knowledge of the Plaintiff-Debtor's Objection to Defendant U.S. Bank and Select Portfolio Service's Proof of Claim and that Plaintiff-Debtor filed the instant Adversary Complaint to object to that Proof of Claim. The Plaintiff-Debtor argues that the court did not make a ruling to retain its jurisdiction to hear the Adversary.

The Plaintiff-Debtor requests that the court confirm that it does not have any further jurisdiction over the complaint and order that the case be dismissed without prejudice. The Plaintiff-Debtor further requests that the Defendant's Motion be denied.

APPLICABLE LAW

Jurisdiction was granted to the district courts and bankruptcy courts to the extent that issues arise under the Bankruptcy Code, in the bankruptcy case (such as administration of an asset), or relate to the (administration or outcome of a) bankruptcy case. 28 U.S.C. § 1334(a) and (b). However, recognizing this broad reach of federal court jurisdiction, Congress also provided that federal judges may, and in some situations are required to, abstain from hearing matters though federal court jurisdiction under § 1334 may exist. *See* 28 U.S.C. § 1334(c).

As provided in 28 U.S.C. § 1334(c)(1),

> (1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

A bankruptcy judge's exercise of the federal judicial power is considered in light of core and non-core (related to) jurisdiction created by Congress and limited by the United States Constitution. *See Stern v. Marshall*, 564 U.S. ____ , 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011). This court has previously addressed the issue of when a bankruptcy court judge should utilize federal bankruptcy jurisdiction to adjudicate issues between parties which determination will have no bearing on the bankruptcy case and do not concern Bankruptcy Code issues. *See Pineda v. Bank of America, N.A. (In re Pineda)*, 2011 Bankr. LEXIS 5609 (Bankr. E.D. Cal 2011), *affrm. Pineda v. Bank of America, N.A. (In re Pineda)*, 2013 Bankr. LEXIS 1888 (B.A.P. 9th Cir. 2013). Such jurisdiction should be carefully used by the federal courts to the extent necessary and appropriate to effectuate the goals, policies, and rights relating to bankruptcy cases, and not as a device to usurp state courts of general jurisdiction or the district as the trial court for federal matter and diversity jurisdiction.

Before a federal court exercises its jurisdiction over parties, it must determine that there is a sufficient "case" or "controversy as required by the United States Constitution, Article III, Section 2, Clause 1, which states,

> Sec. 2, Cl 1. Subjects of jurisdiction.
>
> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

As stated by the Ninth Circuit Court of Appeals in *Southern Pacific Company v. McAdoo,* 82 F.2d 121, 121-122 (9th Cir. 1936),

> Unless this proceeding was within the original jurisdiction of the District Court, it could not be brought within that jurisdiction by removal. *In re Winn*, 213 U.S. 458, 464, 29 S. Ct. 515, 53 L. Ed. 873. Unless it presents a "case" or "controversy," within the meaning of section 2, art. 3 of the Constitution, it is not within the jurisdiction of any federal court. *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 259, 53 S. Ct. 345, 77 L. Ed. 730, 87 A.L.R. 1191; *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274, 289, 48 S. Ct. 507, 72 L. Ed. 880; *Liberty Warehouse Co. v. Grannis*, 273

U.S. 70, 74, 47 S. Ct. 282, 71 L. Ed. 541.

"[A]bstention implicates the question of whether the bankruptcy court should exercise jurisdiction, not whether the court has jurisdiction... The act of abstaining presumes that proper jurisdiction otherwise exists." *Krasnoff v. Marchack (In re Gen. Carriers Corp.)*, 258 B.R. 181, 189-90 (9th Cir. BAP 2001) (citation omitted). The Ninth Circuit has identified the following factors in deciding whether to abstain from a Title 11 proceeding:

> (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable law; (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6)the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than form of an asserted "core" proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; (9) the burden of [the bankruptcy court's] docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; and (12) the presence in the proceeding of nondebtor parties.

In re Jones, 410 B.R. 632, 640-41 (Bankr. D. Idaho 2009)(citing *Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.)*, 912 F.2d 1162, 1167 (9th Cir.1990) (quoting *In re Republic Reader's Serv., Inc.*, 81 B.R. 422, 429 (Bankr. S.D. Tex.1987)). Rule 5011 of the Federal Rules of Bankruptcy Procedure requires a request for the exercise of discretionary abstention to be brought by motion. See Fed. R. Bankr. P. 5011(b).

The dismissal of a bankruptcy case does not deprive the bankruptcy court of jurisdiction to address such remaining necessary issues as are proper under the Bankruptcy Code and relate to the proceedings before the court. See 11 U.S.C. § 349, Effect of Dismissal, § 105(a), and *Carraher v. Morgan Electric*, 971 F.2d 327, 328 (9th Cir. 1992) (Congress did not include termination of jurisdiction as one of the effects of dismissal.).

DISCUSSION

Both parties here are seeking the dismissal of the instant Adversary Proceeding. However, each party is urging the court to take a different means of reaching this end.

Each party assert that the court lacks jurisdiction to hear the Adversary Proceeding due to the underlying bankruptcy case being dismissed on February 21, 2016. Case no. 15-25446, Dckt. 89. Both parties are wrong. Congress has provided for federal court to have federal jurisdiction over all bankruptcy cases, matters arising under and arising in bankruptcy cases, and matters related to the bankruptcy case. The Complaint raises issues arising under the Bankruptcy Code (the claim), in the bankruptcy case (property of the

estate), and related to the bankruptcy case (certain state law claims). Federal jurisdiction exists.

Second, parties do not create, and do not destroy, federal court jurisdiction. It would not be as easy as a plaintiff-debtor conniving a dismissal of a bankruptcy case to avoid the entry of a judgment or order in an adversary proceeding. Nor would it be an option for a defendant-creditor to engage in improper adversary proceeding litigation to obtain the dismissal of plaintiff-debtor's bankruptcy case and then thumb its nose at the federal court, contending that the federal court could not then address the misconduct because creditor-defendant had destroyed federal jurisdiction.

While federal court jurisdiction exists, the question exists as to whether a federal judge reach out and address these issues using the broad grant of federal jurisdiction under 11 U.S.C. § 1334(a). As this court has previously addressed in *Pineda v. Bank of America, N.A. (In re Pineda)*, 2011 Bankr. LEXIS 5609 (Bankr. E.D. Cal 2011), *affrm. Pineda v. Bank of America, N.A. (In re Pineda)*, 2013 Bankr. LEXIS 1888 (B.A.P. 9th Cir. 2013); the exercise of this broad grant of jurisdiction must have some connection to the bankruptcy case, administration of the case, or the conduct of the case.

The actual point being made by the Parties is that this court should abstain pursuant to 28 U.S.C. § 1334(c)(1) and not "reach out and touch" these issues since they no longer can effect the bankruptcy case (which has been dismissed) and are limited to the non-bankruptcy law dispute between the Parties. Very little litigation has occurred in this Adversary Proceeding, there is no conduct of either Party which is the subject to any pending motions, and all that has been required is for Defendants to file a simple motion to either abstain or dismiss.

The court determines that abstention is proper, as there is no longer any reason to litigate a objection to Defendants' claim. Further, litigation of the other issues cannot effect the bankruptcy case, the administration of the bankruptcy case, or the conduct of the parties in connection with the bankruptcy case.

The court concludes that dismissal of this Adversary Proceeding without prejudice is proper – and necessary. If the court were to merely abstain, given what appears to be the extreme litigation, one or both of the Parties might be tempted to "reactivate" this Adversary Proceeding if a possible future district court or state court proceedings are commenced and such other proceedings are not progressing to their liking.

Therefore, in light of the foregoing, the Motion is granted and Adversary Proceeding No. 16-2026 is dismissed without prejudice, there no longer remaining underlying bankruptcy case which could be impacted by litigation in the instant Adversary.

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 Defendant-Debtor 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 granted and Adversary Proceeding No. 16-2026 is dismissed without prejudice, there no longer remaining underlying bankruptcy. The court orders the dismissal without prejudice of this Adversary Proceeding, determining that abstention from determining any issues, rights, claims, or other matters in connection with the claims and defenses asserted is proper pursuant to 28 U.S.C. § 1334(c)(1), and that dismissal without prejudice is the proper way to insure that there be no further attempted litigation in this Adversary Proceeding.

6. 15-29555-E-13 DIANNE AKZAM
15-2247
U.S. TRUSTEE V. AKZAM

MOTION TO DISMISS ADVERSARY PROCEEDING
2-19-16 [12]

Tentative Ruling: 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).

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.

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 Allen Massey for Tracy Hope Davis and Aldridge Pite, LLP on February 18, 2016. By the court's calculation, 56 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). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss is denied.

Dianne Akzam ("Defendant-Debtor") filed the instant Motion to Dismiss for Failure to State a Claim on February 19, 2016. Dckt. 12.

Defendant-Debtor asserts that instant Adversary Proceeding Case No. 15-02247 was filed by Tracy Hope Davis, the United States Trustee, for an injunction against filing another bankruptcy case pursuant to 11 U.S.C. § § 105 and 349.

Defendant-Debtor argues that the Complaint fails to state any cause of action and it fails to allege with particularity of any fraud as required by Fed. R. Civ. P. 9(b). The Defendant-Debtor also argues that the Complaint is so vague and ambiguous that Defendant-Debtor cannot reasonably prepare a response. In the alternative, the Defendant-Debtor requests a more definitive statement.

The Defendant-Debtor argues that, though not alleged by the Plaintiff specifically, the Complaint states a cause for fraud because the Bankruptcy

Code sections cited by the Plaintiff mention fraud.

Defendant-Debtor asserts that Plaintiff's claim for injunctive relief fails because injunctive relief is not considered to be a viable claim. Defendant-Debtor also states that she does not know if this is a core or non-core proceeding.

PLAINTIFF'S OPPOSITION

The Plaintiff filed an opposition on March 30, 2016. Dckt. 16. The Plaintiff opposes the Motion because neither request is appropriate.

The Plaintiff argues that in the Complaint, at paragraph 21, includes 11 U.S.C. § 349 as a legal theory for the requested 3-year bar of further bankruptcy proceedings by Defendant. The Plaintiff argues that the Complaint specifically states facts that Defendant-Debtor misrepresented that she has not filed prior cases (¶ 8), that Defendant-Debtor has an extensive history of filings and dismissal (¶ 9), and of Defendant-Debtor's egregious behavior in not filing Chapter 13 Plans or making plan payments (¶ 11 and 12).

The Plaintiff argues that the Defendant-Debtor's intention to defeat state court litigation is suggested by Defendant-Debtor's assuring that Wells Fargo Home Mortgage received notice of her voluntary petition, with the inclusion of the creditor on the master address list (Dckt. 4) while later asserting at Schedule D that she has no creditors securing her Property. The Plaintiff asserts that the Defendant-Debtor has received notice of the Complaint and summons. The Complaint compiles a list of filed and dismissed bankruptcy cases from which the court can make findings of the frivolous or harassing nature of her bankruptcy filings.

The Plaintiff asserts that pleading fraud is not necessary to the complaint. Pursuant to 11 U.S.C. § 105 and 349, fraud is not required to be plead and the Defendant-Debtor does not cite to any case law requiting that fraud must be pled.

Additionally, the Plaintiff argues that the underlying claims derive from 11 U.S.C. § 105 and 349 and details the Defendant-Debtor's abusive pattern of filing non-productive bankruptcy cases.

APPLICABLE LAW

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).

Federal Rule of Bankruptcy Procedure 7001(7) requires that injunctive relief be obtained through an adversary proceedings. This provides the parties with all of the normal litigation protections and procedure, including Federal Rule of Civil Procedure 65, which is incorporated into Federal Rule of Bankruptcy Procedure 7065. As stated in 2 Collier on Bankruptcy, 16th Edition, ¶ 105.03[4], "Courts have been near universal in reversing injunctions which have been issued without compliance with Rule 7001." *State Bank of S. Utah v. Glenhill (In re Glenhill)*, 76 F.3d 1070, 1080 (10th Cir. 1996); *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746 (5th Cir. 1995); *Wedgewood Inv. Fund, Ltd. v. Wedgewood Realty Group, Ltd (In re Wedgewood Realty Group, Ltd.)*, 878 F.2d 693, 701 (3rd Cir. 1989); *In re Martin*, 268 B.R. 168 (Bkcy. E.D. Ark. 2001), affd 271 B.R. 333 (B.A.P. 8th Cir. 2002); *Ramirez v. Whelan (In re Ramirez)*, 188 B.R. 413, 416 (B.A.P. 9th Cir. 1995) (Klein, J, concurring); *Tighe v. Mora (In re Nieves)*, 290 B.R. 370 (Bkcy C.D. Cal. 2003).

The bankruptcy courts are established by an act of Congress. 28 U.S.C. § 151. The All Writs Act, 28 U.S.C. § 1651(a), and 11 U.S.C. § 105 provide the bankruptcy courts with the inherent power to enter pre-filing orders against vexatious litigants. *Molski v. Evergreen Dynasty Corp*., 500 F.3d 1047 (9th Cir. 2007); *Gooding v Reid, Murdock & Co.*, 177 F. 684, (7th Cir. 1910); *Weissman v. Quail Lodge Inc.*, 179 F.3d 1194, 1197 (9th Cir. 1999); *In re Bialac* 15 B.R. 901, (B.A.P. 9th Cir. 1981), *aff'd*, 694 F.2d 625 (9th Cir. 1982). A court must be able to regulate and provide for the proper filing and prosecuting of proceedings before it. Section 105(a) expressly grants the court the power to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. Further, the court is

authorized to *sua sponte* take any action or make any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process. This power exists and it does not matter whether it is being exercised pursuant to 11 U.S.C. § 105 or the inherent power of the court. *In re Volpert*, 110 F.3d 494, 500 (7th Cir. 2007).

The Court of Appeals for the Ninth Circuit restated the grounds and methodology for pre-filing review requirements as an appropriate method for the federal courts in effectively managing serial filers or vexatious litigants. *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007), *en banc* hearing denied, 521 F.3d 1215 (9th Cir. 2008); *see also In re Fillbach*, 223 F.3d 1089 (9th Cir. 2000). While maintaining the free and open access to the courts, it is also necessary to have that access be properly utilized and not abused. The abusive filing of bankruptcy petitions, motions, and adversary proceedings for purposes other than as allowed by law diminishes the quality of and respect for the judicial system and laws of this country.

As addressed by the Ninth Circuit in *Molski*, the ordering of a pre-filing review requirement is not to be entered with undue haste because such orders can tread on a litigant's due process right of access to the courts. As discussed in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982), the right to seek redress from the court is a protected right civil litigants. The issuing of a pre-filing order is to be made only after a cautious review of the pertinent circumstances.

However, the Ninth Circuit clearly draws the line that a person's right to present claims and assert rights before the federal courts is a not a license to abuse the judicial process and treat the courts merely as a tool to abuse others.

> Nevertheless, "[f]lagrant abuse of the judicial process cannot be tolerated because it enables one person to preempt the use of judicial time that properly could be used to consider the meritorious claims of other litigants." *De Long [v. Henneessey]*, 912 F.2d [1144,] 1148 [(9th Cir. 1990)]; *see O'Loughlin v. Doe*, 920 F.2d 614, 618 (9th Cir. 1990).

Molski, 500 F.3d at 1057. In the Ninth Circuit the trial courts apply a four-factor analysis in determining if and what type of pre-filing or other order should properly be issued based on the conduct of the party at issue.

1. First, the litigant must be given notice and a chance to be heard before the order is entered.

2. Second, the district court must compile "an adequate record for review."

3. Third, the district court must make substantive findings about the frivolous or harassing nature of the plaintiff's litigation.

4. Finally, the vexatious litigant order "must be narrowly tailored" to closely fit the specific vice encountered.

Molski, 500 F.3d at 1057-1058.

DISCUSSION

Here, the Defendant-Debtor has offered no argument or evidence that would justify the court granting the instant Motion.

The Defendant-Debtor's argument is based on the improper belief that the Plaintiff is required, based on the style of the complaint, to plead fraud. Based on this fundamentally wrong premise, the Defendant-Debtor argues that the Plaintiff and the Complaint did not meet the necessary standard of pleading for a cause of action that requires a showing of fraud.

As discussed supra, the Cause of Action for injunction relief to place a bar on the Defendant-Debtor's ability to file subsequent bankruptcies does not require a showing of fraud. The Defendant-Debtor improperly conflates the section of 11 U.S.C. § 727(a)(2) to impute the necessity of pleading fraud. However, this is not necessary for a party to file a complaint seeking a bar on future bankruptcy filings for a period of time.

The Defendant-Debtor in her Motion merely provides case law citations on the necessary components for a fraud cause of action. The Defendant-Debtor does not provide any argument or proof that the relief requested by the Plaintiff, the bar on future filings for 3-years, somehow is a cause of action requiring a showing of fraud. This is notably absent from the Defendant-Debtor's motion and for good reason – that is not a necessity for the relief sought by the Plaintiff.

Therefore, in light of the foregoing, the Motion is denied without prejudice.

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 Defendant-Debtor 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 Defendant Dianne Akzam shall file and serve an answer to the Complaint on or before May 4, 2016.