UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

September 23, 2021 at 11:00 a.m.

1.	**19-22653-E-7** **19-2156**	**REECE/RODINA VENTURA** **PGM-1** **Peter Macaluso**	**MOTION FOR COMPENSATION FOR PETER G. MACALUSO, DEFENDANTS GAUNIA V. VENTURA ET AL ATTORNEY(S)**
	CASE DISMISSED: 08/05/2021		**8-20-21 [44]**

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

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

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff's Attorneys on August 20, 2021 By the court's calculation, 34 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(6) (requiring twenty-one days' notice when requested fees exceed $1,000.00).

The Motion for Prevailing Party Fees was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. Opposition was filed by Plaintiff Creditor.

The Motion for Prevailing Party Fees is granted.

Reece and Rodina Ventura ("Movant" or "Defendant-Debtor") filed this Motion seeking prevailing party fees in the amount of $5,425.00 pursuant to 11 U.S.C. 523(d) against plaintiff in the

adversary proceeding 19-2156, Adela Gaunia ("Plaintiff-Creditor").

Movant states with particularity (FED. R. BANKR. P. 9011) the following grounds in support of the Motion:

1. On December 22, 2019, Plaintiff-Creditor filed a complaint pursuant to 28 U.S.C. § 523(a)(2), (4), and (6) for nondischargability of a judgment debt.

2. On September 16, 2020, an Order Setting Pretrial Conference was issued.

3. Defendants prepared for said trial and as a result incurred attorney fees.

4. On July 27, 2021, Plaintiff-Creditor filed a motion to dismiss the adversary.

5. Under 11 U.S.C. § 523(d), the court shall grant judgment in favor of the debtor for costs and reasonable attorney's fees for the proceeding if the court finds the position of the creditor was not substantially justified.

6. In order to recover attorney's fees under § 523 (d), a debtor has the burden to prove: (1) the creditor requested a debt be exempt from discharge under 11 U.S.C. § 523(a); (2) the debt was a consumer debt; and (3) the debt was discharged.

7. If the debtor meets their burden, the creditor must offer evidence to prove its position was substantially justified or special circumstances exist to make a damages award unjust.

8. The Defendant-Debtor met their burden under 11 U.S.C. § 523(d) because: (1) the debt was challenged by the creditors to be exempt from discharge under 11 U.S.C. § 523(a); (2) the debt was consumer debt because it arose from a stipulated settlement, which is within the definition of "consumer debt" under Bankruptcy Code § 101(8); and (3) the objection to discharge was not successful.

9. The Plaintiff-Creditor has not met their burden because (1) there was no evidence submitted in support of their complaint; (2) the evidence reflected that if trial would have occurred, there would be no support for a 11 U.S.C. § 523(a)(2) claim since no evidence or testimony was presented; and (3) there was no reasonable connection between the actual facts and the theory advanced at trial.

10. Since Plaintiff-Creditor did not meet their burden, the adversary proceeding was not substantially justified.

11. Defendant-Debtor request attorney fees to be awarded in the amount of $5,425.00.

STATUTORY BASIS FOR ATTORNEY'S FEES

The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the Unites States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 14 days' notice; on motion served within seven days thereafter, the action of the clerk may be reviewed by the court. *Fed. R. Bank P.* 7054(b)(1)

11 U.S.C. § 523(d)

If a creditor requests a determination of dischargeability of a consumer debt under 11 U.S.C. § 523(a)(2), and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified. However, a court shall not award such costs and fees if special circumstances would make the award unjust. 11 U.S.C. 523(d).

The elements of § 523(d) are (i) a request for determination of dischargeability; (ii) a consumer debt; and (iii) the discharge of the consumer debt. *In re Kullgren*, 109 B.R. 949, 953 (Bankr. C.D. Cal. 1990). In *Kullgren*, the Plaintiffs filed a complaint alleging that debtors applied for a credit card account and incurred credit card charges. *Id*. at 951. The complaint further alleged that the charges were for consumer items. *Id*. Lastly, the complaint requested that discharge be denied, with the complaint being later dismissed. *Id* . at 951-52. The Court held that the Debtor satisfied the § 523(d) elements because (i) the Plaintiff filed a complaint for the determination of dischargeability; (ii) of a consumer debt; and (iii) that debt was discharged. *Id*. at 953.

After the Debtor has proven these three elements, the burden shifts to the Creditor to establish that its position is substantially justified or special circumstances give rise for awarding fees. *In re Hunt*, 238 F.3d. 1098, 1103-1104 (B.A.P. 9th Cir. 2001); *American Sav. Bank v. Harvey (In re Harvey)*, 172 B.R. 314, 318 (9th Cir.BAP 1994) (held that fees are to be awarded "unless the creditor establishes that its nondischargeability complaint is substantially justified"); *First Card v. Carolan (In re Carolan)*, 204 B.R. 980, 987 (9th Cir.BAP 1996) (same). There is almost no case law interpreting the "special circumstances" language in § 523(d). *In re Hunt*, 238 F.3d at 1104; *In re Hingson*, 954 F.2d 428, 429-30 (7th Cir. 1992) (indicating that the clause "should be interpreted with reference to traditional equitable principles."). For example, "if a debtor could somehow be found to have procured the creditor's groundless claim of fraud, the exception for special circumstances would justify the denial of the debtor's application for attorney's fees." *Hingson*, 954 F.2d at 430.

Fees Requested by Counsel

Description	Time	Hourly Rate	Total Fees Computed Based on Time and Hourly Rate
7/1/21 Review and Prepare for Trial	5.0	$350.00	$1,750.00
7/3/21 Defendant's Trial Brief Prepared	1.5	$350.00	$525.00
7/13/21 Review Trial Date with Defendants and Discuss Trial	2.0	$350.00	$700.00
7/17/21 Meet with Clients to Discuss/Prepare Testimony	2.5	$350.00	$875.00
7/25/21 Meet with Clients to Discuss Video of Plaintiff	1.5	$350.00	$525.00
7/27/21 Review Motion/Application to Dismiss	0.5	$350.00	$175.00
8/3/21 Defendant's Trial Brief Filed	0.5	$350.00	$175.00
8/20/21 Motion for Allowance of Fees and Costs [PGM-1]	2.0	$350.00	$700.00
Total Fees for Period of Application			$5,425.00

The Plaintiff-Creditor filed a Response to the Debtor's Motion for Attorney Fees opposing the following fees:

A. Defendant-Debtor is requesting 6.5 hours of attorneys fees prior to the deadline of July 13, 2021 for the Plaintiff to file direct testimony. The fees in question are: Review and Prepare for trial - five hours (5) and Defendant's Trial Brief Prepared - 1.5 hours.

B. Meet with Clients to discuss Video of Plaintiff - 1.5 hours. The

Plaintiff-Creditor argues that this video has no relevance to the instant case.

C. Defendant-Debtor billed 0.5 hours for filing a trial brief. The Plaintiff-Creditor does not know if this description was preparation and filing of a trial brief or just the filing of a trial brief. In the latter, 0.5 hours for filing a trial brief is excessive. Additionally, the Plaintiff-Creditor argues the filing of the brief was unnecessary because it was after the dismissal was filed and served, and the court's order setting the matter for hearing was entered and served.

D. Plaintiff-Creditor asserts that reasonable fees would be at most seven (7) hours at $350.00 per hour or $2,450.00. These fees incurred after Creditor's direct testimony was due, less the unnecessary trial brief.

E. The Plaintiff-Creditor further asserts that over half of the declaratory evidence and all documentary evidence submitted by Defendant-Debtor is irrelevant, Defendant-Debtor's counsel billed 4.5 hours, Creditor asserts the fees should be reduced by a similar percentage - 2.25 hours for a total of 4.75 hours or $1,662.50 in fees.

F. Lastly, Plaintiff-Creditor asserts that a fair amount would be less than $2,000.00 or may be even less than $1,500.00 if the court sees that the dismissal was not gamesmanship but merely Plaintiff-Creditor's attempt to conserve party and judicial resources.

Dckt. 49.

Fees Ordered by the Court

This Adversary Proceeding did not proceed to trial, Plaintiff-Creditor electing to dismiss it. This "presumptive" ability to dismiss (which while it may exist under State Law is not permitted under applicable Federal Rule of Civil Procedure 41 and Federal Rule of Bankruptcy Procedure 7041) led to Plaintiff-Creditor to just stop working on her trial and filing the Request for Dismissal.

Computation of Prevailing Party Attorney's Fees

Unless authorized by statute or provided by contract, attorney's fees ordinarily are not recoverable as costs. Cal. Code Civ. Proc. § 1021; *International Industries, Inc. v. Olen*, 21 Cal. 3d 218, 221 (Cal. 1978). Here, Congress provides in 11 U.S.C. § 523(d) statutory attorney's fees for a consumer debtor under specified circumstances.

However, the Parties appear to ignore that a final judgment (a final order from which an appeal can be taken to be a "judgment;" Federal Rule of Civil Procedure 54(a), Federal Rule of Bankruptcy Procedure 9001(7), 7054) has been entered by this court. Order of Dismissal, Dckt. 41.

To address Plaintiff-Creditor's failure to comply with the order for lodging of direct testimony statements and exhibits, instead electing to abandon the litigation on the eve of trial, with the

stipulation of Plaintiff-Creditor stated by counsel on the record, the court's final judgment (the Order of Dismissal) expressly provides:

> **IT IS FURTHER ORDERED** that on or before August 20, 2021, Reece Ventura and Rodina Ventura, the Defendant-Debtors, shall file a motion, if any, seeking the allowance **of attorney's fees, costs, and expenses incurred during the period of July 1, 2021 and August 4, 2021**, in preparing for the trial in this Adversary Proceeding which the Plaintiff requested be dismissed after the deadline for Plaintiff lodging with the court her Direct Testimony Statements and Exhibits had expired, with no such Direct Testimony Statements and Exhibits lodged with the court, plus the reasonable costs and attorney's fees for preparing and prosecuting the Motion for Allowance of such costs, fees, and expenses.

Dismissal Order, p. 2:10-17; Dckt. 41.

There is nothing left for the Parties to fight, in good faith, about the time period for fees and expenses to be allowed for the period July 1 through August 4, 2021 for Defendant-Debtor. The court, by final judgment (order) has determined that Defendant-Debtor shall recover fees and expenses "in preparing for the trial in this Adversary Proceeding."

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). An attorney's fee award based on the lodestar 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 a professional's fees. *Gates v. Duekmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). Having this discretion is appropriate "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.

DISCUSSION

If the basis for the fees was not already set by final judgment (order), the elements under § 523(d) are also met. The Defendant-Debtor correctly argues the first element is met by Plaintiff-Creditor's filing of Case No. 19-02156 and Debtor's Answer to Complaint. See Exhibit A, Dckt. 47. The Debtor correctly argues the second element is met because the claim arose based on stipulated settlement, incurred by the Debtor concerning a family debt, purchased by a collection agency. As such, it is consumer debt. Lastly, the Debtor correctly argues the third element is met. This is not only due to

Creditor's objection to discharge was not successful and resulted in a voluntary dismissal, but because the underlying bankruptcy case was discharged. As such, the debt claimed in the adversary proceeding is now discharged.

The court having determined that Movant shall be awarded attorney's fees as set forth in the final judgment (order) in this Adversary Proceeding, the court must determine whether the fees sought are reasonable. For the foregoing reasons, the court finds most of the fees sought are reasonable.

Applying the normal lodestar analysis, the court begins with the billing rates for the attorneys for which the attorneys' fees are requested. The hourly rates for the work done by the attorney at $350.00 an hour are reasonable. For an appellate attorney, they are very moderate when considering the regular billing rates in the community, as well as commensurate with the level of legal experience for the litigation involved.

The court finds the allowance requested for preparation of the following were reasonable:

Description	**Time**	**Hourly Rate**	**Total Fees Computed Based on Time and Hourly Rate**
7/1/21 Review and Prepare for Trial	5.0	$350.00	$1,750.00
7/3/21 Defendant's Trial Brief Prepared	1.5	$350.00	$525.00
7/13/21 Review Trial Date with Defendants and Discuss Trial	2.0	$350.00	$700.00
7/17/21 Meet with Clients to Discuss/Prepare Testimony	2.5	$350.00	$875.00
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7/27/21 Review Motion/Application to Dismiss	0.5	$350.00	$175.00
8/3/21 Defendant's Trial Brief Filed	0.5	$350.00	$175.00
Motion for Allowance of Fees and Costs [PGM-1]	2.0	$350.00	$700.00
Total Reasonable Fees			$5,425.00

In the Opposition, Plaintiff-Creditor makes the general argument in disputing the fees requested:

> On July 27th, 2021 Defendant filed their evidence, a total of 8 pages of testimony by Rodina Ventura, **the majority of which related to the complaint and adversary of Benjamin Villanueva, and not the Debtor, and submitted only one document, a video also relating to Benjamin Villanueva which had never been produced either during the 2004 document productions nor in the Initial Disclosures**. Further, the video had no authentication, or testimony regarding its production. Plaintiff did not file objections as the case was dismissed prior to objections being due.

However, the Opposition does not specifically identify the charges on the detailed billing statement which are believed to apply to Plaintiff-Creditor's husband's litigation, not the August 2021 trial for her adversary proceeding.

The Declaration of Plaintiff-Creditor (improperly attached to the Opposition as opposed to being filed as a separate documents as required by Local Bankruptcy Rule 9004-2(c)(1)) is a declaration filed in response to an objection to claim in the bankruptcy case and provides a discussion of why Plaintiff-Creditor believes she has a valid claim against Defendant-Debtor. Nothing relates to the fees of Defendant-Debtor for the period July 1 through August 4, 2021 pursuant to the final judgment (order) of the court. It could be viewed that this extraneous materials are presented to prejudice, incite, inflame the judge against Defendant-Debtor.

Continuing in the tit for tat litigation practices, rather than providing the court with a "standard" billing statement identifying the tasks, time spent, billing rate, and charge for each task, counsel for Defendant-Debtor provided only daily totals for time spent. It is not clear why such was done.

However, in looking at the charges, there is only a "one day" charge, that being on July 1, 2021 for 5 hours. That was for "Review and Prepare for Trial." While not broken out, having a trial prep day is not unusual and the 5 hours is not unreasonable.

All the other charges and dollar amounts are modest, running from 0.5 to 2.0 hours, and reasonable for the work described.

In total, the reasonable allowance for Counsel's services in preparing for the trial that Plaintiff-Creditor chose to have dismissed on the eve of trial, are $5,425.00.

The Motion is granted.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Prevailing Party Fees filed by Reece and Rodina Ventura ("Movant"), in Adversary Proceeding 19-2156, the court having allowed Movant

attorney's fees and expenses for the period July 1 through August 4, 2021, in the final judgment (order), Dckt. 41, Plaintiff having stipulated on the record to the allowance of such fees as a condition of Plaintiff seeking to dismiss this Adversary Proceeding on the eve of trial, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing.

IT IS ORDERED that Movant is awarded reasonable attorney's fees as provided in this court's final judgment (order), Dckt. 41, as prevailing party attorney's fees against Adela Bon Gaunia, the Plaintiff, in the amount of $5,425.00.

2. **21-21153-E-11 KL-2** **REHANA HARBORTH** **Marc Voisenat** **CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY** **7-12-21 [75]**

WILMINGTON SAVINGS FUND SOCIETY, FSB, ET AL VS.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors holding the twenty largest unsecured claims, and Office of the United States Trustee on July 12, 2021. By the court's calculation, 31 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). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Relief from the Automatic Stay is xxxxx.

WILMINGTON SAVINGS FUND SOCIETY, FSB, AS OWNER TRUSTEE OF THE RESIDENTIAL CREDIT OPPORTUNITIES TRUST VI-A ("Movant") seeks relief from the automatic stay with respect to real property commonly known as 3535 Las Pasas Way, Sacramento, California ("Property"). Movant has provided the Declaration of Ron McMahan to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor in Possession has not made four post-petition payments, with a total of $8,749.60 in post-petition payments past due. Declaration, Dckt. 78. Movant also provides evidence that there are 8.5 years worth of pre-petition payments in default, with a pre-petition arrearage of $292,957.78. *Id*.

Movant provides evidence, which is properly authenticated, that the borrower under the Note dated April 25, 2003 is Debtor's ex-husband Robert Harborth, not the Debtor. Exhibit A, Dckt. 80.

DEBTOR'S OPPOSITION

Debtor in Possession filed an Opposition on July 29, 2021. Dckt. 96. Debtor in Possession asserts that Movant is adequately protected because there is an equity cushion where the value stated by Debtor in Possession in Schedule C is no longer applicable because the Property is now valued at $700,000. Debtor in Possession asserts that Movant has not offered any evidence to the decline in value of the Property. Debtor in Possession further argues that Debtor in Possession has commenced making payments to Movant and Movant will receive the benefits of the increase in value.

Debtor in Possession alleges that the Property is necessary for an effective reorganization and that there is a reasonable possibility of a successful reorganization within a reasonable time because Debtor in Possession is now making the mortgage payments and will propose a plan to continue making payments. Moreover, Debtor in Possession argues that in proposing a plan Debtor in Possession does not have to rely on one source of income or asset but that with the current disposable income of $4,512, the Debtor in Possession can propose a repayment plan to cure the arrears over an extended period of time. In addition, Debtor in Possession has other properties/assets that can be liquidated to cure the default and sufficient liquid assets with equity that would allow her to propose a confirmable plan.

Finally, Debtor in Possession argues that if relief were granted, the estate would lose the rental income produced by the Property and Debtor would have to incur further costs of renting another place which would reduce her disposable income to pay other creditors.

Debtor in Possession filed her Declaration in support of the Opposition testifying, under penalty of perjury, to the following:

1. After reviewing property values estimates from Redfin and Trulia, Debtor now values the Property at $700,000.00.

2. Debtor in Possession testified at the Meeting of Creditors that she had an agreement with her ex-husband whereby she agreed to waive spousal support and in return, her ex-husband agreed to keep making the mortgage payments.

3. After learning that her ex-husband was not making payments and that the loan went into default, Debtor contacted Movant to address the default but Movant refused to speak to her because she was not the borrower.

4. AMIP (former holder of the mortgage) began communicating with her in 2020 but she was unable to reach an agreement on cure of the arrears and had to file the current bankruptcy to avoid a foreclosure sale.

5. Debtor in Possession began making mortgage payment to Wilmington Savings Fund Society in July 2021 and will continue to make the monthly contractual payment pending confirmation of a chapter 11 plan.

6. Debtor in Possession testified at her Meeting of Creditors that once the COVID moratorium was lifted, she would increase the rents on the

rental properties to further increase her monthly income.

7. Debtor in Possession intends to go back to the family law court to recover the unpaid mortgage payments from her husband.

8. Debtor in Possession also plans to liquidate what she will receive from the DaValle Trust which she estimates at $20,000; and if necessary, will liquidate her retirement accounts which total approximately $70,000.

9. Debtor in Possession's real property located at 5707 Ivytown Lane, West Sacramento, California has approximately $125,000 in equity that could be used to fund a plan if necessary. Debtor in Possession's real property located at 2888 Azevedo Dr has a lot of equity, and her share is approximately $140,000 that could be used to fund a plan if necessary.

Declaration, Dckt. 97.

MOVANT'S REPLY

Movant filed a Reply on August 5, 2021. Dckt. 99. Movant asserts that Debtor in Possession amended her schedules in an attempt to "make the numbers work" so that relief from the automatic stay would not be granted. Debtor in Possession cannot show that she will be able to cure the pre-petition default. Movant restates that relief should be granted because:

A. Debtor failed to make monthly mortgage payments on Movant's loan for over eight (8) years. Debtor in Possession blames her former husband for failure to pay and fails to explain what efforts if any she took to get her former husband to pay the mortgage.

B. Debtor in Possession failed to include the Property in her Chapter 13 Plan (prior to this case being converted to Chapter 11) despite knowing that no mortgage payments had been paid for more than eight (8) years.

C. Debtor in Possession's statements at the Meeting of Creditors indicate that Debtor does not believe she should make payments. If Debtor in Possession was interested in keeping the Property, she would have made the post-petition payments. Debtor's new attitude regarding the loan comes "too little too late" taking into account the hundreds of thousands of dollars owed by Debtor.

D. Debtor in Possession does not have equity in the Property. Movant relied on Debtor's valuation of $600,000 which she again testified to under penalty of perjury at the Meeting of Creditors. Debtor in Possession did not indicate that said value was incorrect. Yet within weeks of the Meeting, Debtor in Possession filed amended Schedules now showing a value of $700,000. Debtor in Possession has failed to explain why she only valued the subject property at $600,000.00 four (4)

months prior but when faced with the Motion, is increasing that valuation by 16%, or $100,000.00.

E. Even using Debtor in Possession's new valuation of $700,000.00, there is no adequate protection for Movant. Assuming the costs of sale of 8.00% (which Debtor fails to account-for in her Opposition) or $56,000.00, and Movant's claim totaling $554,177.42, there is only an equity cushion of 8.71% ($610,177.42/$700,000.00). Movant arguing that courts have held an equity cushion below 12% is rarely adequate and pointing the court to various cases. *In re LeMay*, 18 B.R. 659 (Bankr. D. Mass. 1982) (7% equity cushion is not adequate); *Ukrainian Sav. And Loan Ass'n v. Trident Corp*., 22 B.R. 491 (Bankr. D.D. Pa., 1982) (8.3% equity cushion is insufficient); *In re Jung End in the Berkshires, Inc.*, 46 B.R. 892, 900 (Bankr. D. Mass. 1985) (8.5% is insufficient); *Suntrust Bank v. Den-Mark Const., Inc.*, 406 B.R. 683, 700-701 (E.D. N.C. 2009) (11% equity cushion inadequate due to other financial factors, including a $12,000 monthly interest payment.).

F. The Property is burdensome and not necessary for an effective reorganization where Debtor in Possession shows a loss of $1,913.00 from the Property each month. Debtor's amended Schedules I and J show that while Debtor in Possession generates only $1,700.00 in monthly income from the Property (by renting the subject property to her niece), Debtor in Possession's monthly expenses related to the Property are more than double, amounting to $3,613.00 – a difference of $1,913.00 (not including any arrearage payments). Moreover, Debtor did not list maintenance-related expenses for the Property.

G. Debtor in Possession's schedules show that she suffers a loss in the total of $1,943.00 each month from all three (3) of her properties combined. Debtor in Possession alleges that her disposable income is $4,512.00, but once the monthly loss of $1,943.00 from Debtor's real properties is accounted for, Debtor in Possession's disposable income is actually $2,569.00. At this amount, even if Debtor in Possession were to use the entire disposable income to pay Movant, it would take Debtor in Possession 114 months to cure the pre-petition arrearage. This is not a reasonable amount of time to cure Movant's pre-petition arrearage.

H. Debtor in Possession alludes to equity from other properties to fund the Plan yet fails to explain what exactly she intends to do, whether it is a sale or refinance.

I. Debtor in Possession is unable to show that she will be able to successfully propose a plan given her inadequate disposable income.

Dckt. 99.

DISCUSSION

The court reviews the prosecution of this Bankruptcy Case by this Debtor in Possession and as the Chapter 13 Debtor prior to conversion. This Bankruptcy Case was filed on March 30, 2021 by Debtor. Debtor's counsel filed a proposed Chapter 13 Plan on April 12, 2021. Dckt. 9. That Chapter 13 Plan did not provide for this secured claim.

Debtor then sought to convert the case to Chapter 11, asserting that she could not fund a Chapter 13 Plan to address her creditor's claims in the limited time period of a Chapter 13 case. Civ. Min., Dckt. 37. In discussing some of the creative financial information provided by Debtor under penalty of perjury, the court noted that Debtor stated having more than $100,000 of income for which Debtor did not have to pay any taxes. *Id*.

In concluding that the case should be converted to Chapter 11, rather than dismissed, the court noted:

> At the hearing, the court considered the arguments of the various parties. Debtor can only proceed under Chapter 11. Rather than subjecting all of the parties in interest to denial of this Motion, further delay, dismissal, and then a filing of a second Chapter 11 case, it is in the best interests of the bankruptcy estate and creditors to convert this case now.

Id. at 8.

The court's order converting this case was entered on May 26, 2021. No Chapter 11 plan has been filed by Debtor.

As discussed above, Debtor in Possession now values the Property at $700,000. Dckt. 95 at 1. In her declaration Debtor in Possession indicates that she testifies to it having this value based upon what she read (heard) what Trulia and Redfin had written (said) on their websites for valuations of the Property she now states the property has a value of $700,000. Declaration, ¶ 3; Dckt. 97. Whether this is her opinion or just repeating what she heard Trulia and Redfin say is not clear.

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $537,492.30 (Declaration, Dckt. 78), while the value of the Property may be north of $600,000.00.

Movant cites to its secured claim being more than eight years in default. While Movant cites to this as showing great harm, Movant does not address why a creditor, with the power to conduct a nonjudicial foreclosure sale, sits for eight years of defaults and fails to act. It could well appear that the owner of the note during the eight years of defaults did not find them significant.

11 U.S.C. § 362(d)(1): Grant Relief for Cause

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief

is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Movant has filed the Declaration of Lior Katz, attorney of record for Movant, who attended the Meeting of Creditors. Mr. Katz testifies under penalty of perjury that at the Meeting of Creditors, Debtor testified that despite living at the Property Debtor had not made any payments on the approximately eight (8) years for three reasons: 1) financial difficulties, 2) Movant's loan was not her debt, and 3) she experienced issues with her divorce. Declaration, Dckt. 79. Moreover, Mr. Katz testifies that Debtor in Possession continued to assert that the loan held by Movant is not her debt. Additionally, Mr. Katz alleges that Debtor in Possession testified that she did not make property tax payments for over eight (8) years and indicated that she had made a payment of approximately $3,000 but that said payment did not clear. *Id.*

Movant argues that it is not adequately protected and thus there is cause for relief from the stay where Debtor in Possession has failed to make mortgage payments for over eight years. At the time that Debtor in Possession filed the instant bankruptcy case as a chapter 13 case, Debtor in Possession failed to list Movant as a creditor. Movant further argues that given Debtor's income and the substantial amount of arrears owed to Movant, it is unlikely that Debtor in Possession will be able to propose a feasible chapter 11 Plan.

Movant has also point out that the Property being Debtor in Possession's principal residence, Debtor in Possession cannot modify the claim and will be required to pay Movant's claim in full within a reasonable time.

Debtor in Possession filed a Declaration explaining that four months after filing her petition she now values the Property at $700,000 and that she has begun making the mortgage payments. This substantial increase appears questionable. Either Debtor provided her original opinion without knowledge of the value, or may be stating the higher value without knowledge of the value.

The court not having a plan and Debtor in Possession providing how she will provide for this claim, the court is at a loss as to whether there is a possibility of an effective reorganization, or whether Debtor is merely seeking to "pay rent" on property with eight and one-half years of defaults.

In the Opposition, Debtor in Possession reports having $4,512 in projected disposable income. Opposition, p. 5:23, 6:1; Dckt. 96. It is not clear what the Debtor in Possession proposes as an adequate protection payment to Creditor. It appears that it is just what the normal mortgage payment would be if the loan was not in default. This provides a substantial fund each month to make a substantial adequate protection payment, which is effectively the Debtor in Possession paying the Bankruptcy Estate to increase the equity in the Property. It would also serve as a strong incentive for the Debtor in Possession to diligently prosecute a plan, enforce the rights against Debtor's ex-husband in state court, and prosecute this case in good faith.

Merely stating that there is value in the property so the Debtor in Possession, after eight and one-half years of no payments, can just stay in there and Movant can run the risk of the historically low interest rates and extraordinarily elevated real estate value bubble bursting is not sufficient.

11 U.S.C. § 362(d)(2)

A debtor has no equity in property when the liens against the property exceed the property's value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. 11 U.S.C. § 362(g)(2); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988).

Movant asserts that there is no equity and that Debtor in Possession does not generate sufficient income to keep the Property, and that the subject property is burdensome and is not necessary to effect a reorganization of this Debtor in Possession.

In the Declaration, Mr. Katz states that Debtor in Possession testified at the Meeting of Creditor she is generating approximately $1,700 per month in rental income from her niece renting the Property. Declaration, Dckt. 79. Movant argues this is suspicious as the niece is an insider and no proof has been provided to support this rental income.

The debt owed to Movant is $537,492.30, where Debtor in Possession originally valued the Property at $600,000. According to Movant, the cost of sale using Debtor's value of $600,000.00 is $48,000.00. Thus, there is no equity in the Property. As stated by Movant, even when taking into account the new valuation of $700,000.00, there is no sufficient equity in the Property. Accounting for the debt owed and costs of sale of 8% (approximately $56,000), the total would be $610,177.42. This leaves approximately $80,000 in equity.

As addressed at the hearing, the court orders the adequate protection requiring the payment of the current monthly principal and interest payments, as well as a $400 a month impound payment for property taxes, as a condition of continuing the hearing. With the adequate protection payment imposed, creditor concurred with the court continuing the hearing.

No other or additional relief is granted by the court.

At the hearing, the parties agreed to continuing the Motion to September 23, 2021.

Supplemental Declaration

On September 14, 2021, Movant filed the Declaration of Ron McMahan in support of the Motion testifying to the following:

1. The Debtor has defaulted on the Order of this Court requiring the Debtor to make ongoing mortgage payments.

2. The August 23, 2021 Order required Debtor to make $400.00 monthly impound payments to the Clerk of the court, and make ongoing principal

and interest payments directly to Movant by the 10th day of each month commencing with the August 2021 payment.

3. Debtor has tendered a payment for August 2021, but said payment was returned for Non-Sufficient Funds. Debtor did not make any timely payment by September 2021. Since filing bankruptcy Debtor has made one single payment of $2,187.40 and no payments were applied to the loan since the original hearing on the Motion on August 12, 2021.

4. Movant maintains that sufficient cause exists to grant the Motion.

Dckt. 103.

September 23, 2021 Hearing

At the hearing xxxxxxxx

3. 18-20456-E-13 MARIA ANDRICHUK — MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
21-2033 FTW-2 Pro Se — 8-5-21 [32]
ANDRICHUK V. CLEAR RECON CORP.

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor (*pro se*) on August 5, 2021. By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss Adversary Proceeding is granted.

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

REVIEW OF FIRST AMENDED ADVERSARY COMPLAINT

The First Amended Adversary Complaint ("FAC") seeks relief pursuant to 11 U.S.C. § 362 and § 105(a) for: (1) filing fraudulent foreclosure and/or real property documents; (2) filing motions with this court for which Plaintiff-Debtor alleges Clear Recon Corp. and Bank of America, collectively "Defendants," had no standing; (3) obtaining an order annulling the automatic stay as they relate to a foreclosure sale conducted by Defendants on March 6, 2017. FAC ¶ 32. It is also asserted that the pleadings filed with the court by Defendants constituted a fraud on the court. *Id.*, ¶ 33.

In Paragraph 33 of the FAC Plaintiff-Debtor also states that the pleadings and conduct at issue were not in connection with Plaintiff-Debtor's bankruptcy case, but a "prior related case," that of an entity named "Hard Stone CBO Trust." *Id.*

Plaintiff-Debtor further asserts that the court in this Adversary Proceeding should rescind orders entered in the Hard Stone CBO Trust bankruptcy case – specifically, the order in that case annulling the automatic stay. *Id.*, ¶ 38. By rescinding the order annulling the stay in the Hard Stone CBO Trust bankruptcy case, that would void the foreclosure sale as against Hard Stone CBO Trust,

Plaintiff-Debtor should be awarded damages for the foreclosure having been conducted in violation of the un-annulled stay in the Hard Stone CBO Trust bankruptcy case. *Id.*

In Paragraph 42 of the FAC, Plaintiff-Debtor further states that based on information and belief "Hard Stone CBO Trust will file a Motion to Set Aside/Vacate the Default Judgment on the Motion to Annul the Automatic Stay." *Id.*

In asserting that Defendants lacked standing in requesting such relief, the FAC alleges the following:

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

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

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

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

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

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

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

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

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

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

REVIEW OF MOTION

The Memorandum of Points and Authorities in Support of Defendant's Motion responds to the FAC's claims as follows:

A. The FAC fails to provide a short and plain statement of the claim showing that the pleader is entitled to relief.

B. The FAC fails to state with particularity the circumstances constituting fraud or mistake as required for a claim alleging fraud.

C. The FAC does not allege a plausible claim for relief because Defendant was entitled to rely on the Court's Order annulling the stay when it went forward at Bank of America's direction to conduct the foreclosure action.

D. The First Claim for Relief fails to state a claim upon which relief may be granted because the FAC admits the court granted the annulment of the automatic stay.

E. An adversary proceeding is improper for the court to determine civil contempt.

PLAINTIFF-DEBTOR'S OPPOSITION

Plaintiff-Debtor filed an Opposition on September 9, 2021. Dckt. 50. Plaintiff-Debtor asserts the following:

1. Plaintiff-Debtor has standing to address the motion to annul in a related case "In Re: Hard Stone CBO Trust" as Plaintiff lost her interest in the Subject Property.

2. Defendant violated the automatic stay because they acted as an agent for Bank of America and Bank of America did not have standing to file its motion to Annul the Automatic Stay.

3. Defendant failed to provide admissible evidence showing it is the proper successor Trustee.

4. If the court finds deficiencies in Plaintiff-Debtor's FAC, Plaintiff-Debtor requests leave to amend.

APPLICABLE LAW

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

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

Under the Supreme Court's formulation of Federal Rule of Civil Procedure 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do.").

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

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

DISCUSSION

Debtor Lacks Standing

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

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

to sue in their own names without joining the person for whose benefit is brought. A review of the docket shows Plaintiff-Debtor is not a party in interest in the Hard Stone CBO Trust bankruptcy case.

Plaintiff-Debtor argues Defendant violated Hard Stone CBO Trust's automatic stay by ordering foreclosure of the property commonly known as 1757 Park Oak Drive, Roseville, California on March 1, 2017. Plaintiff-Debtor claims the foreclosure action was in violation of the automatic stay granted to Hard Stone CBO Trust pursuant to their bankruptcy filing on January 29, 2017.

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

There Was No Automatic Stay for Defendant to Violate

Even if Plaintiff-Debtor had standing, there were no stays with respect to Plaintiff-Debtor in effect that Defendant could have violated. Plaintiff-Debtor alleges Defendant violated the automatic stay by acting as Trustee at the direction of Bank of America during the foreclosure proceedings on March 6, 2017. As Plaintiff-Debtor notes in their FAC, the automatic stay in the Hard Stone CBO Trust case was annulled. Having been annulled, there was no automatic stay in effect when Defendant acted as Trustee in the foreclosure sale in March 2017.

Moreover, Plaintiff-Debtor's present bankruptcy case was filed on January 29, 2018. The Plaintiff-Debtor's bankruptcy case was filed more than eight months after the alleged violations of the automatic stay. Therefore, there is no way the automatic stay in Plaintiff-Debtor's case could have been violated.

In addition, a review of the docket reveals Plaintiff-Debtor did not list a legal, equitable, or other type of interest in "1757 Park Oak Drive, Roseville, California" in their schedules filed with the court. Based on a review of the facts in a light most favorable to Plaintiff, there does not appear to be a violation of the automatic stay.

An Automatic Stay Would Not Apply to Defendant

Even if there was an automatic stay, Defendant was acting as a "Foreclosure Trustee." Foreclosure Trustees under a deed of trust owe no duties regarding the power of sale beyond those specified in both the statutory provisions of California Civil Code Section 2924 and the deed of trust itself. *I. E. Assocs. v. Safeco Title Ins. Co.*, 39 Cal. 3d 281, 288 (1985).

California Civil Code Section 2924 provides no duty for the foreclosure trustee to inquire as to whether there is a bankruptcy proceeding or automatic stay. Additionally, the Assignment of Deed of Trust, Dckt. 18, contains no language that impose duties on Defendant as Foreclosure Trustee to inquire into a bankruptcy proceeding or automatic stay.

As such, since Defendant was acting as a Foreclosure Trustee, even if there was an automatic stay, Defendant breached no duty when proceeding at the direction of Defendant Bank of America with the sale of the property.

Defendant is Not a Creditor

Plaintiff-Debtor alleges Defendant did not file a proof of claim in the present case and as such is not entitled to payment. The issue is not whether Defendant filed a proof of claim, but whether Defendant was exercising rights it had in property of Hard Stone. That Plaintiff-Debtor asserts a foreclosure sale was completed does not alter the rights and interest it had. If Hard Stone disputes such, it can, in a court of appropriate jurisdiction, litigate such bona fide disputes.

Additionally, a creditor with a secured claim is not required to file a proof of claim to preserve that creditor's security interest and right to collateral, but may negatively impact a creditor's ability to get paid on any unsecured portion of the claim. Fed. R. Bankr. P. 3002(a), stating, "A lien that secures a claim against the debtor is not void due only to the failure of an entity to file a proof of claim."

Plaintiff Cannot File an Adversary Complaint to Seek Relief from Judgement

Defendant asserts this adversary complaint seeks relief from the final judgement granting Bank of America relief from the automatic stay. Defendant states that in order to seek rescindment of a final judgement, Federal Rule of Bankruptcy Procedure 60(b)(3) requires Plaintiff-Debtor to seek such relief by filing a motion, not by commencing an adversary proceeding.

Moreover, Ninth Circuit case law has determined that a violation of the automatic stay is treated as civil contempt. *Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 193 (9th Cir. 1995). Federal Rule of Bankruptcy Procedure 9020 provides that allegations of civil contempt are contested matters and thus relief must be requested by motion. Here, Plaintiff-Debtor filed an adversary proceeding instead of a Motion for Violation of the Stay as required by the Bankruptcy Rules.

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

RULING

The Motion to Dismiss Adversary Proceeding is warranted because Plaintiff-Debtor has no standing to assert such claims and to defend a non-existent automatic stay. The Motion is granted.

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

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

IT IS ORDERED that the Motion to Dismiss is granted, and this Adversary Proceeding is dismissed as to Clear Recon Corp. for all claims asserted in the First Amended Complaint.

IT IS FURTHER ORDERED that Plaintiff-Debtor is not granted leave to file a further amended complaint by this order. If Plaintiff-Debtor seeks relief to file a further amended complaint as provided in Federal Rule of Civil Procedure 15(a)(2) and Federal Rule of Bankruptcy Procedure 7015, Plaintiff-Debtor shall include a copy of the proposed further amended complaint filed as an exhibit in support of any such motion.

There being no other defendant parties remaining in this Adversary Proceeding, the Clerk of the Court may close the file for this Adversary Proceeding October 15, 2021, or any time thereafter if no motion to file a further amended complaint has been filed.

5. **18-20456-E-13 MARIA ANDRICHUK** **CONTINUED STATUS CONFERENCE**
21-2033 **RE: AMENDED COMPLAINT**
ANDRICHUK V. CLEAR RECON CORP. **7-13-21 [20]**

Plaintiff's Atty: Pro Se
Defendant's Atty:
Fred T. Winters [Clear Recon Corp.]

Adv. Filed: 5/17/21
Answer: none
Amd. Cmplt. Filed: 7/13/21 [Reissued Summons 7/14/21]
Answer: none

Nature of Action:
Recovery of money/property - other
Injunctive relief - imposition of stay
Declaratory judgment

Notes:
Continued from 8/4/21 [to specially set day and time], Defendant Bank of America, N.A. having filed a Motion to Dismiss the First Amended Complaint.

Reissued Summons [re First Amended Complaint] set status conference for 10/13/21; rescheduled to 10/20/21 at 2:00 p.m. due to change in court's calendar] [Dckt 22]

[FTW-1] Order dismissing without prejudice as moot the Motion to Dismiss Complaint filed 8/13/21 [Dckt 43]

[FTW-2] Defendant Clear Recon Corp's Notice of Hearing and Motion to Dismiss First Amended Adversary Complaint filed 8/5/21 [Dckt 31], set for hearing 9/23/21 at 11:00 a.m.

[SW-2] Order granting Motion to Dismiss as to Bank of America, N.A. for all claims asserted in the First Amended Complaint filed 8/27/21 [Dckt 47]

The Status Conference is xxxxxxx

6. **17-21973-E-7** **JOSE/MARIA PIMENTEL** **MOTION FOR ENTRY OF DEFAULT**
20-2181 **SSA-2 Michael Williams** **JUDGMENT**
EDMONDS V. BETTENCOURT **8-26-21 [38]**

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

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant, Debtors, Debtors' Attorney, and Office of the United States Trustee on August 26, 2021. By the court's calculation, 28 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 the Federal Rules of Civil Procedure 55(b) incorporated into the Federal Rules of Bankruptcy Procedure 7055. Federal Rules of Civil Procedure 55(b) requires notice at least 7 days before the hearing *if* the party against whom default judgment is sought has appeared personally or by a representative. Here, Defendant was served by publication and failed to appear personally. Therefore, notice is not required for the entry of default judgment.

The failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). 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~~.

Plaintiff Irma Edmonds ("Plaintiff-Trustee") filed the instant Motion for Default Judgment on August 26, 2021. Dckt. 38. Plaintiff-Trustee seeks an entry of default judgment against Joao Bettencourt, aka John Bettencourt ("Defendant") in the instant Adversary Proceeding No. 20-02181.

This Adversary Proceeding was commenced on December 4, 2020. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on December 4, 2020. Dckt. 4. The summons was reissued by the Clerk on February 3, 2021. Dckt. 10. The summons was again reissued on April 28, 2021. The complaint and summons were properly served on Defendant through publication. Dckt. 21.

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on July 8, 2021. Dckt. 24.

REVIEW OF COMPLAINT

Plaintiff-Trustee filed a complaint for injunctive relief against Defendant. The Complaint contains the following general allegations as summarized by the court:

A. Plaintiff-Trustee was the duly appointed Trustee in the underlying Chapter 7 bankruptcy case involving Debtors Jose L. Pimentel and Maria Z. Pimentel.

B. Debtors and Defendant Joao Bettencourt aka John Bettencourt ("Defendant") entered into a written agreement on March 27, 2017 where Debtors agreed to sell seventy-one (71) Holstein cows for a price of $82,500.00.

C. The seventy-one (71) Holstein cows are property of the bankruptcy estate under 11 U.S.C. § 541.

D. Plaintiff-Trustee has the duty and authorization to collect this debt under 11 U.S.C. § § 542(a); 704 et seq.

First Claim for Relief—Enforcement of Written Contract

Plaintiff-Trustee alleges the following for the First Cause of Action:

A. Defendant made sporadic payments to Plaintiff-Trustee from January 23, 2018 through April, 2020.

B. Plaintiff-Trustee accepted payments from Defendant, although not pursuant to actual terms and conditions set forth in the agreement.

C. The full balance was required to be paid by March 5, 2020.

D. Plaintiff-Trustee's attorney attempted to contact Defendant in April 2020. However, Defendant's only known phone number had been disconnected.

E. Plaintiff-Trustee's attorney sent a letter on September 1, 2020 to inform Defendant of payments in default.

F. Plaintiff-Trustee has fulfilled all conditions, covenants, and promises on delivery of the cows.

G. Defendant breached the agreement by failing to pay the amount due.

H. As a result of Defendant's breach, Plaintiff-Trustee has suffered damages in the principal sum of $54,600.00 since April 2020.

Second Claim for Relief—Account Stated

Plaintiff-Trustee alleges the following for the Second Cause of Action:

A. Pursuant to the written agreement, Defendant remains indebted to Plaintiff-Trustee in the principal sum of $54,600.00, plus reasonable attorney's fees, costs of suit, and reasonable interest to accrue on any judgment rendered.

Third Claim for Relief—Enforcement of Contractual Attorney's Fees and Costs

Plaintiff-Trustee alleges the following for the Third Cause of Action:

A. Plaintiff-Trustee, through her attorney, had to pursue legal claims and enforce rights held by the bankruptcy estate.

B. The written agreement stipulates for the defaulting party, Defendant, to be liable for actual and incidental damages, court costs, attorney's fees, and any available equitable relief.

C. Plaintiff-Trustee requests reasonable fees and costs.

Prayer

Plaintiff-Trustee requests the following relief in the Complaint's prayer:

A. Damages in the principal sum of $54,600.00;

B. Award attorneys' fees and costs.

REVIEW OF THE MOTION

Minimum Pleading Requirements for a Motion

The Supreme Court requires that the motion itself state with particularity the grounds upon which the relief is requested. FED. R. BANKR. P. 7007. The Rule does not allow the motion to merely be a direction to the court to "read every document in the file and glean from that what the grounds should be for the motion." That "state with particularity" requirement is not unique to the Bankruptcy Rules and is also found in Federal Rule of Civil Procedure 7(b).

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. *See* 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545

(2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. *See* 556 U.S. 662 (2009).

Federal Rule of Bankruptcy Procedure 9013 incorporates the "state with particularity" requirement of Federal Rule of Civil Procedure 7(b), which is also incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7007. Interestingly, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court endorsed a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

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

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

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

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

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

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

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

Not stating with particularity the grounds in a motion can be used as a tool to abuse other parties to a proceeding, hiding from those parties grounds upon which a motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. By hiding possible grounds in citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning any actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

Grounds Stated in Motion

Movant has not stated with particularity the grounds for said motion to be granted. Instead, Movant has merely provided the procedural history of the case. The insufficient statements made by Movant are:

A. The complaint was initially filed on December 4, 2020.

B. The summons and complaint were initially served on Defendant on December 9, 2020 at all known addresses for him.

C. The above documents came back unclaimed following service.

D. Plaintiff-Trustee's counsel obtain approval by the Court granting service by publication.

E. Publication and notice was completed and a Certificate/Proof of Publication was filed on May 19, 2021.

F. Entry of Default and Order re: Default Judgment Procedures was filed on July 8, 2021.

G. Plaintiff-Trustee, through counsel, requests an entry of judgment consistent with Plaintiff's complaint and underlying prayer.

Those grounds as stated with "particularity" in the Motion are insufficient. Presumably, Movant believed that the court would grant the motion based on these facts, but the "grounds" cannot merely state the procedural time line of this case.

However, Plaintiff-Trustee has filed a Memorandum of Points and Authorities in Support of Motion for Entry of Default Judgment ("MPA"). In Plaintiff-Trustee's MPA, Plaintiff-Trustee states legal and factual arguments with particularity that give this court grounds to adequately decide on the merits of the Motion for Entry of Default Judgment.

The court presumes that Plaintiff-Trustee's experienced bankruptcy counsel will request the court to consider the "Mothorities" and treat the statement of grounds in the Points and Authorities as part of the Motion based on the facts and circumstances of this Adversary Proceeding.

These facts and circumstances identified by counsel for Plaintiff-Trustee at the hearing are:

xxxxxxx

Review of "Mothorities" Grounds and Relief Requested

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *Cashco Fin. Servs. v. McGee (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.*

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. 3d 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, because the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors that 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. 3d ed.)); *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62 (B.A.P. 9th Cir. 1994).

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

First Claim for Relief: Enforcement of Written Contract

The elements for a breach of contract include the following:

(1) There must exist a valid contract,
(2) Plaintiff's performance or excuse for nonperformance,
(3) Defendant's breach and failure to perform what the contract required of them,

(4) Damages to the Plaintiff resulting from Defendant's breach of contract.

Richman v. Hartley, 224 Cal. App. 4th 1182, 1186 (2014).

Pursuant to 11 U.S.C. § 541 (a)(1), the bankruptcy estate includes all legal or equitable interests of the debtor in property at the commencement of the case. Under 11 U.S.C. § 542(b), an entity that owes a debt that is property of the bankruptcy estate shall pay such debt to the trustee.

Here, a written contract was executed on March 27, 2017. The written contract is attached to the Complaint as Exhibit 1, Dckt. 1, and is also attached to Plaintiff-Trustee's "Exhibits in Support of Motion for Entry of Default Judgment" as Exhibit 1. Dckt. 31. The written contract was signed and dated by Debtor Joe Pimentel and Defendant. The essential terms of the contract are clear: seventy-one (71) Holstein cows were to be sold from Mr. Pimentel to Defendant in return of $85,200.00 given in monthly installments. The first payment was to be $2,000.00 on the date of possession, followed by $2,400.00 on the fifth of each month for the remainder of the balance. There was a valid written contract.

As indicated in the declaration of Maria Z. Pimentel, Dckt. 29, Mr. Pimentel fulfilled his obligations under the contract by having delivered the seventy-one (71) Holstein cows. As such, Debtor Joe Pimentel performed what was required of him in the contract.

The contract existed at the time Debtor filed for Chapter 12 and subsequently converted their case to Chapter 7. As such, a legal interest existed in the Debtor's property at the commencement of the case. Therefore, the payments resulting from this contract is property of the bankruptcy estate. Payments to the Plaintiff-Trustee were proper.

From Plaintiff-Trustee's investigation, Defendant did not adhere to the terms and conditions of the contract. As established in Exhibit 2 of the "Exhibits in Support of Motion for Entry of Default Judgment," Dckt. 31, Defendant failed to timely make payments to Plaintiff-Trustee as required by law. As such, Defendant is in breach of the contract.

At the time of filing of the complaint, these damages were $54,600.00. However, after further review, Plaintiff-Trustee has determined that these damages are incorrect. Dckt. 28. The true amount owed on the account is $47,400.00. *Id.*

Second Claim for Relief: Account Stated

An account stated is an agreement between parties that establishes a debtor-creditor relationship. *Leighton v. Forster*, 8 Cal. App. 5th 467, 491 (2017). The agreement must state a particular amount is due and owed from the debtor to the creditor. *Id.* The debtor must expressly or impliedly promise to pay creditor the amount determined to be owed. *Id*. An account stated action is not based on the original terms of the contract, but rather on the balance agreed to by the parties. *Gardner v. Watson*, 170 Cal. 570, 574 (1915).

Here, Plaintiff-Trustee claims in her second claim for relief that Defendant owes her money on an account stated. As established by the written contract, there was an agreement between Defendant and Debtor Joe Pimentel for the sale of seventy-one (71) Holstein cows for $85,200.00. As property of the bankruptcy estate, the proceeds from the sale became due to Plaintiff-Trustee and Defendant failed to

timely pay Plaintiff-Trustee.

Although Plaintiff-Trustee has provided evidence of the existing contract between Debtor Joe Pimentel and Defendant, Plaintiff-Trustee has failed to provide evidence of a subsequent agreement between Plaintiff-Trustee and Defendant or Debtors and Defendant that recognizes a debtor-creditor relationship.

As there is no evidence of an agreement between any parties that establish a debtor-creditor relationship, an account stated for the sum of $47,400.00 does not exist.

Third Claim for Relief: Enforcement of Contractual Attorney's Fees and Costs

Plaintiff-Trustee seeks attorney's fees. Pursuant to California Civil Code § 1717(a),attorneys fees can be recovered if the contract specifically provides attorney's fees, which are incurred to enforce the contract, to the prevailing party.

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

California Civil Code § 1717(a) provides:

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

Here, there is a request for attorney fees from Plaintiff-Trustee in the complaint as requested in the contract. Plaintiff-Trustee provides evidence at Paragraph 2 of the contract provision. Exhibit 1, Dckt. 1. However, under the Federal Rules of Civil Procedure 54 as incorporated in the Federal Rules of Bankruptcy Procedure 7054, attorney fees must be requested "no later than 14 days after the entry of judgment" in a post-judgment motion.

In the Mothorities, Plaintiff-Trustee identifies the amount of legal fees to be $4,020.00 and the costs to be $860.64. Dckt. 34 at 4. Detailed billing records are provided as Exhibit 3 in support of the Motion. Dckt. 31.

The court interprets the Mothorities to request that the court combine the award of attorney's fees and costs with the unopposed Motion for Entry of Default Judgment. Federal Rule of Civil Procedure 54(d) provides that prevailing party fees and costs shall be requested by post-judgment motion unless a "court order provides otherwise." The Mothorities is seeking to have an order providing otherwise based on the facts and circumstances of this Adversary Proceeding.

The key facts and circumstances in the Mothorities is that the attorney's fees are a modest (at

least as attorney's fees go) $4,020.00 and the $860.64 in expenses are documented. If the court were to require a post-judgment motion, the attorney's fees could well increase by $2,500.00, a more than 50% increase for the judgment debtor to pay.

Given the modest amount of attorney's fees and the possible financial prejudice to the judgment debtor if a separate motion is required, the court orders that the award of prevailing party attorney's fees be included in the Motion for Entry of Default Judgment.

The court determines that prevailing party attorney's fees of $4,020.00 and costs of $864.00 are reasonable, necessary, and documented by the evidence presented, and therefore are awarded as part of the judgment.

CONCLUSION

Applying these factors, the court finds that Plaintiff-Trustee's first claim of relief for enforcement of the written contract is granted and the court awards the attorney's fees and costs. However, Plaintiff-Trustee's second claim for relief based on an account stated is denied.

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

> Findings of Fact and Conclusions of Law are stated in Civil Minutes for the hearing.
>
> The Motion for Entry of Default Judgment and for prevailing party attorney's fees filed by Irma Edmonds ("Plaintiff-Trustee") 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 in part. The court shall enter judgment determining that Defendant breached the contract in the purchase of seventy-one (71) Holstein cows and owes a remaining balance of $47,400.00.
>
> **IT IS FURTHER ORDERED** that Plaintiff is awarded $4,020.00 in attorney's fees and $864.00 in expenses as the prevailing party.
>
> **IT IS FURTHER ORDERED** that the determination and award of prevailing party attorney's fees and costs, based on the facts and circumstances of this Adversary Proceeding (and to save the judgment debtor from having to pay additional reasonable attorney's fees and costs for a post-judgment motion for attorney's fees and costs (which could increase the attorney's fees by more than 50%) shall and is included in the Motion for Entry of Default Judgment.

IT IS FURTHER ORDERED that the claim for relief based on an account stated is denied and judgment shall be entered for the Defendant on that claim.

Counsel for the Plaintiff-Trustee shall prepare a proposed judgment, including attorney's fees and costs for the prevailing party, as ordered above, and lodge said proposed judgment with the court.

7. **20-23267-E-7 SJT-0** **SHON/JILL TREANOR** **STATUS CONFERENCE RE: MOTION COURT INVESTIGATION INTO EXCESSIVE FEE'S CHARGED FOR SERVICES FAILED TO BE RENDERED PROFESSIONALLY BY GARY FRALEY AND PETE MACALUSO**
9-13-21 [341]

Debtors' Atty: Pro So

Notes:
Set by order of the court filed 9/15/21 [Dckt 343]. No reply or opposition pleadings required to be filed prior to the hearing. Ordered to appear in person (not telephonically): Shon Treanor, Debtor; Jill Treanor, Debtor; Hank Spacone, Chapter 7 Trustee; Russell Cunningham, Esq., Counsel for the Chapter 7 Trustee; Assistant U.S. Trustee assigned to this case with knowledge of whether relief will be sought by the U.S. Trustee pursuant to 11 U.S.C. § 329 in this case.

The Status Conference is xxxxxxx

SEPTEMBER 23, 2021 STATUS CONFERENCE

On September 13, 2021, Shon Treanor and Jill Treanor, the Debtor, filed a Motion titled:

COURT INVESTIGATION INTO EXCESSIVE FEE'S CHARGED FOR SERVICES FAILED TO BE RENDERED PROFESSIONALLY BY GARY FRAYLEY [sic] AND PETE MACALUSO

Motion, Dckt. 341 (Emphasis in original). In the Motion, Debtors request the "Court to investigate Gary Fraley and Peter Macaluso under Bankruptcy Court Rule 2017 to investigate why both attorneys' charged us for services that were never completed or rendered per contracted professional promises that were never produced ever." Motion, p. 1:19-21; Dckt. 341. In the Motion Debtors seek to have the court become an investigatory agency, a role that is not the court's.

In the Motion, Debtors repeat various allegations of state employees, including state court judges, obstructing justice. They call into question the conduct of the Chapter 7 Trustee and Trustee's counsel.

Debtors state that they desire that the court first investigate the alleged violation by their former attorneys and then for the court, based on the court's investigation, order funds returned to Debtors.

With respect to the fees charged and paid to attorneys relating to bankruptcy cases, Congress provides in Bankruptcy Code § 329 (emphasis added):

> § 329. Debtor's transactions with attorneys
>
> (a) **Any attorney representing a debtor in a case under this title, or in connection with such a case**, whether or not such attorney applies for compensation under this title, **shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation** of or in connection with the case by such attorney, and the source of such compensation.
>
> (b) If such **compensation exceeds the reasonable value of any such services**, the court may **cancel any such agreement**, or order the return of any such payment, to the extent excessive, to –
>
> (1) the estate, if the property transferred—
>
> (A) would have been property of the estate; or
>
> (B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or
>
> (2) the entity that made such payment.

Congress empowers the bankruptcy judge to address attorney's fees paid by debtors to their attorneys in connection with bankruptcy cases.:

The United States Supreme Court providing the rules relating to the court adjudicating disputes concerning debtor counsel fees. This Rule, as cited by Debtors, provides (emphasis added):

> Rule 2017. Examination of Debtor's Transactions with Debtor's Attorney
>
> (a) Payment or transfer to attorney before order for relief. **On motion by any party in interest** or on **the court's own initiative**, the **court** after notice and a hearing **may determine whether any payment of money or any transfer of property by the debtor**, made **directly or indirectly and in contemplation of the filing of a petition under the Code** by or against the debtor or before entry of the order for relief in an involuntary case, **to an attorney for services rendered or to be rendered is excessive**.
>
> (b) Payment or transfer to attorney after order for relief. On motion by the debtor, the United States trustee, or on the court's own initiative, the court after notice and a hearing may **determine whether any payment of money or any transfer**

> **of property, or any agreement therefor, by the debtor to an attorney after entry of an order for relief in a case under the Code is excessive**, whether the payment or transfer is made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to the case.

This Rule recognizes that it is the court which makes the decision, as federal courts do for matters presented to them, based upon the information, evidence and arguments presented by the parties. The court can order such evidence, arguments, and law be presented by parties, but the court does not investigate, advocate, and prosecute rights and positions of parties.

Here, Debtors call into question $30,000.00 (by Debtors' calculation) paid to Gary Fraley for the filing of two bankruptcy cases for the two debtors. No cases were filed. The asset transferred was Debtors' travel trailer. Debtors originally claimed an exemption in this asset, but when new counsel (Peter Macaluso) substituted in as counsel for Debtors, they amended the exemption so Debtors could claim a $100,000.00 homestead exemption in real property that is also property of the estate, rather than the $21,620.00 wildcard exemption in asserted claims against Gary Fraley. First Amended Schedule C, Dckt. 19; Second Amended Schedule C, Dckt. 139. With this Second Amendment, Debtors were able to exempt five times more in value than they originally had claimed as exempt.

The court further notes that in other pleadings, Debtors state that the transfer of the trailer was to pay Mr. Fraley $9,999.00 for filing a Chapter 7 case for debtor Shon Treanor and $9,999.00 for debtor Jill Treanor. Stmt of Fin Affairs, Question 18; Dckt. 1.

No Certificate of Service was filed for Debtors' Motion, with the Motion on its face stating that there is a September 22, 2021 hearing date on the Motion. That is not a Sacramento law and motion hearing date.

As of the court's issuing of its September 15, 2021 Status Conference Order, there was not a motion and supporting evidence before the court for a determination of the attorney's fees for Debtors' various counsel pursuant to 11 U.S.C. § 329. The court has not issued an order for parties to provide pleading, evidence, and legal authorities concerning fees paid to Gary Fraley (stated to be $30,000.00 in the Motion) and Peter Macaluso (stated to be $10,000.00 in the Motion).

In addition to the Debtors, there are the U.S. Trustee, within the Department of Justice, and the Chapter 7 Trustee, a fiduciary of the bankruptcy estate in this case, who are parties in interest to seek determination of fees pursuant to 11 U.S.C. § 329. The Trailer transferred to Mr. Fraley, and the right to recover it, is property of the bankruptcy estate to be recovered by the Trustee, in addition to standing to seek relief pursuant to 11 U.S.C. § 329.

In addition to these other parties in interest, the Debtors have standing to seek determination of reasonable fees pursuant to 11 U.S.C. § 329 and the recovery of fees in excess of the reasonable amount. Seeking an order for the court to investigate, prosecute, and advocate for Debtors or the bankruptcy estate is not seeking relief pursuant to 11 U.S.C. § 329.

A review of the Docket in this Chapter 7 case (with 341 docket entries) reflects a dysfunctionality in the prosecution of this case. Rather than continue that dysfunction by either denying

the Motion without prejudice or allowing Debtors to stumble through the request for relief not properly allowable, the court sets a Status and Scheduling Conference, if anyone seeks to prosecute a Motion for Relief pursuant to 11 U.S.C. § 329.

Chapter 7 Trustee Status Report

The court's September 15, 2021 Order setting the Status Conference expressly states: "that no reply or opposition pleadings are required to be filed prior to the hearing at which the Status and Scheduling Conference will be conducted. . . ;" Order, p. 4:20-21, Dckt. 343; the Chapter 7 Trustee filed a Status Report for this matter on September 21, 2021. Dckt. 346.

With respect to the asset transferred to Mr. Fraley by Debtors for his representation of Debtors in a Chapter 7 bankruptcy case, the Trustee reports (identified by the paragraph number used in the Status Report):

> 3. Among the assets of the Bankruptcy Estate is a claim the Debtors contend arises from the April 2020 transfer ("Pre-Petition Transfer") of a 2019 Keystone Outback Ultra-Lite Toy Hauler VIN 4YDT2402XKB451120 ("Trailer") to the Law Firm and Attorney (collectively "Fraley Parties") in exchange for legal services rendered the Debtors to be rendered in connection with the Bankruptcy Case. The attorney client relationship between the Debtors and the Fraley Parties terminated before the Petition Date and the Bankruptcy Case was commenced through the services of other counsel.
>
> 4. The Fraley Parties have provided the Trustee with an itemized billing statement:
>
> > (a) attesting 38 hours devoted to the Debtors' contemplated bankruptcy case during the period March 18, 2020, through April 6, 2020; and
> >
> > (b) asserting that the value of those services aggregated $10,475.
>
> 5. The Fraley Parties have provided the Trustee with an appraisal (opining without inspection) that the forced liquidation value of the Trailer, without deduction for selling costs) was $19,000 in April 2020 and increased to $21,000 in June 2021.
>
> 6. Subject to Bankruptcy Court approval, the Trustee and Fraley Parties have reached a resolution, the principal terms of which are that:
>
> > (a) Settlement Payment. The Fraley Parties shall pay the Trustee $10,000 as follows: (a) $5,000 deposit upon of execution of this Agreement; and (b) $5,000 within 7 calendar days of entry of the approval order.

> (b) Mutual Release. The Trustee and Fraley Parties shall execute broad mutual releases and waive the provision of California Civil Code Section 1542.

Status Report, Dckt. 346 at 2.

In reading this Status Report, several initial points come to the court's mind. This is a Chapter 7 case and Mr. Fraley was hired to file a Chapter 7 case for Debtors. It is stated that there are itemized billings provided by Mr. Fraley for $10,475 of fees in preparation for the filing of the Chapter 7 bankruptcy cases. Such $10,000 in fees is well outside the norm for filing a Chapter 7 case in this District.

Exhibit B (Dckt. 352) filed in Support of the Motion to Approve Compromise are the billing records to support the $10,475 in fees. The billing records also include statements by Mr. Fraley, not under penalty of perjury about the contract was "**NEVER AN HOURLY CONTRACT**," (EMPHASIS IN ORIGINAL), and that,

> 3. The contract for a JOINT filing was $9,999 plus filing fees. When it was determined that the Treanors were going to fail the Current Monthly Income the decision was to do two separate case filing due to the fact that they were separated. Mrs. Treanor then signed a separate contract for the second case at $9,999 = $19,998. Both signed a waiver of conflict of interest. With transfer costs of $860.50 + $400 That total would be $20,858.50.
> . . .
> 5. Filing the cases was thwarted by client's own actions in refusing to co-operate and by terminating the representation as they stated under oath. I did send a termination email later.

Dckt. 352 at 7.

The Motion to Approve Compromise does not provide the court with evidence or analysis why the court should conclude that allowing $10,475 for preparation to file a Chapter 7 case (which was never filed and prosecuted by Mr. Fraley) are proper for the services rendered.

The Trustee also stated in the Status Report and Motion to Compromise that the Trustee is relying on a valuation (which is provided by a bankruptcy experienced auction company, that the "forced liquidation value" for the trailer that is at the center of the dispute with Mr. Fraley is only $21,000. The West Auction Report is provided as Exhibit C (Dckt. 352 at 8) in support of the Motion to Approve Compromise.

This Auction Report has not been prepared for the Trustee but for Mr. Fraley. It expressly states:

> There are two intended uses of this appraisal. The **first intended use of this appraisal is to determine the forced liquidation value of the travel trailer** when you took possession in April 2020. The **second intended use of this appraisal is to determine a current forced liquidation value**. Any other use of this appraisal renders it null and void. Value conclusions are subject to critical

assumptions and limiting conditions set forth herein.

Dckt. 352 at 7 (emphasis added). On its face, this valuation is not for the fair market value of the trailer, nor for the orderly marketing and sale of the trailer, but for a **Forced Liquidation Value**. While a Chapter 7 trustee duties include:

> § 704. Duties of trustee
>
> (a) The trustee shall—
>
> (1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest; . . . .;

such does not direct a trustee to sell property in the least lucrative way possible because an opposing party demands it. 11 U.S.C. § 704(a)(1).

In the Status Report the Trustee states that in addition to the proposed settlement providing for "an efficient administration of the Bankruptcy Estate," which is something a trustee should do, he also states that "a net positive return to creditors on account of the claim will be ensured." Status Report, ¶ 7; Dckt. 346.

Neither in the Status Report does the Trustee state whether the net monies from the proposed settlement will go into the estate to distribute to creditors, or whether the net settlement monies will go to the Debtors as surplus.

The court's recollection is that there is a $1,100,000 property to be administered by the Trustee, having succeeded to the Debtor's right as the beneficiary of the Estate of Cheryl Gortmeyer. Amended Schedule C, Part 1 § 2; Dckt. 139 at 10. Debtors have claimed a $100,000 homestead exemption in the property, and it appears to be minimally encumbered. *Id*., Schedule A/B, § 25. [Fn.1.]

FN. 1. While merely because something is on the internet does not make it true, the court notes that Zillow.com states this property to have a value of $1,699,000. https://www.zillow.com/homes/4390-Emerald-Ridge-Ln-Fairfield,-CA-94534_rb/15726294_zpid/

In light of the substantial claims filed in this case, it appears that sale of said property will be necessary, and the case not being resolved by the compromise of the dispute concerning the trailer. Thus, in the trustee fulfilling his fiduciary duties to the bankruptcy estate (the Trustee has such duties to the bankruptcy estate and not any creditor or the Debtors), this compromise is of the surplus assets and interests which ultimately would go back to the Debtors. Clearly, the Debtors want to fight the payment of trailer to Mr. Fraley for forced liquidation proceeds of $10,000.

In addressing the dysfunctionality of this case, the court notes that Debtors appear to have pursued prosecution of this case in a manner to drive up administrative expenses for the estate, have sought to have this court exceed its jurisdiction, and to use this federal bankruptcy case as a device to assert and have litigated rights and interests of non-bankruptcy party family members. This has been

part of Debtors' belief that the world is allied against them and their family members to steal assets from their family.

Discussion at September 23, 2021 Status Conference

xxxxxxx