UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

July 22, 2021 at 11:00 a.m.

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1. **19-26574-E-7** **SEAN ALMEIDA** **STATUS CONFERENCE RE: COMPLAINT**
21-2041 **6-7-21 [1]**
HOPPER V. NAVY FEDERAL CREDIT UNION ET AL

Plaintiff's Atty: J. Russell Cunningham
Defendant's Atty: Bryan M. Grundon

Adv. Filed: 6/7/21
Answer: none

Nature of Action:
Validity, priority or extent of lien or other interest in property

Notes:
Set by order of the court filed 7/16/21 [Dckt 15]. Russell Cunningham, Esq., counsel for the Plaintiff-Trustee, or other attorney from Mr. Cunningham's office, shall appear to address the possible issues addressed as they relate to serve. Telephonic appearances permitted.

The Status Conference is xxxxxxx

On January 16, 2021, the court set a Status Conference to address possible issues concerning service of pleadings with respect to persons the Plaintiff-Trustee was seeking entry of their defaults. Order, Dckt. 15.

On January 20, 2021, Plaintiff-Trustee filed a Status Report. Dckt. 19. In the Status Report the Plaintiff-Trustee notes that the issues concerning service identified by the court would need to be investigated further. However, the Plaintiff-Trustee notes that the liens for the two Defendants against whom the Plaintiff-Trustee sought entry of defaults appear to be facially invalid - one being recorded after the bankruptcy case was filed and the other not having been renewed. Status Report, ¶ 6; *Id.*

The Plaintiff-Trustee states that he will either dismiss those Defendants without prejudice or will obtain a reissued summons and have it and the Complaint served on the two Defendants so that

there will not be any question as to sufficient service.

At the Status Conference, **xxxxxxx**

2. **19-25168-E-7** **MATHEW LAKOTA**
19-2140 **RLS-1** **Pro Se**
LUCAS V. LAKOTA

MOTION FOR AN ORDER THAT THE RECORDS OF JAN P. JOHNSON ARE SELF AUTHENTICATING ADMISSIBLE BUSINESS RECORDS
6-22-21 [31]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor [(*pro se*), on June 22, 2021. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion for an Order that the Records of Jan P. Johnson as Self-Authenticating Admissible Business Records has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion For An Order that the Records of Jan P. Johnson are Self-Authenticating Admissible Business Records is granted.

Review of Minimum Pleading Requirements for a Motion

The Supreme Court requires that the motion itself state with particularity the grounds upon which the relief is requested. FED. R. BANKR. P. 9013. The Rule does not allow the motion to merely be a direction to the court to "read every document in the file and glean from that what the grounds should be for the motion." That "state with particularity" requirement is not unique to the Bankruptcy Rules and is also found in Federal Rule of Civil Procedure 7(b).

Federal Rule of Bankruptcy Procedure 9013 incorporates the "state with particularity" requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary

proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court endorsed 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.

Law and motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law and motion process. These include sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from the automatic stay, motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

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

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

434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ind. 2009) (holding that a proper motion must contain factual allegations concerning requirements of the relief sought, not conclusory allegations or mechanical recitations of the elements).

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

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." The standard for "particularity" has been determined to mean "reasonable specification."

Martinez v. Trainor, 556 F.2d 818, 819–20 (7th Cir. 1977) (citing 2-A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 7.05 (3d ed. 1975)).

Not stating with particularity the grounds in a motion can be used as a tool to abuse other parties to a proceeding, hiding from those parties grounds upon which a motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. Noncompliance with Federal Rule of Bankruptcy Procedure 9013 or 7007 may be a further abusive practice in an attempt to circumvent Bankruptcy Rule 9011 by floating baseless

contentions to mislead other parties and the court. By hiding possible grounds in citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning any actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

Grounds Stated in Motion

Movant has not provided any grounds, not even unsupported conclusions of law. Debtor's "motion" is notice of hearing, with the direction to read other pleadings, and whatever else Movant presents at the hearing, to determine the grounds for the Motion.

Movant is reminded that "[f]ailure of counsel or of a party to comply with these [Local Bankruptcy] Rules . . . may be grounds for imposition of any and all sanctions authorized by statute or rule within the inherent power of the Court, including without limitation, **dismissal of any action**, entry of default, finding of contempt, imposition of monetary sanctions or attorneys' fees and costs, and other lesser sanctions." LOCAL BANKR. R. 1001-1(g) (emphasis added).

The "motion" states that grounds are found in:

A. The Notice of Motion;
B. Memorandum of Points and Authorities;
C. The Federal Rules of Evidence 803(6), 902(11), 101, 1101(a);
D. The Declaration of Raymond L. Sandelman; and
E. Whatever else is presented prior to or at the hearing.

The court generally declines an opportunity to do associate attorney work and assemble motions for parties. It may be that Movant believes that the Points and Authorities is "really" the motion and should be substituted by the court for the Motion. That belief fails for multiple reasons. One is that under Local Bankruptcy Rule 9014-1(d)(4), a motion and a memorandum of points and authorities are separate documents, even though they may be filed as one document when not exceeding six pages. *See* Local Bankruptcy Rule 9014-(d)(4).

In the Points and Authorities, Movant has a statement of facts and then the legal authorities upon which the relief is based. It is asserted that Defendant-Debtor received monies distributed by Jan Johnson, the Chapter 13 Trustee, in Plaintiff's ex-husband's bankruptcy case based on a judgment Plaintiff had obtained and assigned to Defendant-Debtor for collection. Further, that Defendant-Debtor failed to pay to Plaintiff 66% of such monies received as required by their collection agreement. Points and Authorities, p. 1:26-24, 2:1-3; Dckt. 32.

The Direct Testimony Statement of Jan Johnson, who is now retired from serving as a Chapter 13 trustee, has been delivered to Defendant-Debtor and is part of Plaintiff's case in chief. Plaintiff asserts that no objections to Mr. Johnson's Direct Testimony Statement has been filed and the deadline for such Objections has passed, and the time for such objections set in the court's March 3, 2021 Pretrial Conference Order.

The Minutes for the March 3, 2021 Pretrial Conference states that the court set the following dates and deadlines:

A. Evidence shall be presented pursuant to Local Bankruptcy Rule 9017-1.

B. Plaintiff shall filed with the court and serve their Direct Testimony Statements, other evidentiary documents, and Exhibits on or before May 24, 2021.

C. Defendant has not filed a Pre-Trial Conference Statement and has not identified any witnesses, exhibits, documentary, or other evidence to be presented as part of his case in chief on defense. Though Defendant's election to not file a Pre-Trial Conference Statement results in Defendant's inability to present such evidence as part of his case in chief, it is without prejudice to his right to cross-examine Plaintiff's witnesses, present true rebuttal witnesses, or assert evidentiary objections.

D. The Parties shall lodge with the court, file, and serve Hearing Briefs and Evidentiary Objections on or before June 18, 2021.

E. Oppositions to Evidentiary Objections, if any, shall be lodged with the court, filed, and served on or before June 25, 2021.

F. The Trial Setting Conference shall be conducted at 11:00 a.m. July 22, 2021. The Parties shall file and set for hearing at that date and time any motions to set the method for presentation of evidence at trial.

Dckt. 26 (emphasis added).

A copy of the Jan Johnson Direct Testimony Statement is provided as Exhibit 1 in support of the present Motion. Dckt. 34. The focus of the present motion is on the distributions made by Mr. Johnson to Defendant-Debtor. While phrased as a request to have the court determine that the records are "self-authenticating," the real request is to allow Mr. Johnson's direct testimony be in the form of the Direct Testimony Statement, written testimony, and not require Mr. Johnson to be personally there.

As discussed in *In re Adair*, 965 F.2d 777 (9th Cir. 1992); the use of written testimony at trial is not prohibited, and in some situations encouraged.

> The use of written testimony "is an accepted and encouraged technique for shortening bench trials." *Phonetele, Inc. v. American Tel. & Tel. Co.*, 889 F.2d 224, 232 (9th Cir. 1989) (citing *Malone v. United States Postal Serv.*, 833 F.2d 128, 133 (9th Cir. 1987)), *cert. denied*, 112 S. Ct. 1283 (1992). Accordingly, we have held that a district court did not abuse its discretion in accepting only declarations and exhibits on a particular issue where the parties were afforded "ample opportunity to submit their evidence." *See Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1330, 1342 (9th Cir.), *cert. denied*, 112 L. Ed. 2d 414, 111 S. Ct. 430 (1990).

In re Adair, 965 F.2d at 779.

A review of the Direct Testimony Statement of former Chapter 13 Trustee Jan Johnson

shows that it is of limited scope and relates to a narrow set of facts concerning the former Chapter 13 Trustee's administration of the Plaintiff's ex-husband's Chapter 13 case. Mr. Johnson's testimony is short and simple (identified by paragraph numbers used in the Direct Testimony Statement):

> 2. He was formerly the Bankruptcy Trustee in the Jeffery Scott Kahn Chapter 13 bankruptcy case, 16-26950.
>
> 3. He signed an August 13, 2029 declaration in state court proceedings "as the duly authorized" custodian of records of the Office of Jan P. Johnson Chapter 13 Trustee. A true and correct copy of that declaration is marked as Exhibit 1 to the Exhibit To Direct Testimony Declaration of Jan P. Johnson.
>
> 4. "I have reviewed the August 13, 2019 declaration, and re-affirm that each of the statements made in that declaration is true and correct."

Direct Testimony Statement, Exhibit 1; Dckt. 34. The Direct Testimony Statement is made under penalty of perjury.

Attached to the Direct Testimony Statement is Mr. Johnson's Declaration from the State Court Action and which is incorporated into the Direct Testimony Statement. In it he testifies as to the distributions made to Defendant-Debtor in the Jeffery Kahn Chapter 13 case based on Defendant-Debtor's claim filed in that case. Additionally, copies of cancelled checks for the payments are provided. These are authenticated by Jan Johnson. Mr. Johnson testifies that he disbursed $7,472.29 to Defendant-Debtor on the claim filed in the Jeffery Kahn Chapter 13 case.

When a Chapter 13 trustee concludes a case or retires from that position in the case, he or she files a Report and Account for the funds administered by the trustee. Such a Report and Account was filed by Mr. Johnson in the Jeffery Kahn case. 16-26950; Dckt. 88. In the Report and Account, Mr. Johnson states that Defendant-Debtor was paid $7,717.19 on his claim in that case. Report and Account, *Id*., p. 2. No objections to the Report and Account were filed, with the deadline for such expiring November 4, 2019. *Id*.; Notice of Filing and Fixing Deadline, Dckt. 89.

Plaintiff also addresses it as a business record of Jan Johnston, as the former Chapter 13 Trustee. Federal Rule of Evidence 803(6) provides the hearsay exception for business records, but does not address the admissibility of such.

Plaintiff also directs the court to Federal Rule of Evidence 902(11) as it relates to self-authentication of business records, which provides:

> (11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)–(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them.

Federal Rule of Evidence 806(6)(A)-(C) provides:

> (6) Records of a regularly conducted activity. A record of an act, event, condition, opinion, or diagnosis if:
>
> (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;
>
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
>
> (C) making the record was a regular practice of that activity

Plaintiff cites to the Advisory Committee Notes that a declaration is a sufficient method of providing the certification required in Federal Rule of Evidence 902(11). This is consistent with the discussion of this in 5 Weinstein's Federal Evidence § 902.13 (2021), as well as the Rutter Group Practice Guide cited in the Points and Authorities.

The court determines that the Direct Testimony Statement of Jan Johnson may be presented as Mr. Johnson's Direct Testimony, his presence not required for such. This testimony is for a very specific point for which Defendant-Debtor not only has personal knowledge but can provide counter testimony. The subject of the testimony has also been stated in Mr. Johnson's Report and Account in the Kahn Chapter 13 Case, to which no objection has been filed and the deadline for such has long passed.

Additionally, it is proper for the certification of these business records and has been properly presented in the Direct Testimony Statement. Defendant-Debtor may, if he believes cross examination is necessary, subpoena the former Chapter 13 trustee.

The Motion is granted.

The court shall issue an 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 Order that the Records of Jan P. Johnson are Self-Authenticating Admissible Business Records ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Order that the Records of Jan P. Johnson as Self-Authenticating Admissible Business Records is granted, with the court determining:
>
> (1) The direct testimony of Jan Johnson, the former Chapter 13 Trustee in the Jeffery Kahn Chapter 13 case, 16-26950, may be presented by written Direct Testimony Statement in the form presented in Exhibit 1 (Dckt. 34), which includes the Declaration incorporated

therein and attached thereto; and

(2) The Direct Testimony Statement provides the written testimony under penalty of perjury to properly certify the business records attached as permitted by Federal Rule of Evidence 902(11).

3. **19-25168-E-7** **MATHEW LAKOTA** **CONTINUED PRE-TRIAL CONFERENCE RE: COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT**
19-2140

LUCAS V. LAKOTA **11-14-19 [1]**

Plaintiff's Atty: Raymond L. Sandelman
Defendant's Atty: Pro Se

Adv. Filed: 11/14/19
Answer: 11/26/19

Nature of Action:
Dischargeability - fraud as fiduciary, embezzlement, larceny
Dischargeability - willful and malicious injury

Notes:
Continued from 3/3/21. No appearance was made by the Defendant-Debtor. The Parties are to set for hearing at the continued status conference date of 7/22/21 at 11:00 a.m., any motions for the court to set the method and mode of presentation of evidence at and the conducing of the trial.

Plaintiff's Trial Brief filed 6/8/21 [Dckt 29]

[RLS-1] Notice of Motion and Motion for an Order that the Records of Jan P. Johnson are Self Authenticating Admissible Business Records filed 6/22/21 [Dckt 31], set for hearing 7/22/21 at 11:00 a.m.

The Trial in this Adversary Proceeding shall be conducted at xxxxxxx on xxxxxxx, 2021.

At the March 3, 2021 Pre-Trial Conference, the court set the following dates and deadlines:

A. Evidence shall be presented pursuant to Local Bankruptcy Rule 9017-1.

B. Plaintiff shall filed with the court and serve their Direct Testimony Statements, other evidentiary documents, and Exhibits on or before May 24, 2021.

C. Defendant has not filed a Pre-Trial Conference Statement and has not identified any

witnesses, exhibits, documentary, or other evidence to be presented as part of his case in chief on defense. Though Defendant's election to not file a Pre-Trial Conference Statement results in Defendant's inability to present such evidence as part of his case in chief, it is without prejudice to his right to cross-examine Plaintiff's witnesses, present true rebuttal witnesses, or assert evidentiary objections.

D. The Parties shall lodge with the court, file, and serve Hearing Briefs and Evidentiary Objections on or before June 18, 2021.

E. Oppositions to Evidentiary Objections, if any, shall be lodged with the court, filed, and served on or before June 25, 2021.

Trial on the Adversary Proceeding shall be conducted at xxxxxxx on xxxxxxx, 2021.

The Plaintiff having filed her Pretrial Conference Statement, Dckt. 20, and Defendant-Debtor not filing any Pre-Trial Conference Statement, and as stated on the record at the Pretrial Conference, the court has establish for all purposes in this Adversary Proceeding:

Plaintiff(s) Defendant(s)

Jurisdiction and Venue:

Plaintiff Lisa Lucas alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b)(2), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B) an d(I). Complaint ¶¶ 2, Dckt. 1. In the Answer, Defendant Mathew Lakota admits the allegations of jurisdiction and core proceedings. Answer ¶ 2, Dckt. 8.

Undisputed Facts:	Undisputed Facts:
1. Lisa Lucas obtained a judgment against her ex-husband Jeffrey Kahn. Defendant-Debtor and Lisa Lucas signed an assignment of judgment. Defendant-Debtor promised to pay Lisa Lucas 66 % of the monies collected.	1. No Pretrial Conference Statement Filed.
2. Defendant-Debtor is in the business of collecting assigned judgments. He has had hundreds of assignments.	
3. Then Jeffrey Kahn filed for bankruptcy and proposed a Chapter 13 plan where all unsecured creditors were to be paid 100 % of their claims over sixty months. Defendant-Debtor filed two proofs of claims with the bankruptcy court concerning the debt he was collecting for Ms. Lucas.	
4. Each month, the bankruptcy trustee sent Mr. Lakota a check. Except for one payment of $1,000 to Ms. Lucas, Defendant-Debtor retained all of the monies he received from the trustee and did not send Ms. Lucas her 66% share of the payments.	

5. Defendant-Debtor made a single payment to Ms. Lucas of $1,000 in March of 2018. The balance owed to Ms. Lucas is $4,092.33. 6. Seven of the payments that Defendant-Debtor received from the bankruptcy trustee were after he filed an Answer to the Complaint in the state court litigation. Each month after he filed his Answer, he retained 100 % of the proceeds, knowing that Ms. Lucas was suing him for punitive damages for failing to pay her 66 % of the proceeds he collected. 7. Defendant-Debtor claimed that he does not have any documents for his receipt of the seven payments after he filed his Answer or the fifteen payments he received prior to his filing of his Answer. 8. Defendant-Debtor' s deposition on July 23, 2019 he testified that he did not know if he had received any monies from the bankruptcy trustee or anyone else in response to the proofs of claim he filed in the Jeffrey Kahn bankruptcy. 9. Defendant-Debtor stated that he had no records of monies being received, and that he had no files for the assigned judgment from Ms. Lucas. 10. Prior issues arising under the California Penal Code are relevant to this Adversary Proceeding.	
Disputed Facts: 1. Whether Defendant-Debtor had a fraudulent intent. 2. Was Defendant-Debtor's conduct deliberate or intentional. 3. 4.	Disputed Facts: 1. No Pretrial Conference Statement Filed.
Disputed Evidentiary Issues: 1. None Identified.	Disputed Evidentiary Issues: 1. No Pretrial Conference Statement Filed.
Relief Sought:	Relief Sought:

1. Nondischargeable actual damages in the amount of $3,931.71, plus interest. 2. Nondischargeable punitive damages of $6,068.29.	1. No Pretrial Conference Statement Filed.
Points of Law: (Not all authorities cited are included below) 1. *Moore v. United States* (1895) 160 US 268, 269-270, 16 S.Ct. 294, 295; *In re Littleton* (9th Cir. 1991) 942 F.2d 551, 555; *In re Wada* (9th Cir. B.A.P. 1997) 210 BR 572, 576 2. *Savonarola v. Beran* (BC ND FL 1987) 79 BR 493, 496 3. *In re Blanton* (BC ED VA 1992) 149 BR 393, 394-395 4. Pen. Code, § 506, Pen. Code, § 506a, referring to violation of Pen. Code, § 506; *People v. Weitz*, 42 Cal. 2d 338, 267 P.2d 295 (1954) (Pen. Code, § 506a amplifies Pen. Code, § 506). *People v. Steffner*, 67 Cal. App. 23, 227 P. 699 (3d Dist. 1924). 5. 18A Cal. Jur. 3d Criminal Law: Crimes Against Property § 159 6. 11 U.S.C. § 523(a)(4) 7. 11 U.S.C. § 523(a)(6) 8. *Kawaauhau v. Geiger* (1998) 523 US 57, 61-62, 118 S.Ct. 974, 977; *In re Steger* (8th Cir. B.A.P. 2012) 472 BR 533, 537 9. *In re Bailey* (9th Cir. 1999) 197 F.3d 997, 1000; *In re Rodriguez* (BC SD CA 2017) 568 BR 328, 339; *Lockerby v. Sierra* (9th Cir. 2008) 535 F.3d 1038, 1041 10. *Matter of Ormsby* (9th Cir. 2010) 591 F.3d 1199, 1206; *In re Barboza* (9th Cir. 2008) 545 F.3d 702, 711; *In re Su* (9th Cir. 2002) 290 F.3d 1140, 1147 11. *In re Thiara* (9th Cir. B.A.P. 2002) 285 BR 420, 427; *In re Qari* (BC ND CA 2006) 357 BR 793, 798 12. *In re Honkanen* (9th Cir. B.A.P. 2011) 446 BR 373, 378; *In re Berman* (7th Cir. 2011) 629 F.3d 761, 767-768; *In re Nail* (8th Cir. B.A.P. 2011) 446 BR 292, 299-300 13. *Double Bogey, L.P. v. Enea* (9th Cir. 2015) 794 F.3d 104 7, 1050; *In re Davis* (BC ND CA 2013) 486 BR 182, 192	Points of Law: 1. No Pretrial Conference Statement Filed.

14. *Kazanjian v. Rancho Estates, Ltd.* (1991) 235 Cal. App. 3d 1621. 1626 15. *Devers v. Greenwood*, 139 Cal.App.2d 345, 293 P.2d 834)." *Sequoia Vacuum Sys. v. Stransky* (1964) 229 Cal. App. 2d 281, 289; *Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co.* (1986) 185 Cal. App. 3d 1149, 1154); Cal. Civ. § 3294	
Abandoned Issues: 1. None Identified	Abandoned Issues: 1. No Pretrial Conference Statement Filed.
Witnesses: 1. Lisa Lucas 2. Mathew Lakota 3. Custodian of Records, Chapter 13 Trustee	Witnesses: 1. No Pretrial Conference Statement Filed.
Exhibits: 1. Defendant-Debtor's Motion to Confirm Amended Chapter 13 Plan, United States Bankruptcy Court, Eastern District of California, Sacramento Division, Action No. 16-26950-A-BJ 2. Amended Chapter 13 Plan, United States Bankruptcy Court, Eastern District of California, Sacramento Division, Action No. 16-26950-A-13J 3. Order Confirming Chapter 13 Plan Filed on December 9, 2016, United States Bankruptcy Court, Eastern District of California, Sacramento Division, Action No. 16-26950-A-13J 4. Certificate of Service, United States Bankruptcy Court, Eastern District of California, Sacramento Division, Action No. 16-26950-A-13J 5. Proof of Claim, United States Bankruptcy Court, Eastern District of California, Sacramento Division, Action No. 16-26950-A-131 6. Proof of Claim, United States Bankruptcy Court, Eastern District	Exhibits: 1. No Pretrial Conference Statement Filed.

	of California, Sacramento Division, Action No. 16-26950-A-131	
7.	Certificate of Service, United States Bankruptcy Court, Eastern District of California, Sacramento Division, Action No. 16-26950-A-13J	
8.	Creditor's Response to Debtor's Objection to Claim, United States Bankruptcy Court, Eastern District of California, Sacramento Division, Action No. 16-26950-A-13J	
9.	Order on Objection to Proof of Claim Filed by Mathew M. Lakota, United States Bankruptcy Court, Eastern District of California, Sacramento Division, Action No. 16-26950-A-BJ	
10.	Acknowledgment of Assignment of Judgment, Superior Court of California, County of Butte, Action No. FL036366	
11.	Abstract of Judgment - Civil and Small Claims, Superior Court of California, County of Butte, Action No. FL036366	
12.	Memorandum of Costs After Judgment, Acknowledgment of Credit and Declaration of Accrued Interest, Superior Court of California, County of Butte, Action No. FL035366	
13.	Memorandum of Costs After Judgment, Acknowledgment of Credit and Declaration of Accrued Interest, Superior Court of California, County of Butte, Action No. FL035366	
14.	Acknowledgment of Assignment of Judgment, Superior Court of California, County of Butte, Action No. CD13590	
15.	Acknowledgment of Assignment of Judgment, Superior Court of California, County of Butte, Action No. 16SC00673	
16.	Acknowledgment of Assignment of Judgment, Superior Court of California, County of Butte, Action No. 16SC00672	
17.	Acknowledgment of Assignment of Judgment, Superior Court of California, County of Butte, Action No. 16UD00681	
18.	Acknowledgment of Assignment of Judgment, Superior Court of California, County of Butte, Action No. 16SC00863	
19.	Acknowledgment of Assignment of Judgment, Superior Court of California, County of Butte, Action No. DSC09748	
20.	Acknowledgment of Assignment of Judgment, Superior Court of	

	California, County of Butte, Action No. 16SC02835	
21.	Acknowledgment of Assignment of Judgment, Superior Court of California, County of Butte, Action No. 16UD03121	
22.	Acknowledgment of Assignment of Judgment, Superior Court of California, County of Butte, Action No. 16UD00451	
23.	Acknowledgment of Assignment of Judgment, Superior Court of California, County of Butte, Action No. 17SC00915	
24.	Transfer Order in Aid of Execution, Superior Court of California, County of Butte, Action No. 16SC02758	
25.	Acknowledgment of Assignment of Judgment, Superior Court of California, County of Butte, Action No. 16UD01680	
26.	Acknowledgment of Assignment of Judgment, Superior Court of California, County of Butte, Action No. 17CV01228	
27.	First Amended Acknowledgment of Assignment of Judgment, Superior Court of California, County of Butte, Action No. 16UD01680	
28.	Acknowledgment of Assignment of Judgment and Claim, Superior Court of California, County of Butte, Action No. 17UD03374	
29.	Complaint for Money Due on Account Stated; Revolving Account, Superior Court of California, County of Butte, Action No. 18CV00526	
30.	Acknowledgment of Assignment of Judgment and Claim, Superior Court of California, County of Butte, Action No. 16SC02671	
31.	Acknowledgment of Assignment of Judgment and Claim, Superior Court of California, County of Butte, Action No. 18UD00630	
32.	Complaint for Money Due on Account Stated; Revolving Account, Superior Court of California, County of Butte, Action No. 18CV01448	
33.	Request to File New Litigation by Vexatious Litigant and Complaint for Money Due on Account Stated; Revolving Account, Superior Court of California, County of Butte, Action No.	
34.	Acknowledgment of Assignment of Judgment, Superior Court of California, County of Butte, Action No. 16SC00891	

35.	Acknowledgment of Assignment of Judgment, Superior Court of 10 California, County of Butte, Action No. 18SC01035	
36.	Acknowledgment of Assignment of Judgment, Superior Court of California, County of Butte, Action No. 19UD01446	
37.	Acknowledgment of Assignment of Judgment, Superior Court of California, County of Butte, Action No. 19SC00665	
38.	Minute order from court date stating "Notice is waived", Superior Court of California, County of Butte, Action No. 18CV03834	
39.	Creditor's Complaint to Determine that Debt is Non-Dischargeable, the United States Bankruptcy Court, Eastern District of California, Sacramento Division, Action No. 17-27428	
40.	Plaintiff's Response to Defendants' Motion for Summary Judgment, the United States Bankruptcy Court, Eastern District of California, Sacramento Division, Action No. 17-23968-A-7	
41.	Felony complaint, Superior Court of California, County of Butte, Action No. CM017766	
42.	Clerk's minutes from sentencing and Terms & Conditions of Formal Probation, Superior Court of California, County of Butte, Action No CM017766	
43.	Complaint, Superior Court of California, County of Butte, Action No. 18CV03834	
44.	Order After Hearing, Superior Court of California, County of Butte, Action No. 18CV03834	
45.	Notice of Motion for Issue Sanctions, Evidence Sanctions, Or Terminating Sanctions for Mathew M. Lakota's Failure to Comply with Discovery Order, and Monetary Sanctions; Memorandum of Points and Authorities, Superior Court of California, County of Butte, Action No. 18CV03834	
46.	Civil Subpoena (Duces Tecum) for Personal Appearance and Production of Documents, Electronically Stored Information, and Things at Trial or Hearing and Declaration [Mathew M. Lakota]	
47.	Agreement between and signed by Lisa Ann Lucas and Mathew M. Lakota	

48. Lisa Lucas' Form Interrogatories - Limited Civil Cases (Economic Litigation) propounded to Mathew M. Lakota 49. Mathew M. Lakota's First Amended Answers to Lisa Lucas' Interrogatories 50. Statement of Punitive Damages Sough 51. Records from Bankruptcy Trustee, Jan P. Johnson 52. Order Granting Motion for Issues Sanctions, Superior Court of California, County of Butte, Action No. 18CV03834	
Discovery Documents: 1. Transcript to the July 23, 2019 deposition of Matthew Lakota 2. Lisa Lucas' Form Interrogatories - Limited Civil Cases (Economic Litigation) propounded to Mathew M. Lakota Interrogatories 115.2, 150.1, 150.5, 150.7, and 150.8, and Mathew M. Lakota's First Amended Answers to the Interrogatories.	Discovery Documents: 1. No Pretrial Conference Statement Filed.
Further Discovery or Motions: 1. None Identified	Further Discovery or Motions: 1. No Pretrial Conference Statement Filed.
Stipulations: 1. None Identified	Stipulations: 1. No Pretrial Conference Statement Filed.
Amendments: 1. None Identified	Amendments: 1. No Pretrial Conference Statement Filed.
Dismissals: 1. None Identified	Dismissals: 1. No Pretrial

	Conference Statement Filed.
Agreed Statement of Facts: 1. None Identified	Agreed Statement of Facts: 1. No Pretrial Conference Statement Filed.
Attorneys' Fees Basis: 1. Attorneys' Fees Not Sought.	Attorneys' Fees Basis: 1. No Pretrial Conference Statement Filed.
Additional Items 1. None Identified	Additional Items 1. No Pretrial Conference Statement Filed.

4. **21-21249-E-7** **JOHN/JEANANN MCCOY** **ORDER TO SHOW CAUSE**
21-2020 **Pro Se** **6-20-21 [11]**
MCCOY ET AL V. UNITED STATES

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

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

Local Rule 9014-1(f)(3) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 7 Trustee, and Office of the United States Trustee on June 23, 2021. By the court's calculation, 29 days' notice was provided. The court set the hearing for July 22, 2021. Dckt. 12.

The Order to Show Cause was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(3). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing ----------.

The Order to Show Cause is sustained, and the Adversary Proceeding the Amended Complaint is Dismissed Without Prejudice.

ORDER TO SHOW CAUSE RE DISMISSAL OF ADVERSARY PROCEEDING AND CONTINUANCE OF STATUS CONFERENCE

This Adversary Proceeding was commenced by John McCoy, in *pro se*, the Plaintiff-Debtor, on April 6, 2021. The Chapter 7 bankruptcy case filed by the Plaintiff-Debtor, 21-21249, was filed on April 6, 2021, and dismissed on April 19, 2021. The court denied the Plaintiff-Debtor's Motion to Vacate the order dismissing the bankruptcy case. 21-21249; Order, Dckt. 31.

No certificate of service of the summons and complaint have been filed. On April 13, 2021 and Amended Complaint was filed and on April 14, 2021, a Reissued Summons was issued. No certificate of service has been filed for service of the Complaint, Amended Complaint, or the Summons.

Federal Rule of Bankruptcy Procedure 7004(e), the summons must be served within seven

days of issuance and Federal Rule of Civil Procedure 4(m), as incorporated into Federal Rule of Bankruptcy Procedure 7004 requires that the summons and complaint be filed within 90 days after the complaint is filed, and if not the court must either dismiss without prejudice the complaint or order that the summons and complaint be served within a specified time.

The bankruptcy case having been dismissed, it does not appear that there is a basis for this court to exercise federal court jurisdiction arising under 28 U.S.C. § 1334 to address a dispute between Debtor and the Internal Revenue Service.

Plaintiff-Debtor's Response

On July 2, 2021 Plaintiff-Debtor filed a Response stating that Plaintiff-Debtor filed the instant case in order to stop the Internal Revenue Service from ignoring losses in the amount of approximately $700,000 incurred by Plaintiff-Debtor from a 1991 bankruptcy filing where their then counsel failed to list three real estate properties.

Together with their Response, Plaintiff-Debtor filed a series of documents:

1. The court's Order to Show Case dated June 20, 2021

2. A copy of the docket for Plaintiff-Debtor's 1991 case (Case No. 91-93902), with a printing day of 8/25/2016

3. A copy of the National Archives and Records Administration Bankruptcy Cases Order and Instructions

4. A copy of the May 18, 2021 Tentative Ruling issued by the Superior Court of California, County of San Joaquin for Motion for Sanctions and Demurrer to Complaint

5. A copy of the May 19, 2021 Minute Order issued by the Superior Court of California, County of San Joaquin for Demurrer to Complaint

6. A copy of the Reply Brief filed by the County Court Defendant in support for their Motion for Sanctions

Plaintiff-Debtor alludes to a lawsuit in San Joaquin County Superior against an individual by the name of Mark Alvis Garibaldi. The lawsuit was dismissed on May 18, 2021. The court is unable to ascertain why a lawsuit based on defamation at the State Court is at all relevant to the instant adversary proceeding or to the Order to Show Cause.

While Plaintiff-Debtor would like to seek some relief from this court, Plaintiff-Debtor is not prosecuting this Adversary Proceeding. The period for properly serving the summons and complaint has expired. Plaintiff-Debtor's bankruptcy case has been dismissed. There being no bankruptcy case, the court concludes that there is no basis for the court to exercise federal court jurisdiction pursuant to 28 U.S.C. § 1334 over this dispute.

The Adversary Proceeding and Amended Complaint are dismissed without prejudice, with no leave to amend granted.

The court shall issue an 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 hearing on this Order to Show Cause re Dismissal of this Adversary Proceeding having been conducted by the court, Plaintiff-Debtor's related Chapter 7 bankruptcy case having been dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Order to Show Cause is sustained, and the Adversary Proceeding and Amended Complaint are dismissed without prejudice. No leave to file a further amended complaint is granted.
>
> The Clerk of the Court shall close the file for this Adversary Proceeding.

5. **21-21249-E-7 JOHN/JEANANN MCCOY** **CONTINUED STATUS CONFERENCE**
21-2020 **RE: AMENDED COMPLAINT**
MCCOY ET AL V. UNITED STATES **4-13-21 [8]**

Plaintiff's Atty: Pro Se
Defendant's Atty: unknown

Adv. Filed: 4/6/21
Answer: none

Amd. Cmplt. Filed: 4/13/21
Reissued Summons: 4/14/21
Answer: none

Notes:
Continued from 6/16/21. Set by order of the court filed 6/20/21 [Dckt 11]. To be hearing in conjunction with the Order to Show Cause re Dismissal of Adversary Proceeding. Response to Order to Show Cause due on or before 7/9/21. Response filed 7/2/21 [Dckt 13]

> The First Amended Complaint and Adversary Proceeding having been Dismissed Without Prejudice, **the Status Conference is concluded and removed from the Calendar.**

6. 18-20456-E-13 MARIA ANDRICHUK
21-2029 SW-1 Pro se
ANDRICHUK V. CLEAR RECON CORP. ET AL

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
6-16-21 [7]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor on June 16, 2021. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss Adversary Proceeding is granted.

Bank of America, National Association ("Defendant") moves for the court to dismiss all claims against it in Maria Andrichuk's ("Plaintiff-Debtor") Complaint according to Federal Rule of Civil Procedure 12(b)(6).

REVIEW OF COMPLAINT

The Complaint alleges the following grounds:

A. Defendant Bank of America was not the original lender and the only stamped endorsement on the original Note has a forged stamped signature of David A. Spector. Defendants were not parties to the original transaction.

B. Defendant did not hold a valid and enforceable, secured or unsecured claim against property of the bankruptcy estate: Debtor's single-family home, 1757 Park Oak Drive, Roseville, California ("Property").

C. On March 1, 2017, Defendant Bank of America directed Defendant Clear Recon Corp to sell Plaintiff's Property, while an automatic stay was still in effect.

D. On June 21, 2017, in another case relating to the Property, Defendant Bank of America filed a Motion for Relief from the Automatic Stay.

E. On June 25, 2017, the court granted Defendant Bank of America's Motion for Relief from the Automatic Stay in the other case relating to the Property.

F. Plaintiff-Debtor filed for bankruptcy on January 29, 2018, which instituted the Automatic Stay.

G. Defendants intentionally filed fraudulent foreclosure and/or real property documents. Thus, Defendant had no standing to seek annulment of the automatic stay.

H. Defendant willfully violated the automatic stay by foreclosing on Plaintiff-Debtor's property.

I. By foreclosing on the Property without standing, which is a fraud upon the court and the Chapter 13 case, the court should sanction Defendants.

J. The court should rescind its own order granting Defendant Bank of America's Motion to Annul the Automatic Stay in a related case.

Dckt. 1.

APPLICABLE LAW

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

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. Co.*, 256 F.2d 824, 826–27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Federal Rule of Civil Procedure 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and

expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do.").

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

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: either a lack of a cognizable legal theory, or insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (citation omitted).

PLAINTIFF-DEBTOR'S OPPOSITION

Plaintiff-Debtor did not file an opposition to this motion.

DEFENDANT'S REPLY

Defendant filed a "Reply" indicating that the Plaintiff-Debtor did not file an opposition to their motion withing the time allowed. Defendant requested the court to not consider any untimely oppositions submitted by Plaintiff-Debtor.

REVIEW OF MOTION

The Motion responds to the Complaint's claims with the following grounds:

A. Plaintiff-Debtor's Complaint fails to state a claim for which relief can be granted because Defendant had standing to seek an order annulling the automatic stay.

B. Plaintiff-Debtor assigned the Property to Hard Stone CBO Trust, an unauthorized third party, prior to the foreclosure sale. Defendant did not receive notice of the transfer or Hard Stone CBO's bankruptcy and so Defendant proceeded with the foreclosure sale.

C. Once Defendant discovered the unauthorized transfer and bankruptcy filing, Defendant sought and obtained the order annulling the say and thus validating its foreclosure sale.

D. This adversary complaint is subject to dismissal under the doctrine of *res judicata*, where an identical adversary complaint based on the same

allegations regarding standing and violations of the stay was filed by Hard Stone and later dismissed by this court.

E. This Adversary Proceeding is improper to determine civil contempt or to seek to rescind a judgment because relief of this kind should be requested by motion.

F. Defendant had standing to see annulment of the stay because as stated in Defendant's Motion for Relief, Defendant held possession and could enforce the Note including seeking annulment of the stay in order to validate the foreclosure sale; had no notice of the unauthorized transfer to Hard Stone, or notice of Hard Stone's bankruptcy prior to the sale. Plaintiff-Debtor did not oppose the Motion for Relief.

DISCUSSION

Debtor Lacks Standing

Plaintiff-Debtor has no standing to allege a violation of a third party's automatic stay under 11 U.S.C. 362. Federal Rule of Bankruptcy Procedure 7017 (incorporating Federal Rule of Civil Procedure 17) states that an action must be prosecuted in the name of a real party in interest. Specifically, FRCP 17 allows the following to sue in their own name without joining the person for whose benefit is brought:

(A) an executor;
(B) an administrator;
(C) a guardian;
(D) a bailee;
(E) a trustee of an express trust;
(F) a party with whom or in whose name a contract has been made for another's benefit; and
(G) a party authorized by statute.

A review of the docket shows Plaintiff-Debtor is not a party in interest in the Hard Stone CBO Trust bankruptcy case. Plaintiff-Debtor argues Defendant violated Hard Stone CBO Trust's automatic stay by ordering foreclosure of the property commonly known as 1757 Park Oak Drive, Roseville, California on March 1, 2017. Debtor claims the foreclosure action was in violation of the automatic stay granted to Hard Stone CBO Trust pursuant to their bankruptcy filing on January 29, 2017.

Even if the stay in the Hard Stone CBO Trust case was not annulled by the court, Plaintiff-Debtor is not Hard Stone CBO Trust and has no standing to purse a claim for violation of the automatic stay in that case. Similarly, in the event Hard Stone CBO Trust chooses to pursue filing an motion to vacate the order annulling the automatic stay, Plaintiff-Debtor would still have no standing to pursue violation of Hard Stone CBO's Trust's automatic stay. Such rights belong to Hard Stone CBO Trust's and they, not Plaintiff-Debtor, can pursue such causes of action at their discretion. Thus, Plaintiff-Debtor has failed to state a claim.

There was no Automatic Stay for Defendant to Violate

Even if Plaintiff-Debtor had standing, there were no stays in effect Defendant could have violated. Plaintiff-Debtor alleges Defendant violated the automatic stay by ordering foreclosure proceedings on March 1, 2017 and then executing the foreclosure sale on March 6, 2017. As Plaintiff-Debtor notes in their Complaint, the automatic stay in the Hard Stone CBO Trust case was annulled. Having been annulled, there was no automatic stay in effect when Defendant ordered and executed the foreclosure sale in March 2017.

Moreover, Plaintiff-Debtor's present case was filed on January 29, 2018. The Plaintiff-Debtor's case was filed more than seven months after the alleged violations of the automatic stay. Therefore, there is no way the automatic stay in Plaintiff-Debtor's case could have been violated. In addition, a review of the docket reveals Plaintiff-Debtor did not list a legal, equitable, or other type of interest in "1757 Park Oak Drive, Roseville California" in their schedules filed with the court. Based on a review of the facts in a light most favorable to Plaintiff, there does not appear to be a violation of the automatic stay.

Defendant is not a Creditor

Plaintiff-Debtor alleges Defendant did not file a proof of claim in the present case and as such is not entitled to payment. The issue is not whether Defendant filed a proof of claim, but whether Defendant was exercising rights it had in property of Hard Stone CBO Trust. That Defendant asserts a foreclosure sale was completed does not alter the rights and interest it had. If Hard Stone CBO Trust disputes such, it can, in a court of appropriate jurisdiction, litigate such *bona fide* disputes. Additionally, a creditor with a secured claim is not required to file a proof of claim to preserve that creditor's security interest and right to collateral, but may negatively impact a creditor's ability to get paid on any unsecured portion of the claim. Fed. R. Bankr. P. 3002(a), stating, "A lien that secures a claim against the debtor is not void due only to the failure of an entity to file a proof of claim."

***Res Judicata* bars the Re-litigation of this Claim**

Defendant asserts that Plaintiff-Debtor's complaint is identical to Hard Stone's allegations in its Adversary Complaint (Dckt. 18, Ex.17). First, Defendant asserts Hard Stone and Plaintiff-Debtor are in privity and thus the determination in favor of Defendant should be binding on Plaintiff-Debtor. Next, Defendant asserts the adversary proceeding between Hard Stone CBO Trust and Defendant resulted in a finding for Defendant on the merits. Plaintiff-Debtor filed an appeal on the matter which was ultimately dismissed.

The order dismissing the Complaint in Hard Stone CBO Trust v. Clear Recon Corp., et al, 20-2102, does not state that it is a dismissal with prejudice. The Motion to Dismiss asserts that the Hard Stone Complaint failed to state a claim. Federal Rule of Civil Procedure 41(b), which is incorporated into Federal Rule of Bankruptcy Procedure 7041(2)(a) states that when there is an involuntary dismissal of the adversary proceeding is without prejudice.

Thus, it does not appear that the dismissal of the prior adversary proceeding is an adjudication of the rights and interests.

Plaintiff Cannot File an Adversary Complaint to Seek Relief from Judgement

Defendant asserts this adversary complaint seeks relief from the final judgement granting Defendant relief from the automatic stay. Defendant states that in order to seek rescindment of a final judgement, Federal Rule of Bankruptcy Procedure 60(b)(3) requires Plaintiff-Debtor to seek such relief by filing a motion, not by commencing an adversary proceeding. Moreover, Ninth Circuit case law has determined that a violation of the automatic stay is treated as civil contempt and under Federal Rule of Bankruptcy Procedure 9020, civil contempt must be requested by motion.

Moreover, even if the court views this as a Motion for Reconsideration, Federal Rule of Bankruptcy Procedure 60(b)(3) requires a motion to be brought within a reasonable time and not more than a year from the date of the Order. Here, the Order Granting Annulment of the Stay occurred over four years ago, and thus this request is untimely.

Defendant had Standing and Annulment was Appropriate

Bank of America was in possession of the Note at the time of the filing of their Motion, it is the "holder" and thus "entitled to enforce" the Note. Cal. Comm. Code §3301(i). The Note is endorsed and payable "in blank." As holder of the Note, Bank of America had standing to seek annulment of the Automatic Stay. Because Bank of America had standing to file its Motion, the Stay was properly annulled due to the multiple bankruptcy filings associated with the parties and the Property.

Defendant did not Violate the Automatic Stay

Plaintiff-Debtor alleges Defendant violated the automatic stay because Defendant filed a motion for relief from the automatic stay when Defendant knew it did not have standing to file said motion. Defendant claims that for the reasons stated above it did have standing to pursue relief from the stay. Moreover, the Motion for Relief from the automatic stay annulled *nunc pro tunc* the automatic stay such that Plaintiff's bankruptcy filing and subsequent stay had no force or legal effect on Defendant's foreclosure sale which occurred on March 1, 2017.

RULING

The Motion to Dismiss Adversary Proceeding is warranted because of the reasons listed above. The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss Adversary Proceeding filed by Bank of America, National Association ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is granted and the Complaint is dismissed.

7. **18-20456-E-13 MARIA ANDRICHUK** **MOTION TO DISMISS ADVERSARY**
21-2033 SW-1 Pro Se **PROCEEDING/NOTICE OF REMOVAL**
ANDRICHUK V. CLEAR RECON CORP. ET AL **6-16-21 [14]**

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor on June 16, 2021. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss Adversary Proceeding is xxxxx.

Bank of America, National Association ("Defendant") moves for the court to dismiss all claims against it in Maria Andrichuk's ("Plaintiff-Debtor") Complaint according to Federal Rule of Civil Procedure 12(b)(6).

REVIEW OF COMPLAINT

The Complaint alleges the following grounds:

A. Defendant Bank of America was not the original lender and the only stamped endorsement on the original Note has a forged stamped signature of David A. Spector. Defendants were not parties to the original transaction.

B. Defendant did not hold a valid and enforceable, secured or unsecured claim against property of the bankruptcy estate: Debtor's single-family home, 1757 Park Oak Drive, Roseville, California ("Property").

C. On March 1, 2017, Defendant Bank of America directed Defendant

Clear Recon Corp to sell Plaintiff's Property, while an automatic stay was still in effect.

D. On June 21, 2017, in another case relating to the Property, Defendant Bank of America filed a Motion for Relief from the Automatic Stay.

E. On June 25, 2017, the court granted Defendant Bank of America's Motion for Relief from the Automatic Stay in the other case relating to the Property.

F. Plaintiff-Debtor filed for bankruptcy on January 29, 2018, which instituted the Automatic Stay.

G. Defendants intentionally filed fraudulent foreclosure and/or real property documents. Thus, Defendant had no standing to seek annulment of the automatic stay.

H. Defendant willfully violated the automatic stay by foreclosing on Plaintiff-Debtor's property.

I. By foreclosing on the Property without standing, which is a fraud upon the court and the Chapter 13 case, the court should sanction Defendants.

J. The court should rescind its own order granting Defendant Bank of America's Motion to Annul the Automatic Stay in a related case.

Dckt. 1.

APPLICABLE LAW

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

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. Co.*, 256 F.2d 824, 826–27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Federal Rule of Civil Procedure 12(b)(6), a

plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do.").

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

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: either a lack of a cognizable legal theory, or insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (citation omitted).

REVIEW OF MOTION

The Motion responds to the Complaint's claims with the following grounds:

A. Plaintiff-Debtor's Complaint fails to state a claim for which relief can be granted because Defendant had standing to seek an order annulling the automatic stay.

B. Plaintiff-Debtor assigned the Property to Hard Stone CBO Trust, an unauthorized third party, prior to the foreclosure sale. Defendant did not receive notice of the transfer or Hard Stone CBO's bankruptcy and so Defendant proceeded with the foreclosure sale.

C. Once Defendant discovered the unauthorized transfer and bankruptcy filing, Defendant sought and obtained the order annulling the say and thus validating its foreclosure sale.

D. This adversary complaint is subject to dismissal under the doctrine of *res judicata*, where an identical adversary complaint based on the same allegations regarding standing and violations of the stay was filed by Hard Stone and later dismissed by this court.

E. This Adversary Proceeding is improper to determine civil contempt or to seek to rescind a judgment because relief of this kind should be requested by motion.

F. Defendant had standing to see annulment of the stay because as stated in Defendant's Motion for Relief, Defendant held possession and could

enforce the Note including seeking annulment of the stay in order to validate the foreclosure sale; had no notice of the unauthorized transfer to Hard Stone, or notice of Hard Stone's bankruptcy prior to the sale. Plaintiff-Debtor did not oppose the Motion for Relief.

DISCUSSION

Preliminary Consideration

Plaintiff-Debtor's filing of an Amended Complaint in the above titled action is untimely. Plaintiff-Debtor filed the original complaint on May 17, 2021. Dckt. 1. Federal Rule of Bankruptcy Procedure 7015 (incorporating Federal Rule of Civil Procedure 15) allows a party to amend their complaint as a matter of course within:

> (A) 21 days after serving it, or
>
> (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.
>
> (2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Here, the Amended Complaint was served on July 7, 2021. However, the document was not filed with the court until July 13, 2021. By the court's calculation, the Amended Complaint was filed 27 days after Plaintiff-Debtor was served with Defendant's motion to dismiss under Rule 12(b). Thus, Plaintiff-Debtor did not timely file an amended complaint; where leave of court to amend was not granted and no evidence is presented that opposing party consented to such an amendment.

Plaintiff-Debtor acting in *Pro Se* the court notes the issue. At the hearing, xxxxx

Debtor Lacks Standing

Plaintiff-Debtor has no standing to allege a violation of a third party's automatic stay under 11 U.S.C. 362. Federal Rule of Bankruptcy Procedure 7017 (incorporating Federal Rule of Civil Procedure 17) states that an action must be prosecuted in the name of a real party in interest. Specifically, Rule 17 lists the following as real parties in interest:

> (A) an executor;
> (B) an administrator;
> (C) a guardian;
> (D) a bailee;
> (E) a trustee of an express trust;
> (F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

to sue in their own names without joining the person for whose benefit is brought. A review of the docket shows Plaintiff-Debtor is not a party in interest in the Hard Stone CBO Trust bankruptcy case. Plaintiff-Debtor argues Defendant violated Hard Stone CBO Trust's automatic stay by ordering foreclosure of the property commonly known as 1757 Park Oak Drive, Roseville, California on March 1, 2017. Debtor claims the foreclosure action was in violation of the automatic stay granted to Hard Stone CBO Trust pursuant to their bankruptcy filing on January 29, 2017.

Even if the automatic stay in the Hard Stone case was not annulled by the court, Plaintiff-Debtor is not Hard Stone CBO Trust and has no standing to pursue a claim for violation of the automatic stay in that case. Similarly, in the event Hard Stone CBO Trust chooses to pursue filing a motion to vacate the order annulling the automatic stay, Plaintiff-Debtor would still have no standing to pursue violation of Hard Stone CBO Trust's automatic stay. Such rights belong to Hard Stone CBO Trust's and only they, not Plaintiff-Debtor, can pursue such causes of action at their discretion. Thus, Plaintiff-Debtor has failed to state a claim for which relief can be granted.

There Was No Automatic Stay for Defendant to Violate

Even if Plaintiff-Debtor had standing, there were no stays in effect that Defendant could have violated. Plaintiff-Debtor alleges Defendant violated the automatic stay by ordering foreclosure proceedings on March 1, 2017 and then executing the foreclosure sale on March 6, 2017. As Plaintiff-Debtor notes in their Amended Complaint, the automatic stay in the Hard Stone CBO Trust case was annulled. Having, been annulled, there was no automatic stay in effect when Defendant ordered and executed the foreclosure sale in March 2017.

Moreover, Plaintiff-Debtor's present case was filed on January 29, 2018. The Plaintiff-Debtor's case was filed more than eight months after the alleged violations of the automatic stay. Therefore there is no way the automatic stay in Plaintiff-Debtor's case could have been violated. In addition, a review of the docket reveals Plaintiff-Debtor did not list a legal, equitable, or other type of interest in "1757 Park Oak Drive, Roseville, California" in their schedules filed with the court. Based on a review of the facts in a light most favorable to Plaintiff, there does not appear to be a violation of the automatic stay.

Defendant is Not a Creditor

Plaintiff-Debtor alleges Defendant did not file a proof of claim in the present case and as such is not entitled to payment. The issue is not whether Defendant filed a proof of claim, but whether Defendant was exercising rights it had in property of Hard Stone. That Defendant asserts a foreclosure sale was completed does not alter the rights and interest it had. If Hard Stone disputes such, it can, in a court of appropriate jurisdiction, litigate such *bona fide* disputes. Additionally, a creditor with a secured claim is not required to file a proof of claim to preserve that creditor's security interest and right to collateral, but may negatively impact a creditor's ability to get paid on any unsecured portion of the claim. Fed. R. Bankr. P. 3002(a), stating, "A lien that secures a claim against the debtor is not void due only to the failure of an entity to file a proof of claim."

Res Judicata Bars the Re-litigation of this Claim

Defendant asserts that Plaintiff-Debtor's complaint is identical to Hard Stone CBO Trust's allegations in its Adversary Complaint (Dckt. 18, Ex.17). First, Defendant asserts Hard Stone CBO Trust and Plaintiff-Debtor are in privity and thus the determination in favor of Defendant should be binding on Plaintiff-Debtor. Next, Defendant asserts the adversary proceeding between Hard Stone CBO Trust and Defendant resulted in a finding for Defendant on the merits. Plaintiff-Debtor filed an appeal on the matter which was ultimately dismissed. Thus, Plaintiff-Debtor cannot attempt to re-litigate this issue in the current adversary proceeding.

The order dismissing the Complaint in Hard Stone CBO Trust v. Clear Recon Corp., et al, 20-2102, does not state that it is a dismissal with prejudice. The Motion to Dismiss asserts that the Hard Stone Complaint failed to state a claim. Federal Rule of Civil Procedure 41(b), which is incorporated into Federal Rule of Bankruptcy Procedure 7041(2)(a) states that when there is an involuntary dismissal of the adversary proceeding is without prejudice.

Thus, it does not appear that the dismissal of the prior adversary proceeding is an adjudication of the rights and interests.

Plaintiff Cannot File an Adversary Complaint to Seek Relief from Judgement

Defendant asserts this adversary complaint seeks relief from the final judgement granting Defendant relief from the automatic stay. Defendant states that in order to seek rescindment of a final judgement, Federal Rule of Bankruptcy Procedure 60(b)(3) requires Plaintiff-Debtor to seek such relief by filing a motion, not by commencing and adversary proceeding. Moreover, Ninth Circuit case law has determined that a violation of the automatic stay is treated as civil contempt and under Federal Rule of Bankruptcy Procedure 9020, civil contempt must be requested by motion.

Moreover, even if the court views this as a Motion for Reconsideration, Federal Rule of Bankruptcy Procedure 60(b)(3) requires a motion to be brought within a reasonable time and not more than a year from the date of the Order. Here, the Order Granting Annulment of the Stay occurred over four years ago, and thus this request is untimely.

Defendant had Standing and Annulment was Appropriate

Bank of America was in possession of the Note at the time of the filing of their Motion, it is the "holder" and thus a "person entitled to enforce" the Note. Cal. Comm. Code §3301(i). The Note is endorsed and payable in blank". As holder of the Note, Bank of America had standing to seek Annulment of the Automatic Stay. Because Bank of America had standing to file its Motion, the Stay was properly Annulled due to the multiple bankruptcy filings.

July 22, 2021 Hearing

At the hearing, the court addressed with the parties the issues of due process raised when the court applies a Defendant's motion to dismiss to a subsequent Amended Complaint. There being no differences in substantive grounds alleged with regards to the Standing argument in the Amended Complaint, the court finds that the Amended Complaint has failed to state a claim for which relief can be granted.

However, Plaintiff-Debtor being in *Pro Se*, the court may allow Plaintiff-Debtor to file a supplemental pleading or submit on oral argument as presented at the hearing. The court is not giving Plaintiff-Debtor leave to file a second amended complaint.

The Motion to Dismiss Adversary Proceeding is **xxxxxxx**

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss Adversary Proceeding filed by Bank of America, National Association ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is **xxxxxxx**.