UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

May 31, 2017, at 1:45 p.m.

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1. **16-26043-E-13** **SUSAN GEDNEY**
17-2006
GEDNEY V. WRIGHT ET AL

MOTION FOR ENTRY OF DEFAULT JUDGMENT
4-17-17 [57]

Tentative Ruling: 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.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff and Defendants on April 18, 2017. By the court's calculation, 43 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

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

Susan Gedney ("Plaintiff-Debtor") filed the instant Motion for Entry of Default Judgment on April 17, 2017. Dckt. 57. Plaintiff-Debtor seeks an entry of default judgment against Sarah Wright, Gabriel Witkin, Tenth Hall, Inc., and Does 1 through 10 ("Defendant"). Plaintiff-Debtor seeks an award of attorney's fees in the amount of $6,200.00.

The instant Adversary Proceeding was commenced on January 24, 2017. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on January 24, 2017. Dckt. 3. The complaint and summons were properly served on Defendants. Dckt. 9.

Defendants Gabriel Witkin and Tenth Hall, Inc., failed to file a timely answer or response or request for an extension of time. Defendant Sarah Wright requested an extension of time. Default was entered against Defendants Gabriel Witkin and Tenth Hall, Inc., pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on March 16, 2017. Dckts. 38 & 40. Default was entered against Defendant Sarah Wright pursuant to Federal Rule of Bankruptcy Procedure 7055 by the court on May 2, 2017. Dckt. 64.

ISSUES OF UNDISCLOSED CONFLICT AND NON-DISCLOSURE TO COURT

This Adversary Proceeding was part of a campaign for Plaintiff-Debtor to terminate the services of the real estate broker that was employed prior to the commencement of this case. The gist of Plaintiff-Debtor's arguments, advanced by her counsel, was that the prior realtor was not competent to conduct the short sale. Rather, Plaintiff-Debtor had a much more competent real estate broker to hire.

What was not disclosed to the court was that the much more competent real estate agent works for Plaintiff-Debtor's counsel's real estate business. Plaintiff-Debtor's counsel is the broker who employs the real estate agent.

The court has authorized the rejection of the pre-petition employment agreement with the prior real estate broker. Such rejection may well lead to the creation of pre-petition breach damages. It was not disclosed to the court that the much more "competent" real estate broker to conduct a short sale was Plaintiff-Debtor's attorney, who has his own fiduciary duties to this bankruptcy estate.

It may well be that this complaint is merely part of the attorney's/broker's strategy to misuse the judicial process to improperly divert real estate business, and profits, into the attorney's/broker's pocket. This complaint and the adversary proceeding itself appear to be greatly excessive for what should have been a simple motion to reject an executory contract.

DISCUSSION OF MOTION

SUMMARY OF COMPLAINT

Plaintiff-Debtor seeks in the First Cause of Action a determination that a pre-petition listing agreement does not constitute authorization to be employed post-petition pursuant to 11 U.S.C. § 327.

In the Second Cause of Action, Plaintiff-Debtor seeks a determination that Defendants are not entitled to compensation pursuant to 11 U.S.C. § 330.

The Third Cause of Action asserts claims for breach of duty by Defendants in acting as the real estate broker for Plaintiff-Debtor. In this cause of action, Plaintiff-Debtor merely states legal conclusions,

not providing the necessary "short and plain statement of the claim showing that the pleader is entitled to relief," FED. R. CIV. P. 7(a)(2), FED. R. BANKR. P. 7007. The Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). 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.

In the Fourth Cause of Action Plaintiff-Debtor seeks a determination that Defendants are not entitled to compensation pursuant to 11 U.S.C. § 328.

In the Fifth Cause of Action Plaintiff-Debtor asserts that Defendants contending that they had enforceable rights and claiming an interest in proceeds from a post-petition sale of property of the estate constitutes a violation of the automatic stay. 11 U.S.C. § 362(a).

In the Sixth Cause of Action, Plaintiff-Debtor cites to 11 U.S.C. § 365 and the rejection of the pre-petition listing agreement upon the future confirmation of the Plaintiff-Debtor's Chapter 13 Plan.

In the Seventh Cause of Action, Plaintiff-Debtor requests contractual and statutory attorneys' fees.

It appears that all of the claims and rights stated in the First Amended Complaint, other than the Third Cause of Action, are properly asserted in contested matter motion practice. FED. R. BANKR. P. 7001, 9013. It does not appear that the asserted rejection of an executory contract, denial of fees, or violation of the automatic stay are tied to any alleged breach of duties under the listing agreement.

SUMMARY OF ANSWER

No answers have been filed by any of the Defendants. At the preliminary injunction hearing on March 9, 2017, Gabriel Witkin and Sarah Wright appeared and stated that they would not be contesting termination of the executory contract listing agreement. Mr. Witkin stated that his reluctance in cooperating with Plaintiff-Debtor and Plaintiff-Debtor's counsel was not because he wanted any money, but because he was concerned that the broker who Plaintiff-Debtor sought to use post-petition was not as experienced as Mr. Witkin and could not provide the same level of service in conducting a short-sale of property.

PROCEEDINGS IN PLAINTIFF-DEB TOR'S BANKRUPTCY CASE

Though the court issued an order shortening time so Plaintiff-Debtor could promptly obtain an order rejecting the pre-petition listing agreement as an executory contract (which Mr. Witkin indicated that he would not oppose), the court does not see such motion having been filed by Plaintiff-Debtor in the bankruptcy case, although a proposed Amended Plan filed on May 3, 2017, does not include any executory contracts, and Section 3.02 of the Amended Plan states that "[a]ny executory contract or unexpired lease not listed . . . is rejected." Bankr. E.D. Cal. 16-26043.

REQUIRED PLEADING OF CORE AND NON-CORE MATTERS, CONSENT OR NON-CONSENT TO NON-CORE MATTER

The basic pleading requirements of Federal Rule of Civil Procedure 8 for a complaint, including that the complaint "[m]ust contain: (1) a short and plain statement of the grounds for the court's jurisdiction . . . ," apply to complaints in Adversary Proceedings. In addition to incorporating Rule 8, Federal Rule of Bankruptcy Procedure 7008 adds an additional pleading requirement concerning whether the matters in the complaint are core or non-core:

> "Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy judge, **the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge**."

FED. R. BANKR. P. 7008 (emphasis added).

For a responsive pleading, Federal Rule of Bankruptcy Procedure 12(b) applies in adversary proceeding. FED. R. BANKR. P. 7012(b). The Bankruptcy Rules add a further responsive pleading requirement concerning whether the matters are core or non-core, as well as the consent or non-consent for non-core matters by the responding party:

> "(b) Applicability of Rule 12(b)-(I) F.R.Civ.P. Rule 12(b)-(I) F.R.Civ.P. applies in adversary proceedings. A responsive pleading **shall admit or deny an allegation that the proceeding is core or non-core**. If the response is that the proceeding is **non-core, it shall include a statement that the party does or does not consent** to entry of final orders or judgment by the bankruptcy judge. In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties."

FED. R. BANK. P. 7012(b) (emphasis added).

FINAL BANKRUPTCY COURT JUDGMENT

Plaintiff-Debtor does not allege in the Complaint the basis for federal court jurisdiction for this Adversary Proceeding. Plaintiff-Debtor does allege that this is a core proceeding 28 U.S.C. § 157(b)(2)(N), "orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate." The Complaint does not allege any orders approving the sale of property or any claims arising from such order.

APPLICABLE LAW

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

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d 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, because 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. 3d ed.)).; *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62 (B.A.P. 9th Cir. 1994).

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff-Debtor'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-Debtor did not offer evidence in support of the allegations. *See id.* at 775.

DISCUSSION

Applying these factors, the court finds that Plaintiff-Debtor has not sufficiently pled in the Complaint a claim to be asserted in an adversary proceeding that Defendants have not been employed by the Estate and are not currently entitled to compensation under the Bankruptcy Code. Additionally, confirmation of Plaintiff-Debtor's latest Chapter 13 Plan in her bankruptcy case—by its own terms in Section 3.02—would reject any executory contract that has not been provided for, and the listing agreement that is the dispute of this Adversary Proceeding has not been provided for by that proposed plan.

While Plaintiff-Debtor references the court to Item 15 of the Listing Agreement providing for an award of attorney's fees in any action between the parties regarding an obligation to pay compensation

to a prevailing party, Exhibit B, Dckt. 6, such does not support a claim for attorney's fees for whatever work Plaintiff-Debtor's attorney chose to undertake.

The court finds that the Complaint is not sufficient and the requested relief in the Motion is not meritorious. Plaintiff-Debtor offers no evidence in support of the Motion, with the exception of the young associate providing a declaration authenticating the billing records for Debtor's Attorney.

Here, the Complaint asserts "claims" for which relief is sought by simple motion. Plaintiff-Debtor requests that the court determine the allowability and amount of compensation pursuant to 11 U.S.C. § 327 and 11 U.S.C. § 330. No motion to employ the pre-petition broker was filed and no employment authorized. No motion for allowance of fees pursuant to 11 U.S.C. § 330 was filed. Rather, it appears that in attempting to rise a simple executory contract rejection into a "federal case," Plaintiff-Debtor has concocted "causes of action" to create the appearance that claims for which the court could grant relief may exist.

As discussed in a separate motion filed in the bankruptcy case, a more nefarious purpose for this Complaint and Adversary Proceeding may exist. This bankruptcy case and this Adversary Proceeding have had an interesting dynamic in which the real estate broker that Debtor hired pre-petition was determined (purportedly by Debtor) post-petition to "not be qualified." No mention was made during the long, multiple hearings that the new, better realtor was one owned by Debtor's attorney, Ted Greene. Though Attorney Greene has a new, young associate appearing as attorney of record in this case, it is his law firm that has Plaintiff-Debtor as the client. Attorney Greene's name appears on all the pleadings.

Plaintiff-Debtor seeks to employ realtor Dawn Robinson of JCL Realty, Inc., pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. Plaintiff-Debtor seeks the employment of a realtor to assist with short selling her property.

David Cusick, the Chapter 13 Trustee, filed a Response on April 25, 2017. Dckt. 105. The Trustee states that there is a pending adversary proceeding (No. 17-02006) dealing with a prior real estate listing agreement between Debtor and realtor Sarah Wright and broker Gabriel Witkin.

The Trustee, in responding to that Motion, noted that JCL Realty, Inc. is owned by Ted Greene (Attorney Greene) who is also the owner of Law office of Ted A. Greene, Inc., which represents Debtor in this Chapter 13 case. This was disclosed in the Motion to Employ.

The California Bureau of Real Estate confirms on its website that Dawn Robinson is licensed as a real estate sales person. FN.1. Her employing broker is stated by the Bureau to be JCL Realty Inc. FN.2. The Bureau reports that the licensed officer for JCL Reality, Inc. is Theodore Greene. FN.3.

FN.1. http://www2.dre.ca.gov/PublicASP/pplinfo.asp?start=1. .

FN.2. http://www2.dre.ca.gov/PublicASP/pplinfo.asp?License_id=01341479.

FN.3. http://www2.dre.ca.gov/PublicASP/pplinfo.asp?License_id=01786518.

Dawn Robinson, realtor with JCL Realty, Inc., testifies that she and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with the debtors, creditors, the U.S. Trustee, any party in interest, or their respective attorneys, except that Plaintiff-Debtor's Attorney owns the business Ms. Robinson works for. She testifies that her fee for selling Debtor's property will be 3.5% of the purchase price.

In connection with the Motion to Employ the real estate agent employed by Attorney Greene, the court has stated concern whether Attorney Greene and his firm can fulfill their duties as counsel to the Debtor, who is the fiduciary to the bankruptcy estate and will be the fiduciary under a Chapter 13 Plan (if one can be confirmed) in dealing with Attorney Greene's real estate business. The court is unsure how Mr. Greene and his firm can represent Debtor and advise Debtor as to the performance by Mr. Greene's real estate company, advocating for her with Mr. Greene's real estate company.

The pleadings connected to the Motion to Employ Real Estate Agent also do not contain evidence showing compliance with California Rule of Professional Conduct 3-300.

REQUEST FOR ATTORNEYS' FEES

As part of Plaintiff-Debtor's Motion—and the Seventh Claim for Relief in the Complaint—Plaintiff-Debtor requests an award of attorney's fees. Plaintiff-Debtor presents that her attorney accumulated 24.8 hours of work in this Adversary Proceeding, billed at $250.00 per hour. That total amount is $6,200.00.

Plaintiff-Debtor has provided the raw billing information showing both the total hours and amount. Exhibit A, Dckt. 60.

Much of these billings appear to be for substantially excessive, legally unnecessary work. The court cannot determine why seeking preliminary injunction was appropriate. The court has not been presented with credible evidence that the prior broker failed to act. Rather, the court has been presented with a pending motion to employ Debtor's attorney as the "much superior" real estate broker.

The Complaint alleges that the prior broker asserted a right to a commission from a sale as part of his pre-petition claim. Such would be his right, if the pre-petition broker had such a claim. *See* 11 U.S.C. § 365(g). If such a claim were made, and if such a claim were disputed, then Plaintiff-Debtor would have filed an objection to claim (11 U.S.C. § 502), not an adversary proceeding to determine 11 U.S.C. § 327, 11 U.S.C. § 330, and 11 U.S.C. § 362 issues.

No testimony is presented by Debtor in support of the present motion. Rather, it is only the declaration of the young associate in Debtor's Attorney's (and proposed Debtor's broker) law firm. No evidence is presented in support of the various claims asserted in the Complaint. The testimony of the young associate is advanced for prosecuting this Adversary Proceeding to dislodge Debtor's pre-petition broker so that Debtor's Attorney could be Debtor's real estate broker to conduct a "complex" short-sale.

Much of the young associate's time appears to have arisen due to the failure of Debtor's Attorney, Ted Greene, providing the appropriate direction to a newly minted attorney. Included in the $6,200 of requested fees are the time spent on filing an improper Motion for Declaratory Judgment ($2,000 just for "drafting") in the bankruptcy case. Then there is an additional $2,000 in charges relating to the follow up and attempting to prosecute a "Motion" for declaratory judgment in the bankruptcy case. Here, two-thirds of the fees requested relate to a motion that the bankruptcy judge could not grant. *See* FED. R. BANKR. P. 7001 (stating that declaratory relief (if proper) must be sought through an adversary proceeding).

It appears that Debtor's Attorney, Ted Greene, caused the legal services to be provided so that he, Ted Greene the real estate broker, could try to make money as Debtor's real estate broker. He then pushed the contention that the prior broker was not competent, but another "real estate agent" (one who was an undisclosed agent working for him) was much more highly skilled to conduct a short-sale.

RULING

The court has granted the Motion to Reject the executory contract. The court cannot divine, based on the First Amended Complaint and evidence presented, any basis exists for granting the relief requested in the First Amended Complaint. As the Supreme Court has instructed federal court trial judges, the court shall not grant judgment for whatever is asked merely because an opposition is not asserted. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14, 176 L. Ed. 2d 158, 173 n.14 (2010); *see also Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.)*, 293 B.R. 489, 499 (B.A.P. 9th Cir. 2003) (citing *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1213 (9th Cir. 1994)). There must be an actual legal and factual basis for the relief sought.

Therefore, 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 for Entry of Default Judgment filed by Plaintiff-Debtor Susan Gedney having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Entry of Default Judgment is denied without prejudice.
>
> **IT IS FURTHER ORDERED** that Plaintiff-Debtor shall file a motion for entry of default judgment on or before June 16, 2017, and if such motion is not filed, the court shall dismiss without prejudice this Adversary Proceeding, with no further notice or hearing.
>
> No attorneys' fees have been allowed for Attorney for Plaintiff-Debtor. This is without prejudice to any proper request for the award of such fees for

Plaintiff-Debtor in this Adversary Proceeding and the separate allowance of attorneys' fees for Plaintiff-Debtor's Attorney in the bankruptcy case itself (so such fees may actually be paid to counsel).

2. **16-28049-E-13** **ARMANDO RODRIGUEZ** **MOTION FOR ENTRY OF DEFAULT JUDGMENT**
17-2018 **UST-1**
U.S. TRUSTEE V. RODRIGUEZ **4-25-17 [12]**

Final Ruling: No appearance at the May 31, 2017 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant and Chapter 13 Trustee on April 25, 2017. By the court's calculation, 36 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Entry of Default Judgment is granted.

The United States Trustee ("Plaintiff") filed the instant Motion for Default Judgment on April 25, 2017. Dckt. 12. Plaintiff seeks an entry of default judgment for injunctive relief against Armando Rodriguez ("Defendant") in the instant Adversary Proceeding No. 17-02018.

The instant Adversary Proceeding was commenced on February 13, 2017. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on February 13, 2017. Dckt. 3. The complaint and summons were properly served on Defendant. Dckt. 6.

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on March 31, 2017. Dckt. 9.

SUMMARY OF COMPLAINT

Plaintiff filed a complaint for injunctive relief against Defendant. The Complaint alleges that Defendant filed a prior bankruptcy case that was dismissed on September 9, 2016. In that prior case, Plaintiff filed a spousal waiver identifying Rose Rodriguez as his spouse, and both parties signed the waiver. Plaintiff alleges that Rose Rodriguez has filed at least seven bankruptcy cases since 2011, each of which has been dismissed, and she used the same address as Plaintiff has used in his bankruptcy cases.

Plaintiff requests that the court enjoin Defendant (jointly and individually) from filing another bankruptcy case for a period of two years in the United States Bankruptcy Court for the Eastern District of California without obtaining permission first from the Chief Judge.

APPLICABLE LAW

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

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d 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, because 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. 3d ed.)).; *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62 (B.A.P. 9th Cir. 1994).

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

DISCUSSION

Applying these factors, the court finds that the Plaintiff will be prejudiced if default judgment for injunctive relief is not entered against Defendant to prevent the filing of further abusive bankruptcy petitions. Defendant and his spouse have filed at least nine petitions, and Defendant has not presented any reason to the court to believe that filings will stop after any future case dismissals. As the Plaintiff alleges in the Complaint, monetary sanctions would be insufficient to make Defendant stop presenting abusive filings; only injunctive relief at this point will have an impact upon Defendant. Defendant cannot dispute the U.S. Trustee's records of the cases filed by Defendant that were all dismissed.

The court finds that the Complaint is sufficient, and the request for relief requested therein is meritorious. It has not been shown to the court that there is or may be any dispute concerning material facts. Defendant has not contested any facts in this Adversary Proceeding. Although the Federal Rules of Civil Procedure favor decisions on the merits through the crucible of litigation, Defendant has been given several opportunities to respond, and there is no indication that Defendant has a meritorious defense or disputes Plaintiff's right to judgment in this Adversary Proceeding. The court finds it necessary and proper for the entry of a default judgment against Defendant.

The court grants the default judgment in favor of Plaintiff and against Defendant Armando Rodridguez.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Entry of Default Judgment filed by Plaintiff United States Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Entry of Default Judgment is granted. The court shall enter judgment determining that Armando Rodriguez ("Defendant") is enjoined from filing, individually or jointly, another bankruptcy case in the United States Bankruptcy Court for the Eastern District of California for a period of two years beginning May 31, 2017, without first seeking and receiving the authorization of the chief bankruptcy judge.
>
> **IT IS FURTHER ORDERED** that the Clerk of the Bankruptcy Court, and deputy clerks operating at the discretion and control of the Clerk of the Court, are authorized to reject any petition attempted to be filed by Defendant during the two-year period if there is not prior authorization from the chief bankruptcy judge.
>
> Counsel for the Plaintiff shall prepare and lodge with the court a proposed judgment consistent with this Order, which judgment includes the express

authorization to reject a presented filing by Defendant for which there is not a prior authorization from the chief bankruptcy judge.