

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Chief Bankruptcy Judge

Sacramento, California

June 23, 2016 at 1:30 p.m.

1. [10-28701](#)-E-13 STANLEY/JANELLE ORR MOTION TO STRIKE
[15-2250](#) PLC-5 5-23-16 [[56](#)]
ORR ET AL V. NATIONSTAR
MORTGAGE, LLC ET AL

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant's on May 23, 2016. By the court's calculation, 31 days' notice was provided. 28 days' notice is required.

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

The Motion to Strike is denied.

Stanley and Janelle Orr ("Plaintiff-Debtor") filed the instant Motion to Strike Answers and Defenses of Defendants in the Alternative Request for More Definitive Statement on May 23, 2016. Dckt. 56.

The Motion states the following grounds with particularity upon which the request for relief is based:

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- A. Specific answers should be stricken as they contain redundant or leally baseless answers requiring the Plaintiff-Debtor to address issues already admitted or determined by the court, pursuant to Fed. R. Civ. P. 12(f)
- B. Specific affirmative defenses should be stricken as they do not put the Plaintiff-Debtor on fair notice of nature and grounds for the defense as they have taken inconsistent positions in filings with the court pursuant to Fed. R. Civ. P. 8.
 - 1. Plaintiff contends that the defenses provided by Defendants do not place the Plaintiff-Debtor on fair notice of the nature and grounds of such affirmative defense in light of the allegedly conflicting documents they have filed.
- C. In the alternative, Plaintiff-Debtor requests under Fed. R. Civ. P. 12(e) a more definitive statement as tot he answers and defenses pled by the Defendant.

The prayer then requests for the court to strikethe Defendant's entire answer and affirmative defenses.

The Plaintiff-Debtor appear to be asserting that based on some unspecified legal concept or doctrine, the Defendant's prior opposition to Plaintiff-Debtor's Motion for Default Judgment. Dckt. 29. The Plaintiff-Debtor argues that "[m]any of the answers are completely disingenuous in lights [sic] of the Opposition they had filed with the Court in Docket #29." Dckt. 56.

DEFENDANT'S OPPOSITION

Defendant filed an opposition to the instant Motion on June 9, 2016. Dckt. 62. The Defendant states that its answers and affirmative defenses were asserted in an abundance of caution and with consideration of the legal and factual disputed described in the complaint as well as the Plaintiff-Debtor's Motion for Entry of Default Judgment.

The Defendant states and argues that the Plaintiff-Debtor's complaint consists mostly of legal conclusions and statements to which no response is necessarily required.

The Defendant argues, first, that many of the factual allegations must be addressed in discovery due to certain claims, such as the refinancing application, requiring discovery in order to fully answer. Next, the Defendant argues that the complaint makes factual allegations mixed with legal conclusions, foundationless assertions that are irrelevant to the case. As an example, the Defendant highlights the accusation in the complaint that the Defendant engages in uniform pattern and practice of unfair and overly aggressive servicing. The Defendant states that these are legal conclusions that do not bear any relevance to the Plaintiff-Debtor's complaint.

APPLICABLE LAW

Fed. R. Civ. P. 12(f), as incorporated by Fed. R. Bankr. P. 7012, states the following as to Motions to Strike:

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

Courts will strike a claim as "redundant" when it essentially "repeats another claim in the same complaint. 2 *Moore's Federal Practice*, § 12.37[3] (Matthew Bender 3d ed.). An allegation has been found to be "impertinent" or "immaterial" when it is neither responsive nor relevant to the issues involved in the action. *Id.*

Fed. R. Civ. P. 12 "does not provide any authority to strike pleadings on the basis of falsity." 2 *Moore's Federal Practice*, § 12.37[3A] (Matthew Bender 3d ed.). Particularly, in the Ninth Circuit, dismissal based on "falsity" or "sham" pleading is more akin to a resolution on the merits, which is not appropriate at the pleading stage. *PAE Gov. Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856 (9th Cir. 2007).

When a movant seeks to have a defense struck for legal sufficiency, the "movant must make a strong showing to succeed in striking an affirmative defense. It should be stricken only when it is insufficient on the face of the pleadings." 2 *Moore's Federal Practice*, § 12.37[4] (Matthew Bender 3d ed.); see *United States v. 729.733 Acres of Land*, 531 F.Supp. 967 (D. Haw. 1982).

"Motions to strike allegedly redundant, immaterial, impertinent or scandalous matter are generally not favored by the courts because, for the most part, such motions may represent dilatory tactics." 10 *COLLIER ON BANKRUPTCY* ¶ 7012.09 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). Motions to Strike deal with only the material included in a "pleading," which does not include motions, briefs or memoranda, objections or affidavits. 2 *Moore's Federal Practice*, § 12.37[2] (Matthew Bender 3d ed.).

In order to survive a Motion to Strike, pursuant to Fed. R. Civ. P. 12, "the pleader of an affirmative defenses need only 'state' the defense, but need not 'show' anything in order to survive a motion to strike." *Id.*; see *Baroness Small Estates, Inc. v. BJ's Rests., Inc.* 2011 U.S. Dist. LEXIS 86917, at *15 (C.D. Cal. Aug. 5, 2011).

Fed. R. Civ. P. 8, incorporated by Fed. R. Bankr. P. 7008, states the following requirement for pleading affirmative defenses:

(c) Affirmative Defenses.

(1) In General. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

There is a difference in pleading standards between pleading affirmative defenses in an answer versus asserting a claim for relief. Specifically, "Rule 8 requires only that a party 'affirmatively state' any avoidance or affirmative defense." *2 Moore's Federal Practice*, § 8.08[1] (Matthew Bender 3d ed.).

DISCUSSION

First, the court addresses the request to strike the Defendant's affirmative defenses. As discussed supra, the pleading requirements for affirmative defenses in an answer is less than that in a claim for relief. The party just needs to "affirmatively state" the affirmative defense.

Here, the Defendant affirmatively stated fourteen affirmative defenses in its answer. The Plaintiff-Debtor argues that the statements do not put the Plaintiff-Debtor on fair notice of the nature and grounds for the defense since it is in conflict with the Defendant's prior opposition. However, for a Motion to Strike, it is on the face of the pleadings - not

other pleadings. What the Plaintiff-Debtor appears to be arguing is for a Motion for Judgment on the Pleadings rather than a Motion to Strike.

The Defendant's answer sufficiently and affirmatively states the affirmative defenses and puts the Plaintiff-Debtor on fair notice of these defenses. The Plaintiff-Debtor does not offer any argument that, on the fact of the answer, the affirmative defenses are not sufficient or puts the Plaintiff-Debtor on fair notice.

Therefore, the request to strike the Defendant's affirmative defenses is denied.

Second, as to the remaining answer, the court finds that the Plaintiff-Debtor has not shown how the answers are "redundant, immaterial, impertinent or scandalous to justify striking the answer. In sum, the Motion states the following:

1. SPECIFIC ANSWERS SHOULD BE STRICKEN AS THEY CONTAIN REDUNDANT OR LEGALLY BASELESS ANSWERS REQUIRING THE PLAINTIFF TO ADDRESS ISSUES ALREADY ADMITTED OR DETERMINED BY THE COURT, PURSUANT TO FRCP 12(f)

As more specifically detailed in the Memorandum of Points and Authorities, many of the answers provided by Defendants contain redundant or legally baseless answers. Many of the answers are completely disingenuous in light [sic] of the Opposition they had filed with the Court in Docket #29 (Exhibit A). In effect, their opposition filed with the Court states that the only issue is related to adversary complaint was the amount of damages and attorney's fees. In providing a "boiler-plate" answer and one that contradicts their previous filing forces the Plaintiff to expend substantial resources to litigate issues Defendants already admitted to the Court, as such, those answers should be stricken.

Dckt. 56.

The Plaintiff-Debtor's Memorandum of Points and Authorities as to the answers themselves argues that the Defendants have recited boilerplate answers "without giving the Plaintiff any facts for which to understand the answer pled in relation to other pleadings they have made to the court." Dckt. 60.

As an initial matter, as stated supra, a Motion to Strike only looks to the pleading itself and not the pleadings of the entire case - such a request is more akin to a motion for judgment on the pleadings.

Federal Rule of Bankruptcy Procedure 7007 incorporates the state-with-particularity requirement of Federal Rule of Civil Procedure 7(b). Interestingly, in adopting the Federal Rules and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

The Plaintiff-Debtor does not state how the 98 lines of answer (as stated in the Motion) are either redundant, immaterial, impertinent or scandalous to justify the striking of them. The Plaintiff-Debtor makes a blanket assertion that merely because they appear to be boiler plate answers that the entire answer should be struck. That is not the standard. The moving party has the burden to make the showing that an answer is insufficient. Here, the Plaintiff-Debtor makes an indiscriminate request to have the entire answer, including any statements admitted by the Defendants, and expects the court to "fill-in-the-blank" as for the reason for each of the responses. The court declines this invitation.

Implicit in the Plaintiff-Debtor's argument is that some unspecified form of estoppel should or does apply that would result in the Defendant's opposition estopping the Defendant from being able to deny some of the allegations in the complaint. The court reads this argument as one asserting that the answers provided for by the Defendant are false because they are allegedly not aligned with what was stated in the opposition. However, as discussed supra, such an argument is appropriate in a motion on the pleadings in which the merits can be considered. In a Motion to Strike, such a falsity argument is not appropriate.

Therefore, due to the Plaintiff-Debtor failing to make a showing that the Defendant's answers were redundant, immaterial, impertinent or scandalous, the Motion to Strike is denied without prejudice.

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

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

The Motion to Strike filed by Plaintiff-Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied without prejudice.

2. 16-20734-E-13 EUGENE SPENCER
16-2059 MAS-1
SPENCER V. SPENCER, III

CONTINUED MOTION FOR ABSTENTION
AND/OR MOTION FOR REMAND
5-6-16 [8]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor-Defendant on May 6, 2016. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

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

The denies the request for abstention and remand. The court modifies the automatic stay to allow the respective rights and interests in the community property and related issues be determined in the State Court. The court stays further proceedings in this Adversary Proceeding pending further order of the court.

Disarie Ranessa Spencer ("Plaintiff") filed the instant Motion for Abstention and Remand to State Court on May 6, 2016. Dckt. 8. The Plaintiff is seeking to have the court abstain from determining the issues in the instant Adversary Proceeding and remand to be tried by the family law division of the Sacramento Superior Court.

Plaintiff asserts that the complaint asserts breach of fiduciary duty based on Eugene Joseph Spencer, III's ("Defendant-Debtor") violations

of the California Family Code. The Debtor-Defendant's counterclaim states a claim pursuant to California Family Code and, but for the bankruptcy, there would not be federal court jurisdiction.

In support, the Plaintiff asserts the following:

1. State law issues predominate, all of the issues arising under California Family Code.
2. The bankruptcy court is particularly unfit to deal with matters arising under the Family Code and the specialized California family courts are preferable to bankruptcy court adjudication of unequivocally California family law issues.
3. There was a proceeding about to go to trial in the family court in Sacramento until the instant bankruptcy was filed which stopped the case going to trial.

The Plaintiff asserts that any findings of fact and conclusions of law found in the family court will be considered in the non-dischargeability action with preclusive effect once a final judgment has been entered.

COMPLAINT

The Plaintiff initiated the instant Adversary Proceeding on March 25, 2016. Dckt. 1. The Plaintiff asserts the following:

1. "Pursuant to the California Family Code, at all relevant times, Debtor was a fiduciary of Plaintiff, especially regarding community property. The willful concealment and hiding of community property assets constitutes defalcation of fiduciary duty within the meaning of 11 U.S.C. § 523(a)(4)."
2. "The willful hiding of community property assets and willful failure to disclose them and the complete exhaustion of those community property assets by the Debtor were willful, wanton, and fraudulent and in gross derogation of Debtor's fiduciary duty to Plaintiff."
3. "As a proximate result of the aforementioned defalcation of fiduciary duty, Plaintiff is entitled to judgment in the amount of \$131,524.75 exclusive of interest together with an order/judgment determining that such amount is non-dischargeable within the meaning of 11 U.S.C. § 524(a)(4)."
4. "Plaintiff has incurred and will continue to incur attorneys' fees pursuant to the defalcation of fiduciary duty claim which should be determined to be non-dischargeable within the meaning of 11 U.S.C. § 523(a)(15)."

COUNTERCLAIM

On April 25, 2016, the Defendant-Debtor filed an Answer and Counterclaim. Dckt. 7. In relevant part, the Counterclaim asserts the

following:

1. "As part of the divorce order, Spencer was entitled to exclusive use and possession of the family owned real property at 8191 Gandy Dancer Way, Sacramento, CA 95823. In exchange for that entitlement, Spencer owed [Defendant-Debtor] the fiduciary duty to make all payments relating to the mortgage, property taxes, and utilities in such a way that there was no detriment to [Defendant-Debtor's] credit. Spencer failed to make such payments, resulting in defaults being recorded on the mortgage and the home going into foreclosure proceedings numerous times, causing [Defendant-Debtor] damages."
2. "The willful hiding of community assets by Spencer and her failure to make payments associated with the real property were wanton, fraudulent, and in derogation of Spencer's fiduciary duties to [Defendant-Debtor]."
3. "As a proximate result of Spencer's breach of fiduciary duty, [Defendant-Debtor] is entitled to a judgment in the amount of \$120,000.00, exclusive of interest."
4. "[Defendant-Debtor], will need legal representation by counsel for trial in this matter and anticipates incurring legal expenses in excess of \$20,000.00."

Defendant-Debtor has filed his Answer in *pro se*. Dckt. 7.

APPLICABLE LAW

Federal court jurisdiction in bankruptcy cases is established pursuant to 28 U.S.C. § 1334(a), which provides that the United States District Court shall have original and exclusive jurisdiction over all cases under title 11 (the Bankruptcy Code). Congress further provided that the United States District Courts shall have original, but not exclusive, jurisdiction over all civil proceedings arising under title 11 or arising in or related to a case under title 11. 28 U.S.C. § 1334(b). This is a very broad grant of jurisdiction, often needed to address the various matters relating to a bankruptcy case in an expeditious manner to allow for the proper administration of the bankruptcy estate.

Congress then created the bankruptcy courts, which are part of the United States District Courts, 28 U.S.C. § 151, as a specialized court to allow for the sufficient prosecution of bankruptcy and bankruptcy related cases. Each United States District Court is empowered to transfer any and all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 to a bankruptcy judge in that district. The United States District Court for the Eastern District of California has so referred all such matters to the bankruptcy judges. E.D. Cal. Gen. Orders 182, 223.

Bankruptcy judges are empowered to determine all cases under title 11 and enter final judgments and orders in all core proceedings arising under title 11 or arising in a case under title 11. 28 U.S.C. § 157(b)(1).

Core proceedings are generally defined in 28 U.S.C. § 157(b)(2), and by their nature are matters for which Congress has created rights and remedies under the Bankruptcy Code. Bankruptcy jurisdiction extends to four types of title 11 matters: cases "under title 11," cases "arising under title 11," proceedings "arising in a case under title 11," and cases "related to a case under title 11." See *Stoe v. Flaherty*, 436 F.3d 209, 216 (3rd Cir. 2006). A proceeding "arising under title 11" is one that "invokes a substantive right provided by title 11." *Gruntz v. County of Los Angeles (In re Gruntz)*, 202 F.3d 1074, 1081 (9th Cir. 2000) (quoting *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987)). A proceeding "arising in a case under title 11" is one that "by its nature, could arise only in the context of a bankruptcy case." *Id.* A proceeding is "related to a case under title 11" if its outcome could conceivably affect the administration of the estate." *Lorence v. Does 1 through 50 (In re Diversified Contract Servs., Inc.)*, 167 B.R. 591, 595 (Bankr. N.D. Cal. 1994) (citing *Fietz v. Great Western Savings (In re Fietz)*, 852 F.2d 455, 457 (9th Cir. 1988)).

Matters other than a case under title 11, or arising under title 11 or in a case under title 11 are referred to as "related to matters." These matters arise under nonbankruptcy law and are only before the bankruptcy judge (rather than general trial courts such as the United States District Court and California Superior Court) because a bankruptcy case has been filed. A bankruptcy judge hearing and deciding a related-to matter raises Constitutional issues as to the exercise of the federal judicial power which resided in the judiciary under Article III of the United States Constitution. See *Stern v. Marshall*, 564 U.S. ___, 131 S. Ct. 2594 (2011), for a discussion of the exercise of federal court powers and the scope of an Article I judge's ability (such as a bankruptcy judge) to enter final judgments and orders on related to matters.

Congress has addressed the Constitutional issue of an Article I judge exercising federal-court power for related to matters in 28 U.S.C. § 157(c)(1) and (2). This provides that for related to matters the bankruptcy judge shall either (1) hear the matter and make proposed findings of fact and conclusion of law to the district court judge, who shall review them *de novo*, or (2) if the parties consent, the bankruptcy judge shall issue the final judgment and orders in the related to matter. See *Executive Benefits Insurance Agency v. Arkison*, ___ U.S. ___, 189 L.Ed. 2d 83, 2014 U.S. LEXIS 3993 (2014), affirming the *de novo* review procedure provided in 28 U.S.C. § 157(c)(1).

Congress has provided in 28 U.S.C. § 1334(c)(2) for the mandatory abstention by federal courts from exercising the broad grant of jurisdiction for matters "related to" bankruptcy cases. Five elements must be met for mandatory abstention to apply: "(a) the motion must have been made on a timely basis, (b) the claim must have been based on state law, (c) the claim cannot be either based on bankruptcy law or have arisen in a bankruptcy case, (d) the claim must have not been capable of being filed in a federal court absent bankruptcy jurisdiction, and (e) the claim must be capable of being timely adjudicated in state court." *Bally Total Fitness Corp. v. Contra Costa Retail Center*, 384 B.R. 566, 570 (Bankr. N.D. Cal. 2008).

Recognizing that the scope of federal-court jurisdiction for bankruptcy cases as granted in 28 U.S.C. § 1334 is very broad, encompassing anything and everything which can even be merely related to the bankruptcy

case, Congress also empowered federal judges to abstain from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11 in the interest of justice, or interest of comity or respect for State law. 28 U.S.C. § 1334(c)(1). This is commonly called discretionary abstention.

As discussed by the Eighth Circuit Court of Appeals, where the related to matter sounds in nonbankruptcy law and bears a limited connection to the debtor's bankruptcy case, abstention is particularly compelling. *In re Titan Energy, Inc.*, 837 F.2d 325, 331 (8th Cir. 1988); see also *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1169 (9th Cir. 1990) (citing *Titan Energy* for the proposition that abstention is appropriate when the issues in the related to matter arise under state law and disposition in another court will not hinder the bankruptcy case). Citing to a Texas bankruptcy case, the Ninth Circuit identified a summary of factors which would be considered in determining whether abstention was appropriate:

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

Id. at 1167.

DISCUSSION

The court begins with the nature of the request - the court "abstain" from conducting this Adversary Proceeding. The doctrine of abstention is one in which the federal court elects not to adjudicate the proceeding, but leave it to the non-federal court to issue the final orders and judgment. The Adversary Proceeding is not merely a "related to matter," but is one arising under the Bankruptcy Code itself - 11 U.S.C. § 523(a)(4), breach of fiduciary duty. The allegations in the Complaint include the following:

- A. "5. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(I) and (J)."
- B. "11. Pursuant to the California Family Code, at all relevant times, Debtor was a fiduciary of Plaintiff, especially regarding community property. The willful concealment and hiding of community property assets constitutes defalcation of fiduciary duty within the meaning of 11 U.S.C. § 523(a)(4). See also *In re Lam* 364 B.R. 379 (Bankr. N.D. Cal. 2007)."
- C. "13. As a proximate result of the aforementioned defalcation of fiduciary duty, Plaintiff is entitled to a judgment in the amount of \$131,524.75 exclusive of interest together with an order/judgment determining that such amount is non-dischargeable within the meaning of 11 U.S.C. § 523(a)(4)."
- D. "14. Plaintiff has incurred and will continue to incur attorneys' fees pursuant to the defalcation of fiduciary duty claim which should be determined to be non-dischargeable within the meaning of 11 U.S.C. § 523(a)(15)."

Complaint, ¶¶ 5, 11, 13, 14.

There are two distinct issues to consider in the dischargeability analysis: first, the establishment of the debt itself; and, second, a determination as to the nature of that debt, an issue within the exclusive jurisdiction of the bankruptcy court and thus governed by Bankruptcy Rule 4007. *Banks v. Gill Distribution Centers, Inc.*, 263 F.3d 862, 867 (9th Cir. 2001). Clearly, the relief requested is that arising under the Bankruptcy Code, and is a federal law question which is for federal judges to determine and enter the final judgment. That is not a "related to" matter.

Additionally, the Complaint which is the subject of this Adversary Proceeding was filed in this federal court and not in the state court and removed to this federal court. Thus, to the extent that it requests the court "remand" this Adversary Proceeding to the state court, such relief cannot be granted. 28 U.S.C. § 1452 is the statutory basis for removal of state court actions "related to" a bankruptcy case. Such a case may be remanded to the state court in which the action was removed from. 28 U.S.C. § 1447(d).

Abstention from Determining State Law Issues

**And Staying This Adversary Proceeding Pending
Final State Court Judgement**

While this is not a "related to" proceeding, Plaintiff is correct that determination of the underlying rights and obligations of Plaintiff and Defendant-Debtor arising under California Family Law. While federal judges commonly determine state law issues and matters in contested matters and adversary proceedings, due deference is given to state court determining such issues when they may be expeditiously litigated in the state court. This is especially true in connection with family law matters. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 12 (2004). "Thus, while rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, see, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432-434, 80 L. Ed. 2d 421, 104 S. Ct. 1879 (1984), in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts." *Id.* at 13.

It is alleged that the present bankruptcy case was filed by Defendant-Debtor on the eve of the state court determining the respective rights and obligations of these two parties as former spouses under California Family Law. While it is not shocking that a debtor would have filed a bankruptcy case on the eve of a trial, foreclosure, a state court receiving taking possession of debtor's business, or the like, the court properly considers the nature of the non-bankruptcy court proceeding and how it meshes or unduly conflicts with the bankruptcy process.

Debtor's bankruptcy case was filed on February 10, 2016. To date, three proofs of claims have been filed. Plaintiff's proof of claim is in the amount of \$45,822.81 and comprises 98.5% of all claims filed in this case. Official Registry of Claims, Case No. 16-20734. The claims bar date for non-governmental claims is June 22, 2016, and for governmental claims is August 8, 2016. 16-20734; Notice of Bankruptcy, Dckt. 19.

In reviewing the Complaint and Counter-complaint, it is clear that while the determinations to be made in the Adversary Proceeding would have direct effect of the dischargeability of the Plaintiff's claim, the underlying issue resonates in California Family Law. The counter-claim filed by Defendant-Debtor. While not specified, it appears that the following state law matters may, and should in the context of this Adversary Proceeding and Defendant-Debtor's bankruptcy case, be allowed to be determined in the state court - so long as they can be promptly and timely determined so as not to unduly impair Defendant-Debtors' ability and right to an effective prosecution of his underlying bankruptcy case.

State Law Claims Stated In Nondischargeability Complaint 11 U.S.C. § 523	State Law Claims Stated in Counter-Claim (Property of Estate - 11 U.S.C. § 541(a))
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<p>"8. Subsequent to the completion of the divorce, Plaintiff learned that Debtor had wrongfully concealed substantial community property assets in the form of willfully undisclosed pension monies, refinance proceeds, and other property. The value of these willfully concealed and/or hidden community property assets is over \$100,000.00."</p>	<p>"40. The parties continued to live together in the community-owned residence for at least one (1) year following service of the summons and complaint for dissolution."</p>
<p>"9. A trial was set in the Family Law Action for February 2016 on a claim for breach of fiduciary duty to disclose assets as well as attorneys' fees incurred by Plaintiff."</p>	<p>"41. After Spencer complained that Spencer III did not disclose assets in the divorce proceeding, Spencer III discovered that other assets belonging to the community, that were in the exclusive control of Spencer, were not disclosed or shared by her."</p>
<p>"10. Less than 24 hours prior to the time that the trial in the Family Law Action was to begin, Debtor filed his bankruptcy petition herein."</p>	<p>"42. Specifically, Spencer purposefully willfully failed to disclose bank accounts and retirement accounts that belonged to the community, breaching the fiduciary duty Spencer owed to Spencer III within the meaning of California Family Code § 1101."</p>
<p>"11. Pursuant to the California Family Code, at all relevant times, Debtor was a fiduciary of Plaintiff, especially regarding community property."</p>	<p>"43. Spencer III estimates the value of the undisclosed assets to be in excess of \$90,000."</p>
<p>"12. The willful hiding of community property assets and willful failure to disclose them and the complete exhaustion of those community property assets by the Debtor were willful, wanton, and fraudulent and in gross derogation of Debtor's fiduciary duty to Plaintiff."</p>	<p>"44. At all relevant times, Spencer was a fiduciary of Spencer III regarding the community property."</p>

<p>"13. As a proximate result of the aforementioned defalcation of fiduciary duty, Plaintiff is entitled to a judgment in the amount of \$131,524.75 exclusive of interest...."</p>	<p>"45. As part of the divorce order, Spencer was entitled to exclusive use and possession of the family owned real property at 8191 Gandy Dancer Way, Sacramento, CA 95823. In exchange for that entitlement, Spencer owed Spencer III the fiduciary duty to make all payments relating to the mortgage, property taxes, and utilities in such a way that there was no detriment to Spencer III's credit. Spencer failed to make such payments, resulting in defaults being recorded on the mortgage and the home going into foreclosure proceedings numerous times, causing Spencer III damages.</p>
	<p>"46. The willful hiding of community assets by Spencer and her failure to make payments associated with the real property were wanton, fraudulent, and in derogation of Spencer's fiduciary duties to Spencer III."</p>
	<p>"47. As a proximate result of Spencer's breach of fiduciary duty, Spencer III is entitled to a judgment in the amount of \$120,000.00, exclusive of interest."</p>

Complaint, Dckt. 1; Counter-Claim, Dckt. 7.

Thus, it is proper for this court to: (1) "abstain" from determining the state law duties, rights, and obligations as "fiduciaries" and the damages, if any, owed by Defendant-Debtor to Plaintiff (Plaintiff's claim) and owed by Plaintiff to Defendant-Debtor (property of the estate). However, what is to be litigated in State court must be clearly identified and identified to an existing complaint. Further, the automatic stay must be modified to allow the state court judge to conduct the necessary proceedings and enter final orders and judgment.

Once the final state court judgment is entered, and all of the required findings of fact and conclusions of law are made, this federal court will then conduct this Adversary Proceeding, applying the doctrine of collateral estoppel, and determine all issues necessary to make the determination of what claims, if any, are nondischargeable.

STATE COURT ACTION

Movant filed a request for "Judicial Notice" of pleadings filed in the underlying bankruptcy case (16-20734). The documents are the Movant's declaration in opposition to Defendant-Debtor's proposed Chapter 13 Plan and copies of two state court orders and a California Child Support Statement. In the Declaration, Movant testifies to, relevant to the present Motion, : (1) believing that Defendant-Debtor concealed specified community property assets and (2) in her dissolution proceedings Movant "[c]aused a motion to

be made to have the Debtor found in defalcation of fiduciary duty under the California Family Code in the family law case based on the foregoing concealed monies/assets which were community property;" and (3) less than 24 hours before "trial" on that motion, Defendant-Debtor commenced his Chapter 13 bankruptcy case.

While testifying to there being a "motion" to have it determined that Defendant-Debtor be found in "defalcation of fiduciary duty," no copy of the Motion is provided.

**ADDITIONAL PLEADINGS IDENTIFYING THE
STATE COURT ACTIONS FOR WHICH THE
AUTOMATIC STAY WILL BE MODIFIED**

To properly structure an order modifying the automatic stay, the court ordered the Debtor and Movant to file any supplemental pleadings on or before June 16, 2016, identifying the state court proceedings at issue. Movant timely filed a supplemental declaration and exhibits. Dckts. 21, 22. Debtor did not file any additional evidence.

The court modifies the automatic stay to allow the California courts to issue a final judgment, including all appeals (if any) in In re Marriage of Spencer, Disarie Ranessa Spencer, Petitioner/Plaintiff v. Eugene J. Spencer, III, Respondent/Defendant; California Superior Court for Sacramento County case number 06FL06410, for the following claims, interest, and rights, as stated in the Request for Order for (1) Undisclosed Assets and (2) Undisclosed Assets, Breach of Fiduciary Duty, filed on June 10, 2015 (a copy of which is attached to the Order modifying the automatic stay):

A. Undisclosed Bank Accounts:

1. Determination of whether the claim asserted by Disarie Ranessa Spencer that Husband's undisclosed bank accounts on date of separation, which are stated to have been \$5,951.64 in savings and \$3,105.34 in checking were undisclosed assets and that, by operation of California Family Law, and what portion, if any, the State Court awards to Disarie Ranessa Spencer as her property.
2. Determination of whether the claim asserted by Disarie Ranessa Spencer that Husband withdrawn from Husband's 401(k) after date of separation: 1) \$16,000.00 on October 18, 2006; 2) \$7,590.00 on November 14, 2006; ,and 3) \$16,000.00 on December 5, 2006, which total \$39,590.00, were undisclosed assets and that, by operation of California Family Law, and what portion, if any, the State Court awards to Disarie Ranessa Spencer as her property.
3. Determination of whether the claim asserted by Disarie Ranessa Spencer that Husband received \$74,797.00 deposited into a secret account in 2004 from the proceeds of another refinance of the marital residence were undisclosed assets and that, by operation of

California Family Law, and what portion, if any, the State Court awards to Disarie Ranessa Spencer as her property.

4. Determination of whether the claim asserted by Disarie Ranessa Spencer that community funds were used by Husband to make monthly payments \$1,772.12 to \$1,940.00 to Provident Bank were undisclosed assets and that, by operation of California Family Law, and what portion, if any, the State Court awards to Disarie Ranessa Spencer as her property.
 5. Determine the attorneys' fees and costs, if any, awarded Disarie Ranessa Spencer for the claims asserted in the June 20, 2015 RFO.
- B. The automatic stay is not modified to terminate Debtor's or the bankruptcy estate's interest in any of the assets which are determined to be awarded to Disarie Ranessa Spencer, to order the payment of any specific assets of the bankruptcy estate to Disarie Ranessa Spencer, with any such payments to be made to Disarie Ranessa Spencer through a confirmed Chapter 13 Plan, or by enforcement of the State Court Order and Judgment after the closing or dismissal of this bankruptcy case, or as otherwise ordered disbursed by the bankruptcy court in this case.

The court has structured the modification of the stay to allow the State Court to fully adjudicate the rights, disputes, and interests as between Disarie Ranessa Spencer and Eugene J. Spencer, III, including determining, as between the two of them, who should be awarded community property, rather than dividing it, as being an equitable or punitive division in light of the assets being undisclosed by one of the spouses.

However, the community property is property of this bankruptcy estate and subject to the claims of the creditors of Debtor. 11 U.S.C. § 541(a)(2), 1325(a)(4). It may be of little moment to Movant in that she holds the lion's share of the claims in this bankruptcy case. In considering the distribution of these assets through the bankruptcy case, the court may take into consideration what non-community property assets exist to pay creditor claims and whether an accelerated distribution of community property assets to Movant does not unfairly discriminate as to other creditors holding general unsecured claims.

The court denies the Motion to Abstain, modifies the automatic stay as provided above, and stays further proceedings in this Adversary Proceeding pending completion of the state court matters for which the stay has been modified.

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 Abstention and to Remand to State Court filed by Disarie Ranessa Spencer ("Plaintiff") having been presented to the court, and upon review of the pleadings, evidence, the files in the Chapter 13 bankruptcy case of Eugene Joseph Spencer, Bankr. E.D. Cal. 16-20734, arguments of counsel, and good cause appearing,

IT IS ORDERED that the requested relief for this court to abstain and to remand this Adversary Proceeding which was commenced in this court is denied.

IT IS FURTHER ORDERED that the automatic stay is modified to allow the California courts to issue a final judgment, including determination of all appeals (if any) in the pending action *In re Marriage of Spencer*, Disarie Ranessa Spencer, Petitioner/Plaintiff v. Eugene J. Spencer, III, Respondent/Defendant; California Superior Court for Sacramento County case number 06FL06410, for the following claims, interest, and rights, as stated in the Request for Order for (1) Undisclosed Assets and (2) Undisclosed Assets, Breach of Fiduciary Duty, filed on June 10, 2015 (a copy of which is attached as Addendum A to this Order modifying the automatic stay):

A. Undisclosed Bank Accounts:

1. Determination of whether the claim asserted by Disarie Ranessa Spencer that Eugene J. Spencer, III's undisclosed bank accounts on date of separation, which are stated to have been \$5,951.64 in savings and \$3,105.34 in checking were undisclosed assets and that, by operation of California Family Law, and what portion, if any, the State Court awards to Disarie Ranessa Spencer as her portion of the community property.
2. Determination of whether the claim asserted by Disarie Ranessa Spencer that Eugene J. Spencer, III withdrawn from Eugene J. Spencer, III's 401(k) after date of separation: 1) \$16,000 on October 18, 2006; 2) \$7,590 on November 14, 2006; ,and 3) \$16,000 on December 5,2006, which total \$39,590, were undisclosed assets and that, by operation of California Family Law, and what portion, if any, the State Court awards to Disarie Ranessa Spencer as her portion of the community property.
3. Determination of whether the claim

June 23, 2016 at 1:30 p.m.

asserted by Disarie Ranessa Spencer that Eugene J. Spencer, III received \$74,797 deposited into a secret account in 2004 from the proceeds of another refinance of the marital residence were undisclosed assets and that, by operation of California Family Law, and what portion, if any, the State Court awards to Disarie Ranessa Spencer as her portion of the community property.

4. Determination of whether the claim asserted by Disarie Ranessa Spencer that community funds were used by Eugene J. Spencer, III to make monthly payments \$1,772.12 to \$1,940 to Provident Bank were undisclosed assets and that, by operation of California Family Law, and what portion, if any, the State Court awards to Disarie Ranessa Spencer as her portion of the community property.
5. Determine the attorneys' fees and costs, if any, awarded Disarie Ranessa Spencer for the claims asserted in the June 20, 2015 RFO.

- B. The automatic stay is not modified to terminate Debtor's or the bankruptcy estate's interest in any of the assets which are determined to be awarded to Disarie Ranessa Spencer, to order the payment of any specific assets of the bankruptcy estate to Disarie Ranessa Spencer, with any such payments to be made to Disarie Ranessa Spencer through a confirmed Chapter 13 Plan, or by enforcement of the State Court Order and Judgment after the closing or dismissal of this bankruptcy case, or as otherwise ordered disbursed by the bankruptcy court in this case. The bankruptcy court determine the proper distribution, as a matter of federal law, for the community property through the Chapter 13 plan or as otherwise permitted under federal law.

ADDENDUM TO ORDER

3. [09-26693-E-13](#) TOM/KRIS SHORTRIDGE
[16-2032](#)
SHORTRIDGE ET AL V. GREENWICH
INVESTORS XXXII, LLC ET AL

MOTION FOR ENTRY OF DEFAULT
JUDGMENT
5-19-16 [[21](#)]

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendants on May 19, 2016. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

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

The Motion for Entry of Default Judgment is granted.

Tome and Kris Shortridge ("Plaintiff-Debtor") filed the instant Motion for Default Judgment on May 19, 2016. Dckt. 121 The Plaintiff-Debtor is seeking an entry of default judgment against Greenwich Investors XXXII, LLC ("Greenwich") and Land Home Financial Services, Inc. ("Land Home") (collectively referred to as "Defendants"), in the instant Adversary Proceeding No. 16-02032.

The instant Adversary Proceeding was commenced on February 17, 2016. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on February 17, 2016. Dckt. 3. The complaint and summons were properly served on both Defendants. Dckt. 6.

Defendants failed to file a timely answer or response or request for an extension of time. Default was entered against Defendants pursuant to Fed. R. Bankr. P. 7055(a) by the Clerk of the United States Bankruptcy Court on April 22, 2016. Dckt. 16 and 17.

COMPLAINT

The Complaint contains the following general allegations as summarized by the court:

1. Plaintiff-Debtor owns and resides in a parcel of real property known as 1545 Malaga Court Yuba, California ("Property").
2. The Property had a fair market value of approximately \$245,000.00.
3. Plaintiff-Debtor filed a Chapter 13 Bankruptcy Case No. 09-26693 on April 9, 2010.
4. As of the petition date the following liens encumbered the Property:
 - a. First Deed of Trust in favor of Green Tree Servicing, LLC.
 - b. Second Deed of Trust in favor of National City Mortgage (acquired by PNC Bank, N.A.).
5. Plaintiff filed a Motion to Value the Property on April 20, 2009. The Motion was granted and the Defendants' claim was valued to be a secured claim of \$0.00. Case No. 09-26693.
6. On November 2, 2009 National City Mortgage (now PNC Bank) filed notice of its assignments of all servicing of the second deed of trust to Green Tree Servicing LLC effective October 28, 2009. The court returned the notice, indicating it was the transferee's responsibility to file such notice.
7. On or about November 13, 2009, Defendants assigned all interest in its deed of trust to Greenwich Investors XXXII, LLC.
8. On December 1, 2009, a Notice of Intent to Transfer Claim was filed of National City Mortgage's intent to transfer claim to Green Tree Servicing LLC.
9. The Plaintiff-Debtors filed another Motion to Value out of an abundance of caution, noticing Green Tree Servicing. The Motion was granted on July 6, 2014 and set the value of the secured portion of the claim at \$0.00.
10. Sometime in 2013, Greentree transferred servicing of the loan to Land Home Financial Services, Inc.

11. Plaintiff Kris Shortridge has discussed the issue regarding reconveyance of title with the beneficiary of the second deed of trust and/or the beneficiary's agent and her requests for reconveyance have been flatly denied. On information and belief the company that has refused to reconvey is called Land Home Financial Services, Inc. and is the current servicer of the loan.

First Claim of Relief - Extinguishment of the Second Trust Deed Claim

The Plaintiff-Debtor alleges the following for the First Cause of Action:

1. Plaintiff is informed and believes that the second trust deed is completely unsecured and under applicable law has been determined to be a general unsecured claim, the balance of which was lawfully discharged by order of the court. The court has the authority under applicable law, including 11 U.S.C. § 1322(b), to confirm a chapter 13 plan which treats the holder of the second trust deed as an unsecured creditor.
2. Under applicable law, upon completion of Plaintiff-Debtor's chapter 13 plan and issuance of a discharge, the court has the authority to extinguish the second trust deed.
3. The Plaintiff has completed their Chapter 13 Plan and requested that the defendant remove their lien.
4. Plaintiff began the process of attempting to refinance the property in October 2015. During this process the Plaintiffs discovered that Defendant failed to reconvey the deed of trust and that this lien was still recorded as being valid and Plaintiff was informed that it would be forced to pay the second deed of trust in the event they wanted to refinance the primary mortgage on the property. Plaintiff alleges on information and belief that Defendant provided a pay off amount on the zero value second deed of trust to Plaintiff's prospective lender in an amount greater than \$0.00.
5. Plaintiff immediately contacted Defendant in January 2016 and spoke to a representative and requested the second deed of trust be reconveyed. The representative allegedly refused. Plaintiff again called Defendant on January 22, 2016 and spoke with another agent. The agent requested that Plaintiff fax the order valuing the second deed of trust and other documents to prove that the case has been discharged. The Plaintiff faxed the requests documents. The agent again refused to reconvey.
6. Plaintiff requests judgment from the court to extinguish the second deed of trust in a form allowing for recording with the Sutter County Records office related to the Property
7. The second deed of trust contains an attorney's fees and costs provision. Plaintiff attempted to obtain the release of

the Defendant's lien without incurring attorney fees and costs and was unsuccessful and needed the assistance of counsel to file the instant adversary proceeding. As such, Plaintiff requests an award of attorney fees and costs.

Second Claim for Relief - Violation of California Civil Code § 2941(d)

The Plaintiff-Debtor alleges the following for the Second Cause of Action:

1. Plaintiff, for valuable consideration, made and delivered a promissory note to Defendant (or its successors in interest). On that same day Plaintiff executed and delivered to Defendant (or its successors in interest) a certain trust deed, namely the second deed of trust.
2. Plaintiff later obtained an order valuing the security of the second deed of trust to \$0.00 and then obtained a discharge in the underlying bankruptcy case. Defendant (or its successors in interest) received notice of all events as required under the Bankruptcy Code.
3. Plaintiff noticed Defendant, in addition to their formal notice from the Bankruptcy Court, that they obtained discharge and faxed proof of the same to Defendant. Despite having clear knowledge of the \$0.00 value of its second deed of trust and being made aware that their actions were causing harm and delay to Plaintiff, Defendant and/or its agents refused to reconvey and persisted in its willful act of frustrating the Plaintiff's discharge and causing them stress and unlawful delay in obtaining a refinance of their primary mortgage.
4. California Civil Code § 2491(d) requires that, within 30 days after an obligation secured by a deed of trust has been satisfied, the beneficiary or the assignee shall execute and deliver a full reconveyance. Defendant has failed to reconvey as required by law. As a result, Plaintiff has been damaged in an amount to be proven at trial.
5. California Civil Code § 2491(d) provides that victims of a failure to reconvey are entitled to any and all actual damages and statutory damages in an amount of \$500.00.

Prayer

The prayer requests the court entering a judgment for the following:

1. Extinguishing the second deed of trust;
2. Attorney's fees and costs;
3. Actual damages in an amount according to proof at trial;
4. Statutory penalties;

MOTION

Debtor filed a Motion on May 19, 2016. Dckt. 21. The Plaintiff-Debtor requests the following in the Motion:

1. The court should enter a default judgment declaring the deed of trust is void.
2. The court should award attorney fees in the amount of \$5,780.00 Dckt. 24, Exhibit F.
3. The court should award \$500.00 pursuant to Civil Code Section 2941.
4. The court order Defendants to remove all "inaccurate, derogatory credit information they have reported to the credit bureaus they report to and that any failure to do so may subject Defendants to contempt." Dckt. 21.

APPLICABLE LAW

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

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

- (1) the possibility of prejudice to the plaintiff,
- (2) the merits of plaintiff's substantive claim,
- (3) the sufficiency of the complaint,
- (4) the sum of money at stake in the action,
- (5) the possibility of a dispute concerning material facts,
- (6) whether the default was due to excusable neglect, and
- (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

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

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled

and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. See *id.* at 775.

DISCUSSION

Reconveyance

That First Cause of Action seeks a declaration as between the parties that the court's May 19, 2009 order is a real, enforceable order, and that it really means that Defendant's secured claim has a value of \$0.00 (now that the plan has been completed), and therefore there is no debt for the Deed of Trust to secure.

Plaintiff-Debtor states that on April 9, 2009 they filed a Chapter 13 bankruptcy case. As of that date, the Property had two liens encumbering the property: (1) First Deed of Trust in favor of Green Tree and (2) Second Deed of Trust in favor of National City Mortgage (later transferred to Defendant).

Plaintiff-Debtor states that on or about June 26, 2014, the Plaintiff-Debtor completed their Chapter 13 plan which required the Defendant to reconvey the Deed of Trust on the Property. Plaintiff-Debtor was discharged on October 6, 2014. Case No. 09-26693, Dckt. 112.

According to the Trustee's Final Report and Account in the Plaintiff-Debtor's bankruptcy case, Case Number: 2009-26693, Debtor's Plan was confirmed on May 29, 2009, and completed on June 26, 2014. Bankr. E.D. Cal. No. 09-26693, Dckt. 103, August 13, 2014. The discharge of Plaintiff-Debtor was entered on October 6, 2014. Bankr. E.D. Cal. No. 10-37416, Dckt. 111. Plaintiff-Debtor states that more than 30 days have passed and Defendants have not reconveyed, and that Plaintiff has been required to file an adversary proceeding.

Here, it appears that Plaintiff-Debtor was entitled to the full reconveyance of the Deed of Trust on the Property. This court has addressed, in detail, the California state law, standard note and deed of trust contractual basis, and possible 11 U.S.C. § 506(d) basis for a creditor having the obligation to reconvey a deed of trust upon a debtor has successfully completed the Chapter 13 Plan which provides for the payment of the secured claim in the 11 U.S.C. § 506(a) determined amount. *In re Frazier*, 448 B.R. 803 (Bankr. ED Cal. 2011), *affd.*, 469 B.R. 803 (ED Cal. 2012) (discussion of "lien striping" in Chapter 13 case); *Martin v. CitiFinancial Services, Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. CA 2013).

Upon completion of the Chapter 13 Plan and its terms becoming the final, modified contract between the Debtor, Defendant, and creditors, there remains no obligation which is secured by the Second Deed of Trust. As a matter of California law, the Second Deed of Trust is void. FN.1. The lien is also rendered void by operation of 11 U.S.C. § 506(d) upon completion of the Chapter 13 Plan. *Martin v. CitiFinancial Services, Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. CA 2013).

FN.1. 4 WITKIN SUMMARY OF CALIFORNIA 9 LAW, TENTH EDITION, § 117, citing California Civil Code § 2939 et seq.; Rest.3d, Property (Mortgages) § 6.4; 4 Powell § 37.33; C.E.B., 2 Mortgage and Deed of Trust Practice 3d, § 8.84; and 13 Am.Jur. Legal Forms 2d, § 179:511.

In addition, California Civil Code § 2941(b)(1) imposes a statutory obligation on the beneficiary under the deed of trust (Defendant in this Adversary Proceeding) to reconvey the deed of trust when the obligation secured has been satisfied. The Chapter 13 Plan having been completed and Defendant having been paid the full amount of the secured claim as finally determined pursuant to 11 U.S.C. § 506(a) and completion of the confirmed plan, that secured obligation has been satisfied.

California Civil Code § 2941(b)(1) requires that within 30 days of the obligation secured by a deed of trust having been satisfied, the beneficiary [Defendant-OneWest] shall deliver to the trustee under the deed of trust an executed request for reconveyance and supporting documents. The trustee under the deed of trust then has 21 days from receipt of the request for reconveyance to reconvey the deed of trust. Cal. Civ. § 2941(b)(1)(A). The trustee under the deed of trust, not the beneficiary, is responsible for providing a copy of the reconveyance to the owner of the property—here the Plaintiff. Cal. Civ. § 2941(b)(1)(B)(ii).

Here, the Plaintiff-Debtor completed their plan on June 26, 2014. To date, Defendant has not reconveyed the Deed of Trust as required by § 2941 within 30 days after the obligation has been satisfied (here being after the completion of the plan).

Statutory Penalty

The California Legislature has provided for a statutory forfeiture of \$500.00 (expressly stated as a forfeiture in the statute) in connection with the reconveyance of a deed of trust, as follows:

(d) The violation of this section shall make the violator 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. § 2941(d). The grounds for the possible violations of California Civil Code § 2914 in connection with this Adversary Proceeding are (as summarized by the court):

- I. 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:
 - A. 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.

- B. The trustee shall execute and record the reconveyance within 21 calendar days after receipt by the trustee of the original note, deed of trust, request for a full reconveyance, and fees as may be necessary to reconvey, or cause to be reconveyed, the deed of trust.
- C. The trustee shall deliver a copy of the reconveyance to the beneficiary or its servicing agent, if known.

II. If the trustee has failed to execute and record, or cause to be recorded, the full reconveyance within 60 calendar days of satisfaction of the obligation, the beneficiary, upon receipt of a written request by the trustor, shall execute and acknowledge a document pursuant to Section 2934a substituting itself or another as trustee and issue a full reconveyance.

Cal. Civ. § 2924(b)

The 30-day period at issue is for the beneficiary to execute and deliver the original note, deed of trust, and request for reconveyance to the trustee under the deed of trust. Plaintiff-Debtor presents evidence, which is uncontradicted, that as of June 26, 2014, Defendant knew of the bankruptcy plan being completed and a "demand" by Plaintiff-Debtor that the deed of trust had to be reconveyed.

Defendant failed to answer and offers no evidence that it took any action to provide the documents or demand the reconveyance within the 30-day period.

Attorney's Fees

The Plaintiff-Debtor request attorney's fees pursuant to the Note and Deed of Trust, with application of California Civil Code §§ 1717, and pursuant to California Civil Code § 2941. For their request pursuant to § 2941, the Plaintiff-Debtor asserts that it they are entitled to fees as the prevailing party in this action.

The Deed of Trust contains the following attorneys' fee provision:

"7. Protection or Lender's Security. If Borrower fails to perform the covenants and agreements contained in this Deed of Trust, or if any action or proceeding is commenced which materially affects Lender's interest in the Property, then Lender, at Lender's option, upon notice to Borrower, may make such appearances, disburse such sums, including reasonable attorneys' fees, and take such action as is necessary to protect Lender's interest. If Lender required mortgage insurance as a condition of making the loan secured by this Deed of Trust, Borrower shall pay the premiums required to maintain such insurance in effect until such time as the requirement for such insurance terminates in accordance with Borrower's and Lender's written agreement or applicable law.

Any amounts disbursed by Lender pursuant to this paragraph

7, with interest thereon, at the Note rate, shall become additional indebtedness of Borrower secured by this Deed of Trust. Unless Borrower and Lender agree to other terms of payment, such amounts shall be payable upon notice from Lender to Borrower requesting payment thereof. Nothing contained in this paragraph 7 shall require Lender to incur any expense or take any action hereunder."

Such right to attorneys' fees is made reciprocal by California Civil Code § 1717. Here, Plaintiff-Debtor was required to commence this action to protect Plaintiff-Debtor's interest in the real property due to Defendant's failure to fulfill the obligation to reconvey the Deed of Trust as required by the Deed of Trust itself (Deed of Trust ¶ 20).

The evidence presented to support the request for attorneys' fees is the Declaration of Steve Gimbin, the attorney for Plaintiff-Debtor, (Dckt. 24) and billing records (Exhibit F, Dckt. 24).

CONCLUSION

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

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

ATTORNEYS FEES

Plaintiffs seek attorney fees pursuant to Civil Code Section 1717(a), which provides for attorney fees where the contract specifically provides attorney's fees, which are incurred to enforce the contract, to the prevailing party.

The prevailing party must establish that a contractual provision exists for attorneys' fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). California Civil Code § 1717 provides for application of a contractual attorneys' fees provisions to any prevailing party to the contract and that the reasonable attorneys' fees shall be determined by the court.

California Civil Code section 1717(a) provides:

In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Here, Plaintiff-Debtor states that the underlying contract has an attorney fees provision that, pursuant to § 1717(a), is reciprocal. A copy of the Deed of Trust has been filed as Exhibit F, Dckt. 24.

The Plaintiff-Debtor's counsel has also provided a billing statement, showing approximately 5.5 hours working on the complaint, status conference, preparation of entry of default, and hearing. Upon review of the billing statement and finding that the Plaintiff-Debtor is the prevailing party, the court awards the Plaintiff-Debtor \$5,788.00 in attorneys' fees.

CALIFORNIA CIVIL CODE SECTION 2941

Plaintiff-Debtor also seek an award of \$500.00 pursuant to California Civil Code Section 2941, which requires lenders to reconvey deeds of trust when the debt is satisfied.

California Civil Code § 2941(b)(1) imposes an affirmative obligation on the beneficiary (creditor) when the obligation secured by the deed of trust has been satisfied. When no obligation remains, the beneficiary must instruct the trustee under the deed of trust to issue a full reconveyance of the deed of trust. Once the obligation no longer exists, resulting in the lien being extinguished by operation of law, the trustor or mortgagor (debtor) is entitled to a certificate of discharge, the mortgage cancelled or satisfied as of record, and the deed of trust reconveyed.

Here, Defendant failed to have the deed of trust reconveyed after the obligation secured had been satisfied, as required by California Civil Code § 2941(b)(1). Therefore, the violation of that section allows Plaintiff-Debtor to seek the penalty of \$500.00 pursuant to California Civil Code Section 2941(d).

The attorneys' fees provisions of California Civil Code § 2914(b)(5) apply only to a title company, not the beneficiary or owner of the note.

CONCLUSION

The court grants the default judgment in favor of Plaintiffs and

against Defendant and holds that the deed of trust is void. The court further awards \$500.00 pursuant to California Civil Code Section 2941(d). Additionally, the court awards \$5,788.00 in attorneys' fees pursuant to California Code of Civil Procedure § 1717 and the Deed of Trust.

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

IT IS ORDERED that the Motion for Entry of Default Judgment is granted. The court shall enter judgment determining that the deed of trust, and any interest, lien or encumbrance pursuant thereto, held by Greenwich Investors XXXII, LLC against the real property commonly known as 1545 Malaga Court, Yuba City, California, with the County Recorder for Sutter County, California, recorded on June 29, 2007, Document No. 2007-0013284, is void, unenforceable, and of no force and effect. Further, the judgment shall adjudicate and determine that Greenwich Investors XXXII, LLC and servicer Land Home Financial Services, Inc., and each of them, has no interest in the above described real property pursuant to said Deed of Trust.

IT IS FURTHER ORDERED that the Plaintiff-Debtor's request for attorney fees is granted and the Plaintiff-Debtor is awarded \$5,788.00 in attorneys' fees, pursuant to California Code of Civil Procedure § 1717 and Deed of Trust Exhibit F, Dckt. 24.

IT IS FURTHER ORDERED that the Plaintiffs are awarded \$500.00 pursuant to California Code Section 2941(d).

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