UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

June 23, 2014 at 10:00 a.m.

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1. 13-30804-A-11 ELWYN/JEANNINE DUBEY — OBJECTION TO CLAIM
VS. FRANCHISE TAX BOARD — 5-7-14 [105]

Tentative Ruling: The objection will be overruled.

The debtors object to the proofs of claim of the California Franchise Tax Board (proof of claim nos. 1-3), arguing that the FTB "gave up 'any right, title or interest in the property at issue'" in the district court litigation brought by the Internal Revenue Service against the debtors. The debtors assert that the FTB's proofs of claim should be disallowed on the basis of claim preclusion.

The FTB opposes the objection, contending that the disclaimer it filed in IRS' district court litigation did not disclaim that the debtors owed debt to the FTB. "The FTB's disclaimer . . . only disclaimed any right, title or interest in real properties that were subject to the litigation in the district court that the FTB may possess by virtue of any then-recorded liens." And, FTB's amended proof of claim (no. 3) is a general unsecured claim.

The FTB filed three proofs of claim, nos. 1, 2, 3. Each of the claims was originally filed as secured by real property owned by the debtors. On May 20, 2014, however, the FTB amended each of the claims to reclassify them as unsecured.

FTB's proofs of claim (nos. 1, 2, 3) are presumed to be prima facie valid. 11 U.S.C. § 502(a).

"Inasmuch as Rule 3001(f) and section 502(a) provide that a claim or interest as to which proof is filed is "deemed allowed," the burden of initially going forward with the evidence as to the validity and the amount of the claim is that of the objector to that claim. In short, *the allegations of the proof of claim are taken as true*. *If those allegations set forth all the necessary facts to establish a claim and are not self-contradictory, they prima facie establish the claim*. Should objection be taken, the objector is then called upon to produce evidence and show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves. But the ultimate burden of persuasion is always on the claimant. Thus, it may be said that the proof of claim is some evidence as to its validity and amount. It is strong enough to carry over a mere formal objection without more."

Wright v. Holm (In re Holm), 931 F.2d 620, 623 (9th Cir. 1991) (quoting 3 L. King, Collier on Bankruptcy § 502.02, at 502-22 (15th ed. 1991)).

The presumptive validity of the claim may be overcome by the objecting party only if it offers evidence of equally probative value in rebutting that offered

by the proof of claim. Holm at 623; In re Allegheny International, Inc., 954 F.2d 167, 173-74 (3rd Cir. 1992). The burden then shifts back to the claimant to produce evidence meeting the objection and establishing the claim. In re Knize, 210 B.R. 773, 779 (Bankr. N.D. Ill. 1997).

The debtors have not offered sufficient evidence to rebut the presumptive validity of the claim. The debtors' contention that FTB's claim is barred by res judicata is without merit.

Res judicata or claim preclusion bars the litigation in a subsequent action of any claims that were raised or could have been raised in the prior action. Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001) (citing Western Radio Servs. Co. v. Glickman, 123 F.3d 1189, 1192 (9th Cir. 1997)). In order for res judicata to apply, three elements must be met (1) identity of claims, (2) final judgment on the merits, and (3) privity between the parties. Headwaters, Inc. v. United States Forest Serv., 399 F.3d 1047, 1052 (9th Cir. 2005). Involuntary dismissal under Rule 41(b), including dismissal with prejudice for failure of prosecution, is final judgment on the merits for purposes of res judicata. Owens at 714.

The court has received no argument or evidence from the debtors that there is identity of claims between the claim litigated against the FTB in the district court action and the claims asserted by the FTB in this bankruptcy case.

In determining identity of claims, courts consider four factors: (i) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (ii) whether substantially the same evidence is presented in the two actions; (iii) whether the two suits involve infringement of the same right; and (iv) whether the two suits arise out of the same transaction or nucleus of facts. Rein v. Providian Fin. Corp., 270 F.3d 895, 903 (9th Cir. 2001); see also Associates v. Reed (In re California Litfunding), 360 B.R. 310, 322 (Bankr. C.D. Cal. 2007).

The district court action was filed by the IRS "to foreclose federal tax liens and foreclose judgment lien." Docket 105, Ex. G. The action was filed for the IRS to foreclose on several real properties encumbered by liens held by the IRS. In June 2008, in response to the IRS' first amended complaint, the FTB filed a disclaimer, disclaiming its interest in the property subject to the district court action. As quoted by the debtors, the FTB disclaimed only "any right, title, or interest in or to the property described in the complaint that the FTB may or may not possess by virtue of any recorded liens." Docket 105, Ex. G at 1.

The district court action did not establish, deny, or adjudicate in any way the debt owed to the FTB. It adjudicated solely FTB's security interest in property as to which the IRS sought foreclosure. No evidence of the debt owed to the FTB was ever presented, questioned or considered in the district court action. The debtors have provided no evidence of the district court action involving adjudication in any way of the basis for the debt owed to the FTB.

Hence, there is no identity between the claims litigated in the district court action and the unsecured claims asserted by the FTB here.

The FTB became entangled in the district court action only to the extent the IRS were seeking to foreclose on property as to which the FTB might have asserted or already possessed security interest. That property was limited to the properties involved in the district court action. The FTB disclaimed any

interest in such property but did not give up its claims against the debtors. For the debtors now to argue that the FTB somehow also released or waived the debt owed by them to the FTB is disingenuous.

As the FTB's proofs of claim are unsecured, they are not inconsistent with the FTB's disclaimer in the district court litigation. The objection will be overruled.

Lastly, the court disagrees with the debtors that the opposition filed by the FTB is untimely. The opposition was filed with the court and served on the debtors on June 9, 2014, 14 days prior to the June 23 hearing on this objection. Docket 136. This was in compliance with Local Bankruptcy Rule 3007-1(b)(1)(A), which requires that "[o]pposition, if any, to the sustaining of the objection . . . shall be served and filed with the Court by the responding party at least fourteen (14) days preceding the date or continued date of the hearing."

Fed. R. Bankr. P. 7004(b)(1) provides that "service may be made within the United States by first class mail postage prepaid as follows: (1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession." Fed. R. Bankr. P. 9014(b) prescribes that a motion must be served in the manner provided for service of a summons and a complaint in Rule 7004(b).

2. 13-30804-A-11 ELWYN/JEANNINE DUBEY — OBJECTION TO CLAIM
VS. INTERNAL REVENUE SERVICE — 5-7-14 [108]

Tentative Ruling: The objection will be overruled.

The debtors object to the proof of claim of the Internal Revenue Service, proof of claim no. 4. The claim totals $2,039,928.13, $1,079.17 of which is unsecured ($524.88 is priority) and $2,038,848.96 is secured by properties owned by the debtors. The proof of claim is based on tax liens that were the subject of federal district court litigation discussed by this court in its rulings on the IRS' motion for relief from the automatic stay and the debtors' reconsideration motion. Dockets 70 & 90.

IRS' proofs of claim (no. 4) is presumed to be prima facie valid. 11 U.S.C. § 502(a).

"Inasmuch as Rule 3001(f) and section 502(a) provide that a claim or interest as to which proof is filed is 'deemed allowed,' the burden of initially going forward with the evidence as to the validity and the amount of the claim is that of the objector to that claim. In short, *the allegations of the proof of claim are taken as true. If those allegations set forth all the necessary facts to establish a claim and are not self-contradictory, they prima facie establish the claim.* Should objection be taken, the objector is then called upon to produce evidence and show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves. But the ultimate burden of persuasion is always on the claimant. Thus, it may be said that the proof of claim is some evidence as to its validity and amount. It is strong enough to carry over a mere formal objection without more." (Emphasis added).

Wright v. Holm (In re Holm), 931 F.2d 620, 623 (9th Cir. 1991) (quoting 3 L. King, Collier on Bankruptcy § 502.02, at 502-22 (15th ed. 1991)).

The presumptive validity of the claim may be overcome by the objecting party only if it offers evidence of equally probative value in rebutting that offered by the proof of claim. Holm at 623; In re Allegheny International, Inc., 954 F.2d 167, 173-74 (3rd Cir. 1992). The burden then shifts back to the claimant to produce evidence meeting the objection and establishing the claim. In re Knize, 210 B.R. 773, 779 (Bankr. N.D. Ill. 1997).

The debtors have not offered sufficient evidence to rebut the presumptive validity of the claim. The debtors contend that the claim should be disallowed as follows:

"1) Tax liens for years 1986, 1987, 1989 were never re-filed. Thus, the IRS Proof of Claim for those years should be disallowed. *See* Exhibit A, Government's Proof of Claim for Internal Revenue Taxes.

"2) The IRS has not perfected their Claim. Claimants intentional misrepresentation to the Court have failed to provide satisfactory proof in support of claim to this Court. The IRS has filed unreadable paperwork as support of their Proof of Claim. There is no way to know what is on this paperwork used to support their Proof of Claim. *See* Exhibit B at pp. 1-15, IRS Filings in support of Claim.

"3) Claimant's Proof of Claim is not secured being based upon some assessment the Dubey's never received and the IRS never provided as required by law.

"4) Claimant's lien is based upon an invalid tax assessment; *See* Exhibit C, LHS review of Dubey's Tax Transcripts.

"5) The debt is satisfied. According to Certified Public Accountant Lawrence H. Stephens ('LHS'), the Dubeys have paid all tax owed and stand now as creditors being owed by the IRS; *See* Exhibit C, LHS review of Dubey's Tax Transcripts.

"6) Claimants unlawful attempt to collect a debt it knows Petitioner does not owe. *See* Exhibit C, LHS review of Dubey's Tax Transcripts.

"7) #4 on IRS Proof of Claim under 'Secured Claims' shows no tax due, no penalties due, but claims interest due in the amount of $120,749.79 for a tax year in which it did not refile its liens on the Dubey's property. *See* Exhibit A, IRS Proof of Claim, *see also* Exhibit C, LHS review of Dubey's Tax Transcripts at 3.

"8) 'Jeffrey Werstier,' an unknown creditor to the Dubeys is listed on page three of the IRS Claim. *See* Exhibit D, Proof of Claim Section 5 and Section 8.

"9) The IRS intentionally waited until 2014 to collect their alleged judgment from 1998 purposely allowing interest and penalties to accrue against the Dubeys. The Dubey's have attempted on several occasions to work with Attorney Jennings but to no avail. It is not the Dubey's responsibility, additionally, to come forward and offer to help the government collect any judgment they may have. All penalties and interest should be disallowed.

"10) Finally, liens and judgments do not merge. Some liens being released, thus, the judgments are of no effect. *See* Exhibit E, Assistant U.S. Attorney Adair Burroughs evaluation of Garden Valley Investments Property (Case No.

07-cv-02372 E.D.Ca), doc. 44 at 8, 11.5-6."

Docket 108 at 2-4.

The only declaration in support of the foregoing and the above-cited exhibits is the declaration of L.H. Stephens, CPA.

The IRS objects to the admissibility of Mr. Stephens' declaration because Mr. Stephens has not been qualified as an expert witness, eligible to render an opinion as to the debtors' tax liabilities.

The court agrees. Mr. Stephens' declaration does not qualify him as an expert eligible to render an opinion about the debtors' tax liabilities. His declaration does not state his skill, education, work experience, training or knowledge for expert witness qualification. Fed. R. Evid. 702. Although in the declaration Mr. Stephens' name ends with "CPA", this is not sufficient for the court to qualify Mr. Stephens as an expert. Docket 108, Ex. C; Fed. R. Evid. 702. As Mr. Stephens has not been qualified as an expert witness, his opinions about the debtors' tax liabilities are inadmissible. Fed. R. Evid. 701(c). Without the opinions of Mr. Stephens, the debtors' other evidence - consisting of exhibits that are illegible or incomprehensible (Exhibit B) and are not helpful in supporting the debtors' own conclusions above - is also inadmissible. As a result, the debtors have not offered sufficient evidence to rebut the presumptive validity of the claim.

Further, this court has already concluded that the IRS' proof of claim is based on now concluded litigation between the IRS and the debtors. As the court explained in its ruling on the debtors' motion for reconsideration of its order granting in part the IRS' stay relief motion:

"[A]s the court also noted in its ruling on the motion for relief from the automatic stay, 'in the district court action leading to the 1998 judgment, the debtors had the opportunity to litigate both the interest and penalties assessed on their outstanding tax debt. As the 1998 judgment specifically provides for interest, both pre and post 1998, the debtors cannot relitigate these issues again. This court will not allow the debtors to challenge or relitigate in this court issues already litigated or issues that could have been litigated in the district court. To the extent the above-issues were not litigated in the district court, res judicata bars the debtors from relitigating them now. The debtors cannot collaterally attack the district court's judgments here.' Docket 74 at 2.

"This motion makes no effort to address the applicability of the issue or claim preclusion to the debtors' present challenge to the IRS's claim.

"[G]iven that the debtors have had two district court actions to present all their challenges to the amount of IRS's claim, given the applicability of issue and claim preclusion to any new challenges to IRS's claim, and given that the district court is the court where the debtors should be seeking to present newly-discovered evidence - assuming there is such - the court would still dispose of IRS's motion as it did, i.e., grant it in part. See Docket 70. The IRS would still have a colorable claim against the debtors given the prior litigation between the parties in district court."

Docket 90 at 3.

The court incorporates its rulings on the IRS' stay relief motion and the

debtors' reconsideration motion here by reference. Dockets 70 & 90.

Despite the foregoing, before overruling the subject objection. This is without prejudice to the debtors commencing a challenge to the IRS' claim in the federal district court where that claim was established.

3.	13-35329-A-12 KELLY/DEBORA HEISER SJS-2 VS. THE BANK OF NEW YORK MELLON	MOTION TO VALUE COLLATERAL 3-10-14 [18]

Tentative Ruling: The motion will be granted as provided in the ruling below.

The hearing on this motion was continued from May 27, 2014 to allow once again the respondent creditor, The Bank of New York Mellon, to obtain and file its own appraisal of the property. The court also required the bank to explain its failure to comply with the May 12 deadline the court had set on April 14, 2014, at the initial hearing on this motion.

At the May 27 hearing on the motion, the bank was required to file its evidence of value no later than June 10, 2014. Docket 47. The bank filed its evidence on June 10, along with an explanation of why it had not complied with the court's deadline set on April 14. The court is satisfied that the bank's failure to file its evidence of value within the May 12 deadline was not due to its fault. The bank's appraiser had left "several messages with the Debtors and received no return calls" prior to May 12. Docket 48 ¶ 11.

The debtors have not filed any evidence in reply to the bank's evidence of value.

Turning to the merits of the motion, the debtors are asking the court to strip down the senior mortgage of The Bank of New York Mellon on their real property in Rio Linda, California. The mortgage totals approximately $221,879, whereas the debtors are claiming that the value of the property is $135,000.

11 U.S.C. § 1222(b)(2) allows a chapter 12 debtor to modify the rights of secured claim holders. Unlike chapters 11 and 13 of the Bankruptcy Code, chapter 12 does not contain an anti-modification provision. This means that a chapter 12 debtor may strip down claims secured by his principal residence.

Pursuant to 11 U.S.C. § 506(a)(1), a secured claim is a secured claim only to the extent of the creditor's interest in the estate's interest in the collateral. 11 U.S.C. § 506(a)(1) provides that:

"An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim."

"[The value of the collateral] shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest."

A debtor's opinion of value is evidence of value and it may be conclusive in the absence of contrary evidence. Enewally v. Washington Mutual Bank (In re Enewally), 368 F.3d 1165, 1173 (9th Cir. 2004).

Although the debtor contends that the property has a value of $135,000, this valuation is based solely on the debtors' lay opinion of value. See Schedule A; see also Docket 20, Heiser Decl. ¶¶ 3, 4.

On the other hand, the bank has produced evidence of value that is supported by the expert testimony of a real estate appraiser. Docket 45 ¶ 6. That evidence indicates that the property has a value of $195,000. Docket 45 ¶ 6. As the bank's evidence of value is based on the testimony of an expert witness, the court finds the bank's valuation as more persuasive than the debtors' lay opinion of value.

The property is subject to a single mortgage held by The Bank of New York Mellon (serviced by Select Portfolio Servicing according to Schedule D) with a balance of approximately $221,879.

The Bank of New York Mellon's claim will be stripped down to $195,000, representing the value of the property. The Bank of New York Mellon's claim in excess of $195,000 will be an unsecured claim. The motion will be granted only in connection with plan confirmation.

Valuations pursuant to 11 U.S.C. § 506(a) and Fed. R. Bankr. P. 3012 are contested matters and do not require the filing of an adversary proceeding. It is only when such a motion or objection is joined with a request to determine the extent, validity or priority of a security interest, or a request to avoid a lien that an adversary proceeding is required. Fed. R. Bankr. P. 7001(2). Therefore, by granting this motion the court is only determining the value of the respondent's collateral. The court is not determining the validity of a claim or avoiding a lien or security interest. The respondent's lien will remain of record until the plan is completed. See 11 U.S.C. § 349(b). Once the plan is completed, if the respondent will not reconvey/cancel its lien, the court then will entertain an adversary proceeding.

4. 12-35330-A-12 BETTE SPAICH — MOTION TO AMEND JUDGMENT
12-2669 BS-2
SPAICH V. ROTH ET AL — 5-13-14 [96]

Tentative Ruling: The motion will be denied without prejudice.

The court will not adjudicate this motion unless and until the debtor first moves to reopen the adversary proceeding. This adversary proceeding was closed by the court on April 25, 2014.

The plaintiff, Bette Spaich, asks the court to amend the judgment the court entered on April 7, 2014 (Docket 93) by declaring Fazenda Imobiliario, L.L.C., as an alter ego of Defendant Alfred Nevis, and adding Fazenda as defendant to the judgment. The court's judgment directed Mr. Nevis, among other defendants, to comply with the terms of the settlement agreement the parties had reached and the court had approved. See Docket 87.

"California Code of Civil Procedure § 187 has been interpreted to grant courts '"the authority to amend a judgment to add additional judgment debtors."' In re Levander, 180 F.3d 1114, 1121 (9th Cir.1999) (quoting Issa v. Alzammar, 44 Cal.Rptr.2d 617, 618 (Cal.Ct.App.1995) (parallel citation omitted)). This circuit has approved the use of the state procedure in federal court pursuant to Federal Rule of Civil Procedure 69(a). See id. at 1120-21 (noting that Rule 69(a) 'permits judgment creditors to use any execution method consistent with the practice and procedure of the state in which the district court sits'

(quoted source and internal marks omitted)). Section 187 is premised on the notion that the amendment 'is merely inserting the correct name of the real defendant,' id. at 1122 (quoted source and internal marks omitted), such that adding a party to a judgment after the fact does not present due process concerns."

Katzir's Floor and Home Design, Inc. v. M-MLS.com, 394 F.3d 1143, 1148 (9th Cir. 2004).

Cal. Civ. Proc. Code § 187 provides that:

"When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."

"A § 187 amendment requires '(1) that the new party be the alter ego of the old party and (2) that the new party had controlled the litigation, thereby having had the opportunity to litigate, in order to satisfy due process concerns.'"

Katzir's Floor and Home Design at 1148 (quoting Levander at 1121).

"'Alter ego is a limited doctrine, invoked only where recognition of the corporate form would work an injustice to a third person.' Tomaselli v. Transamerica Ins. Co., 25 Cal.App.4th 1269, 31 Cal.Rptr.2d 433, 443 (1994) (citation omitted) (emphasis in the original). The injustice that allows a corporate veil to be pierced is not a general notion of injustice; rather, it is the injustice that results only when corporate separateness is illusory. See id. (listing examples of the 'critical facts' needed to establish that it would be inequitable to respect separate corporate identities 'as inadequate capitalization, commingling of assets, [or] disregard of corporate formalities'). The district court made none of these critical findings before determining that Sommer was the alter ego of M-MLS, Inc. and that the corporate veil should be pierced. Had the district court considered these factors, the only evidence in the record would have supported a finding that the corporation was indeed a separate entity. M-MLS, Inc. maintained separate bank accounts from Sommer, and Sommer never commingled funds with M-MLS, Inc. or used its assets as his own. The mere fact of sole ownership and control does not eviscerate the separate corporate identity that is the foundation of corporate law. See Dole Food Co. v. Patrickson, 538 U.S. 468, 475, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003) ('The doctrine of piercing the corporate veil, however, is the rare exception, applied in the case of fraud or certain other exceptional circumstances.'); 1 William Meade Fletcher et al., Fletcher Cyclopedia of the Law of Private Corporations § 41.35, at 671 (perm.ed., rev.vol.1999) ('[A]llegations that the defendant was the sole or primary shareholder are inadequate as a matter of law to pierce the corporate veil. Even if the sole shareholder is entitled to all of the corporation's profits, and dominated and controlled the corporation, that fact is insufficient by itself to make the shareholder personally liable.' (footnotes omitted))."

Katzir's Floor and Home Design at 1149 (Emphasis added).

"Whether a party is liable under an alter-ego theory is normally a question of fact. (Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal.App.3d 1220, 1248, 1 Cal.Rptr.2d 301; accord, RLH Industries, Inc. v. SBC

Communications, Inc. (2005) 133 Cal.App.4th 1277, 1288, 35 Cal.Rptr.3d 469.) 'The conditions under which the corporate entity may be disregarded, or the corporation be regarded as the alter ego of the stockholders, necessarily vary according to the circumstances in each case inasmuch as the doctrine is essentially an equitable one and for that reason is particularly within the province of the trial court.' (Stark v. Coker (1942) 20 Cal.2d 839, 846, 129 P.2d 390.) Nevertheless, it is generally stated that in order to prevail on an alter-ego theory, the plaintiff must show that '(1) there is such a unity of interest that the separate personalities of the corporations no longer exist; and (2) inequitable results will follow if the corporate separateness is respected.' (Tomaselli v. Transamerica Ins. Co., supra, 25 Cal.App.4th at p. 1285, 31 Cal.Rptr.2d 433.)

"'The alter ego test encompasses a host of factors: "[1] [c]ommingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses . . .; the treatment by an individual of the assets of the corporation as his own . . .; the failure to obtain authority to issue stock or to subscribe to or issue the same . . .; the holding out by an individual that he is personally liable for the debts of the corporation . . .; the failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities . . .; the identical equitable ownership in the two entities; the identification of the equitable owners thereof with the domination and control of the two entities; identification of the directors and officers of the two entities in the responsible supervision and management; sole ownership of all of the stock in a corporation by one individual or the members of a family . . .; the use of the same office or business location; the employment of the same employees and/or attorney . . .; the failure to adequately capitalize a corporation; the total absence of corporate assets, and undercapitalization . . .; the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation . . .; the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities . . .; the disregard of legal formalities and the failure to maintain arm's length relationships among related entities . . .; the use of the corporate entity to procure labor, services or merchandise for another person or entity . . .; the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another . . .; the contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions . . .; and the formation and use of a corporation to transfer to it the existing liability of another person or entity." . . . [] This long list of factors is not exhaustive. The enumerated factors may be considered "[a]mong" others "under the particular circumstances of each case."' (Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft, LLP (1999) 69 Cal.App.4th 223, 249-250, 81 Cal.Rptr.2d 425, quoting Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal.App.2d 825, 838-840, 26 Cal.Rptr. 806; see also VirtualMagic Asia, Inc. v. Fil-Cartoons, Inc. (2002) 99 Cal.App.4th 228, 245, 121 Cal.Rptr.2d 1.) 'No single factor is determinative, and instead a court must examine all the circumstances to determine whether to apply the doctrine. [Citation.]' (VirtualMagic Asia, Inc. v. Fil-Cartoons, Inc., supra, 99 Cal.App.4th at p. 245, 121 Cal.Rptr.2d 1.)."

Zoran Corp. v. Chen, 185 Cal. App. 4th 799, 811-12 (2010).

Fed. R. Civ. P. 69 applies in adversary proceedings via Fed. R. Bankr. P. 7069.

The court is unpersuaded that Fazenda is an alter ego of Mr. Nevis. The plaintiff has not met her burden of persuasion on this point.

The evidence from the plaintiff that Fazenda is an alter ego of Mr. Nevis consists of the following:

(1) A statement in the plaintiff's supporting declaration, declaring that:

"Fazenda Imobiliario, LLC is a California limited liability company with principle [sic] office at 310 James Way, #150, Pismo Beach, CA 93449. Alfred Nevis is the agent for service and principal. The entity was formed March 25, 2011 with Alfred Nevis as the sole manager and organizer."

Docket 98 ¶ 6.

(2) The plaintiff states that Mr. Nevis transferred a real property in Yuba City, California (consisting of five parcels and three addresses, including 3862 Broadway and 3663 and 3541 Nuestro Rd.) to Fazenda without consideration and that Mr. Nevis resides at the property and farms the property. Docket 98 ¶ 8. The property was purportedly transferred from Santa Barbara Holding Co., a general partnership, Port Kihei Inv., Inc., a California corporation and Alfred Nevis to Fazenda. The plaintiff states that Mr. Nevis "executed the grant deed for both Port Kihei Inv., Inc. and Santa Barbara Holding Company, identifying himself as Chief Executive Officer of Port Kihei and general partner of Santa Barbara Holding Company."

Docket 98 ¶ 8.

(3) The plaintiff states: "The records of the County of Sutter indicate that Fazenda Imobiliario, LLC encumbered the Nuestro Rd. property to the Leal Trust and has periodically increased the loan amount by further advances. Fazenda Imobiliario, LLC has no ongoing business insofar as known."

Docket 98 ¶ 11.

(4) The plaintiff states: "The main house on the said real property of Fazenda Imobiliario, LLC is occupied by Alfred Nevis's sister, Alison Nevis and her husband, without payment of rent. The land is farmed by a farm management company, operated by Alfred Nevis' cousins."

Docket 98 ¶ 12.

The court will sustain the evidentiary objections raised by Fazenda. The statements in the plaintiff's declaration lack foundation, *i.e.*, the source of the information for these statements and the plaintiff's personal knowledge is unclear and they appear to be hearsay as refer to out of court statements asserted for the truth of the matters asserted by the plaintiff. Fed. R. Evid. 602, 701, 802.

Further, even if the evidence from the plaintiff were admissible, it is insufficient to establish that Fazenda should be declared an alter ego of Mr. Nevis. The fact that property was transferred to Fazenda from Mr. Nevis and other entities he controls without consideration, that he is listed as agent for service of process and principal of Fazenda, and that he lives on one of the properties transferred along with members of his family, does not establish

that Fazenda is an alter ego of Mr. Nevis. The court has no evidence from the plaintiff about Fazenda's ownership and control structure. Fazenda is a limited liability company that may have more than one managing member. There is no evidence on the capitalization of Fazenda or whether and to what extent its corporate formalities are being kept.

The transfer of property from Mr. Nevis, in part, to Fazenda without consideration, may be evidence of commingling of funds, but it is not dispositive evidence of commingling of funds. There may be a satisfactory "arms-length" transfer explanation of why Mr. Nevis transferred the property to Fazenda without consideration. For instance, he may have received a substantial stake in Fazenda, warranting the transfer of the property without consideration. Although the court will not speculate, the evidence submitted by the plaintiff, even if admissible, is far from conclusive as to Fazenda's alter ego status.

More, even if the evidence from the plaintiff were admissible and it were somehow sufficient to establish that Fazenda is an alter ego of Mr. Nevis, the court still cannot amend the judgment to add Fazenda as an alter ego of Mr. Nevis. As noted earlier, "[a] § 187 amendment requires '(1) that the new party be the alter ego of the old party and (2) that the new party had controlled the litigation, thereby having had the opportunity to litigate, in order to satisfy due process concerns.'" Katzir's Floor and Home Design at 1148 (quoting Levander at 1121).

The court has no evidence whatsoever that Fazenda exerted any control over the subject litigation. The motion will be denied.

The court cannot consider the additional evidence submitted by the plaintiff in her reply to the opposition to the motion, without first giving the respondent an opportunity to respond to that evidence. The court's Local Bankruptcy Rules require that each motion is supported by adequate evidence, meaning that the movant cannot "sandbag" the respondent by not submitting adequate evidence with the motion and submit the required evidence only after the respondent no longer has an opportunity to respond to the motion. See Local Bankruptcy Rule 9014-1(d)(6).

5.	12-35330-A-12	BETTE SPAICH	MOTION TO
	12-2669	BS-3	AMEND JUDGMENT
	SPAICH V. ROTH ET AL		5-13-14 [101]

Tentative Ruling: The motion will be denied without prejudice.

The court will not adjudicate this motion unless and until the debtor first moves to reopen the adversary proceeding. This adversary proceeding was closed by the court on April 25, 2014.

The plaintiff, Bette Spaich, asks the court to amend the judgment the court entered on April 7, 2014 (Docket 93) by declaring Ilsey Farms, LLC (named Isley Farms, LLC in the response to the motion) as an alter ego of Defendant Alfred Nevis, and adding Isley Farms as defendant to the judgment. The court's judgment directed Mr. Nevis, among other defendants, to comply with the terms of the settlement agreement the parties had reached and the court had approved. See Docket 87.

Isley Farms has filed opposition to the motion.

The motion will be denied for substantially the same reasons outlined in the court's ruling on the plaintiff's related motion to amend the judgment to add Fazenda Imobiliario, LLC as defendant on this calendar. That ruling is incorporated here by reference.

6. 13-34541-A-11 CAH-7 — 6056 SYCAMORE TERRACE L.L.C. — MOTION TO CONFIRM PLAN 12-23-13 [40]

Tentative Ruling: The motion will be dismissed as moot.

The debtor is asking the court to confirm its chapter 11 plan filed on December 23, 2013. Docket 40. However, this motion will be dismissed as moot because the debtor filed a new plan and disclosure statement on May 28, 2014. The debtor has set a hearing on the approval of the disclosure statement for July 21, 2014 at 10:00 a.m. This motion will be dismissed.

7. 13-34541-A-11 CAH-9 — 6056 SYCAMORE TERRACE LLC — CONTINUED MOTION TO VALUE COLLATERAL 2-7-14 [85]
VS. JPMORGAN CHASE BANK, N.A.

Tentative Ruling: This motion has been resolved by stipulation. Dockets 111 & 112.

8. 14-21371-A-12 SW-2 — JEREMIAH/HOLLY HARPER — MOTION FOR RELIEF FROM AUTOMATIC STAY 6-9-14 [99]
ALLY BANK VS.

Tentative Ruling: The motion will be denied without prejudice.

The movant, Ally Bank, seeks relief from the automatic stay with respect to a 2010 Dodge Ram. The movant has valued the vehicle at $27,250 and its secured claim is approximately $18,385.42. According to this valuation, the debtor has $8,864.58 of equity in the vehicle.

The court concludes that there is enough equity in the vehicle to provide adequate protection for the movant's interest in the vehicle during the next few months while the debtor obtains plan confirmation. Accordingly, the motion will be denied.

9. 14-21371-A-12 TTF-1 — JEREMIAH/HOLLY HARPER — MOTION TO CONFIRM CHAPTER 12 PLAN 5-20-14 [44]

Tentative Ruling: The debtors move for confirmation of their amended chapter 12 plan filed on May 20, 2104. Docket 47. The motion will be denied.

(1) The debtors' proposed plan strips off or strips down secured claims without court approval. Sections 2.10 and 2.03 of the plan state that the debtors shall file motions to value the 2012 crop proceeds and the Wheatland property before the confirmation hearing. However, the motions to value collateral are scheduled for hearing on July 7, 2014. Dockets 69 & 64.

(2) Section 2.11 of the plan contemplates avoiding a judgment lien on the Wheatland property before the confirmation hearing. However, the motion to avoid lien is scheduled for hearing on July 7, 2014. Docket 76.

(3) The proposed plan does not list out all of the priority or unsecured claims to be paid by the plan. For instance, the Franchise Tax Board has filed two priority claims not listed in the plan, POC Nos. 12 & 13.

As to the unsecured claims, the debtors merely state that a portion of the $50,000 paid semi-annually "shall be distributed to the holders of allowed unsecured claims on a pro rata basis." Without the full list of claims and corresponding amounts, the court cannot determine whether and to what extent the plan is paying the filed proofs of claim.

(4) The proposed plan does not provide for the payment of all and in full of the filed priority claims. Besides seemingly omitting a priority proof of claim filed by the Franchise Tax Board, the plan does not pay the claim of the Internal Revenue Service in full. The amount of the IRS claim in the plan is $125,066, whereas the amount in the proof of claim is $149,925.60. POC No. 16.

(5) The proposed plan does not identify the claims to which the debtors will be objecting. Nor does the plan set a deadline for filing claim objections. Rather, section 4.03 of the plan states that the debtors shall retain authority to file objections to any claims from and after the effective date of the plan. The court will require the plan to set a deadline for the filing and prosecution of claim objections.

(6) The plan cannot be confirmed because it does not satisfy the requirements under 11 U.S.C. § 1225(a)(4), which provides that:

"the value, as of the effective date of the plan, of property to be distributed under plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date."

According to the debtors' liquidation analysis summary, $130,222.06 will be available for payment of general unsecured claims. Exhibit A, Docket 47. However, per the court's calculation, the plan provides only $124,934 in payments to general unsecured claims.

Using the plan formula, $25,013.20 ($125,066 times 1/5) will be used yearly to pay the class 2 priority claims. The remaining $24,986.80 will be distributed to class 14 general unsecured creditors. The payments for the class 14 general unsecured claims during the five-year plan term equals only $124,934 ($24,986.80 times five years).

As such, the plan violates 11 U.S.C. § 1225(a)(4).

(7) The court does not have enough information to assess the feasibility of the plan. In his declaration, Mr. Harper provides a financial projection of $890,000 in annual gross income for the five year plan term. Docket 46.

However, Mr. Harper has not identified the assumptions underlying the financial projections. This is quite important given that the projected income during the life of the plan is substantially higher than the $490,000 in gross income reported for 2012 and $140,000 in gross income reported for 2013. Docket 17, Statement of Financial Affairs.

Lastly, the court finds it unnecessary to address the objections raised by Caterpillar Financial Services Corporation and Green Tree Servicing LLC. Dockets 106 & 108.

10. 11-44274-A-11 GEOFFREY/MARIVIE FABIE — STATUS CONFERENCE
13-2069 — 2-25-13 [1]
CARDILLO V. FABIE ET AL

Tentative Ruling: None.

11. 11-44274-A-11 GEOFFREY/MARIVIE FABIE — MOTION FOR SUMMARY JUDGMENT
13-2069 LP-9 — 1-30-14 [17]
CARDILLO V. FABIE ET AL

Tentative Ruling: None. The parties have informed the court that this adversary proceeding has been settled and that they are still in the process of documenting the settlement.

12. 10-40074-A-13 THOMAS MILLER — MOTION TO SET ASIDE
14-2046 BN-1 — 5-16-14 [20]
MILLER V. GOLDEN 1 CREDIT UNION

Tentative Ruling: The motion will be denied.

The defendant, The Golden 1 Credit Union, asks the court to vacate its default judgment entered against the defendant on May 9, 2014. Docket 17. The defendant has invoked Rule 60(b)(1), (3) and (6), seeking relief from the judgment on the grounds of "mistake, inadvertence, surprise, excusable neglect, misrepresentation or misconduct by an opposing party or 'any other reason that justifies relief.'"

The defendant's principal argument is that the plaintiff "grossly misrepresented the record in his pursuit of a default judgment against [the defendant][,] especially as to the defendant "swiftly address[ing] the Debtor's request that [the defendant] reconvey a deed of trust to resolve completely the Debtor's complaint." Docket 20 at 2.

Fed. R. Civ. P. 55(c), made applicable here by Fed. R. Bankr. P. 7055, provides that the court may set aside an entry of default for good cause shown, and it may set aside a default judgment under Rule 60(b).

Fed. R. Civ. P. 60(b), as made applicable here by Fed. R. Bankr. P. 9024, allows the court to set aside or reconsider an order or a judgment for:

"(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief."

"A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c).

"Relief under Rule 60(b) is discretionary and is warranted only in exceptional circumstances."

Van Skiver v. United States, 952 F.2d 1241, 1243 (10th Cir. 1991), cert.

denied, 506 U.S. 828 (1992).

"The 'good cause' standard that governs vacating an entry of default under Rule 55(c) is the same standard that governs vacating a default judgment under Rule 60(b). (Citation omitted) The good cause analysis considers three factors:"

(1) whether the defendant engaged in culpable conduct that led to the default; (2) whether the defendant had a meritorious defense to the action, or (3) whether vacating the default judgment would prejudice the plaintiff.

"As these factors are disjunctive, the district court was free to deny the motion [for relief from the default] 'if any of the three factors was true.'"

Franchise Holding II, LLC v. Huntington Restaurants Group, Inc., 375 F.3d 922, 925-26 (9th Cir. 2004); TCI Group Life Ins. Plan v. Knoebbler, 244 F.3d 691, 696, overruled in part on other grounds by 532 U.S. 141, 147-50 (9th Cir. 2001); American Ass'n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1108 (9th Cir. 2000); see also Kajander v. Phoenix, No. CV 09-02164-PHX-JAT, 2010 WL 653386 *1 (D. Ariz. Fed. 19, 2010).

The plaintiff filed the underlying chapter 13 bankruptcy case on July 29, 2010. Case No. 10-40074, Docket 1. The court granted a motion to value the collateral of the defendant on December 8, 2010, valuing the defendant's claim at $0.00, in the same order that confirmed the plaintiff's chapter 13 plan. Case No. 10-40074, Docket 19. A notice of intent to enter chapter 13 discharge was filed on October 31, 2013. Case No. 10-40074, Docket 45. That notice was served on the defendant on November 1, 2013. Case No. 10-40074, Docket 46 at 1. The court entered the plaintiff's chapter 13 discharge on November 18, 2013. Case No. 10-40074, Docket 47. The defendant was served with the plaintiff's discharge "after completion of chapter 13 plan" on November 19, 2013. Case No. 10-40074, Docket 48 at 1. The case closed on December 2, 2013. Case No. 10-40074, Docket 49.

Under Cal. Civ. Code § 2941(b)(1)(A), the defendant had 30 days after the November 18, 2013 entry of discharge - which satisfied the defendant's debt for purposes of that statute - to execute and deliver to the trustee the note, deed of trust, and request a full reconveyance. This did not occur.

The plaintiff filed a motion to reopen the bankruptcy case on January 30, 2014, in order to file and prosecute the instant adversary proceeding. Case No. 10-40074, Docket 51. That motion was granted on February 5, 2014. Case No. 10-40074, Docket 54.

The instant adversary proceeding was filed on January 30, 2014. The plaintiff asserted the following causes of action:

1. Ratification of valuation of security,
2. Determination of extent of [the defendant's] second trust deed claim,
3. Extinguishment of [the defendant's] second trust deed claim,
4. Rosenthal Fair Debt Collection Practices Act violations,
5. Violation of Cal. Civ. Code § 2941(d), and
6. Violation of the Fair Credit Reporting Act.

The complaint seeks extinguishment of the defendant's claim secured by the property; seeks declaration that the claim has been discharged; seeks award of attorney's fees and costs under the agreement between the parties, under Cal. Civ. Code § 2941, and under the Fair Credit Reporting Act; seeks award of a

statutory penalty of $1,000 for violation of Cal. Civ. Code § 1788 et. seq.; seeks award of a statutory penalty of $500 for violation of Cal. Civ. Code § 2941; and seeks injunction against the reporting of derogatory information to the credit reporting agencies.

The plaintiff served the complaint on the defendant on January 31, 2014. Docket 6. **On February 4**, 2014, the defendant received the complaint, initiated the reconveyance, and the defendant's collection supervisor, Shirley Giroux, called the office of the plaintiff's attorney. She spoke with someone named Jesse. Dockets 22 & 24, Ex. A at 1. The defendant executed the reconveyance on February 7, 2014. Dockets 22 & 24, Ex. A at 3. The defendant sent a reconveyance deed to the plaintiff's counsel **on or about February 7**. Docket 20 at 3. **On February 11**, Ms. Giroux emailed Jesse, attaching a copy of the reconveyance and stating: "In the future, you can call us at 877-723-3010 and request this verbally, we do not require you file an advers[ary] proceeding." Docket 20 at 3; Dockets 22 & 24, Ex. A at 1.

On April 9, the plaintiff applied for entry of default. Docket 7. The request for entry of default confirmed that the summons and complaint were served on the defendant timely, identified the date by which the defendant was required to file a responsive pleading (March 2, 2014), stated that the defendant did not file a responsive pleading within the deadline, and confirmed that the defendant had not been granted an extension of time to file a responsive pleading. Docket 7.

On April 11, the clerk of the court entered the defendant's default. Docket 8. The entry of default directed the plaintiff to apply for default judgment within 30 days of the date of entry of default, or May 11. Docket 8.

On April 15, after receiving the entry of default, Ms. Giroux emailed the plaintiff's counsel Peter Cianchetta, stating she was surprised with the entry of default, given the reconveyance, and asking Mr. Cianchetta to confirm receipt of the reconveyance and whether this "resolve[d] [the plaintiff's] concerns." Docket 20 at 3; Dockets 22 & 24, Ex. C at 1. The e-mail also asked whether the plaintiff would be willing to have the entry of default set aside, in the event he did not agree that the reconveyance resolved the complaint. Docket 20 at 3; Dockets 22 & 24, Ex. C at 1.

On April 17, Mr. Cianchetta responded, making it clear that the reconveyance did not resolve all claims in the complaint and refusing to agree to set aside the entry of default. Docket 20 at 4; Dockets 22 & 24, Ex. D at 1.

On April 18, the defendant's collection manager, Kamaria Coffman, replied to Mr. Cianchetta:

- stating that the defendant "never received any correspondence from you, your office or the debtor before your adversary proceeding was filed,"

- noting that the reconveyance was made on or about February 10, 2014,

- asserting that the defendant disagrees with the merits of the plaintiff's state law claims but nevertheless reconveyed the deed "to avoid any form-over-substance arguments,"

- reaffirming that the defendant had understood from Ms. Giroux's telephone conversation with Jesse that the reconveyance resolved all the claims,

- stating that the defendant is not responsible for "self-inflicted injuries,"

- expressing an intent to oppose any request for default judgment and expressing surprise at the plaintiff's counsel's purported failure to "mitigate losses," and

- making a settlement offer to the plaintiff for the resolution of all claims, which offer was to expire on April 25 or upon the filing of a request for default judgment.

Docket 20 at 4-5; Dockets 23 & 25, Ex. B at 1.

On April 21, the plaintiff's counsel responded to Ms. Coffman's April 18 e-mail, asking for explanation of the statement that the defendant "is not responsible for self-inflicted injuries." Docket 20 at 5. Ms. Coffman replied the same day, clarifying that "of the $2,767.75 you allege in legal fees, all could have been avoided with a simple call. (After all, Golden 1 reconveyed title just 3 days after receiving your complaint.) As for the over $800 in amounts billed after we reconveyed title (and believed the action was resolved per Shirley's conversation with Jesse), Golden 1 simply cannot be responsible." Dockets 23 & 25, Ex. C at 1.

There were no more communications between the parties. The defendant filed nothing with the court.

On May 8, the plaintiff filed his request for entry of default judgment. Docket 11. The court entered the default judgment on May 9. Docket 17. The judgment awarded, among other relief, $3,426.50 in attorney's fees and $1,500 in penalties, for a total of $4,926.50. Docket 17.

This motion was filed within reasonable time. It was filed on May 16, 2014, only seven days after entry of the subject judgment.

The motion will be denied. The defendant has not established good cause for relief from the default judgment under Rule 55(c), Rule 60(b), and Franchise Holding II.

The defendant does not consider its culpability in the entry of default and ultimately entry of the default judgment.

First, the court rejects the contention that the plaintiff should have contacted the defendant prior to filing the instant adversary proceeding. The defendant has cited to no legal authority imposing such an obligation on the plaintiff and the court is aware of none.

The defendant says, "Golden 1 was never contacted about reconveying title before receiving Debtor's complaint," as if the defendant does not have a statutory duty under Cal. Civ. Code § 2941(b)(1)(A) to initiate full reconveyance within 30 days of satisfaction of the obligation. Docket 20 at 8. Cal. Civ. Code § 2941(b)(1)(A) & (d) prescribes that:

"(b)(1) Within 30 calendar days after the obligation secured by any deed of trust has been satisfied, the beneficiary or the assignee of the beneficiary shall execute and deliver to the trustee the original note, deed of trust, request for a full reconveyance, and other documents as may be necessary to reconvey, or cause to be reconveyed, the deed of trust.

"(A) The trustee shall execute the full reconveyance and shall record or cause it to be recorded in the office of the county recorder in which the deed of trust is recorded within 21 calendar days after receipt by the trustee of the original note, deed of trust, request for a full reconveyance, the fee that may be charged pursuant to subdivision (e), recorder's fees, and other documents as may be necessary to reconvey, or cause to be reconveyed, the deed of trust.

. . .

"(d) The violation of this section shall make the violator liable to the person affected by the violation for all damages which that person may sustain by reason of the violation, and shall require that the violator forfeit to that person the sum of five hundred dollars ($500)."

Cal. Civ. Code § 2941(b)(1) is clear that the defendant has the duty to reconvey the deed upon satisfaction of the claim secured by the deed. The defendant received notice of the notice of intent to enter discharge in the bankruptcy case and also received notice of the plaintiff's entry of discharge, on November 18, 2013. The defendant did nothing but it now complains that the plaintiff filed the instant action. This is disingenuous on the defendant's part.

Second, despite all the e-mail exchanges, a telephone call with Jesse, and the plaintiff's rejection of the request for setting aside the entry of default, the defendant did nothing to make an appearance in this adversary proceeding, until after the court had already entered the default judgment. The defendant does not explain why it did nothing to make an appearance and file a responsive pleading in this action, even though the reconveyance obviously did not resolve all the claims in the complaint, the defendant had not obtained a settlement agreement in writing with the plaintiff, the plaintiff proceeded to obtain an entry of default, and the plaintiff then refused to have the entry of default set aside.

The defendant had sufficient time to engage legal counsel to review the complaint and decide on a sober course of action. Yet, for some reason, it decided to ignore the claims in the complaint, hoping that the reconveyance would resolve all causes of action.

Even a brief glimpse of the complaint reveals that the defendant was naive to think that simply reconveying the deed would resolve all claims. Three of the claims were asking for damages based on Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code § 2941(d) and Fair Credit Reporting Act violations.

And, on the face of the complaint, the defendant had already violated Cal. Civ. Code § 2941(d), as it had not initiated full reconveyance within 30 days of satisfaction of the obligation. As the discharge was entered on November 18, 2013, the defendant should have initiated the full reconveyance no later than December 18, 2013.

The defendant's own evidence indicates that it did not execute the reconveyance until February 7, 2014, after this adversary proceeding was filed. Docket 25, Ex. A at 3.

Further, even lay common sense dictates that after a lawsuit is filed, any settlement should be reduced to writing. Instead, here, the defendant argues that the settlement was in a telephone conversation between Ms. Giroux and

Jesse.

The court rejects the telephone conversation between Ms. Giroux and Jesse as evidence of a complete settlement also for another reason. The defendant does not identify statements made by Jesse. Rather, the defendant states what the defendant understood from the conversation with Jesse - "that if it promptly prepared and sent a reconveyance deed then Debtor's complaint would be completely resolved." Docket 20 at 3. The court does not need the defendant's opinion of what Jesse communicated to Ms. Giroux. It is not probative of whether there was indeed a settlement reached, especially given that the court does not have Jesse's statements to Ms. Giroux in the record.

On the other hand, the court has Jesse's declaration in the record, indicating that he never agreed to or discussed the settling of claims in the complaint or dismissing the action. Docket 33 ¶¶ 6-12.

Moreover, as Jesse is a case manager and not counsel for the plaintiff, it was naive for the defendant to believe that Jesse would be able to bind the plaintiff and agree to a settlement with the defendant over the telephone.

The defendant could not have reasonably believed that it had settled the entire lawsuit with the plaintiff, when it reconveyed the deed on February 7, 2014. The defendant then should not have been surprised when the plaintiff obtained an entry of default and then refused to have the entry of default set aside. From February 10 until the entry of default on April 11, the defendant had approximately two months to retain legal counsel to review the complaint and take appropriate action.

The defendant did not retain counsel during those two months and did not retain counsel also during the 21 days between April 17, when the plaintiff refused to have the entry of default set aside, and May 8, when the plaintiff filed his request for entry of default judgment.

The defendant has not offered a probative explanation of why it did not retain legal counsel after it was served with the complaint - to review and take appropriate action with respect to the complaint - but it instead chose to have its non-legal collections department address the dispute.

Third, the court is unpersuaded that the defendant has meritorious defenses to the complaint.

In light of Cal. Civ. Code § 2941(b)(1), the plaintiff should not have had to even file this action. As elaborated above, the duty is on the defendant to initiate the reconveyance within 30 days after satisfaction of the obligation. The plaintiff waited for over 60 days and when the defendant did nothing, the plaintiff had to retain counsel and take action to protect his interests.

As mentioned above, the defendant violated Cal. Civ. Code § 2941(b)(1) by not initiating the reconveyance within 30 days of satisfaction of the obligation, thus warranting the award of $500 in statutory fees under Cal. Civ. Code § 2941(d).

Importantly, neither the motion, nor the reply mention Cal. Civ. Code § 2941 or the defendant's failure to comply with the 30-day deadline of Cal. Civ. Code § 2941(b)(1). The defendant makes no effort to address its violation of Cal. Civ. Code § 2941(b)(1).

Further, given the defendant's failure to reconvey as prescribed under Cal. Civ. Code § 2941(b)(1) and the defendant's continued insistence that the plaintiff should have contacted the plaintiff before effectuating the reconveyance, the court is not convinced that the defendant has a meritorious defense to the award of $1,000 in statutory penalty under Cal. Civ. Code § 1788.30(b).

As with Cal. Civ. Code § 2941, the motion does not address the defendant's defenses to the statutory penalty under Cal. Civ. Code § 1788.30(b). The motion does not even mention Cal. Civ. Code §§ 1788 et. seq.

As to the motion's mention of jurisdiction and preemption as defenses to the statutory fees/penalties causes of action, the motion does not establish that these are actual defenses. It merely mentions them as defenses raised by Ms. Coffman in her e-mail to Mr. Cianchetta, but it does not explain or even attempt to discuss why such defenses are actionable, applicable or relevant here.

The defendant has not established good cause for setting aside the default judgment.

Fourth, given the relatively small amount of damages awarded by the judgment ($4,926.50) and given that any further litigation that would result from vacating the judgment would lead to the plaintiff incurring additional attorney's fees and costs - merely to establish the defendant's undisputed violation of the deadline prescribed by Cal. Civ. Code § 2941(b)(1) - there is substantial danger of prejudice to the plaintiff if the judgment is vacated.

Fifth, in connection with the foregoing three points, the court notes that the defendant has not cited or attempted to discuss the excusable neglect standard under Rule 60(b)(1). That standard is outlined by Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380, 395 (1993).

"Because Congress has provided no other guideposts for determining what sorts of neglect will be considered 'excusable,' we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . [1) the danger of prejudice to the debtor; 2) the length of delay caused by the neglect and its effect on the proceedings; 3) the reason for the neglect, including whether it was within the reasonable control of the moving party; and 4) whether the moving party acted in good faith]." Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380, 395 (1993).

In light of the court's conclusions above, the defendant has not established excusable neglect for failing to respond to the complaint or otherwise appear and take action in the proceeding, prior to the entry of default and entry of default judgment.

Sixth, the failure of the plaintiff's counsel to disclose to the court in the default judgment request some of the e-mails between him and the defendant's employees, starting on April 14, 2014, does not change the outcome of this motion.

The plaintiff's request for entry of the default judgment disclosed that:

"To date, [the plaintiff] Miller has not heard from anyone on behalf of Golden 1. However, Miller's Counsel has heard from staff at Golden 1, not legal

counsel, expressing surprise that Plaintiff is seeking a default judgment as they did in fact reconvey the deed of trust upon receipt of the summons and complaint. See Declaration of Peter Cianchetta filed concurrently herewith."

Docket 11 at 3.

Mr. Cianchetta's declaration represented that:

"Since the filing of the Adversary Complaint in the above referenced matter, I have received the following communications from Defendant Golden 1: a. February 11, 2014, email with copy of reconveyance. (Exhibit G). b. April 15, 2014, email expressing surprise by request for default.

"At no time have I heard from legal counsel representing Golden 1 nor have I been requested to stipulate to set aside the default for the purpose of Golden 1 to make an appearance."

Docket 15 at 1-2.

The point of the defendant's e-mails to the plaintiff's counsel, starting April 14, was that Ms. Giroux had settled all claims in the telephone call with Jesse on or shortly after February 4, 2014.

But, as noted above, even a brief glimpse of the complaint reveals that the defendant was naive to think that simply reconveying the deed would resolve all claims. And, even lay common sense dictates that after a lawsuit is filed, any settlement should be reduced to writing. As such, the court is not convinced that it would not have entered the default judgment if Mr. Cianchetta had disclosed all the e-mail exchanges with the defendant.

Finally, in his declaration supporting the request for default judgment, Mr. Cianchetta unequivocally states that " . . . nor have I been requested to stipulate to set aside the default for the purpose of Golden 1 to make an appearance." Docket 15 at 1-2.

This statement by Mr. Cianchetta is not true because Ms. Giroux's April 15 e-mail asked him whether he "will agree to set aside [the defendant's] default." Dockets 22 & 24, Ex. C at 1.

However, the court does not infer from this statement any malicious, fraudulent or otherwise inappropriate intent on Mr. Cianchetta's part, to mislead or make misrepresentations to the court. This is supported by Mr. Cianchetta's genuine, albeit erroneous, belief that the defendant's employees were engaged in the unauthorized practice of law, when they were attempting to settle the action and seek the setting aside of the entry of default. This explains Mr. Cianchetta's disregard for Ms. Giroux's request for setting aside of the entry of default. The court makes no findings or conclusions on the unauthorized practice of law issue.

And, the court is not persuaded that it would have denied the request for entry of default judgment, had it known that the defendant's employees had asked Mr. Cianchetta to set aside the entry of default. The motion will be denied.