UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

October 3, 2013 at 1:30 p.m.

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1. **09-34904-E-13 WILLIAM/DIANE METZELAAR** **CONTINUED MOTION FOR ENTRY OF**
13-2015 PGM-3 **DEFAULT JUDGMENT**
METZELAAR ET AL V. UNITED **7-10-13 [44]**
GUARANTY RESIDENTIAL INSURANCE

CASE DISMISSED 9-17-13

Final Ruling: The case having previously been dismissed, the Motion is dismissed as moot.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Entry of Default Judgment having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is dismissed as moot, the case having been dismissed.

2. **13-24512-E-13 AMOS SNELL**
13-2171 DIS-1
SNELL V. DEUTSCHE BANK NATIONAL TRUST COMPANY ET AL
ADV. DISMISSED 9-9-13

CASE DISMISSED 9-9-13

MOTION TO DISMISS ADVERSARY PROCEEDING AND/OR MOTION FOR A MORE DEFINITE STATEMENT
8-29-13 [50]

APPEARANCE OF TIMOTHY M. RYAN, COUNSEL FOR THE LAW OFFICE OF LES ZIEVE AND JENNIFER BENDER REQUIRED FOR OCTOBER 3, 2013 HEARING

TELEPHONIC APPEARANCE PERMITTED

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff (pro se) and Attorney for Defendant on August 29, 2013. By the courts calculation, 35 days notice was provided. 28 days notice is required.

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

The court's tentative decision is to grant the Motion to Dismiss Adversary Proceeding. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Defendants Law Offices of Les Zieve and Jennifer Bender ("Defendants") move for an order dismissing the adversary proceeding pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendants argue that the Plaintiff failed to allege any conduct that would give rise to a FDCPA claim, that they are subject to the litigation privilege and that the underlying bankruptcy case has been dismissed.

STANDARD

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits, and 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 which would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether a motion to dismiss is to be granted should be resolved in favor of the pleader. *Pond v. General Electric Company*, 256 F.2d 824, 826-827 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true. *Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

A complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-66 (2007). ("[A] plaintiff's obligation to provide 'grounds' of his 'entitle[ment]' to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.*, citing to 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"). However, all allegations of fact by the party opposing the motion are accepted as true and are construed in the light most favorable to that party. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988). Federal Rule of Civil Procedure 8, made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7008, requires that complaints contain a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. Fed. R. Civ. P. 8(a). Under the Supreme Court's most recent formulation of Civil Rule 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, 129* S.Ct 1937, 1954 (2009).

When hearing a Rule 12(b)(6) motion to dismiss a district court may 'dispose of the motion by dismissal rather than judgment.'" *Technology Licensing Corp. v. Technicolor USA, Inc.*, 2010 WL 4070208 (E.D. Cal. Oct. 18, 2010) (quoting *Sprint Telephony PCS, L.P. v. County of San Diego*, 311 F. Supp. 2d 898, 902 03 (S.D. Cal.2004)).

In ruling on a 12(b)(6) motion to dismiss, 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 be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

DISCUSSION

Here, the complaint does not set forth enough factual matter to establish plausible grounds for the relief sought against Defendants.

An examination of the Plaintiff's 26-page Complaint (with an additional 9 pages of exhibits) is difficult to follow. From what the court can discern, Plaintiff alleges Defendants have assisted Deutsche Bank in filing civil cases and papers to seize the property of Plaintiff and hundreds of securitized trusts and filing false and fabricated Assignments of Deeds of Trust, grant deeds and Trustees deed upon sale. Complaint, 9-10. The thrust of the allegations appear that these Defendants assisted Deutsche Bank National Trust Company in preparing, filing and signing the fraudulent recordings.

The sole action for relief under the Complaint appears to be under the Federal Fair Debt Collection Practices Act ("FDCPA") 15 U.S.C. § 1692 et seq. Complaint 23:4-6. However, to obtain relief under the FDCPA, Defendants must be "debt collectors" as defined in the statute.

15 U.S.C. § 1692a(6) defines "debt collector" as:

> any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

Here, Plaintiff has not shown that Defendants are "debt collectors" or how they had any part in the foreclosure on the subject real property. The allegations regarding the fraudulent loan, assignment and trustee's sale do not state how the Defendants, were involved.

Even if the Defendants were "debt collectors," the complaint fails to set forth enough factual matter to establish plausible grounds for relief against any of the Defendants. Even if all the allegations set forth against Defendants in the complaint were true, the cause of action would fail as a matter of law. There is not sufficient factual allegations against Defendants to show any violation of the FDCPA. No specific factual wrongdoings are alleged in "assisting" Deutsche Bank National Trust Company in their allegedly fraudulent loan, assignment or trustee's sale. As such, the Motion to Dismiss is granted.

The court has dismissed the Debtor's bankruptcy case and there is no reason for this court exercising federal court jurisdiction arising under 28 U.S.C. § 1334 to determine any substantive issues or conducting any further proceedings on amended complaints in this Adversary Proceeding. The Motion is dismissed without prejudice, with no leave to amend.

LAW OFFICE OF LES ZIEVE AND JENNIFER BENDER STATEMENT OF NON-OPPOSITION TO ITS OWN MOTION

Timothy Ryan, counsel for Movant, filed his statement of Non-Opposition to his motion to dismiss the adversary proceeding. The pleading prepared by Mr. Ryan is titled:

> REPLY RE: NON-OPPOSITION

TO DEFENDANTS LAW
OFFICES OF LES ZIEVE AND
JENNIFER BENDERS' MOTION
TO DISMISS PLAINTIFF'S
COMPLAINT; DECLARATION
OF TIMOTHY M. RYAN

The court is confused as to why or how Mr. Ryan is filing his non-opposition to his own motion. If he intended to state that no opposition was filed to his Motion, the title would be something like:

NOTICE THAT NO OPPOSITION
HAS BEEN FILED TO MOTION
TO DISMISS

It appears that counsel has intentionally filed a pleading titled to mislead the Clerk of the Court and the court to believe that the Plaintiff was filing a non-opposition to the Motion to Dismiss.

Though counsel's law firm regularly appears in this District, he appears to have intentionally ignored the basic pleading rules in this District – the Motion, Points and Authorities, each Declaration, and the Exhibits are filed as separate electronic documents. Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Pleadings.

Compliance with these basic pleading and document preparation rules are so simple and very few other attorneys fail to comply with filing separate electronic pleadings. The failure to comply evidences either an intentional violation of the rules or that counsel is unable to comply with such simple rules. Neither foretells a successful practice of law.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is dismissed as moot, the case having been dismissed.

3. 13-20155-E-13 JEFFREY AKZAM
13-2103
AKZAM ET AL V. OPTION ONE MORTGAGE CORPORATION ET AL

CONTINUED STATUS CONFERENCE RE: COMPLAINT
3-26-13 [1]

Plaintiff's Atty: Pro Se
Defendant's Atty: Nichole L. Glowin

Adv. Filed: 3/26/13
Amd Cmplt Filed: 8/12/13

Answer: none

Nature of Action:
Injunctive relief - imposition of stay
Injunctive relief - other
Recovery of money/property - preference
Recovery of money/property - other
Validity, priority or extent of lien or other interest in property

Notes:

Continued from 9/4/13 to be conducted in conjunction with the court's Order to Show Cause why it should not abstain pursuant to 28 U.S.C. § 1334(c)(1) from conducting any further proceedings in this Adversary Proceeding.

Amended Motion to Dismiss Plaintiff's First Amended Complaint Filed by Defendant, Sand Canyon Corporation fka Option One Mortgage Corporation; Memorandum of Point and Authorities filed 9/18/13 [Dckt 82], set for hearing 10/24/13 at 1:30 p.m.

4. 13-20155-E-13 JEFFREY AKZAM **ORDER TO SHOW CAUSE**
13-2103 RHS-1 **9-9-13 [76]**
AKZAM ET AL V. OPTION ONE MORTGAGE CORPORATION ET AL

Notice Provided: The Order to Show Cause was served by the Clerk of the Court through the Bankruptcy Noticing Center on all parties, on September 10, 2013. 23 days notice of the hearing was provided.

The Court's tentative decision is to sustain the Order to Show Cause and abstain from conducting any further hearings in this Adversary Proceeding.

BACKGROUND

The court ordered that Jeffrey Akzam and Dianne Akzam, Plaintiffs, in the above-captioned case, to appear to show cause as to why the court should not abstain from hearing the issues in this Adversary Proceeding pursuant to 28 U.S.C. § 1334(c)(1).

This Adversary Proceeding has been commenced by the Chapter 13 Debtor, Jeffrey Akzam, and his sister, Dianne Akzam. The court determined on September 4, 2013, that the Debtor's Chapter 13 bankruptcy case should be dismissed. The court review of the Plaintiff's Second Amended Complaint is summarized as follows:

A. On January 7, 2013, the Plaintiff-Debtor commenced Chapter 13 case number 13-20155.

B. This is a core proceeding to determine the extent, validity, and priority of a lien. 28 U.S.C. § 157(b)(2)(K).

C. Plaintiff-Debtor lives in the 631 Steffan Street Property. Dianne Akzam (a non-debtor co-plaintiff) lives in the 631 Steffan Street Property.

D. Plaintiffs assert that they have been appointed to be the Administrators of the estate of Charles Akzam, their brother.

E. Plaintiffs assert that they acquired the 631 Steffan Street Property after the death of their brother.

F. In 2006 their brother obtained a loan in the amount of $234,000.00 from Option One Mortgage Corp.("OOMC"), which is evidenced by a note. The lender is listed as OOMC on the deed of trust.

G. In July 2009 Plaintiffs entered into a loan modification with American Home Mortgage Servicing, Inc. ("AHMSI").

H. In November 2009, Plaintiffs discovered inconsistencies with the original loan documentation and a blank notice of cancellation.

I. Plaintiffs claim a superior title to any of the Defendants asserting an interest under the deed of trust.

J. In April 2010 the defendants recorded a notice of default under the deed of trust.

K. In July 2010, the defendants recorded a substitution of trustee, executed by a Sand Canyon Corporation ("SCC") for OOMC.

L. On March 9, 2011, Jeffrey Akzam filed a Chapter 13 case ("First Bankruptcy Case") to stop the pending foreclosure sale. Case No. 11-25844. That case was subsequently converted to one under Chapter 7. FN.1.

FN.1. In Case No. 11-25844 Jeffrey Akzam received a Chapter 7 discharge. Schedule A filed by Jeffrey Akzam lists the 631 Steffan Street Property as an asset, listing his interest as "co-debtor." 11-25844, Dckt. 21 at 3.

M. In the First Bankruptcy Case Wells Fargo Bank ("WFB"), Trustee, filed a proof of claim and motion for relief from the automatic stay. It is alleged that in that case, the bankruptcy judge ruled that WFB, Trustee had neither Constitutional or Prudential standing to bring the motion since only a blank allonge was provided as evidence of WFB, Trustee asserting an interest in the Property.

N. In the First Bankruptcy case WFB, Trustee filed a second motion for relief, which is alleged to have been denied for the same reasons. FN.2.

FN.2. The Civil Minutes for the September 13, 2011 hearing on the WFB, Trustee motion for relief state that evidentiary objections asserted by Jeffrey Akzam were sustained. These objections went to the personal knowledge of an employee of loan servicer AHMI and his ability to testify as to the books, records, and interests asserted by WFB, Trustee. The court sustained the objection and struck the loan servicer's testimony. With that testimony struck, the bankruptcy judge concluded that he did not have any evidence of WFB, Trustee having an interest in the note sufficient to have standing to bring the motion. The court denied the motion without prejudice. Civil Minutes, 11-25844 Dckt. 99. The court did not determine that WFB, Trustee did not have either Constitutional or Prudential standing or make a final determination thereon, but that there was no evidence of what interest, if any, WFB, Trustee had. The motion was denied without prejudice, leaving WFB, Trustee to refile the motion and have the issues litigated to a final determination.

O. It is asserted that since WFB, Trustee "did not have standing to bring or succeed in a relief from stay motion, they surely

did not have standing to file a proof of claim, or it makes the proof of claim invalid."

P. On October 12, 2011, WFB, Trustee cancelled the non-judicial foreclosure sale because more than one year had passed since it had first been set for sale.

Q. A new non-judicial foreclosure sale was set by a notice in March 2012. A transfer of interest document from OOMC to WFB, Trustee, via SCC, was recorded in January 2012.

R. Plaintiffs allege that the January 2012 transfer document is fraudulent and void.

S. The Plaintiffs commenced a state court action in April 2012, for which the defendants' (in that action) demurrer was sustained and Plaintiffs were denied leave to file a second amended complaint. Plaintiffs have appealed that ruling in the state court.

T. In January 2013 Jeffery Akzam filed a second Chapter 13 case, No. 13-201155, ("Second Chapter 13 case") to avoid losing the 631 Steffan Street Property at a purported non-judicial foreclosure sale.

U. WFB, N.A. has filed a proof of claim in the Second Bankruptcy Case. It is alleged that this proof of claim constitutes "an act to collect a debt as a personal liability of the Debtor, in direct violation of the discharge injunction."

V. Notwithstanding the commencement of the Second Bankruptcy Case in January 2013, defendants "continued to set a foreclosure sale date every month from the start of April 2012 in direct violation of the stay."

W. Plaintiffs allege that "defendants claim is invalid and no lien exists that is not void along with the assignment of the deed of trust."

X. The note upon which WFB, Trustee, asserts its claim has been placed in a securitization pool. Each transfer must include the note and deed of trust. It is asserted that the note was not properly transferred to the securitized pool as required under the trust agreement and New York law.

Y. It is asserted that the note was assigned separate and apart from the deed of trust, which leaves it "naked and unenforceable."

Z. Plaintiff's allege the failure to comply with the Internal Revenue Service Rules, the trust agreement, and New York Law should render the notice of trustee's sale void.

AA. The First Cause of Action alleges that the automatic stay was violated because of attempts to enforce the deed of trust

after Jeffrey Akzam obtained his discharge in the First Bankruptcy case. He also alleged that the continued setting of foreclosure sale dates violated the automatic stay in the Second Bankruptcy Case.

BB. The Second Cause of Action asserts that the defendants violated the discharge injunction in the First Bankruptcy Case by filing a proof of claim in the Second Bankruptcy Case. It is asserted that the proof of claim was false, since no assignment of the note was shown by WFB, Trustee.

CC. The Third Cause of Action is an objection to the claim of defendants. This is based on any purported transfer to the trust being void under New York Law. It is asserted that the "deed of trust" was not effectively transferred to the trust, and "that precluded WFB, Trustee, from receiving the note." Proof of Claim No. 1 has been filed by WFB, Trustee.

A serious issue exists as to whether the bankruptcy court or district court should exercise the broad grant of jurisdiction and authority given by Congress under 28 U.S.C. §§ 1334 and 157. This jurisdiction was granted to the extent that the issues arise under the Bankruptcy Code, in the bankruptcy case (such as administration of an asset), or relate to the (administration or outcome of a) bankruptcy case. 28 U.S.C. § 1334(a) and (b). However, recognizing this broad reach of federal court jurisdiction, Congress also provided that federal judges may, and in some situations are required to, abstain from hearing matters though federal court jurisdiction under § 1334 may exist. *See* 28 U.S.C. § 1334.

As provided in 28 U.S.C. § 1334(c)(1),

> (1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

A bankruptcy judge's exercise of the federal judicial power is considered in light of core and non-core (related to) jurisdiction. *See Stern v. Marshall*, 564 U.S. ____ , 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011). This court has previously addressed the issue of when a bankruptcy court judge should utilize federal bankruptcy jurisdiction to adjudicate issues between parties which determination will have no bearing on the bankruptcy case and do not concern Bankruptcy Code issues. *See Pineda v. Bank of America, N.A. (In re Pineda)*, 2011 Bankr. LEXIS 5609 (Bankr. E.D. Cal 2011), *affrm. Pineda v. Bank of America, N.A. (In re Pineda)*, 2013 Bankr. LEXIS 1888 (B.A.P. 9th Cir. 2013). Such jurisdiction should be carefully used by the federal courts to the extent necessary and appropriate to effectuate the goals, policies, and rights relating to bankruptcy cases, and not as a device to usurp state courts of general jurisdiction or the district as the trial court for federal matter and diversity jurisdiction.

The court cannot identify any issues or rights arising under the Bankruptcy Code or arising in the bankruptcy case, or any related to matters

which effect the administration of the bankruptcy case or the bankruptcy law rights of the Debtor, for which the bankruptcy court should exercise jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157 in the place of the state court of general jurisdiction for these state law and non-bankruptcy law issues.

Abstaining from conducting any other hearings or making any determinations in this Adversary Proceeding is proper.

5. 13-29072-E-13 GARY/JUDY DUERNER — **MOTION TO DISMISS ADVERSARY PROCEEDING**
13-2238 SW-1 — **9-4-13 [15]**
DUERNER ET AL V. U.S. BANK NATIONAL ASSOCIATION

CASE DISMISSED 7-30-12

Final Ruling: The Plaintiffs having filed a Notice of Dismissal pursuant to Federal Rule of Bankruptcy Procedure 7041 (Dckt. 21), the underlying bankruptcy case being dismissed (13-29072, Dckt. 67), the Motion to Dismiss Adversary Proceeding is dismissed as moot.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss Adversary Proceeding having been presented to the court, the case having been previously dismissed, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is dismissed as moot, the case having been dismissed.

6. 11-44878-E-7 VLADIMIR/SNEZHANNA SEMCHENKO DLB-15
12-2573 U.S. TRUSTEE V. BRYANT

MOTION FOR PROTECTIVE ORDER AND/OR MOTION TO QUASH
9-6-13 [205]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff U.S. Trustee and to Bank of America on September 6, 2013. By the court's calculation, 27 days' notice was provided. 14 days' notice is required.

Tentative Ruling: The Motion for Protective Order was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to deny the Motion for Protective Order. 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Defendant David Bryant seeks an order quashing the subpoena and a protective order to prevent abuse by the United State Trustee ("UST"). The UST issued a subpoena duces tecum to Bank of America, requesting that the custodian deliver to them the following:

> 1. Copies of signature cards, bank statements, checks and other withdrawal documents (front and back), and deposit slips and/or deposit receipts with deposited check or other supporting documents comprising the deposit (Front and back) for account number [ending in] 6597.
>
> 2. Copies of signature cards, bank statements, checks and other withdrawal documents (front and back), and deposit slips and/or deposit receipts with deposited check or other supporting documents comprising the deposit (Front and back) for any other account for David Leigh Bryant; David L. Bryant; David Bryant; Winchester Consulting, LLC; and any other account(s) for which Mr. Bryant is signer of the account(s).

Exhibit A, Dckt. 207.

Defendant argues that the UST is "attempting to delve into matters in which it has no business" and that the personal financial records have nothing to do with the underlying allegations of the case, the relief being sought and are not reasonably calculated to the discovery or remotely admissible evidence related to the subject matter, claims or defenses at issue.

UST OPPOSITION

UST opposes Defendant's motion, stating that Defendant has not provided a basis for quashing the subpoena or for entering a protective order. UST argues that Defendant has not shown that the Bank of America subpoena subjects him to undue burden or that the documents requested requires a disclosure of a trade secret or other confidential research, development or commercial information. The UST states that Defendant has not shown that a protective order is warranted under Rule 26(b)(2)(C).

UST argues that the documents he seeks are relevant to the adversary in that they may reveal the names of clients from which Defendant has received monies that could be compared to names of bankruptcy cases, may reveal who Defendant's employees are, or have been, so they can be the source of information or deposed concerning the preparation of bankruptcy documents at Defendant's house/office. UST argues that this information may also reveal whether Winchester Consulting is anything other than Defendant's alter ego or an assignee.

Lastly, the UST states that the Bank of America subpoena and third-party sources are the only available evidence, as Mr. Bryant has failed to provide responses or attend his deposition.

DEFENDANT'S REPLY

Defendant replies, stating that the names of Bryant's clients are not in his bank records, that the UST already is in possession of his clients in the "Decaf list" and that most of his clients pay in cash, and would not be identifiable in his accounts.

Similarly, Defendant argues that the names of Bryant's employees and contractors are not his bank records. Defendant states that he has not paid his employees and/or contractors by check. Defendant argues that the UST already has five or so former employees.

Defendant argues that UST's alter ego theory fails because it is "of no moment" and completely irrelevant.

Lastly, Defendant argues that UST's subpoena is to harass Defendant.

UST'S REQUEST FOR JUDICIAL NOTICE

The UST requests the court to take judicial notice of documents from the Court's files in *In re Frances E. Branch*, case no. 13-28174, for those portions that relate to David Bryant's account at Bank of America to include check copies.

DISCUSSION

Federal Rule of Civil Procedure 26(b), as incorporated by Federal Rule of Bankruptcy Procedure 7026, states that unless otherwise limited by court order, the scope of discovery is as follows:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense - including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of person who know of any discoverable matter...Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence...

Fed. R. Civ. P. 26(b)(1). A subpoena may seek information likely to lead to the discovery of information relevant to the matters at issue in the case. Fed. R. Civ. P. 26(b)(1).

The general rule is that a party has no standing to quash a subpoena served upon a third party, except as to claims of privilege relating to the documents being sought." *Windsor v. Martindale*, 175 F.R.D. 665, 668 (D. Colo. 1997). Here, Defendant does not assert a privilege to quash a subpoena served on the third party, Bank of America, N.A., for his bank records. The only argument Defendant provides is that the UST is "attempting to delve into matters in which it has no business."

The Supreme Court has determined that bank records "lack...any legitimate expectation of privacy" and held that subpoenas seeking a party's bank records may not be quashed on this basis. *United States v. Miller*, 425 U.S. 435, 436 (1976); *In re Grand Jury Investigation M.H. v. United States*, 648 F.3d 1067 (9th Cir. 2011) (holding the Fifth Amendment privilege against self-incrimination is inapplicable to a subpoena for foreign bank account records). Thus, Defendants argument of privacy in his records is not well founded.

Protective Order

Local Bankruptcy Rule 7026-1(d) also provides a mechanism for addressing abusive discovery practices: "[i]f any party believes that any such proposed discovery is burdensome, oppressive, or otherwise improper, that party shall have the burden of seeking a protective order against such proposed discovery in accordance with the provisions of Fed. R. Civ. P. 26(c) and, if applicable, Fed. R. Civ. P. 45."

Pursuant to Federal Rule of Civil Procedure 26(c) as incorporated by Federal Rule of Bankruptcy Procedure 7026, a party may move for a protective order and the court "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" by specifying the terms for discovery. The motion for a protective order must certify that the movant has attempted in good faith to confer and resolve the dispute without court action. *Id*.

Here, even if the court looked past Defendant's standing, Defendant has not shown sufficient evidence for a protective order pursuant to Federal Rule of Civil Procedure 26(c). The UST's subpoena does not appear to be one

that annoys, embarrasses, oppresses or is an undue burden on Defendant. Furthermore, Defendant has not certified that he has attempted in good faith to confer and resolve the dispute without court action. The court finds that no grounds have been presented for the issuance of a protective order for the outstanding discovery.

Quash Subpoena

Federal Rule of Civil Procedure 45(c) states,

(c) Protecting a Person Subject to a Subpoena...

...(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(I) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person--except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(I) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(I) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

Again, Defendant has not shown sufficient grounds for the court to quash the subpoena issued by the UST. First, the only grounds the court can discern the motion, is that the information sought is not relevant to the UST's complaint. This is not sufficient grounds under Federal Rule of Civil Procedure 43(c)(3)(A) or (B). Defendant *in his reply* attempts to argue that the subpoena is an undue burden. The court is not convinced by this late argument. The subpoena on the third party bank, Bank of America, does not appear to be an undue burden. The only burden Defendant states is that the accounts are of a very personal nature and the UST has ulterior motives with the account information. The court also does not find this argument credible. The account information appears to be encompassed in the very broad discovery definition of "any matter that bears on, or reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Hickman v. Taylor*, 329 U.S. 495, 501 (1947). The court will not quash the subpoena with the request in the present motion.

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

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

The Motion for Protective Order filed by Defendant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied.

7. 09-46888-E-13 MEDY BEAUCHANE
13-2226 DBJ-1
BEAUCHANE V. U.S. BANK, NATIONAL ASSOCIATION

MOTION FOR ENTRY OF DEFAULT JUDGMENT AND/OR MOTION FOR COMPENSATION FOR DOUGLAS B. JACOBS, DEBTOR'S ATTORNEY(S), FEES: $1,453.50, EXPENSES: $500.00
8-29-13 [12]

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, respondent creditor, and Office of the United States Trustee on August 29, 2013. By the court's calculation, 35 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion for Redemption of Personal Property been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 1007(b)(2). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent 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 Application for a Default Judgment is granted. No appearance required.

Plaintiff Medy Ford Beauchane seeks entry of a default judgment against U.S. Bank, National Association, the Defendant, in this adversary proceeding. Entry of a default judgment is authorized by Federal Rule of Civil Procedure 55(b)(2), as made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7055.

This adversary proceeding was commenced on July 12, 2013. Dckt. 1. Summons was issued by the Clerk of the United States Bankruptcy Court on July 12, 2013. The complaint and summons were properly served on Defendant U.S. Bank, National Association.

Defendant failed to file a timely answer or response or a request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055(a) by the Clerk of the United States Bankruptcy Court on August 23, 2013. Dckt. 9.

FACTS

Defendant is the beneficiary under a second deed of trust recorded against Debtors' residence, purporting to secure a promissory note with an approximately balance of $46,480.00 ("Defendant's Secured Claim"). On December 9, 2009, Plaintiffs filed a plan that provided for the payment of the Defendant's Secured Claim, which claim was valued at $0.00 by the court pursuant to 11 U.S.C. § 506(a).

Plaintiff obtained a discharge in their bankruptcy case on July 8, 2013. The Debtor has completed the confirmed Chapter 13 Plan and the payment of Defendant's Secured Claim. Defendant failed to execute a reconveyance after the completion of the Chapter 13 Plan and the Defendant's Secured Claim having been paid. Plaintiff filed this adversary proceeding against Defendant in order to determine the validity, priority or extend of Defendant's lien.

ANALYSIS

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

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

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

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

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee,* 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff did not offer evidence in support of the allegations. *See id.* at 775.

DISCUSSION

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

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

ATTORNEYS FEES

Plaintiffs seek attorney fees pursuant to Civil Code Section 1717(a), which provides for attorney fees where the contract specifically provides attorney's fees, which are incurred to enforce the contract, to the prevailing party. Plaintiffs state Paragraph 10 of the Deed of Trust specifically provide for an award of attorney fees. Plaintiffs asserts that as a result of the failure of U.S. Bank, National Association to provide a reconveyance, they have incurred attorney fees totaling $1,453.50.

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

California Civil Code section 1717(a) provides:

> In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in

> the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Here, Plaintiffs direct the court to a specific contractual provisions for attorney fees: Paragraph 10 of the Deed of Trust. Paragraph 10 of the Deed of Trust provides for Acceleration and Remedies for the Lender, including reasonable attorney's fees.

Plaintiff's counsel has also provided a billing statement, showing approximately 5.1 hours working on the complaint, status conference, preparation of entry of default, and hearing. The hourly rate for attorney fees is $285.00. The court finds the rate and time charged reasonable.

The court therefore grants Plaintiff's request for attorney's fees in relation to the Motion for Entry of Default in the amount of $1,453.00.

CALIFORNIA CIVIL CODE SECTION 2941

Plaintiffs also seek an award of $500 pursuant to California Civil Code Section 2941, which requires lenders to reconvey deeds of trust when the debt is satisfied.

California Civil Code Section 2941(d) provides,

> The violation of this section shall make the violator liable to the person affected by the violation for all damages which that person may sustain by reason of the violation, and shall require that the violator forfeit to that person the sum of five hundred dollars ($500).

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

Here, Defendant U.S. Bank, National Association failed to have the deed of trust reconveyed after the obligation secured had been satisfied, as required by California Civil Code § 2941(b)(1). Therefore, the violation of that section allows Plaintiff to seek the penalty of $500 pursuant to California Civil Code Section 2941(d).

CONCLUSION

The court grants the default judgment in favor of Plaintiffs and against Defendant U.S. Bank, National Association and holds that the second deed of trust is void. The court further awards attorney fees in the amount of $1,453.00 and additionally awards $500 pursuant to California Civil Code Section 2941(d).

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

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

The Motion for Entry of Default Judgment filed by the Plaintiff having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Entry of Default Judgment is granted. The court shall enter judgment determining that the second deed of trust, and any interest, lien or encumbrance pursuant thereto, held by U.S. Bank, National Association against the real property commonly known as 151 Mandalay Court, Chico, California, APN 006-350-042, recorded on July 17, 2006, with the County Recorder for Butte County, California is void, unenforcebale, and of no force and effect. Further, the judgment shall adjudicate and determine that U.S. Bank, National Association has no interest in the real property pursuant to the Deed of Trust.

IT IS FURTHER ORDERED that the Plaintiffs are granted attorney fees in the amount of $1,453.00.

IT IS FURTHER ORDERED that the Plaintiffs are awarded $500 pursuant to California Code Section 2941(d).

Counsel for the Plaintiff shall prepare and lodge with the court a proposed judgment consistent with this Order.