**UNITED STATES BANKRUPTCY COURT**
Eastern District of California

**Honorable Ronald H. Sargis**
Chief Bankruptcy Judge
Sacramento, California

**September 20, 2016, at 1:30 p.m.**

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| **1.** | **15-29555-E-13** | **DIANNE AKZAM** | **CONTINUED MOTION TO VACATE** |
| | **DA-1** | **Pro Se** | **7-15-16 [75]** |

**No Tentative Ruling:** The Motion to Vacate 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.**

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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 Chapter 13 Trustee, parties requesting special notice, and Office of the United States Trustee on July 15, 2016. By the court's calculation, 46 days' notice was provided. 28 days' notice is required.

The Motion to Vacate 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 court's decision on the Motion to Vacate is xxxxxxxxxxxxxx.**

Dianne Akzam ("Debtor") filed the instant Motion to Vacate Order for Relief from Automatic Stay on July 15, 2016. Dckt. 75. The Motion is deceptively "simple," while implicating a long history and some fundamental issues arising under federal law.

In the Motion, Debtor requests that the court vacate its prior order granting relief from the automatic stay as to U.S. Bank, National Association ("Asserted Creditor"), to:

> "allow U.S. Bank National Association, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 802 Ohio Street, Vallejo, California."

Order, Dckt. 73. The court also granted relief from the automatic stay pursuant to 11 U.S.C. § 362(d))(4), preventing the automatic stay from going into effect during the following two years unless said relief is affirmatively granted by the bankruptcy judge in that case.

The court's findings of fact and conclusions of law in granting such relief from the automatic stay are set forth in the Civil Minutes for the June 28, 2016 hearing on that motion. Dckt. 70. In addressing the Chapter 13 Trustee's motion to dismiss this bankruptcy case, the court discussed the multiple prior bankruptcy cases by Debtor and her brother. Dckt. 30. The court revisited this history in ruling on the motion for relief from the automatic stay. This discussion is again repeated here.

**History of Debtor's and Debtor's Brother's Bankruptcy Filings**

Bankruptcy Filings by Jeffrey Akzam, Debtor's Brother

Though not grounds in and of itself to deny confirmation, the following is the series of cases filed by the Debtor and Debtor's brother, Jeffrey Akzam and subsequently dismissed:

A. 11-25844 in *Pro Se* - Debtor Jeffrey Akzam

1. Chapter 13 Filed March 9, 2011

2. On Schedule A lists 802 Ohio Street, Vallejo, California, as property in which he is a "co-owner," with the property not subject to any secured claims. 11-25884, Dckt. 20.

3. Motion to Dismiss for failure to file motion to confirm plan, failure to file tax returns, failure to provide most recent tax return, and failure to provide copies of business records. Dckt. 28.

4. Case converted to Chapter 7 at request of debtor Jeffrey Akzam. Order, Dckt. 42.

5. The court vacated an order granting relief from the automatic stay for U.S. Bank, National Association to foreclose on the 802 Ohio Street Property. Jeffrey Akzam asserted that he had not been properly served with the motion.

6. Discharge entered September 2, 2011.

B. 13-20155 in *Pro se* - Debtor Jeffrey Akzam

1. Chapter 13 Filed January 7, 2013.

2. Case dismissed because of debtor Jeffery Akzam's failure to file tax returns and Mr. Akzam's failure to file a motion to confirm a Chapter 13 Plan. Civil Minutes, Dckt. 73. The court also determined that the Plan, as proposed by debtor Jeffery Akzam, was not feasible and that the plan was underfunded. *Id.*

3. In connection with Jeffery Akzam's Chapter 13 case 13-20155, Jeffery Akzam filed an Adversary Proceeding disputing the lien of Option One Mortgage. Adv. 13-2103.

   a. After granting a motion to dismiss the Complaint, a First Amended Complaint was filed, in which Debtor Dianne Akzam was added as a joint plaintiff with Jeffery Akzam. Debtor Dianne Akzam and her brother Jeffery Akzam disputed the secured claim and alleged violations of the automatic stay.

   b. The court determined that abstention pursuant to 28 U.S.C. § 1334(c), the court finding that there were no issues arising under the Bankruptcy Code or in the bankruptcy case. Civil Minutes, Dckt. 85.

4. Jeffery Akzam again listed an interest in the 802 Ohio Street, Vallejo, California, property, now stating his interest was that of "co-owner/beneficiary." 13-20155; Schedule A, Dckt. 22.

C. 14-30332 in *Pro Se* - Debtor Jeffery Akzam

1. Chapter 13 Case filed October 17, 2014

2. Case dismissed on July 8, 2015.

3. The case was dismissed due to debtor Jeffrey Akzam's failure to file an amended plan after the court denied confirmation of the proposed plan. Civil Minutes, Dckt. 83.

4. Jeffery Akzam again listed an interest in the 802 Ohio Street, Vallejo, California, property, describing it as a "co-owner/beneficiary" interest. 14-30332; Schedule A, Dckt. 15.

Bankruptcy Filings by Dianne L. Akzam, Debtor

The six prior bankruptcy cases filed by Debtor are summarized as follows:

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| 14-28272<br>*In Pro Se* | Chapter 13 Case | Filed August 14, 2014<br>Dismissed September 29, 2014 |
| | I. Case dismissed for failure to filed Schedules, Statement of Financial Affairs, and Chapter 13 Plan.<br><br>II. Court denied Debtor's Motion to Extend the Automatic Stay 11 U.S.C. § 362(c)(3)(B). Dckt. 28. The court discussed in detail the Debtor's history of failure to prosecute prior multiple bankruptcy cases. Civil Minutes, Dckt. 28.<br><br>III. Also the court issued an order to show cause why the case should not be dismissed due to failure to pay filing fees. | |
| 14-23825<br>*In Pro Se* | Chapter 13 Case | Filed April 14, 2014<br>Dismissed July 23, 2014 |
| | I. Case dismissed because Debtor did not meet the eligibility requirements for a Debtor in a Chapter 13 case as (1) she did not have any regular income and (2) had not filed a Certificate of Pre-Filing Credit Counseling. Dckt. 49. | |
| 12-37369<br>*In Pro Se* | Chapter 13 Case | Filed September 27, 2012<br>Dismissed November 19, 2012 |
| | I. The case was dismissed due to Debtor failing to file Schedules, Statement of Financial Affairs, and Plan. Dckt. 21.<br><br>II. Motion to Vacate Dismissal Order denied. Order, Dckt. 33<br><br>III. Also the court issued an order to show cause why the case should not be dismissed due to failure to pay filing fees. | |
| 11-43187<br>*In Pro Se* | Chapter 13 Case | Filed September 27, 2011<br>Dismissed December 14, 2011 |
| | I. The case was dismissed for failure of Debtor to file Schedules, Statement of Financial Affairs, and Plan. Order, Dckt. 25.<br><br>II. Case also dismissed due to Debtor failing to pay filing fees. Order, Dckt. 26. | |

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| 11-20282<br>*In Pro Se* | Chapter 13 Case | Filed January 4, 2011<br>Dismissed March 18, 2011 |
| | I. Case dismissed due to Debtor's failure to attend First Meeting of Creditors and failure to file motion to confirm Chapter 13 Plan. Motion and Order, Dckts. 22, 27.<br><br>II. Also the court issued an order to show cause why the case should not be dismissed due to failure to pay filing fees. | |
| 10-45216<br>*In Pro Se* | Chapter 13 Case | Filed September 22, 2010<br>Dismissed December 16, 2010 |
| | I. The bankruptcy case was dismissed due to Debtor failing to file a motion to confirm the Chapter 13 Plan and Debtor being delinquent in Plan payments. Motion and Order, Dckts. 22, 38.<br><br>II. Also the court issued an order to show cause why the case should not be dismissed due to failure to pay filing fees. | |

**History of Current Bankruptcy Case**

The instant case was filed on December 11, 2015. Dckt. 1.

On May 17, 2016, Asserted Creditor filed a Motion for Relief from Automatic Stay. Dckt. 44. The Debtor did not file a plan when this bankruptcy case was filed, but filed a Chapter 13 Plan in this (her seventh Chapter 13 case) on January 8, 2016. Dckt. 24. Because of the delay in filing the Plan, Debtor was obligated to file a motion to confirm, supporting evidence, and setting the matter for hearing. L.B.R. 3015-1(c), (d). The proposed Chapter 13 Plan filed by Debtor requires a $95.00 a month plan payment by Debtor for sixty (60) months. Dckt. 24. No Class 1 or 2 secured claims are to be paid. There is no surrender of collateral for any Class 3 creditors with secured claims. Debtor will make no payments outside the Plan for any Class 4 secured claims. No Class 5 priority unsecured claims are to be paid. No Class 7 general unsecured claims are to be paid. For Class 6 special treatment unsecured claims (such as co-signed debt for which special treatment is permissible under the Bankruptcy Code), Debtor lists two creditors with claims totaling $5,400.00. The reason stated for special treatment is "promised to pay."

When the Debtor failed to file a motion to confirm a month later on February 1, 2016, the Chapter 13 Trustee filed a motion to dismiss the case. Dckt. 26. It was not until April 8, 2016, (three months after the Plan was filed) that Debtor filed a motion to confirm the Plan. Dckt. 38. In denying the Motion to Confirm, the court's conclusions included the Debtor changing her expenses without explanation, with some being inconsistent or implausible. Civil Minutes, Dckt. 64.

On June 28, 2016, a hearing on the Motion for Relief from Automatic Stay was held, and the Motion was granted. Dckt. 70. On July 15, 2016, Debtor filed this instant Motion to Vacate claiming that

Asserted Creditor lacked prudential standing and that Debtor was denied Due Process. The Debtor seeks to have the order dismissing the case vacated, per Federal Rule of Bankruptcy Procedure 9024.

On July 29, 2016, Debtor filed a First Amended Chapter 13 Plan (Dckt. 85) that still provides for a $95.00 per month plan payment for sixty (60) months. There continues to be no provision for paying any secured claims, there are no priority claims, and for the Class 7 general unsecured claims, Debtor proposes a 13% dividend for $37,240.00 in general unsecured claims. The claim amount has increased due to the California Franchise Tax Board filing Proof of Claim No. 1 for a general unsecured claim in the amount of $31,840.23.

The hearing on the Debtor's motion to confirm the Plan is set for September 13, 2016.

**GROUNDS FOR RELIEF FROM PRIOR ORDER**

In her current Motion, Debtor asserts that an error was made in granting the relief because the court "relied upon erroneous information provided by [Asserted Creditor], [the court] did not have jurisdiction and violated Debtor's due process rights by not allowing any oral argument which the tentative ruling stated she could do." Motion, Dckt. 75. Debtor adamantly asserts that she had oral argument to present that would have prevented the court from making the mistake of relying on the "erroneous information" provided by Asserted Creditor.

At the core of her argument is that Asserted Creditor lacks both constitutional standing and prudential standing to seek relief from the automatic stay. She cites back to a prior decision of another bankruptcy judge in this District on the issue of standing. That judge's rulings are consistent with this court on the constitutional standing requirement being a fundamental pre-requisite for the exercise of federal judicial power and the court-constructed prudential standing inquiry to insure that it is the real parties in interest appearing before the court and not a non-party proxy or officious intermeddler. The court addresses these legal principles later in this Ruling.

Debtor drives home the point that in the court's tentative ruling it stated, "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." This is the court's standard language, indicating there being a permissive allowance of oral argument, as opposed to the court removing the matter from calendar.

Oral argument is not required, and one of the hallmarks of federal court bankruptcy practice in this District is that the parties (as did the Debtor) are required to clearly state the grounds for relief or opposition, legal points and authorities, and evidence to support their respective positions. It is not like in some court where even on the law and motion calendars surprise arguments and evidence is presented to "blow the case wide open." Oral argument is the icing on the cake, not the substantial cake itself.

The judge who heard the calendar that day and determined that oral argument was not necessary is not the current judge (the judge who posted the tentative ruling). Given the history of bankruptcy filings by this Debtor and her brother, and the detailed pleadings filed in opposition by Debtor, it is not unusual that the judge perceived oral argument as not being necessary or beneficial. To the extent that Debtor believes

that oral argument may we lead to a different conclusion, she will have such opportunity through the present Motion.

The meat of Debtor's contention (as it has been through the various bankruptcy cases filed) is that Asserted Creditor has not presented competent evidence that it is in possession of the promissory note endorsed in blank that it asserts is secured by the 802 Ohio Street, Vallejo, California, property. (The same property listed by her brother in which he asserts a "co-owner/beneficial" interest.)

The Debtor correctly points out that an employee of Wells Fargo Bank, N.A., the loan servicer for Asserted Creditor, purports to provide personal knowledge testimony (Fed. R. Evid. 601, 602) that Asserted Creditor is in possession of the note endorsed in blank. While an employee of Wells Fargo Bank, N.A., Debtor argues that there is nothing to show that the Wells Fargo Bank, N.A. employee has any personal knowledge of who is in possession or that she has the requisite knowledge to quote from the "books and records" of Asserted Creditor.

Debtor concludes that there was no admissible evidence that Asserted Creditor was in possession of the note, and therefore there is no admissible evidence that Asserted Creditor or its loan servicer, Wells Fargo Bank, N.A., had constitutional or prudential standing to seek relief from the automatic stay.

**TRUSTEE'S RESPONSE**

David Cusick, the Chapter 13 Trustee, filed a response on August 16, 2016. Dckt. 91. The Trustee notes that Debtor brings the instant Motion under Federal Rule of Bankruptcy Procedure 9024, which incorporates Federal Rule of Civil Procedure 60. The Trustee cannot determine under what specific section of Federal Rule of Civil Procedure 60 Debtor seeks relief.

**ASSERTED CREDITOR'S OPPOSITION**

Asserted Creditor filed an Opposition to Motion on August 16, 2016. Dckt. 93. Asserted Creditor contends that Debtor's actions are in bad faith as part of a scheme to delay, hinder, and defraud U.S. Bank National Association, as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates Series 2006-AR4. Asserted Creditor further contends that Debtor's bad faith actions include: (1) the unauthorized transfer of real property commonly known as 802 Ohio Street, Vallejo, California; (2) ten (10) successive bankruptcy filings by Debtor and her brother; and (3) default under the Note and Deed of Trust.

What Asserted Creditor's Opposition does not address is how it demonstrated, by admissible evidence that it had standing, constitutional or prudential, to assert the alleged rights for which relief from stay was requested. While the relief from stay process is a summary proceeding and the court does not adjudicate the underlying rights, the parties must still meet the basic constitutional requirements for the issues presented to the court.

**AUGUST 30, 2016 HEARING**

At the hearing, the court entertained lengthy arguments from both parties. The court granted the Motion on an interim basis, with the court vacating only that portion of the prior order that allows Asserted Creditor to conduct the actual foreclosure sale. Other than for that limited purpose, the Order granting relief from the automatic stay was ordered to remain in full force and effect for all other purposes and relief granted, including, without limitation, the relief granted pursuant to 11 U.S.C. § 362(d)(4) and taking all actions necessary for properly scheduling or continuing the non-judicial foreclosure sale. The court declared that such limited relief maintained the ownership status quo, while allowing Asserted Creditor to be prepared to proceed with a foreclosure sale if the original note would be produced in court.

The court continued the matter to September 7, 2016, at 10:00 a.m. (specially set with the court's Chapter 13 Dismissal calendar) for Asserted Creditor to provide a status report (written or oral) of when it can produce the original note endorsed in blank in open court. Debtor advised the court that she could not attend the hearing, and the court noted that her appearance was not required because of the hearing being labeled a status report.

The court noted that the parties have targeted September 20, 2016, at 1:30 p.m. as the anticipated date for the production of the original note, if Asserted Creditor can present it by that time.

**SEPTEMBER 7, 2016 HEARING**

At the hearing, counsel for U.S. Bank, N.A., as Trustee, reported that the original note was being sent to his office and that he would have it physically within one week.

The court continued the matter to September 20, 2016, at 1:30 p.m., at which time a representative of U.S. Bank, N.A., as Trustee, shall present in open court the promissory note, endorsed in blank, that is at issue in Debtor disputing the Asserted Creditor's standing to seek relief from the automatic stay.

**APPLICABLE LAW**

**Federal Rule of Civil Procedure 60(b)**

Federal Rule of Civil Procedure Rule 60(b), as made applicable by Federal Rule of Bankruptcy Procedure 9024, governs the reconsideration of a judgment or order. Grounds for relief from a final judgment, order, or other proceeding are limited to:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). A Rule 60(b) motion may not be used as a substitute for a timely appeal. *Latham v. Wells Fargo Bank, N.A.*, 987 F.2d 1199 (5th Cir. La. 1993). The court uses equitable principals when applying Rule 60(b). *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §2857 (3rd ed. 1998). The so-called catch-all provision, Fed. R. Civ. P. 60(b)(6), is "a grand reservoir of equitable power to do justice in a particular case." *Compton v. Alton S.S. Co.*, 608 F.2d 96, 106 (4th Cir. 1979) (citations omitted). While the other enumerated provisions of Rule 60(b) and Rule 60(b)(6) are mutually exclusive, *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 863 (1988), relief under Rule 60(b)(6) may be granted in extraordinary circumstances, *id.* at 863 n.11.

A condition of granting relief under Rule 60(b) is that the requesting party show that there is a meritorious claim or defense. This does not require a showing that the moving party will or is likely to prevail in the underlying action. Rather, the party seeking the relief must allege enough facts, which if taken as true, allow the court to determine if it appears that such defense or claim could be meritorious. 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶¶ 60.24[1]-[2] (3d ed. 2010); *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984).

Additionally, when reviewing a motion under Civil Rule 60(b), courts consider three factors: "(1) whether the plaintiff will be prejudiced, (2) whether the defendant has a meritorious defense, and (3) whether culpable conduct of the defendant led to the default." *Falk*, 739 F.2d at 463.

**Standing**

To exercise jurisdiction over a party, a federal court must meet both constitutional and prudential standing requirements. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). "The concept of standing involves more than constitutional standing. It involves two inquiries." *In re Jackson*, 451 B.R. 24, 27–28 (Bankr. E.D. Cal. 2011) (citing *Franchise Tax Bd. v. Alcan Aluminum*, 493 U.S. 331, 335 (1990) ("We have treated standing as consisting of two related components: the constitutional requirements of Article III and nonconstitutional prudential considerations."); *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). Standing is a threshold question in every federal case that determines the power of the court to hear the suit. *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011).

Constitutional Standing

Constitutional standing requires an injury fairly traceable to the defendant's allegedly unlawful conduct that is likely to be redressed by the requested relief. *In re Jacobson*, 402 B.R. 359, 366 (Bankr. W.D. Wash. 2009). Constitutional standing is based on the case or controversy requirement in Article III, § 2 of the United States Constitution and cannot be waived. It is "a threshold jurisdictional requirement." *Perishing*

*Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 899–900 (9th Cir. 2000). An assignee of a claim must hold legal title to the claim being asserted. *Sprint Comm'ns Co. v. APCC Services, Inc.*, 554 U.S. 269 (2008). Assignees, including assignees for collection, have traditionally satisfied Article III standing requirement. *Id.* at 286–87. A party seeking stay relief need only establish that it has a colorable claim to enforce a right against property of the estate to demonstrate standing to seek relief from the automatic stay. *United States v. Gould (In re Gould)*, 401 B.R. 415, 425 n. 14 (B.A.P. 9th Cir. 2009).

Prudential Standing

Prudential standing is a judicially self-imposed limit on the exercise of federal jurisdiction. *Elk Grove*, 542 U.S. 1, 11. A key component of prudential standing applicable to this case is the doctrine that requires a plaintiff to assert legal rights and prohibits the plaintiff from asserting the legal rights of others. *Sprint*, 554 U.S. 269, 289.

"Generally, a party without legal rights to enforce an obligation under applicable substantive law lacks prudential standing." *In re Jackson*, 451 B.R. at 28 (citing *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1044 (9th Cir. 2008). "Under the Bankruptcy Code, a party seeking relief from stay must establish entitlement to that relief[,] . . . [f]oreclosure agents and servicers do not automatically have standing." *Id.* at 27 (citing *In re Jacobson*, 402 B.R. 359, 367 (Bankr. W.D. Wash. 2009). "Where a negotiable instrument represents the obligation to be enforced . . . the issue whether the movant has a legal right to enforce the obligation, and, thus, whether the movant has prudential standing, is determined by the Commercial Code." *Id*. "If a party has suffered sufficient injury to satisfy the jurisdictional standing requirement of Article III, but the party cannot satisfy the applicable prudential standing requirement(s), the party cannot state a claim upon which relief can be granted." *Id.* at 28 (citing *Guerrero v. Gates*, 357 F.3d 911, 920–21 (9th Cir. 2004).

In California, a party is able to foreclose based solely on its status as an assignee of a lender's rights under a deed of trust, without regard to who holds the borrower's promissory note. Cal. Civ. Code § 2924. The holder of the beneficial interest under the deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of a beneficial interest may initiate the foreclosure process or file a notice of default. Cal. Civ. Code §2924(a)(6).

Whether a party has standing to enforce an obligation and thus, has prudential standing, where a negotiable instrument represents the obligation to be enforced, is determined by the Commercial Code. *In re Jackson*, 451 B.R. 24 (Bankr. E.D. Cal. 2011). An ownership right in an instrument may not always lead to an entitlement to enforce the instrument. U.C.C. § 3-203 Comment 1 (AM. LAW COMM. & UNIF COMM'L COMM. 2016). U.C.C. § 3-301 describes who is entitled to enforce an instrument as follows:

> "Person entitled to enforce" an instrument means (I) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3-309 or 3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument."

The concept of a "holder" is defined in U.C.C. § 1-201(b)(21)(A) as "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." This requires an examination of both the note and any indorsements. *In re Veal* 450 B.R. 897 (B.A.P. 9th Cir. 2011).

**Relief from Stay Proceeding**

In adjudicating a motion for relief from the automatic stay, it is a "summary proceeding." This summary nature of a relief from stay proceeding was stated by the Bankruptcy Appellate Panel in *Hamilton v. Hernandez*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427 (B.A.P. 9th Cir. Aug. 1, 2005), relief from stay proceedings are summary proceedings which address issues arising only under 11 U.S.C. § 362(d). Hamilton, 2005 Bankr. LEXIS 3427 at *8–*9 (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying issues of ownership, contractual rights of parties, or issue declaratory relief.

The court does not, and cannot, adjudicate the rights and interests of the debtor and the moving party as part of a motion for relief from the automatic stay. Rather, as in the present situation, often times relief from the stay is sought by a creditor or property owner to assert rights it purports to have, and then for the debtor to then defend and assert counter rights the debtor has against the creditor.

In this context, the issue for the court in determining standing is whether the party seeking relief has shown that it is asserting rights that the debtor contends to be blocked by the automatic stay, and if so, then do proper grounds exist for granting such relief. The court does not "suffer lightly" officious intermeddlers who are seeking to assert or enforce rights of some undisclosed or hidden third-party.

One method the court has to blunt such officious intermeddlers or proxies who are attempting to hide the identity of the real party in interest is that the order for relief is limited to the moving party and its agents and representatives, and successors. Order, Dckt. 73. The order does not grant such relief to the movant's principal or other parties.

**Evidence**

A moving party is required by some courts to provide admissible evidence tracing the identity of the various holders and services of the deed of trust in question and of the note evidencing the underlying obligation. The business records exception to the rule against hearsay requires that the records: (1) be made at or near the time, by or from information transmitted by, a person with knowledge; (2) pursuant to a regular practice of the business activity; (3) kept in the course of regularly conducted business activity; and (4) the source, method, or circumstances of preparation must not indicate lack of trustworthiness. Fed. R. Evid. 803(6). The elements of the exception must be established by the testimony of a qualified witness, and the documents must be authenticated. Rule 803(6) explicitly requires the proponent of a document to produce a custodian of record or other qualified witness to testify that the offered document was kept in the course of regularly conducted business and that it was the regular practice of the business to make such a document. *Tongil Co. v. Vessel "Hyundai Innovator,"* 968 F.2d 999, 1000 (9th Cir. 1992).

At the center of this dispute is the testimony under penalty of perjury provided by Tifanee Brown in her declaration in support of the motion for relief from the automatic stay. Dckt. 46. This testimony includes in pertinent part the following:

A. "I am a Vice President Loan Documentation of Wells Fargo Bank, N.A. ("Wells Fargo") . . . ." Declaration ("Dec.") ¶ 1.

B. Wells Fargo Bank, N.A. is the servicing agent for U.S. Bank, N.A., as trustee. *Id.*

C. "As part of my job responsibilities for Wells Fargo, I have personal knowledge of and am familiar with the types of records maintained by Wells Fargo in connection with the account that is the subject of the Motion . . . ." Dec. ¶ 2.

D. "I have access to and have reviewed the books, records and files of Wells Fargo that pertain to the Account and extensions of credit given to the borrower concerning the property securing such Account." *Id.*

E. "The information in this declaration is taken from Wells Fargo's business records regarding the Account." Dec. ¶ 3.

F. "4. Wells Fargo's records also reflect that Movant is in possession of the original Note. The Note is indorsed and payable in blank. See Exhibit 1." Dec. ¶ 4.

Dckt. 46.

The universe of this dispute centers on one sentence: "Wells Fargo's records also reflect that Movant is in possession of the original Note. The Note is indorsed and payable in blank." There is no declaration from an employee or officer of Asserted Creditor stating that based on that employee's knowledge of the books and records of Asserted Creditor "the promissory note indorsed in blank is in the possession of U.S. Bank, N.A., and is located . . . ." Rather, the testimony is that Ms. Brown has read in the Wells Fargo Bank, N.A. files that somehow, somebody who prepares the books and records of Wells Fargo Bank, N.A. knows what is in the books and records of Asserted Creditor. No information is provided why there is not an employee or officer of Asserted Creditor who is testifying as to this information about Asserted Creditor being in possession of a promissory note endorsed in blank.

While this is some testimony as to the underlying obligation, the question is whether it is sufficient for the limited issues of a relief from stay hearing.

**DISCUSSION**

At the hearing, Debtor provided additional argument and addressed issues, including whether her contention that the automatic stay applied to Asserted Creditor was sufficient for Asserted Creditor to seek relief from the stay so that it could enforce, and Debtor could then defend against, the rights in the 802 Ohio Street Property. **Xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.**

Therefore, in light of the foregoing, the Motion is [granted/denied] [and the order dismissing the case (Dckt. Xx) is vacated].

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 Vacate Order for Relief from Automatic Stay filed by Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is [granted/denied] [and the order dismissing the case (Dckt. Xx) is vacated].

**2. 15-29555-E-13 DA-3 — DIANNE AKZAM, Pro Se — CONTINUED MOTION TO CONFIRM PLAN, 7-29-16 [82]**

**Final Ruling:** No appearance at the September 20, 2016 hearing is required.
---

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 Chapter 13 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on July 27, 2016. By the court's calculation, 48 days' notice was provided. 42 days' notice is required.

The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). Opposition having been filed, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

**The Motion to Confirm the Amended Plan is denied.**

Dianne L. Akzam ("Debtor") filed the instant Motion to Confirm Amended Plan July 29, 2016. Dckt. 82.

**TRUSTEE'S OPPOSITION**

David Cusick, the Chapter 13 Trustee, filed an Opposition to the Instant Motion on August 24, 2016. Dckt. 97. The Trustee objects on the following grounds:

A. The Debtor has filed six prior cases from 2010 to 2015. Jeffrey Akzam and his sister, the Debtor, have filed a series of coordinated Chapter 13 cases without either of them engaging in the good faith prosecution of those cases. The U.S. Trustee has commenced an Adversary Proceeding seeking injunctive relief to preclude Dianne Akzam from filing further non-productive cases.

B. The Debtor lists real property on Schedule A as 802 Ohio Street, Vallejo, California. The Debtor fails, however, to provide for this debt in the Plan or Schedule D. The Debtor lists the value of the property at $240,000.00 and indicates that she is a co-owner, but Schedule H does not list a co-debtor.

C. Debtor cannot make the payments required under the Plan. Debtor filed an amended Schedule J on March 10, 2015, making the following changes without any explanation:

1. Rent expense decreased from $300.00 to $0.00;

2. Electricity expense increased from $0.00 to $130.00;

3. Water expense increased from $0.00 to $100.00; and

4. Phone expense increased from $0.00 to $70.00.

Debtor's budget is insufficient for the maintenance and support of the Debtor.

**SEPTEMBER 13, 2016 HEARING**

At the hearing, the court continued the matter to September 20, 2016, at 1:30 p.m. (specially set with the court's Chapter 13 Motions for Relief calendar) to be heard concurrently with Debtor's Continued Motion to Vacate (Dckt. 75). Dckt. 111.

**DISCUSSION**

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

The Trustee's objections are well-taken.

One basis for the Trustee's objection is that Debtor is a serial bankruptcy filer. The Debtor has filed the following cases since 2010:

| Case Number | Date Filed | Result |
|---|---|---|
| 10-45216 | September 22, 2010 | Dismissed |
| 11-20282 | January 4, 2011 | Dismissed |
| 11-43187 | September 27, 2011 | Dismissed |

| | | |
|---|---|---|
| 12-37369 | September 27, 2012 | Dismissed |
| 14-23825 | April 14, 2014 | Dismissed |
| 14-28272 | August 14, 2014 | Dismissed |
| 15-29555 | December 11, 2015 | Current Case |

The court is cognizant of the significant impact the filing of a bankruptcy case has on not only the Debtor, but on creditors and other persons. Even if, due to the repeated filings and the provisions that Congress has placed in a subparagraph of a subsection of the Bankruptcy Code, the automatic stay does not go into effect, the mean presentation of a petition and the significant sanctions imposed on someone violating the stay can work to prevent creditors from legitimately enforcing their rights. In these cases, the Debtor has filed a series of nonproductive Chapter 13 cases, which appear to exist only for the purpose of deterring a creditor from proceeding with a foreclosure on real property. The Debtor has been afforded multiple opportunities to advance a Chapter 13 plan to cure defaults on the obligation owing to the creditor and restructure the debt through the Chapter 13 plan. While obtaining the benefit of the automatic stay, whether actual or improperly represented to exist, the Debtor has been unable or refused to properly prosecute a Chapter 13 Plan. This is an indication the Plan has not been proposed in good faith and is reason to deny confirmation. *See* 11 U.S.C. § 1325(a)(3).

Additionally, the Plan may not be the Debtor's best effort. Debtor's Schedule A includes real property, however the Debtor fails to provide for this debt both in the Plan and in Debtor's Schedule D. The Debtor also indicates that she is a co-owner of the property, but no co-owner is listed on Schedule H. Further, Debtor filed an amended Schedule J, but failed to file a declaration explaining the changes. As such, the proposed plan does not appear to be the Debtor's best efforts. 11 U.S.C. §1325(b).

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 Confirm the Chapter 13 Plan filed by the Debtor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Confirm the Plan is denied.

**3.** **16-24111-E-13 NLG-1** **ABBIGAIL CLYMER**
**D. Randall Ensminger**

**MOTION FOR RELIEF FROM AUTOMATIC STAY**
**8-24-16 [25]**

**BOSCO CREDIT, LLC VS.**

**No Tentative Ruling:** The Motion for Relief From the Automatic Stay 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 Not Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, creditor Wells Fargo Bank, and Office of the United States Trustee on August 24, 2016. By the court's calculation, 27 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay 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 Relief From the Automatic Stay is xxxxxxxxxxxx.**

Abbigail Clymer ("Debtor") filed the instant bankruptcy case on June 24, 2016. Dckt. 1

Bosco Credit LLC ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 6059 Kingwood Circle, Rocklin, California (the "Property"). Movant has provided the Declaration of Gina D'Elia to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

The Gina D'Elia Declaration states that there are two (2) post-petition defaults in the payments on the obligation secured by the Property, with a total of $594.58 in post-petition payments past due. The

Declaration also provides evidence that there are ninety-seven (97) pre-petition payments in default, with a pre-petition arrearage of $26,811.99. Dckt. 27.

Movant's Motion for Relief from Automatic Stay lists two (2) bankruptcy cases–including the current one–commenced by Debtor, since September 4, 2009, that affect Movant's interest in the Property. Those cases are:

A. Case No. 09-39133
   1. Filed: September 4, 2009
   2. Type: Chapter 7
   3. Date of Discharge: December 9, 2009.
   4. This case was reopened on March 28, 2016. Movant requested relief from the automatic stay, which was denied as moot. Debtor also requested the court to convert the case to a Chapter 13, which was denied, and the case was closed once again on July 21, 2016.

B. Case No. 16-24111
   1. Filed: June 24, 2016
   2. Type: Chapter 13
   3. Instant Case
   4. This case was filed while the prior bankruptcy action and Debtor's Motion to Convert the prior action were pending still.

**TRUSTEE'S RESPONSE**

David Cusick, the Chapter 13 Trustee, filed a response on September 6, 2016. Dckt. 38. The Trustee states that Debtor is current on plan payments under the proposed plan filed on June 24, 2016 (Dckt. 5). The Trustee notes that no confirmed plan exists, and a proposed plan was denied confirmation on August 30, 2016 (Dckt. 34).

The Trustee supplies the following information:

A. Debtor has paid a total of $813.94 to date.

B. One disbursement of $300.00 has been made to Franklin Credit Management Corp., which represents two adequate protection payments of $150.00 for the months of July and August 2016.

**DEBTOR'S OPPOSITION**

Debtor filed opposition on September 7, 2016. Dckt. 44. Debtor asserts that she is currently in the process of seeking a loan modification of Movant's note and second deed of trust. Debtor believes the Chapter 13 plan will give her a "platform" from which to negotiate a restructuring with Movant over the note and second deed of trust ($68,887.35) and to protect the equity in her home ($81,312.65).

Debtor intends to file an amended plan with all necessary pages to replace the current plan that misses pages 3, 4, and 7.

Debtor states that she will continue to make plan payments of $406.97 per month, and $150.00 of that amount will be paid to Movant.

**DISCUSSION**

From the evidence provided to the court, and only for purposes of this Motion for Relief, the total debt secured by this property is determined to be $242,687.35 (including $68,887.35 secured by Movant's second deed of trust), as stated in Schedule D filed by Debtor. The value of the Property is determined to be $320,000.00, as stated in Schedules A and D filed by Debtor.

The existence of defaults in post-petition or pre-petition payments by itself does not guarantee Movant obtaining relief from the automatic stay as cause under 11 U.S.C. § 361(d)(1). In this case, the equity cushion in the Property for Movant's claim provides adequate protection for such claim at this time. *In re Avila*, 311 B.R. 81, 84 (Bankr. N.D. Cal. 2004). Movant has not sufficiently established an evidentiary basis for granting relief from the automatic stay for "cause" pursuant to 11 U.S.C. § 362(d)(1).

Debtor is prosecuting a Chapter 13 Plan, the confirmation of which was delayed due to what appears to have been a clerical error when the plan was filed (pages missing from Plan filed).

However, it was made clear to Debtor as early as August 4, 2016, that the Plan filed with the court was defective. Trustee's Objection to Confirmation, Dckt. 17. In the forty-seven (47) days that have passed since that time, no action has been taken by Debtor to file an amended plan and motion to confirm an amended plan. Rather, Debtor is living in the no-plan limbo. That is not consistent with prosecuting this case in good faith.

The court is unsure how and what Debtor will do to prosecute this case.

On Schedule I, Debtor states that her monthly gross income is $2,512.00. Dckt. 1 at 28. On Schedule J, excluding secured debt payment on her residence, Debtor states under penalty of perjury that her reasonable and necessary monthly expenses are $1,167.00. *Id.* at 30. No provision is made for property taxes or property insurance. No provision is made for any income taxes. Debtor purports to have monthly food and housekeeping supplies expenses of only $200.00 per month. Allowing $50.00 per month for household supplies, Debtor purports to pay only $1.66 per meal (assuming a 30 day month). This does not appear to be reasonable.

Additionally, Debtor lists no expenses for home maintenance, repair, or upkeep. This too appears unreasonable.

Debtor's real property is stated to have a value of $320,000.00. Schedules A/B and D, Dckt. 1. Wells Fargo Bank, N.A. is listed as having a claim in the amount of $169,000.00 and Movant is listed as having a Claim in the amount of $70,000.00. By Debtor's calculation there is approximately a $90,000.00 equity cushion for both creditors.

Debtor purports to make $406.97 monthly payments, of which $150.00 would be paid to Movant. There is no indication as to why or how this is a reasonable payment.

Wells Fargo Bank, N.A. has filed its proof of claim, stating a secured claim in the amount of $169,008.61. Proof of Claim No. 5. The monthly payment on this claim is stated to be $917.70. *Id.* Debtor has listed $938.00 on Schedule J as the payment for her home.

At the hearing, **xxxxxxxxxxxxxxxxxxxxxxxxxxxx**.

**Relief Pursuant to 11 U.S.C. § 362(d)(4) is Denied**

11 U.S.C. § 362(d)(4) allows the court to grant relief from the automatic stay when the court finds that the petition was filed as part of a scheme to delay, hinder, or defraud creditors that involved either (i) transfer of all or part ownership or interest in the property without consent of creditors with secured claims or court approval or (ii) multiple bankruptcy cases affecting the property. 3 COLLIER ON BANKRUPTCY ¶ 362.07 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.).

The court does not find proper grounds for issuing an order pursuant to 11 U.S.C. § 364(d)(4). Movant has not provided sufficient evidence concerning a series of bankruptcy cases being filed with respect to the subject property. Debtor has filed for bankruptcy two (2) times since 2009, including the present filing. The court does not find that the filing of the present petition works as part of a scheme to delay, hinder, or defraud Movant with respect to the Property by the filing of multiple bankruptcy cases.

As the court (another judge in this District) addressed in denying Movant's motion for relief from the stay in the prior case, which was reopened after Debtor received her discharge and the case was closed, the automatic stay terminated by operation of law. This court questions why Debtor reopened the prior case and tried to convert it to one under Chapter 13 almost seven (7) years after it was filed - well after the expiration of the sixty-month maximum term in a Chapter 13 case.

Though questionable, there is not a pattern of filing cases that are not prosecuted, transferring title, or having a scheme. Rather, Debtor may just be grappling with having a well-secured creditor and substantial equity in the property. Debtor may be able to find a new loan or may have to promptly proceed with a plan to liquidate the property and claim her exemption in the proceeds.

**RULING**

The Relief From the Automatic Stay pursuant to 11 U.S.C. § 362(d)(4) is denied.

The Relief From the Automatic Stay pursuant to 11 U.S.C. § 362(d)(1) is **xxxxxxxxxxxxxxxx**.

Movant has not pleaded adequate facts and presented sufficient evidence to support the court waiving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is granted.

No other or additional relief is granted by the court.

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 for Relief From the Automatic Stay filed by Bosco Credit LLC ("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 is denied as to all relief requested pursuant to 11 U.S.C. § 362(d)(4).
>
> **IT IS FURTHER ORDERED** that **xxxxxxxxxxxxxxxx**.

| | | | |
|---|---|---|---|
| **4.** | **16-20852-E-11 DNL-1** | **MATHIOPOULOS 3M FAMILY LIMITED PARTNERSHIP J. Luke Hendrix** | **CONTINUED MOTION TO USE CASH COLLATERAL 4-21-16 [40]** |

**Tentative Ruling:** The Motion for Authority to Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the 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 offers 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.

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)(iii).**

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Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor-in-Possession, creditors and Office of the United States Trustee on February 25, 2016. By the court's calculation, 14 days' notice was provided. 14 days' notice is required.

The Motion for Authority to Use Cash Collateral was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

No opposition was presented at the hearing. The Defaults of the non-responding parties are entered by the court.

**The Motion for Authority to Use Cash Collateral is granted.**

Mathiopoulos 3M Family Limited Partnership ("Debtor-in-Possession") filed the instant Motion for Authority to Use Cash Collateral on September 6, 2016. Dckt. 94.

**PRIOR MOTIONS FOR AUTHORITY TO USE CASH COLLATERAL**

Debtor-in-Possession filed the first Motion for Authority to Use Cash Collateral on February 25, 2016. Dckt. 13.

Debtor-in-Possession filed a second Motion for Authority to Use Cash Collateral on April 21, 2016. Dckt. 40.

Debtor-in-Possession filed a third Motion for Authority to Use Cash Collateral on July 7, 2016. Dckt. 60.

**BACKGROUND**

The Debtor-in-Possession owns real property identified as 3105, 3111, 3119, 3125, 3127, 3129, 3133, 3137, 3141, and 3145 Penryn Road, Penryn, California ("Property"). The Property consists of a business center with approximately 30,700 square feet of rentable building space, which the Debtor-in-Possession rents out to commercial tenants. Dckt. 13.

The Debtor-in-Possession states that Wells Fargo Bank, N.A. ("Creditor") asserts a first deed of trust and assignment of rents against the Property to secure a promissory note with a balance of approximately $2,900,000.00. Dckt. 13.

Debtor-in-Possession argues that it is vital and necessary for the continued operation of the business to use cash collateral to pay necessary expenses to preserve the Property, including property taxes, business expenses, and Property upkeep. Dckt. 13.

Debtor-in-Possession anticipates that by using the cash collateral it will generate post-petition accounts receivable and/or accumulated cash sufficient to provide adequate protection to holders of secured claims. Dckt. 13.

The Debtor-in-Possession offers a portion of the accounts receivable and accumulated cash it will generate post-petition as replacement collateral to the Creditor, to the extent that the Creditor's collateral is diminished from the Debtor-in-Possession's use of cash collateral. The replacement liens on post-petition accounts receivable and cash shall be of the same scope, in the same priority, and subject to the same infirmities and defenses as existed pre-petition. Dckt. 13.

The court has issued several prior orders authorizing the use of cash collateral.

**CURRENT MOTION**

The Debtor-in-Possession states that it estimates that the regularly reoccurring expenses will be incurred during the period of September 1, 2016, and November 30, 2016.

Debtor-in-Possession estimates the following expenses that will be incurred during the period of September 1, 2016, and November 30, 2016. The Debtor-in-Possession indicates that the expenses generally track previously approved amounts.

| **EXPENSE** | **AMOUNT** |
|---|---|
| Property Insurance | $1,045.41 per month |

| | |
|---|---|
| Pacific Gas and Electric | $300.00 per month (approximate) |
| Recology Auburn (garbage) | $500.00 per month (approximate) |
| Telephone for business | $200.00 per month (approximate) |
| Pest control | $123.60 per month (approximate) |
| Telephone for Fire and Security | $120.00 per month (approximate) |
| Life Insurance Policies (4) | $675.00 per month |
| Property Maintenance, Landscaping, Parking Lot Cleaning | $704.00 per month |
| Misc (fuel, office supplies, equipment repair, postage, advertisement, etc.) | $1,500.00 per month (approximate) |
| | _____ |
| Total Cash Collateral Request | $5,168.01 per month |

Debtor-in-Possession also provides for proposed use for cash collateral as to non-monthly expenses:

| **EXPENSE** | **AMOUNT** |
|---|---|
| Placer County Water Agency | $1,500.00 due October 2016 (approximate amount due every two months) |
| | _____ |
| Total Cash Collateral Request | $1,500.00 through November 30, 2016 |

**APPLICABLE LAW**

Pursuant to 11 U.S.C. § 1101, a Debtor-in-Possession serves as the trustee in a Chapter 11 case when so qualified under 11 U.S.C. § 322. As a Debtor-in-Possession, the Debtor-in-Possession can use, sell, or lease property of the estate pursuant to 11 U.S.C. § 363. In relevant part, 11 U.S.C. § 363 states:

> (b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless--

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease--

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Fed. R. Bankr. P. 4001(b) provides the procedures in which a trustee or Debtor-in-Possession may move the court for authorization to use cash collateral. In relevant part, Fed. R. Bankr. P. 4001(b) states:

(b)(2) Hearing

The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 14 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 14-day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

**DISCUSSION**

In the instant case, the Debtor-in-Possession is seeking authorization of the court to use cash collateral to pay necessary expenses to preserve the Property and continue ongoing business rental operations. Debtor-in-Possession assures the court that the business expenses are modest and track expenses that this court has approved previously.

The court may authorize use of cash collateral so long as the creditor is adequately protected. 11 U.S.C. § 363(e). The Debtor-in-Possession has the burden of proof on the issue of adequate protection. 11 U.S.C. § 363(p)(1). Adequate protection includes providing periodic cash payments to cover the loss in value of the creditor's interest. 11 U.S.C. § 361(1). Additionally, a substantial equity cushion in property provides adequate protection. *See In re Mellor*, 734 F.2d 1396, 1400 (9th Cir. 1984).

Previously, the Debtor-in-Possession and Creditor filed a stipulation in which the Creditor consented to the Debtor-in-Possession's use of cash collateral. The adequate protection payment proposed was $13,193.11, beginning March 14, 2016, and continuing thereafter on the fifteenth (15th) day of each month through May 2016. Here, Debtor-in-Possession asserts that it will continue making adequate protection payments of $13,193.11 to Creditor. The court finds that the adequate protection payment is sufficient given the facts of the instant case.

The court authorizes the use of cash collateral, pursuant to the order of the court, for the period September 1, 2016, through November 30, 2016, including the required adequate protection payments. The court does not pre-judge and authorize the use of any monies for "plan payments" or use of any "profit" by the Debtor-in-Possession. All surplus Cash Collateral from the Property shall be held in a cash collateral account and separately accounted for by the Debtor-in-Possession.

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 Authority to Use Cash Collateral filed by Debtor-in-Possession 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 Use Cash Collateral is granted, pursuant to this order, for the period September 1, 2016 through November 30, 2016, that the cash collateral may be used through September 30, 2016, to pay the following expenses, granting the Debtor-in-Possession a variance of ten percent in any individual line item expense as long as the total amount used does not exceed the total amount allowed:

| **EXPENSE** | **AMOUNT** |
|---|---|
| Property Insurance | $1,045.41 per month |
| Pacific Gas and Electric | $300.00 per month (approximate) |
| Recology Auburn (garbage) | $500.00 per month (approximate) |
| Telephone for business | $200.00 per month (approximate) |
| Pest control | $123.60 per month (approximate) |
| Telephone for Fire and Security | $120.00 per month (approximate) |
| Life Insurance Policies (4) | $675.00 per month |
| Property Maintenance, Landscaping, Parking Lot Cleaning | $704.00 per month |
| Misc (fuel, office supplies, equipment repair, postage, advertisement, etc.) | $1,500.00 per month (approximate) |

| **EXPENSE** | **AMOUNT** |
|---|---|
| Placer County Water Agency | $1,500.00 due October 2016 (approximate amount due every two months) |

**IT IS FURTHER ORDERED** that the creditors having an interest in the cash collateral are given replacement liens in the post-petition rents in the same priority, validity, and extent as they existed in the cash collateral expended, to the extent that the use of cash collateral resulted in a reduction of a creditor's secured claim, which replacement lien is perfected by the issuance of this order, no further act of creditors required.

**IT IS FURTHER ORDERED** the Debtor-in-Possession shall continue to make the monthly adequate protection payments of $13,193.11 to Wells Fargo Bank, N.A.

**IT IS FURTHER ORDERED** Debtor-in-Possession waives any right to seek a surcharge of Creditor's interests in the Property, Pre-Petition Collateral, or Post-Petition Property under 11 U.S.C. § 506(c), only for the expenses which are authorized to be paid with the cash collateral during the period in which Debtor-in-Possession is authorized to use cash collateral by this order.

**IT IS FURTHER ORDERED** that if Creditor asserts that an event for the "automatic" termination of the use of cash collateral has occurred, Creditor shall file an ex parte motion for order terminating use of cash collateral and supporting pleadings (evidence of the event of termination) and lodge with the court a proposed order terminating the use of cash collateral. Creditor shall immediately serve (electronically and by First Class Mail) the ex parte motion and supporting pleadings and provide telephonic notice to counsel for the Debtor-in-Possession and the U.S. Trustee. If the Debtor-in-Possession disputes the event of termination, counsel for Debtor-in-Possession shall notify the court and counsel for Creditor. The court may, upon review the ex parte motion set an emergency hearing *sua sponte* or may rule on the ex parte motion without hearing.

**IT IS FURTHER ORDERED** the hearing on the Motion is continued to 10:30 a.m. on November 17, 2016, to consider a supplement to the Motion to extend the authorization to use cash collateral. On or before November 3, 2016, the Debtor-in-Possession shall file and serve supplemental pleadings for the further use of cash collateral and notice of the November 17, 2016 hearing. Any opposition to the requested use of cash collateral may be presented orally at the hearing.

**5.** **16-25653-E-13** **EMMA BARBER** **MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION**
**GHW-1** **Pro Se** **9-1-16 [8]**

**FEDERAL NATIONAL MORTGAGE ASSOCIATION VS.**

**Final Ruling:** No appearance at the September 20, 2016 hearing is required.
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Local Rule 9014-1(f)(2) Motion.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor (*pro se*), Chapter 13 Trustee, and Office of the United States Trustee on September 1, 2016. By the court's calculation, 19 days' notice was provided. 14 days' notice is required.

The Motion for Relief From the Automatic Stay was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). The Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion.

**The Motion for Relief From the Automatic Stay is granted.**

Federal National Mortgage Association ("Movant") seeks relief from the automatic stay with respect to the real property commonly known as 3326 40th Street, Sacramento, California (the "Property"). The moving party has provided the Declaration of Glenn Wechsler to introduce evidence as a basis for Movant's contention that Emma Barber ("Debtor") does not have an ownership interest in or a right to maintain possession of the Property. Movant presents evidence that it is the owner of the Property. Movant asserts it purchased the Property at a pre-petition Trustee's Sale on June 24, 2016. Based on the evidence presented, Debtor would be at best a tenant at sufferance. Movant commenced an unlawful detainer action in California Superior Court, County of Sacramento and received a judgment for possession, with a Writ of Possession having been issued by that court on August 12, 2016. Exhibits E & F, Dckt. 11.

Movant has provided a certified copy of the recorded Trustee's Deed Upon Sale to substantiate its claim of ownership and the Judgment. Exhibits B & E Based upon the evidence submitted, the court determines that there is no equity in the property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the property is *per se* not necessary for an effective reorganization. *See In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

Movant has presented a colorable claim for title to and possession of this real property. As stated by the Bankruptcy Appellate Panel in *Hamilton v. Hernandez*, No. CC-04-1434-MaTK, 2005 Bankr. LEXIS 3427 (B.A.P. 9th Cir. Aug. 1, 2005), relief from stay proceedings are summary proceedings that address issues arising only under 11 U.S.C. § 362(d). *Hamilton*, 2005 Bankr. LEXIS 3427 at *8–*9 (citing *Johnson v. Righetti (In re Johnson)*, 756 F.2d 738, 740 (9th Cir. 1985)). The court does not determine underlying

issues of ownership, contractual rights of parties, or issue declaratory relief as part of a motion for relief from the automatic stay Contested Matter (Fed. R. Bankr. P. 9014).

The instant case was dismissed on September 13, 2016, for failure to timely file documents. Dckt. 15.

The applicable Bankruptcy Code provision for the matter before the court is 11 U.S.C. § 362(c)(1) & (2). In relevant part, 11 U.S.C. § 362(c) provides:

> (c) Except as provided in subsections (d), (e), (f), and (h) of this section--
>
> > (1) the stay of an act against property of the estate under subsection (a) of this section continues until such **property is no longer property of the estate**;
> >
> > (2) the stay of any other act under subsection (a) of this section continues until the earliest of--
> >
> > > (A) the time the case is closed;
> > >
> > > (B) ***the time the case is dismissed***; or
> > >
> > > (C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

11 U.S.C. § 362(c) (emphasis added).

When a case is dismissed, 11 U.S.C. § 349 discusses the effect of dismissal. In relevant part, 11 U.S.C. § 349 states:

> (b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title--
>
> > (1) reinstates–
> >
> > > (A) any proceeding or custodianship superseded under section 543 of this title;
> > >
> > > (B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and
> > >
> > > (C) any lien voided under section 506(d) of this title;

> (2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and
>
> (3) ***revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.***

11 U.S.C. § 549(c) (emphasis added).

Therefore, as of September 13, 2016, the automatic stay as it applies to the Property, and as it applies to Debtor, was terminated by operation of law. At that time, the Property ceased being property of the bankruptcy estate and was abandoned, by operation of law, to Debtor.

The court shall issue an order confirming that the automatic stay was terminated and vacated as to the Debtor and Property on September 13, 2016.

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 Relief From the Automatic Stay filed by Federal National Mortgage Association ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** the court confirms that automatic stay provisions of 11 U.S.C. § 362(a) were terminated as to the Debtor pursuant to 11 U.S.C. § 362(c)(2)(B) and the real property commonly known as "3326 40th Street, Sacramento, California, pursuant to 11 U.S.C. § 362(c)(1) and § 349(b)(3) as of the September 13, 2016, dismissal of this bankruptcy case filed by Emma Barber, the Debtor.

**6.** **13-90382-E-7** **MICHAEL CARSON**
**13-9016**
**RDR-5**
**TAIPE V. CARSON**

**CONTINUED MOTION TO RECALL WRIT OF EXECUTION, MOTION TO QUASH, MOTION TO VACATE AND/OR MOTION/APPLICATION FOR COMPENSATION FOR ROBERT D. RODRIGUEZ, DEFENDANT'S ATTORNEY**
**7-25-16 [136]**

**No Tentative Ruling:** The Motion to Recall Writ of Execution, Motion to Quash Notice of Levy, Motion to Vacate Wage Garnishment, and Motion for Allowance of Professional 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.**

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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 7 Trustee, and Office of the United States Trustee on July 25, 2016. By the court's calculation, 45 days' notice was provided. 28 days' notice is required.

The Motion to Recall Writ of Execution, Motion to Quash Notice of Levy, Motion to Vacate Wage Garnishment, and Motion for Allowance of Professional 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 and other parties in interest are entered.

**The Motion to Recall Writ of Execution, Motion to Quash Notice of Levy, Motion to Vacate Wage Garnishment, and Motion for Allowance of Professional Fees is ----------.**

Michael Carson, Defendant, filed the instant Motion on July 25, 2016. He requests that the court recall a writ of execution, quash the notice of levy/vacate wage garnishment, grant his request for attorney's fees and costs, and award him sanctions.

Defendant and Graciela Taipe ("Plaintiff") obtained a status judgment for dissolution of marriage on September 14, 2011. Plaintiff was awarded attorney's fees against Defendant on January 24, 2013; July 31, 2014; December 15, 2014; and August 15, 2015, totaling $22,300.00. In the present action, Plaintiff was awarded $10,562.00 on May 7, 2014.

Attorney Paula Grohs obtained a writ of execution in the present matter on February 26, 2016. She sought a wage garnishment on April 24, 2016, and served the U.S. Marshall's Office. Defendant served a claim of exemptions on May 3, 2016. Attorney Grohs filed an objection to the claim of exemptions on May 11, 2016, and the court denied the objection. On June 24, 2016, Attorney Grohs filed an application to reopen the matter, and the court granted it.

Defendant asserts that he has paid the state court and attorney's fees in this matter fully and has satisfied the judgments. He claims that the writ of execution and judgment enforcement proceedings are erroneous on the following grounds:

A. The writ of execution is void because of the automatic stay in Plaintiff's open bankruptcy case (Northern District of California, Case No. 15-40157).

B. Attorney Grohs does not have standing because she has not complied with California law regarding becoming an assignee of record.

C. The assignment is void because it was not perfected.

D. Plaintiff omitted the awards of attorney's fees from her bankruptcy schedules.

E. Defendant has the affirmative defense of judicial estoppel.

F. Plaintiff and Defendant entered into a settlement agreement and mutual release of claims waiving attorney's fees and costs.

G. The awards of attorney's fees represent improper avoidance actions.

**PLAINTIFF'S OPPOSITION**

Plaintiff filed an Opposition on August 26, 2016. Dckt. 147. Plaintiff asserts the following:

A. Defendant does not have standing to complain about any duty between Plaintiff and her legal counsel.

B. Any procedural defect in perfecting the Assignment of Attorney Fees is being corrected through the filing of a Notice and Acknowledgment of Assignment.

C. Allegations that Plaintiff did not include awards of attorney's fees in her bankruptcy schedules should be argued in the Northern District of California, and Defendant lacks standing.

D. Defendant owes money on the State Court Writ of Execution and the Federal Court Writ of Execution.

E. Defendant does not have standing to complain about an alleged violation of the automatic stay in Plaintiff's bankruptcy case in the Northern District of California.

F. Defendant does not have standing to assert that Plaintiff has engaged in fraudulent conduct with improper avoidance claims.

G. Defendant does not have standing and is incorrect to assert that the mutual release of attorney's fees in the family law action applies in the present action.

Plaintiff requests that the court award her attorney's fees and sanctions.

**SEPTEMBER 8, 2016 HEARING**

At the hearing, the court continued the matter to September 20, 2016, at 1:30 p.m. (specially set with the court's Chapter 13 Law & Motion calendar in Sacramento).

Further, the court ordered that all monies in the possession of the U.S. Marshal as of the date of the order–September 12, 2016–and monies received thereafter pursuant to the writ of execution and wage garnishment issued in this Adversary Proceeding were to be turned over by the U.S. Marshal to the Clerk of the Bankruptcy Court for the Eastern District of California, who shall hold the monies pending further order of the court. All liens and other rights in the monies as exist when they were held by the U.S. Marshal were to continue in full force and effect while the monies are in the possession of the Clerk of this Court.

**DISCUSSION**

The court foreshadowed this ruling in denying the Motion filed by Ms. Grohs to shorten time so that the court would hear her motion for sanctions on four working days notice. Order, Dckt. 162. As the court noted in that order, the dysfunctional family law process between the Defendant and Plaintiff, in which Defendant was sanctioned, has spilled over to this bankruptcy case. The award of attorneys' fees in this Adversary Proceedings were sanctions based on the California Family Code. Order, Dckt. 118; Memorandum Opinion and Decision, Dckt. 116.

The first ground stated by Defendant is that the automatic stay in the Plaintiff's bankruptcy case filed in the Northern District of California (in which Defendant is not a debtor) reaches out and makes any action against the Defendant void. No explanation is provided for how or why the automatic stay reaches out and protects Defendant.

Rather, Defendant argues that Grohs is taking action to collect a debt against Plaintiff, and therefore the automatic stay protects Plaintiff from her own attorney, Grohs. In effect, Defendant (Plaintiff's ex-husband in these dysfunctional family law and now bankruptcy proceedings) is attempting to "help" protect Plaintiff from her own attorney.

This contention is without merit and for which Defendant offers no legal basis.

The second contention is that demand may well be made from the wrong party, Plaintiff could have a contention with merit – the obligation owing to Plaintiff is property of the bankruptcy estate in Plaintiff's case. 11 U.S.C. § 541. While making this contention, Defendant makes no mention of having addressed this with the Trustee in Plaintiff's bankruptcy case.

While calling Grohs bad for acting while Defendant contends that there may be a bankruptcy trustee who should be enforcing this obligation, Defendant also asserts that he has settled this obligation with Plaintiff on December 21, 2015. This settlement is in connection with an adversary proceeding in the Plaintiff's bankruptcy case, one in which the Chapter 7 trustee is not a party. By his very argument, Defendant is attempting to claim to have violated the automatic stay in the Plaintiff's bankruptcy case by purporting to have negatively effected rights of the bankruptcy estate - the right to be paid attorneys' fees for Defendant's conduct in this Adversary Proceeding.

Additionally, the purported settlement is in connection with the issues in the Adversary Proceeding in Plaintiff's bankruptcy case. Defendant offers no explanation of what is the subject of that adversary proceeding and to which issues the settlement relates. Rather, he merely states "Settlement, I win."

Fortunately, PACER works for the courts as well as diligent litigants. This court has reviewed the motion to approve settlement and dismiss the adversary proceeding in Plaintiff's bankruptcy case. Bankr. N.D. Cal. Adv. No. 15-04038 ("N.D. Adversary"). The motion states with particularity (Fed. R. Civ. P. 7(c) , Fed. R. Bankr. P. 7007) the following grounds:

A. Defendant filed the N.D. Adversary (as the plaintiff in that action) relating to property issues and Plaintiff's (Taipe) income.

B. Defendant and Plaintiff entered into a settlement agreement and mutual release of claims.

C. No payments are due either party.

D. Mutual of attorneys' fees and costs.

E. Defendant contended that Plaintiff stole assets of the community in which Defendant had a 50% interest.

F. Defendant contended that the obligation owed to him by Plaintiff was non-dischargeable.

No copy of any settlement agreement was filed with the bankruptcy court.

Ms. Grohs appeared in the N.D. Adversary, asserting in February 2016 that she was the assignee of the attorneys' fees awarded in the state court dissolution proceeding. N.D. Adversary, Dckt. 37. In his

Opposition, Defendant makes it clear that only an award of attorneys' fees in the state court dissolution action is at issue, with nothing said about the attorneys' fees ordered as sanctions in this court. *Id.*, Dckt. 40.

What is clear from the Settlement Agreement, Exhibit G (Dckt. 142), is that it does not purport to release the obligation owing for the attorneys' fees awarded Plaintiff by this court. At best for Defendant, it relates to rights and obligations in the state court action, but not this court.

**No Assignment of Judgment Filed.**

Defendant argues that Ms. Grohs has no standing as there has not been an assignment of the judgment in this Adversary Proceeding to Ms. Grohs. That is correct. It appears that even though this issue of whether Ms. Grohs has or was assigned the judgment in this Adversary Proceeding or the right to attorneys' fees in the state court dissolution action. None is on file in this Adversary Proceeding.

While saying that one has not been filed, Defendant makes no effort to cite the court to the proper statute or rule for what is required. Rather, as with Defendant's other arguments, allegations are stated and a ruling in favor of Defendant demanded.

**Other Adversary Proceeding**

Defendant also pounds the table stating that Plaintiff was sued in her bankruptcy case by her former landlord seeking to have Plaintiff denied her discharge. Therefore, apparently, Defendant asserts that he is not obligated to pay the attorneys' fees ordered as sanctions in this Adversary Proceeding.

**Satisfaction of Judgment**

Defendant next advances an argument that Plaintiff paid Grohs the attorneys' fees, in lien of child support, and therefore he is entitled to an offset of $10,172.00. But if Plaintiff never paid Grohs, then Defendant is still entitled to an offset. In substance, Defendant argues that if somebody paid Grohs for her attorneys' fees, then he is off the hook, his obligation to pay the attorneys' fees ordered by this court evaporate.

Defendant also contends that since Plaintiff has filed a Chapter 7 bankruptcy case in the Northern District of California, and thereby would be discharging the obligation to pay her attorney, then that works as a special discharge for Defendant, absolving him of having to pay the attorneys' fees ordered by this court. As with all of Defendant's other arguments, this contention is devoid of any legal authority or basis.

Defendant has taken a "heads I win, tails I win, if the coin stands on an edge I win, if you drop the coin I win" approach to his arguments. No matter what permutation of the facts, without any legal basis or authority, Defendant wins and doesn't have to pay the attorneys' fees ordered as sanctions by this court.

**Opposition by Grohs**

Defendant and his counsel are not alone in presenting unsupported arguments and contentions. Ms. Grohs states that a Notice and Acknowledgment of Assignment is being filed with the Opposition. However, no assignment has been filed with this court for this judgment and award of attorneys' fees.

As with Defendant's liberal contentions and creative use of the law, Ms. Grohs combines pleadings, mixes matters, and files documents such as the one titled "Notice of Intent to Seek Family Code § 271 Sanctions and Sanctions Against Robert D. Rodriguez, Personally as Well as Judgment Debtor For Conduct in Violation of Federal Rules of Civil Procedure Rule 11." Dckt. 150. Ms. Grohs and Defendant feed off of each other in making matters unnecessarily complicated and confusing.

**Ruling**

Of the various contentions and arguments expounded by Defendant, the only one which causes pause is whether the obligation to pay the attorneys' fees ordered by the court is an asset of the Plaintiff and Ms. Grohs or of the bankruptcy estate in Plaintiff's Norther District Bankruptcy Case. From the review of the docket in the Northern District Bankruptcy Case and the N.D. Adversary, it is clear that the issue of attorneys' fees having been awarded Plaintiff by the state court was disclosed. Thus, it appears that the existence of attorneys' fees having been awarded by other court under the California Family Code were disclosed to the Chapter 7 Trustee.

This court has ordered the Clerk of this Court to serve the Chapter 7 Trustee and her attorney in the Northern District Bankruptcy Case with a copy of the order denying Ms. Grohs' request to shorten time. That ruling clearly discloses that there is an attorneys' fee award from this court and if that Trustee believes that she has property of the estate in this case to administer, she will step forward. However, if the Trustee believes that it is the same as other attorneys' fees awards for Defendant's conduct that the Trustee is allowing the Plaintiff and her representatives to enforce, then this court will not hear from that Trustee.

With the exception of the assignment of the judgment, the court denies all of the relief requested by Defendant. The court does so without prejudice to any of the grounds based on Defendant having paid the obligation. The state of the pleadings and evidence are so unclear, while the court cannot find that Defendant has paid the obligation, the court will not make a finding that Defendant has not paid the obligation. At this point in time, it is just that Defendant has not provided the court with sufficient, credible evidence that the attorneys' fees ordered by this court have been paid.

Finally, there is the issue of whether Ms. Grohs is a party in interest who may enforce the judgment for attorneys' fees. The copy of the Writ of Execution filed as Exhibit A is partially filled out, with the name of the judgment creditor and name of the judgment debtor left blank. Dckt. 142. Exhibit B appears to be an Earnings Withholding Order for a Contra Costa Superior Court matter for the same amount due as stated on the writ of execution issued by this court. *Id.* However, the Earnings Withholding Order appears to have been issued by the U.S. Marshal for the Eastern District of California.

From these documents it is not clear that Ms. Grohs is acting as the assignee of the judgment or as the attorney for Plaintiff. In her Opposition, Ms. Grohs states that she is the assignee, but also purports to be appearing as counsel for Plaintiff.

The court can easily address this issue based on Ms. Grohs' pleading stating that she is appearing as counsel for Plaintiff and herself, as the assignee. As part of the order on this Motion, the court requires that Plaintiff and Ms. Grohs, and each of them, have the Marshal deposit all monies received from the wage garnishment with the Clerk of this Court, with the monies to be disbursed only upon further order of this court. Until there is an assignment properly filed in this Adversary Proceeding, Ms. Grohs is co-attorney of record for Plaintiff and all actions taken are to enforce this judgment for attorneys' fees as counsel for Plaintiff.

**ADDITIONAL ARGUMENT AT SEPTEMBER 20, 2016 HEARING**

**XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX**

The court next addresses the issue of whether

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 Recall Writ of Execution, Motion to Quash Notice of Levy, Motion to Vacate Wage Garnishment, and Motion for Allowance of Professional Fees 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 **XXXXXXXXXXX.**