UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

August 13, 2015 at 1:30 p.m.

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1. 09-44339-E-13 GLEN PADAYACHEE
14-2282 PLC-3
PADAYACHEE V. TERRY, III

MOTION FOR COMPENSATION FOR PETER CIANCHETTA, PLAINTIFF'S ATTORNEY
6-29-15 [63]

Tentative Ruling: The Motion for Prevailing Party Fees 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 counsel on June 29, 2015. By the court's calculation, 45 days' notice was provided. 28 days' notice is required.

The Motion for Prevailing Party Fees 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 are entered.

The Motion for Prevailing Party Fees is granted in the amount of $9,657.00.

Glen Padayachee ("Plaintiff-Debtor") filed the instant Motion for

Attorney's Fees After Summary Judgment on June 29, 2015. Dckt. 63. Pursuant to Fed. R. Bankr. P. 7054(b)(2) and Fed. R. Civ. P. 56(d), Plaintiff-Debtor is seeking $16,880.00 in legal fees as the prevailing party in this action. FN.1.

FN.1. While the Motion states that the Plaintiff-Debtor is seeking attorney's fees pursuant to "FRBP § 5054(b)(2)," the court has sua sponte corrected this to Fed. R. Bankr. P. 7054(b)(2), which is the correct Bankruptcy Rule for requests for attorney's fees. It appears that this mistype was a mere scrivener's error.

BACKGROUND

On September 30, 2015, Plaintiff-Debtor filed his complaint initiating the Adversary Proceeding pursuant to California Civil Code § 2941 for Thomas Terry, III ("Defendant") failing to execute a reconveyance Rivers ("Defendant-Debtor").

On June 5, 2015, the court granted the Plaintiff-Debtor's Motion for Summary Judgment, stating the following:

> The Motion for Summary Judgment filed by Glen Padayachee, Plaintiff-Debtor, against Thomas J. Terry, III, the 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 is granted and judgment shall be entered for Glen Padayachee, Plaintiff-Debtor, and against Thomas, J. Terry, III, Defendant, on the Third Cause of Action in the amount of $500.00 for the statutory forfeiture pursuant to California Civil Code § 2941(d).
>
> **IT IS FURTHER ORDERED** that the First and Second cause of action are dismissed without prejudice, as causes of action, but continue as allegations in the Complaint incorporated into the Third and Fourth Causes of Action.
>
> **IT IS FURTHER ORDERED** that the Fourth Cause of Action is one for attorneys' fees, pleaded pursuant to former Federal Rule of Bankruptcy Procedure 9008(b) which required a separate claim in the Complaint for attorneys' fees. This claim for attorneys's fees and costs shall be addressed pursuant to a post-judgment motion, filed and served on or before June 29, 2015, requesting attorneys' fees, if any, as provided in Federal Rule of Bankruptcy Procedure 5054(b)(2)[sic].
>
> **IT IS FURTHER ORDERED** that the First and Second Causes of Action are dismissed.
>
> Counsel for Plaintiff-Debtor shall lodge with the court a proposed judgment consistent with this ruling on or before June 19, 2015. The proposed judgment shall expressly state that any attorneys' fees and costs awarded by the court shall

be enforced as part of this judgment.

Dckt. 57.

MOTION

The Plaintiff-Debtor argues that he is allowed attorney's fees under the contract, namely the Note and Deed of Trust, and pursuant to California Civil Code § 1717.

The Plaintiff-Debtor argues that the requested attorney's fees are reasonable because:

1. Counsel used a commercial service to locate the Defendant.

2. Plaintiff-Debtor notified the servicing agent of the Defendant, PLM Lender Services, a copy of the complaint. The Plaintiff-Debtor argues that, under agency law, the Defendant had knowledge of the complaint and other important following by the alleged agent.

3. The Plaintiff-Debtor's attorney has spent majority of the time focusing on the statutory penalty of $500.00 for the failure of the Defendant to timely reconvey. The Plaintiff-Debtor argues that up to February 3, 2015, Plaintiff-Debtor had only incurred $4,875 in attorney's fees. However, due to the Defendant refusing o pay the $500.00 statutory penalty, the Plaintiff-Debtor incurred an additional $12,005.00 in attorney's fees. FN.1.

FN.1. The court notes that these are the three categories in which the Plaintiff-Debtor argues his fees are reasonable in the Motion.

The Plaintiff-Debtor continues and states that, in order to keep costs down, Plaintiff-Debtor's counsel employed para-professionals to keep the hourly rate down. Additionally, the Plaintiff-Debtor's counsel argues that none of the work billed was redundant or inadequate, but was necessary, especially since February 3, 2015 due to Defendant's refusal to pay the statutory damage.

The grounds stated with particularity in the Motion (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007) includes stating that the fees are requested pursuant to the attorneys' fees provision in the note and deed of trust between the parties.

The Plaintiff-Debtor states that he is the prevailing party because the court granted the Plaintiff-Debtor's Motion for Summary Judgment as to the third and fourth causes of action in the adversary complaint.

DEFENDANT'S OPPOSITION

The Defendant filed an opposition to the instant Motion on July 29, 2015. Dckt. 78. The Defendant argues that because the Plaintiff-Debtor did not offer any kind of "safe harbor" notice, failed to properly file the Judgment

as instructed by the court, and improperly requesting the relief pursuant to Fed. R. Bankr. P. 5054(b)(2) and Fed. R. Civ. P. 56(d), the Plaintiff-Debtor is not entitled to the full amount of attorney's fees.

The Defendant argues that the attorney fees of no more than three hours and clerical fees of no more than 2.3 hours have bene utilized in order to accomplish the reconveyance.

The Defendant states that the attorney's fees that should be awarded should be a total of $1,070.70 ($1,050 in legal work and $20.70 in clerical work).

Attached to the Defendant's opposition is a Points and Authorities which appears to state further grounds for opposition, rather than just being the points and authorities in support for the argument made in the Opposition. Even in light of this error by Defendant, the court reviews the Points and Authorities for further grounds of opposition. First of the "new" grounds for opposition that was not mentioned in the Opposition itself is that the Judgment submitted fails to state that attorney's fees and costs shall be enforced as a part of the judgement.

Additionally, the Defendant argues that the suit was not on the contract and thus the Plaintiff-Debtor is not entitled to prevailing party fees. The Defendant argues that the Plaintiff-Debtor was enforcing the statute rather than the contract, namely the Note and Deed of Trust, and thus California Civil Code § 1717 does not apply.

The Defendant also alleges that the Plaintiff-Debtor is not entitled to prevailing party fees because the Plaintiff-Debtor filed the complaint less than 30 days pursuant to California Civil Code § 2941 and thus did not satisfy the Defendant's due process rights.

Defendant then argues that the request for fees is not reasonable because the reconveyance took place on December 1, 2014 and that the work done following the reconveyance was not reasonable nor necessary.

Lastly, one of the additional grounds found in the Points and Authorities that was not in the Opposition itself is that the Plaintiff-Debtor's counsel is seeking reimbursement for "research" and "drafting" when the Defendant argues that what was used was a "template" complaint. The Defendant alleges that the additional work was not necessary nor proper.

PLAINTIFF-DEBTOR'S REPLY

Plaintiff-Debtor filed a reply to the opposition on August 6, 2015. Dckt. 84. The Plaintiff-Debtor starts by stating that the Opposition essentially rehashes the arguments made by Defendant at the Motion for Summary Judgement and are moot by the court finding that the Defendant did not timely reconvey.

As to the issue over the misstatement over the proper Bankruptcy Rule, the Plaintiff-Debtor argues that such an error should not preclude the Motion from being heard.

Since the Defendant's opposition, an amended Judgment has been entered

which states that "any award of attorney's fees and costs awarded by the Court shall be enforced as part of this judgment." Dckt. 87.

The Plaintiff-Debtor argues that there is no statutory requirement for a "safe harbor" notice before filing suit under California Civil Code § 2941. The Plaintiff-Debtor asserts that the Defendant should not be able to penalize the Plaintiff-Debtor by diminishing attorney's fees because the Plaintiff-Debtor violated a statute.

Lastly, the Plaintiff-Debtor states that he attempted to locate Defendant in California and the number was prohibitive. Notice was given to Defendant through his agent by the Bankruptcy Noticing Center and Defendant never notified the Plaintiff-Debtor that his agent was no longer his agent, despite state and federal law requiring the Defendant to do so. The Plaintiff-Debtor argues that it is the Defendant's refusal to pay the statutory penalty that led to the increase in attorney's fees.

APPLICABLE LAW

Prevailing Party Attorneys' Fees

Unless authorized by statute or contractual provision, attorney fees ordinarily are not recoverable as costs. Cal. Code Civ. Proc. § 1021; *International Industries, Inc. v. Olen*, 21 Cal. 3d 218, 221 (Cal. 1978). 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). In the Ninth Circuit, the customary method for determining the reasonableness of a professional's fees is the "lodestar" calculation. *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996), *amended*, 108 F.3d 981 (9th Cir. 1997). "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales*, 96 F.3d at 363 (citation omitted). "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A compensation award based on the loadstar is a presumptively reasonable fee. *In re Manoa Fin. Co.*, 853 F.2d 687, 691 (9th Cir. 1988).

In rare or exceptional instances, if the court determines that the lodestar figure is unreasonably low or high, it may adjust the figure upward or downward based on certain factors. *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 620 n.4 (9th Cir. 1987). Therefore, the court has considerable discretion in determining the reasonableness of professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). It is appropriate for the court to have this discretion "in view of the [court's] superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437.

Cal. Civ. Code § 1717 states in relevant part,

> (a) 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.

Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.

Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void.

(b)(1) The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section.

(2) Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section.

Where the defendant alleges in his or her answer that he or she tendered to the plaintiff the full amount to which he or she was entitled, and thereupon deposits in court for the plaintiff, the amount so tendered, and the allegation is found to be true, then the defendant is deemed to be a party prevailing on the contract within the meaning of this section.

Where a deposit has been made pursuant to this section, the court shall, on the application of any party to the action, order the deposit to be invested in an insured, interest-bearing account. Interest on the amount shall be allocated to the parties in the same proportion as the original funds are allocated...

DISCUSSION

As both attorneys know, a court awards "reasonable" prevailing party attorneys' fees. A common definition of "reasonable" is "1 a : being in accordance with reason <a reasonable theory>, b : not extreme or excessive <reasonable requests>, c : moderate, fair <a reasonable chance> <a reasonable price>. http://www.merriam-webster.com/dictionary/reasonable. The definition also includes, "2 a : having the faculty of reason, b : possessing sound judgment <a reasonable man>." *Id.* The definition of "reason" includes, "the power of the mind to think and understand in a logical way." http://www.merriam-webster.com/dictionary/reason.

The crux of the contention between the parties is the reasonableness of the attorneys' fees requested based on the actions of the Plaintiff-Debtor, Plaintiff-Debtor's counsel, Defendant, and Defendant's counsel. Unfortunately, it appears that "reason" is not a concept which has been at the forefront for either the parties or attorneys in this Adversary Proceeding.

Review of Adversary Proceeding

Plaintiff-Debtor, represented by Counsel, filed this Adversary Proceeding on September 30, 2014. The Complaint is sixty-six pages in length. Dckt. 1. On October 31, 2014, Defendant filed an Answer (in pro se). Dckt. 8. The Answer admits and denies each allegation and states three affirmative defenses. A Certificate of Service attesting the Answer being served on Plaintiff-Debtor and Plaintiff-Debtor's Counsel was filed on October 31, 2014. Dckt. 9.

Motion for Entry of Default Judgment

On February 20, 2015, Plaintiff-Debtor filed a pleading titled "Motion for Entry of Judgment." Dckt. 15. The Motion requests the entry of a ***default judgment*** against the Defendant (who had filed an answer). The pleadings filed by Plaintiff-Debtor in connection with the Motion for Entry of Judgment are: (1) Motion, four pages; (2) Notice of Hearing, two pages; (3) Exhibits, sixty-six pages; (4) Points and Authorities, six pages; (5) Declaration of law clerk for Plaintiff-Debtor's Counsel, six pages (attesting to the time he has billed to the matter); and (6) Declaration of Debtor's Counsel, two pages (attesting to his hourly rate, the law clerk's hourly rate, and the time Counsel has billed to the matter).

Defendant's Counsel then filed an opposition to the Motion. Amended Opposition, Dckt. 32. The Opposition states that the underlying facts are not in dispute or that the deed of trust has by then been reconveyed. Rather, the dispute is that the then $7,772.50 in fees and costs requested were not reasonable.

The court denied the Motion without prejudice. Order, Dckt. 39. In denying the Motion, the court made the following findings and conclusions:

> "Nowhere in the Motion or any of its accompanying pleadings does the Plaintiff-Debtor argue that a judgment has been entered to justify any sort of reimbursement of fees pursuant to Fed. R. Civ. P. 54 and Fed. R. Bankr. P. 7054. Merely getting the reconveyance does not translate to the Plaintiff-Debtor being the prevailing party for purposes of attorney's fees. In the instant Adversary Proceeding, no

> order, decree, or judgment has been entered 'from which appeal lies.' In fact, the court has not issued any orders in connection with this
> Adversary Proceeding.
>
> The Plaintiff-Debtor may be attempting to be pleading under Fed. R. Civ. P. 55 for default judgment. 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.
>
> Here, the Plaintiff-Debtor has not met the first prong for entry of default judgment as the Defendant has not defaulted nor was one entered.
>
> The Plaintiff-Debtor appears to be asking the court to construe the fact that the Defendant reconveyed the deed of trust without the court needed to issue a judgment in the Adversary Proceeding is prima facie proof that Plaintiff-Debtor is the 'prevailing party.' As such, the Plaintiff-Debtor seeks to have the court find that because the Plaintiff-Debtor got what he was seeking in the Adversary Proceeding, that the remaining causes of actions should be ruled in his favor by a matter of course.
>
> This is improper. The Plaintiff-Debtor has failed to state with particularity how and why the Plaintiff-Debtor is the 'prevailing party' given that the court has not issued any order, decree, or judgments."

Civil Minutes, Dckt. 37.

Review of Complaint

The first six pages are the Complaint and the remaining sixty pages are exhibit. The First Cause of Action is for "Declaratory Relief," in which Plaintiff-Debtor seeks the following:

> "18. Plaintiff seeks a Declaratory Judgment pursuant to FRBP §7001(9) as the relief requested requires the release of lien of Defendant thereby invoking FRBP §7001(2) and FRBP §7001(6).
>
> 19. Plaintiff seeks that the value stated in the Motion to Value ruled by the Honorable Ronald H. Sargis on March 12, 2010, which ordered that the SECOND DEED OF TRUST had a secured value of zero, attached as Exhibit C, is a final non-appealable order.
>
> 20. Further, the Plaintiff's plan has been completed and the Plaintiff seeks, pursuant to FRBP §4007(a)-(b), a determination that the debt has been discharged."

Complaint, p.3:16-23.

As later stated by the court in this Adversary Proceeding, and other similar adversary proceedings filed by Plaintiff-Debtor's Counsel, requesting the court for a "declaration" that prior final orders and judgments are "real orders" is not proper. The prevailing party merely enforces the prior order, not foment litigation (and generate billings for attorneys' fees) seeking redundant orders and judgments stating that prior orders and judgments are "real orders and judgement."

The Second Cause of Action stated in the Complaint is one for quite title, determining that the deed of trust of record of Defendant is void. When a deed of trust is not reconveyed after a bankruptcy plan has been completed and the secured claim determined pursuant to 11 U.S.C. § 506(a) paid, it is necessary for a debtor to see such relief. See *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).

The Third Cause of Action is for $500.99 in statutory damages and attorneys' fees pursuant to California Civil Code § 2941(d).

The Fourth Cause of Action is for attorneys' fees pursuant to California Civil Code § 2941(d) and the contract. (This Complaint pre-dated the amendment to Fed. R. Bankr. P. 7008(b) and a separate claim for attorneys' fees was required when the Complaint was filed.)

Motion for Summary Judgment

Plaintiff Debtor then filed a Motion for Summary Judgment on May 4, 2015. Dckt. 40. (The dysfunctionality of this Adversary Proceeding, the parties, and the attorneys is demonstrated, in part, by the filing of the Motion for Summary Judgment. Though the deed of trust had been reconveyed and the bickering was only over attorneys' fees, no stipulation for judgment, reserving the fight for attorneys' fees, was presented to the court.

The pleadings filed for the Motion for Summary Judgment are: (1) the Motion, three pages; (2) Notice of Hearing, two pages; (3) Exhibits, twenty-six pages; (4) Statement of Undisputed Facts, four pages; (5) Points and Authorities, ten pages; and (6) Request for Judicial Notice, three pages; and Declaration of Plaintiff-Debtor's Counsel, two pages (authenticating the exhibits). The Motion requests that the court on the Second, for $500.00, and Third, for award of attorneys' fees, Causes of Action, Plaintiff-Debtor withdrawing the request for Declaratory Relief. Dckt. 40.

The Motion for Summary Judgment, seeking the $500.00 for the deed of trust not being reconveyed (which it was done after the action was filed) and attorneys' fees was opposed by Defendant. This pleadings in Opposition consisted of: (1) Opposition, three pages; (2) Statement of Disputed Facts, three pages; (3) Statement of Undisputed Facts, three pages; Points and Authorities, nine pages; and (4) Declaration of Defendant, two pages.

The Opposition asserted that Plaintiff-Debtor had failed to show that notice was not given to Defendant instructing him to reconvey the deed of trust. Opposition, p. 2:8-11, 13-16. Dckt. 48. It is further argued that Defendant had reconveyed the deed of trust thirty days after filing the answer to the Complaint. It was asserted that Plaintiff-Debtor "prematurely" commenced this Adversary Proceeding. The Points and Authorities does not

direct the court to a basis for asserting that the Plaintiff-Debtor was required to "instruct" the Defendant to reconvey the deed of trust when there no longer remained any obligation to be secured. (The plan having been completed, the modifications of the creditor-debtor relationship being final, and the court's 11 U.S.C. § 506(a) $0.00 valuation being final, the deed of trust is void as a matter of state law. *In re Frazier, supra*.

The court granted the Motion for Summary Judgment for the Third Cause of Action ($500 statutory forfeiture), directed that the award of attorneys' fees would be determined pursuant to a post-judgment motion, and dismissed without prejudice the First and Second Causes of Action. Order, Dckt. 57. In addressing Defendant's contention that Plaintiff-Debtor has an obligation to "instruct" Defendant to reconvey the deed of trust, the court determined:

> "The plain language of California Civil Code § 2941(b) does not require that a 'demand' be made or notice given of the beneficiary's and trustee's duties to reconvey the deed of trust. Most likely the California Legislature did not include such a provision because the trustees under deeds of trust are generally commercial companies, each with a phalanx of attorneys to make sure they comply with the law. Such trustee's under the deed of trust have duties they owe to the beneficiary.
>
> While not included as a condition for the obligation to reconvey, whether a notice was given or demand made could well be relevant for what constitutes 'reasonable' or 'necessary attorneys' fees. This court is confident that the California Legislature did not create this provision as a trap for beneficiaries and trustees when the Bankruptcy Code inserts itself in the process and redetermines that debt secured by the deed of trust to be $0.00 or some other less than full obligation amount pursuant to 11 U.S.C. § 506(a). The Bankruptcy Code, and the somewhat unique (in the eyes of a state law transactional attorney or lay person) method by which state law rights are modified, destroyed, or turned on their head is not an opportunity for a debtor and debtor's counsel to lie in the weeds, not reasonably and rationally acting to assert rights, and to manufacture otherwise unnecessary legal fees.
> ...
> The undisputed evidence presented to the court is that at the latest Defendant had notice of the plan being completed and a demand to reconvey when he was served with the Complaint, which was mailed on October 6, 2014. Defendant has chosen not to provide any testimony as to when he received the Complaint or contended that delivery of it was unusually delayed from what is the normal United States Postal Service prompt deliver of the mail. The Certificate of Service of the Complaint on Defendant at what he asserts is his correct address was made on October 6, 2014 by depositing in the mail. Certificate of Service, Dckt. 7. October 6, 2014 was a Monday. Fed. R. Bankr. P. 9006(e). When there is a requirement to act within a prescribed period when notice is provided by mail, then three days are added after the prescribed period. Id.,

9006(f).
...
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 October 9, 2014, Defendant knew of the bankruptcy plan being completed and a “demand” by Plaintiff-Debtor that the deed of trust had to be reconveyed.

Civil Minutes, Dckt. 55.

The Request for Attorney’s Fees is On Contract

First, to address the contractual grounds for attorney’s fees under the contract, the court previously made such finding and conclusions of law in the ruling on the Motion for Summary Judgement. The court found the following:

21. Plaintiff has provided both a contractual basis for the award of "reasonable" and "necessary" attorneys' fees and costs. The Plaintiff shall file a costs bill and motion for attorneys' fees and costs, if any, on or before June 22, 2015. Any motion for attorneys' fees shall be in a format similar to that use when professionals seek fees in a bankruptcy case, including providing the court with a task billing analysis. FN.9.

FN.9.

The provision that Plaintiff-Debtor references in the Second Deed of Trust states the following, in relevant part:

18. Borrower's Right to Reinstate. . . (c) Borrower pays all reasonable expenses incurred by Lender and Trustee in enforcing the covenants and agreements of Borrower contained in this Deed of Trust, and in enforcing Lender's and Trustee's remedies as provided in paragraph 17 hereof, includin, but not limited to, reasonable attorneys' fees. . .

Dckt. 1, Exhibit B.

In addition, the Promissory Note evidencing the obligation secured by the Second Deed of Trust provides an additional contractual attorneys' fees provision. In the event of a default, under the Note or Second Deed of Trust, Plaintiff is obligated to pay reasonable costs, including attorneys' fees and expenses relating to any bankruptcy or civil proceeding.

Dckt. 55.

As such, the court finds that this request is actually a request for prevailing party’s fees on a contract pursuant to California Civil Code § 1717. The task now falls on the court to review the fees, confirm that the services are within the scope of the contractual provision, and that such fees and costs

are “reasonable.”

Review of Billing Statements

The court reviews the billing records provided for by Plaintiff-Debtor. The court, from the start, notes that the Plaintiff-Debtor failed to provide task billing. The court finds helpful, and in most cases essential, for professionals to provide a basic task billing analysis for the services provided and fees charged. This has long been required by the Office of the U.S. Trustee, and is nothing new for professionals in this District. The task billing analysis requires only that the professional organize his or her task billing. The more simple the services provided, the easier is for Applicant to quickly state the tasks. The more complicated and difficult to discern the tasks from the raw billing records, the more evident it is for Applicant to create the task billing analysis to provide the court, creditors, U.S. Trustee with fair and proper disclosure of the services provided and fees being requested by this Professional.

Included in the motion is the raw time and billing records, which has not been organized into categories. Rather than organizing the activities which are best known to Applicant, it is left for the court, U.S. trustee, and other parties in interest to mine the records to construct a task billing. The court declines the opportunity to provide this service to Applicant, instead leaving it to Applicant who intimately knows the work done and its billing system to correctly assemble the information. FN.1.

FN.1. The requirement for a task billing analysis is not new to this district and was required well before the modern computer billings systems. More than 20 years ago a bright young associate (not the present judge) developed a system in which he used different color highlighters to code the billing statements for the time period for the fee application. General administrative matters were highlighted in yellow, sales of property in green, adversary proceedings in red, and so on. Subsequently, the billing procedure advanced so that each adversary proceeding was provided a separate billing number so that it would generate a separate billing. Within the bankruptcy case billing number the time entries were given a code on which the billing system could sort the entries and automatically produce a billing report which separates the activities into the different tasks.

It is surprising to the court that Plaintiff-Debtor’s counsel, who appears regularly before the court, failed to provide the task billing, knowing full well that it is a requirement.

However, in light of the contentious nature of this proceeding and the necessity to conclude this case, the court will “provide” that service that the Plaintiff-Debtor and Plaintiff-Debtor’s attorney should have done for the court’s review of this request.

The court, in preparing the task-billing that the Plaintiff-Debtor should have provided for at the time of filing, splits the time sheet into pre- and post-reconveyance.

Pre-Reconveyance - December 1, 2014 and prior

General Administration: Plaintiff-Debtor's counsel spent 2.55 in this category. Plaintiff-Debtor's counsel set up the file, met with client to discuss strategy, prepare fee agreement, and upload documents.

Research: Plaintiff-Debtor's counsel spent 5.9 hours in this category. Plaintiff-Debtor's counsel and paralegal researched public records for deeds, researched statutes, case law, and exhibits.

Drafting and Pleading Review: Plaintiff-Debtor's counsel spent 3.6 hours in this category. Plaintiff-Debtor's counsel and paralegal drafted complaint, reviewed draft, finalized documents and uploaded, downloaded documents and serve, and reviewed answer from Defendant.

Correspondences: Plaintiff-Debtor's counsel spent 3.8 hours in this category. Plaintiff-Debtor's counsel and paralegal emailed client over case, prepared settlement letter, reviewed letter to Defendant with paralegal, reviewed faxed letter from Defendant, reviewed fax with reconveyance, and prepared additional letter in response to Defendant.

Professional	Rate	Hours	Total
Peter Cianchetta	$350.00	6.25	$2,187.50
David Pereira, paralegal	$175.00	8.5	$1,487.50
Flat file set up fee	$150.00		$150.00
TOTAL			$3,825.00

Post-Reconveyance - Post-December 1, 2014

Unlike the pre-reconveyance services, the court has organized the billing based on the motions drafted by Plaintiff-Debtor.

Correspondence: Plaintiff-Debtor's counsel spent 1.6 hours in the following category. The Plaintiff-Debtor's counsel and paralegal reviewed faxed letter from Defendant, reviewed status conference statement, reviewed fax letter, and prepared letter in response.

Motion for Entry of Default: Plaintiff-Debtor's counsel spent 6.8 hours in the following category. The Plaintiff-Debtor's counsel and paralegal researched, drafted, and filed the Motion for Entry of Default.

Motion for Summary Judgment: Plaintiff-Debtor's counsel spent 18.1 hours in the following category. The Plaintiff-Debtor's counsel and paralegal researched, drafted, and filed the Motion for Summary Judgment.

Motion for Compensation: Plaintiff-Debtor's counsel spent 13.8 hours in the following category. The Plaintiff-Debtor's counsel and paralegal researched, discussed, drafted, and filed the Motion for Compensation as well as providing for estimated time to address any responses.

Hearings: Plaintiff-Debtor's counsel spent 5.6 hours in this category. The

Plaintiff-Debtor's counsel attended status conference, Motion for Entry of Default Judgment hearing, and Motion for Summary Judgment hearing.

Professional	Rate	Hours	Total
Peter Cianchetta	$350.00	28.70 [29.9 - 1.2 n/c]	$10,045.00
David Pereira	$175.00	17.2	$ 3,010.00
Total			$13,055.00

Reasonableness of Attorney's Fees

In granting the Motion for Summary Judgment, the court explicitly stated the following as to the reasonableness of the fees incurred in the instant action: "While not included as a condition for the obligation to reconvey, whether a notice was given or demand made could well be relevant for what constitutes "reasonable" or "necessary attorneys" fees."

Courts in California have addressed what considerations the court should look at when determining reasonableness and the purpose of § 1717:

> The purpose of California Civil Code section 1717 is "to establish uniform treatment of fee recoveries in actions on contracts containing attorney fee provisions." *PLCM Group v. Drexler*, 22 Cal.4th 1084, 1094-1095, 95 Cal.Rptr.2d 198, 997 P.2d 511 (2000) (quoting *Santisas v. Goodin*, 17 Cal.4th 599, 616, 71 Cal.Rptr.2d 830, 951 P.2d 399 (1998)). To achieve this goal, the trial court is given "broad authority to determine the amount of a reasonable fee." Id. at 1095, 95 Cal.Rptr.2d 198, 997 P.2d 511 (citing *Int'l Indus., Inc. v. Olen*, 21 Cal.3d 218, 224, 145 Cal.Rptr. 691, 577 P.2d 1031 (1978)); see *Montgomery v. Bio-Med Specialties, Inc.*, 183 Cal.App.3d 1292, 1297, 228 Cal.Rptr. 709 (1986) (providing that the trial court has "wide latitude in determining the amount of an award of attorneys ['] fees"). In exercising this authority, the court is primarily guided by principles of equity. See *Beverly Hills Props. v. Marcolino*, 270 Cal.Rptr. 605, 221 Cal.App.3d Supp. 7, 12 (1990) ("T]he award of attorney[s'] fees under section 1717, as its purposes indicate, is governed by equitable principles." (citing Int'l Indus., 21 Cal.3d at 224, 145 Cal.Rptr. 691, 577 P.2d 1031)).

Sunstone Behavioral Health, Inc. v. Alameda Cnty. Med. Ctr., 646 F. Supp. 2d 1206, 1212 (E.D. Cal. 2009).

As foreshadowed above, reasonableness, and reason, have left the parties and attorneys in connection with various aspects of this Adversary Proceeding. Neither side has a monopoly on such lack of reason.

As the *Sunstone* court stated, it is the "principles of equity" that

guides the determination of attorney's fees under loadstar and § 1717. The court, as noted in the civil minutes for Motion for Summary Judgment, finds that the actions taken by the Plaintiff-Debtor has left much wanted. Even prior to filing the Complaint, it is possible that all the underlying claims could have been dealt with and settled without the need of an adversary proceeding. That is not to say that the Plaintiff-Debtor was wrong in exercising his rights under California law, but the fact that instead of trying to settle the claims outside of filing the instant Complaint, which is the first service rendered by Plaintiff-Debtor's counsel, the Plaintiff-Debtor decided to go on the litigious offensive.

Plaintiff-Debtor's counsel eschews any thought that a reasonable, prudent, rational consumer, and like counsel for such consumer, would send a simple demand letter to a creditor requesting the reconveyance. Here, there is the more complex interplay of state law and bankruptcy law, which turned the concept of a sacrosanct secured creditor having a lien on its head – bifurcating the debt into a $0.00 value secured claim and a 100% general unsecured claim.

Plaintiff-Debtor "rescues" Defendant to some degree in that rather than addressing the void deed of trust when he is served with the Complaint (which the court could have construed as, and valued the services for, a polite, professional, commercially reasonable demand letter) and did not immediately respond to address the obligation to reconvey the deed of trust. While it could be construed as intimidating, there is no denying that the Complaint effectively communicated, informed, and "instructed" Defendant to immediately reconvey the deed of trust.

The court will reduce the fees requested by Plaintiff-Debtor as detailed below. But the court also notes that Defendant's strategy of opposing the relief and contending that there was no "safe-harbor" instruction (for which no legal basis was shown) added to the fees being incurred by Plaintiff-Debtor.

At this juncture, and in light of the palpable animosity between the attorneys, the court notes that attorneys do not need to get along for one of the attorneys to minimize the legal fees. Assuming that Defendant asserts that it is Plaintiff-Debtor's Counsel who is unreasonable and merely seeking to garbage bill the matter, he has some options. First, he could have sent a simple stipulation for entry of judgment on the $500 statutory damages and for the attorneys' fees to be determined by post-judgment motion. Defendant could have made and documented a proposal for attorneys' fees to finally settle all issues. Since the attorneys' fees provision swings both ways, if the Plaintiff-Debtor's Counsel was unreasonable and litigates the issue of attorneys' fees, it is possible that Defendant may have sought his attorney as the prevailing party on the attorneys' fees issue if the court allowed an amount consistent with the settlement proposal.

With respect to the fees sought by Plaintiff-Debtor, his strategy, being with just filing suit and not even making a commercially reasonable effort to request the reconveyance has the stench of litigation for the sake of maximizing legal fees. Plaintiff-Debtor's counsel appears on many matters and strikes the court as good natured, ethical, and well intentioned. It may be that this type of litigation was more complex than anticipated or that in the rush to file these types of suits, the allure of reconveying attorneys'

fees blinded the Plaintiff-Debtor and Counsel to reasonableness.

When reviewing the billing statement, Plaintiff-Debtor's Counsel is seeking to have Defendant pay for legal fees relating to clerical services, motions for which Plaintiff-Debtor did not prevail, or for status conferences and hearing which were required because Plaintiff-Debtor was not reasonably prosecuting this case.

The court disallows the following fees requested by Plaintiff-Debtor:

Clerical Fees Billed As Legal Services

Date	Descripition	Hours	Dollar Charge
09/24/2014	Law Clerk - File Setup, Admin Relating to Setting Up File	Not Stated	$150.00
09/24/2014	Law Clerk - Draft Engagement Letter, Get Client Signature	0.5	$87.50
10/1/2014	Law Clerk - Download Documents From Pacer, Serve, Prepare, and file POS	0.8	$140.00
	Disallowed		$377.50

Fees Billed for Denied Motion for Default Judgment

Date	Description	Hours	Dollar Charge
02/19/2015	Law Clerk - Rough Draft of Motion for Judgment on Attorneys' Fees and Damages	3.2	$560.00
02/20/2015	Attorney - Review rough draft. Research case law from law clerk on attorneys fees and costs. Amended pleadings.	2.1	$367.50
02/20/2015	Law Clerk - Finalize Pleadings. Prepare for filing and file with the Court.	1.2	$210.00
04/03/2015	Attorney -Review Opposition by Terry	.3	$105.00
04/09/2015	Attorney - Attend Hearing on Motion for Judgement on Attorneys' Fees and Damages	1.8	$630.00

	Disallowed fees		$1,872.50

Fees for Status Conferences and Proceedings Caused Due to Plaintiff-Debtor not Reasonably Prosecuting the Adversary Proceeding

Date	Description	Hours	Dollar Charge
01/21/2015	Attorney - Attend Status Conference	1	$350.00
	Disallowed fees		$350.00

Excessive Fees for Services Provided

Plaintiff-Debtor's Counsel seeking to bill clerical services as paralegal services at $175 an hour raises a specter as to the credibility of the other charges in general. In considering the lack of complexity with the issues, but keeping in mind the oppositions asserted by Defendant, the court makes the following reductions:

Date	Description	Hours Reduced	Dollar Charge
	Summary Judgment Motion		
04/30-05/01/2015	Law Clerk - Draft Motion for Summary judgment, final review, and assemble. 7.00 Hours, $1,225.00 fees billed	2	$350.00
	Attorney - Direct, Review, and Finalize Summary Judgment Motion and Pleadings, and uploading (clerical). 6.4 hours, $2,240 fees billed	3	$1,650.00

	In considering the above, billing 13.4 hours for a summary judgment motion for $500 in statutory damages and contractual attorneys' fees is unreasonable and not consistent with the legal of practice in the Sacramento legal community. By the time of this motion, and in light of the court's rulings, the issues were very simple. The parties should note that the court does not reduce Plaintiff-Debtor's Counsel's fees for the time spent reviewing and responding to the opposition to the Summary Judgment motion filed by Defendant.		
	Motion for Attorneys' Fees		
	Law Clerk - Drafting Motion. 3.7 hours, billed $647.50	1.0	$175.00
	Attorney - Researching law on contractual attorneys' fees, 2.7 hours, billed $947.50	1.5	$525.00
	Attorney - Direct Paralegal and discuss cases on contractual attorneys' fees. 1.1 hours, Billed $385.00	.5	$175.00
	Attorney - Review Pleadings and revise for filing. 1.3 hours, billed $455.		No Adjustment
	Attorney - Projected Time to Address Response by Defendant to motion for contractual attorneys' fees and attend hearing. 5 hours, billed $1,750.00	1.5	$525.00
	In considering the time billed for this issue, with the judgment in place and the existence of a contractual attorneys' fee provisions, this is a garden variety, simple fee application. While Plaintiff-Debtor could anticipate a possible objection not well based in reason, that it not an excuse for over engineering the motion or extensive research.		
	Reduced Fees		$1,400.00

The fees as requested and adjustments are:

Law Clerk Fees:

Requested	$4,497.50
Court Ordered Reduction	($1,672.50)
Balance Requested Law Clerk Fees	$2,825.00

Attorneys' Fees:

Requested	$12,232.50
Court Ordered Reduction	($ 4,327.50)
Balance Requested Attorneys' Fees	$7,905.00

Total requested attorneys' and law clerks fees after initial court reductions for reasonableness of the services and time expended total $10,730.00.

Having made the determination of the reasonableness of time and activity, the court also considers whether the requested billings rates of $350.00 for the attorney and $175.00 for the law clerk are "reasonable." Merely because the attorney asks for it, does not mean the attorney automatically gets it.

The billing rates of $350.00 an hour for an experienced bankruptcy attorney litigator and $175 for an experienced law clerk do not shock the court. However, the actions of Plaintiff-Debtor's Counsel and the law clerk raise questions as to whether they, for the services provided in this Adversary Proceeding, support the court computing the prevailing party attorneys' fees at this rate.

Some of the more "inexperienced" acts observed by the court include: (1) seeking declaratory relief that prior final judgments and order are "real judgments and orders," rather than merely enforcing the rights under those judgments and orders; (2) filing a motion for entry of default judgment when an answer had been filed; (3) seeking to have the court award prevailing party attorneys fees for the failed motion for entry of default judgment; and (4) billings for attorney and law clerk for doing clerical and non-professional office support work which is included in an attorney's and law clerk's hourly rate. Such "inexperienced" acts are more consistent with an attorney billing $250 an hour and a $100 an hour paralegal.

However, the court notes that in other portions of the Adversary Proceeding, Plaintiff-Debtor's Counsel and the law clerk were addressing oppositions being advanced by Defendant which were not constructed on the firmest foundations. Therefore, the court believes that a 10% reduction in the hourly rates, rather than the much larger amounts posited above, is consistent with the level of services provided. This 10% reduction (allowing a $335.00 hour billing rate for the attorney and $160 an hour for the law clerk) reduces the total fees for Plaintiff-Debtor as the prevailing party to $9,657.00.

Allowing prevailing party attorneys's fees of $9,657.00 is reasonable not only in light of the services provided and a reasonable billing rate, but

for reasonable services provided considering the nature of this Adversary Proceeding, and the prior rulings of this court and the appellate courts in the Ninth Circuit.

While Defendant may howl that $9,657.00 is outrageous in light of there being only a $500.00 damages award (the attorneys' fees being 1900% of the damages), Defendant has only himself to blame. Plaintiff-Debtor's need to pursue the litigation is shown by Defendant not responding to the Complaint and complying with the obligation within the statutory time period after being served with the Complaint. Further, Defendant chose to argue losing points, trying to fend off a $500 statutory damage. To allow Plaintiff-Debtor any less would send a message that defendants can effectively defeat the statutory rights of a consumer to have a deed of trust being reconveyed and recover the modest forfeiture mandated by the California Legislature, if that defendant just engages in conduct to drive up the expense of the litigation.

Therefore, the court awards Glen Padayachee, as the prevailing party in this Adversary Proceeding, $9,657.00 on attorneys' fees.

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 Prevailing Party Fees filed by Glen Padayachee, the prevailing Plaintiff-Debtor in this Adversary Proceeding, ("Plaintiff-Debtor") having been presented to the court, no task billing analysis having been provided in support of the Application, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted and Glen Padayachee, the Plaintiff-Debtor, is awarded $9,657.00 in attorneys' fees against Thomas J. Terry, III, the Defendant. This award of attorneys' fees shall be enforced as part of the judgment entered in this Adversary Proceeding in favor of Plaintiff-Debtor and against the Defendant.

2. 09-44339-E-13 GLEN PADAYACHEE **CONTINUED STATUS CONFERENCE RE:**
14-2282 **COMPLAINT**
PADAYACHEE V. TERRY, III **9-30-14 [1]**

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: Peter G. Macaluso

Adv. Filed: 9/30/14
Answer: 10/31/14

Nature of Action:
Declaratory judgment
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

Notes:

Continued from 7/21/15 to be heard in conjunction with motion for compensation.

3. 10-26240-E-13 STEVE/KRISTINE SCHARER — MOTION TO DISMISS ADVERSARY PROCEEDING
14-2253 LLL-4 — 6-24-15 [53]
SCHARER ET AL V. WELLS FARGO BANK, N.A.

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

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

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on June 24, 2015. By the court's calculation, 50 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss Adversary Proceeding is denied without prejudice.

Wells Fargo Bank, N.A. (incorrectly sued as Wells Fargo Home Mortgage, a Division of Wells Fargo Bank, N.A.) ("Defendant") filed the instant Motion to Dismiss Adversary Proceeding on June 24, 2015. Dckt. 53.

Law and motion pleading practice in adversary proceedings is governed by Federal Rule of Civil Procedure 7(b). Fed. R. Bankr. P. 7007. A motion filed in an adversary proceeding, must:

A. be in writing unless made during a hearing or trial;

B. **state with particularity the grounds** for seeking the order; and

C. state the relief sought.

Fed. R. Civ. P. 7(b)(emphasis added).

In the present Motion, the below grounds are stated without particularity. Defendants alleges the following:

A. This court lacks subject matter jurisdiction over each of Debtor-Plaintiff's causes of action pursuant to 28 U.S.C. § 1334(b) because their claims do not arise under or arise in Title 11.

B. This court lacks subject matter jurisdiction over each of Plaintiff-Debtor's causes of action pursuant to 28 U.S.C. § 1334(b) because their claims are not related to their bankruptcy proceeding under Title 11.

C. This court should not retain jurisdiction because judicial economy does not support retention of jurisdiction over this adversary proceeding.

D. This court should not retain jurisdiction because it is not unfair to require Plaintiff-Debtor to litigate their state law claims in state court.

E. This court should not retain jurisdiction because it is not inconvenient to require Plaintiff-Debtor to litigate their state law claims in state court.

F. This court should not retain jurisdiction because comity does not support retention of jurisdiction over this adversary proceeding.

The Motion does not comply with the requirements of Federal Rule of Bankruptcy Procedure 7007 because it does not state with particularity the grounds upon which the requested relief is based. The motion merely states that there is no jurisdiction or that the court should abstain in short conclusory statements. This is not sufficient.

The court, on April 9, 2015, granted Defendant's Motion to Dismiss as to the first, second, seventh, eighth, and ninth causes of action. Dckt. 51. However, the court denied the Motion to dismiss as to the third, fourth, fifth, sixth, tenth, eleventh, twelfth, and thirteenth causes of action. In the civil minutes, the court attempted to emphasize that the party must comply with Fed. R. Civ. P. 7 by "stat[ing] with particularity the grounds for seeking the order." Dckt. 49. However, it appears the bolded language in the ruling did not take and, therefore, the court provides the non-truncated version of the discussion concerning the pleading requirements.

In discussing the minimum pleading requirement for a complaint (which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679. Further, a pleading

which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

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.

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 stay (such as in this case to allow a creditor to remove a significant asset from the bankruptcy estate), motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

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

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

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

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

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall

> set forth the relief or order sought." (Emphasis added). The standard for "particularity" has been determined to mean "reasonable specification." 2-A Moore's *Federal Practice*, para. 7.05, at 1543 (3d ed. 1975).

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

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

The Points and Authorities filed in conjunction with the "Motion" appears to be more akin to what the court would expect as a motion. Dckt. 55. The Points and Authorities state the legal grounds for the relief sought, citing specific facts of the case and how that translates either to lack of jurisdiction or why abstention is proper. Instead, the Plaintiff merely files a two-page Motion that in no construction could be considered to state with particularity the grounds for relief. The court previously provided a bit of "give" in the Plaintiff's prior Motion to Dismiss, in hopes that in the future, the Plaintiff would comply with the requirements of Fed. R. Civ. P. 7. Unfortunately, this did not happen. FN.1.

FN.1. While Movant may argue that Movant's counsel writes really clear points and authorities, as well as appellate briefs, so the court should just waive the Federal Rules of Civil Procedure, it does not work that way in a trial court which fairly, equally, and equitably applies the rules to all parties. Given the short time periods in which a motion is filed and heard, the need to clearly state the grounds upon which the movant relies is at a premium. A trial court does not have months for multiple law clerks to review, dissect, analyze, and then conduct oral argument on the way an appellate judge can address an appellate brief.

Further the grounds which must be stated with particularity governed by the certifications made through Federal Rule of Bankruptcy Procedure 9011. The points and authorities may well be chock full of citations, quotations, arguments, contentions, and speculation, which Movant might argue are not governed by Rule 9011 in the same manner as the grounds which must be stated with particularity.

Finally, the court will not engage in a differential application of the Rules, telling one attorney that is or her work is good enough to be exempt from the Rules and another attorney must comply with the Rules. Though in an academic sense one might be able to distinguish such quality differences, it inevitably creates the appearance that the judge is not impartial, but has her

or her "favorite" attorneys who get whatever they ask for from the judge.

Therefore, because the Plaintiff failed to comply with Fed. R. Bankr. P. 7007 and Fed. R. Civ. P. 7, the Motion is denied without prejudice.

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

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

The Motion to Dismiss filed by Defendant 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.

4. 10-26240-E-13 14-2253 SCHARER ET AL V. WELLS FARGO BANK, N.A.
STEVE/KRISTINE SCHARER CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
10-9-14 [12]

Plaintiff's Atty: Selwyn D. Whitehead
Defendant's Atty: Regina J. McClendon; Lindsey E. Kress

Adv. Filed: 8/28/14
Answer: none

Amd Cmplt Filed: 10/9/14
Reissued Summons: 10/10/14
Answer: 5/11/15

Nature of Action:
Dischargeability - other
Other (e.g. other actions that would have been brought in state court if unrelated to the bankruptcy case)

The Status Conference is continued to 2:30 p.m. on xxxxx, 2015, to allow Defendant the opportunity to file and have heard a motion to dismiss for lack of jurisdiction or that the court should, in its description, elect not to exercise federal court jurisdiction in this Adversary Proceeding.

Notes:

Continued from 6/24/15 to be heard in conjunction with motion to dismiss.

5. 15-20081-E-7 JANET ROBINSON
15-2086 RAC-1
MERCEDES-BENZ FINANCIAL SERVICES USA LLC V. ROBINSON

MOTION FOR ENTRY OF DEFAULT JUDGMENT
7-10-15 [13]

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 Defendant-Debtor, Defendant-Debtor's attorney, Chapter 7 Trustee, and Office of the United States Trustee on July 10, 2015. By the court's calculation, 34 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). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Entry of Default Judgment is granted as to the first cause of action and denied as to the second and third cause of action.

Mercedes-Benz Financial Services USA LLC ("Plaintiff") filed the instant Motion for Default on July 10, 2015. Dckt. 13. FN.1.

FN.1. The pleading title motion is a combined motion and points and authorities in which the grounds upon which the motion is based are buried in detailed citations, quotations, legal arguments, and factual arguments (the pleading being a "Mothorities") in which the court and Plaintiff are put to the challenge of de-constructing the Mothorities, divining what are the actual grounds upon which the relief is requested (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007), restate those grounds, evaluate those grounds, consider those grounds in light of Fed. R. Bankr. P. 9011, and then rule on those grounds for the Defendant. The court has declined the opportunity to provide those services to a movant in other cases and adversary proceedings, and has required debtors, plaintiffs, defendants, and creditors to provide those services for the moving party.

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

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

However, given that an entry of default has been entered and this is one of the first time Plaintiff's counsel has appeared before this court, the court waives this defect for this single Motion.

Plaintiff filed the instant Adversary Proceeding No. 15-02086 on May 1, 2015. The complaint contains three causes of actions:

1. Nondischargeability pursuant to 11 U.S.C. § 523(a)(6).

    a. The Plaintiff alleges that due to Defendant-Debtor's actions, the $11,373.48, plus accruing interest, late charges, attorneys' fees and costs are nondischargeable because the Defendant-Debtor has refused to return the Vehicle, transferred the Vehicle to third parties, and, therefore, willfully and maliciously cause injury to the Vehicle.

    b. The Plaintiff is seeking:

        i. a determination that the sum of $11,373.48, plus accruing interest, late charges, attorneys' fees and costs are nondischargeable;

        ii. for damages in the sum of $11,373.48, plus accruing interest, late charges, attorneys' fees and costs from

and after December 23, 2014;

iii. for reasonable attorneys' fees and costs incurred by Plaintiff; and

iv. for exemplary and punitive damages.

2. Deny Discharge pursuant to 11 U.S.C. § 727(a)(2)

a. The Plaintiff argues that the Defendant-Debtor should be denied discharged because the Defendant-Debtor transferred, removed, or concealed, or has permitted to be transferred, removed or concealed, the Vehicle within one year before the date of filing of the petition or after the date of filing of the petition since the Vehicle is not located at Defendant-Debtor's homes and the Defendant-Debtor has refused to surrender the Vehicle.

b. The Plaintiff is seeking for a determination denying Defendant-Debtor's discharge under 11 U.S.C. § 727(a)(2).

3. Deny Discharge pursuant to 11 U.S.C. § 7272(a)(4)(A)

a. The Plaintiff argues that the Defendant-Debtor should be denied discharged because the Defendant-Debtor knowingly and fraudulently made a false oath. Namely, the Defendant-Debtor stated that the Vehicle was at her home and intended to surrender the Vehicle, yet she has not and she omitted the Vehicle and another vehicle on her Amended Schedule B.

b. The Plaintiff is seeking for a determination denying Defendant's discharge under 11 U.S.C. § 727(a)(4)(A).

The summons and complaint were served on Defendant-Debtor on May 1, 2015. Dckt. 3. Defendant-Debtor was required to file an answer or other responsive pleading to the Complaint or a motion pursuant to Fed. R. Bankr. P. 7012 within 30 days of issuance of the summons. The Defendant did not file an answer, a motion, or other responsive pleading.

The court issued an Entry of Default and Order Re: Default Judgment Procedures on June 11, 2015. Dckt. The Entry of Default states that the Plaintiff shall apply for a default judgment within 30 days of the issuance of the default and a "prove up" hearing shall be scheduled.

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

The Plaintiff states that the Defendant-Debtor converted Plaintiff's property, namely a 2007 Mercedes-Benz GL450, VIN XXXX6167 ("Vehicle"). The Plaintiff asserts that the Defendant-Debtor admitted that she had possession of the Vehicle at the Meeting of Creditors and that she was willing to surrender the Vehicle to a representative of the Plaintiff. However, the Plaintiff asserts that when the representative arrived, the Defendant-Debtor would not surrender to vehicle.

Applying these factors, the court finds that the Plaintiff will be prejudiced if the debt arising from the Vehicle and the failure of the Defendant-Debtor to reconvey the Vehicle.

Looking at the merits of each claim, the court finds that the complaint is both sufficient and is meritious.

FIRST CAUSE OF ACTION - 11 U.S.C. § 523(a)(6)

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

quotations omitted).

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

The Supreme Court has clarified that "it is insufficient under §523(a)(6) to show that the debtor acted willfully and that the injury was negligently or recklessly inflicted; instead, it must be shown not only that the debtor acted willfully, but also that the debtor inflicted the injury willfully and maliciously rather than recklessly or negligently." *Id.* (citing *Kawaauhau v. Geiger*, 238 F.3d 1202, 1207 (1998)). To prove malicious injury, the party seeking to except a debt from being discharged must show that the debtor: (1) committed a wrongful act; (2) done intentionally; (3) which necessarily causes injury; and (4) was done without just cause or excuse. *Carrillo v. Su* (*In re Su*), 290 F.3d 1140, 1144-45 (9th Cir. 2002); *Littleton v. Transamerica Commercial Finance,* 942 F.2d 551, 554 (1991).

Here, the complaint sufficiently alleges that the Defendant-Debtor intentionally and willfully converted the Vehicle. This is evidenced by the statements made by the Defendant-Debtor at the Meeting of Creditors that the Defendant-Debtor would surrender the Vehicle to Plaintiff to only recant that and also by the Defendant-Debtor amending her Schedule B to remove the Vehicle as an asset. The Defendant-Debtor clearly, willfully, and intentionally prevented the Plaintiff from recovering the Vehicle, even in light of the Defendant-Debtor herself offering to surrender the Vehicle. It is only further evidence that the Defendant-Debtor acted willfully and maliciously when the Defendant-Debtor, under the penalty of perjury, amended her Schedule B to withdraw the Vehicle as an asset listed.

It is clear that the conversion was intended and willful, justifying the court granting judgment to the nondischargeability of the debt. See *Peklar v. Ikerd* (*In re Peklar*), 260 F.3d 1035 (9th Cir. 2001).

Therefore, upon review of the complaint and in light of the Defendant-Debtor's default, the court grants default judgement against the Defendant-Debtor, and damages in the sum of $11,373.43, accrued interest in the sum of $337.85 is nondischargeable pursuant to 11 U.S.C. § 523(a)(6).

SECOND AND THIRD CAUSES OF ACTION - 11 U.S.C. §§ 727(a)(2) and (a)(4)(A)

The Plaintiff seeks to have the Defendant-Debtor's discharge denied under 11 U.S.C. §§ 727(a)(2) and (a)(4)(A) for the Defendant-Debtor converting the Vehicle and for making a false oath on Schedule B as to the Vehicle.

11 U.S.C. § 727 provides the following, in relevant part:

(a) The court shall grant the debtor a discharge, unless–. . .

> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--
>
> > (A) property of the debtor, within one year before the date of the filing of the petition; or
> >
> > (B) property of the estate, after the date of the filing of the petition;. . .
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case--
>
> > (A) made a false oath or account. . .

The burden of proof for allegations of debtor fraud for purposes of 11 U.S.C. § 727 is a preponderance of the evidence. *In re Scott*, 172 F.3d 959 (7th Cir. 1999).

The following Motion highlights the concerns the court has when parties present "Mothorities." While there is a possibility that there are specific grounds stated that may justify the relief sought, the conflated Motion and the Points and Authorities makes it difficult, if not impossible, to mine through the legal authorities and arguments to draft the grounds in which the Plaintiff is seeking relief.

The facts provided in the "Motion" for the second and third causes of action are placed sporadically between the legal authorities which should be provided for in a separate Points and Authorities.

The court's review of the complaint as well as the Motion leaves the court to conclude that they have not pleaded sufficiently to raise to the level of denial of discharge under either § 727(a)(2) or (a)(4)(A). The crux of the Plaintiff's argument is that the Defendant-Debtor amended her Schedule B to omit the Vehicle and then failed to surrender the Vehicle as she intended she would at the Meeting of Creditors. Under the standard, the court is not persuaded that an entry of default judgment for these two causes of action is proper.

The court notes that the Creditor has already received an order granting relief from the automatic stay in the underlying bankruptcy case. Case No. 15-20081, Dckt. 47. As such, the Plaintiff still has state law rights in order to repossess the Vehicle. However, for purposes of § 727, the court is not persuaded that the complaint sufficiently alleges the necessary grounds.

Therefore, the Motion is denied as to the second and third causes of action.

ATTORNEY'S FEES

Buried within the Motion is the request for attorneys' fees in connection with instant Motion. However, the Plaintiff does not provide any legal basis (contractual or statutory) nor argument as to why such fees are justified. It

appears that Plaintiff seeks to contend that punitive damages should be awarded, with that amount being in the form of attorneys' fees. No claim for punitive damages is pleaded in the Complaint. Dckt.1. Rather, there is an "oh by the way" request that exemplary or punitive damage be awarded as part of the prayer as part of the First Cause of Action. The First Cause of Action is merely for the court to determine the contractual obligation to be nondischargeable.

As now provided by Federal Rule of Bankruptcy Procedure 7008, a request for attorneys' fees is made by post-judgment motion pursuant to Federal Rule of Civil Procedure 54(d)(2) and Federal Rule of Bankruptcy Procedure 7054. Plaintiff may make such proper motion Rather than denying this request, the court will order that on or before September 3, 2015, the Plaintiff shall file a post-judgment costs bill and motion for attorneys' fees, if any.

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 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 as to the first cause of action. The court shall enter judgment for Plaintiff and against Defendant-Debtor in the amount $11,681.28 and that such amount is nondischargeable pursuant to 11 U.S.C. § 523(a)(6).
>
> Counsel for the Plaintiff shall prepare and lodge with the court a proposed judgment consistent with this Order. The judgment shall further provide that any attorneys' fees and costs allowed by the court shall be enforced as part of the judgment.
>
> **IT IS FURTHER ORDERED** that the Motion is denied as to the second and third causes of action.
>
> **IT IS FURTHERED ORDERED** that on or before September 3, 2015, Plaintiff shall file a costs bill and motion for attorneys' fees, if any. The motion for attorneys' fees, if any, shall clearly set forth the contractual or legal basis for an award of attorneys' fees.