

Eastern District of California

Sacramento, California

The Motion to Dismiss 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 to Dismiss is denied without prejudice.

Partners for Payment Relief DE II, LLC, FCI Lenders Services, and California TD Specialists ("Defendants") move for the court to dismiss counts one through five of Roderick Tapnio and Rosemarie Tapnio's ("Plaintiff") Amended Complaint (Dckt. 29) and therefore dismiss this adversary proceeding.

PLAINTIFF'S OPPOSITION

Plaintiff filed an Opposition on December 29, 2016. Dckt. 53. Plaintiff states the following as support for opposing the Motion:

- A. "Legal Standard Applicable to Motion to Dismiss Under FRCP Rule 12(b)(6)
- B. The Required 30 day Increments From Original Sale Date of 2/3/16 Results In Dates of 3/4/16, 3/31/14, and 4/29/16 Not 4/4/16.
- C. The Automatic Stay Was In Effect At the Time of the Foreclosure Sale
- D. The Automatic Stay Was In Effect When Recording"

Review of Motion Minimum Pleading Requirements

Federal Rule of Civil Procedure 7(b), which is incorporated in its entirety by Federal Rule of Bankruptcy Procedure 7007, states,

"(b) Motions and Other Papers

(1) In General. A request for a court order must be made by motion. The motion must:

- (A) be in writing unless made during a hearing or trial;
- (B) **state with particularity the grounds for seeking the order;** and
- (C) state the relief sought."

Fed. R. Civ. P. 7(b) (emphasis added). The same “state with particularity” requirement is included in Federal Rule of Bankruptcy Procedure 9013 for all motions in the bankruptcy case itself.

Consistent with this court’s repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, 434 B.R. 644 (N.D. Ala. 2010), applied the general pleading requirements enunciated by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to the pleading with particularity requirement of Bankruptcy Rule 9013. The Twombly pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court.

In discussing the minimum pleading requirement for a complaint (which only requires a “short and plain statement of the claim showing that the pleader is entitled to relief,” Fed. R. Civ. P. 7(a)(2)), the Supreme Court reaffirmed that more than “an unadorned, the-defendant-unlawfully-harmed-me accusation” is required. *Iqbal*, 556 U.S. at 678–79. Further, a pleading which offers mere “labels and conclusions” of a “formulaic recitations of the elements of a cause of action” are insufficient. *Id.* A complaint must contain sufficient factual matter, if accepted as true, “to state a claim to relief that is plausible on its face.” *Id.* It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Federal Rule of Bankruptcy Procedure 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 and Civil Procedure and Bankruptcy Procedure, the Supreme Court stated a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the “short and plain statement” standard for a complaint.

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

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

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

Weatherford, 434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ill. 2009) (A proper motion for relief must contain factual allegations concerning the requirement elements. Conclusory allegations or a mechanical recitation of the elements will not suffice. The motion must plead the essential facts that will be proved at the hearing).

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

Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, “shall be made in writing, [and] shall state with particularity the grounds therefor, and shall set forth the relief or order sought” (emphasis added). The standard for “particularity” has been determined to mean “reasonable specification.” 2-A Moore’s Federal Practice, para. 7.05, at 1543 (3d ed. 1975).

Martinez v. Trainor, 556 F.2d 818, 819–20 (7th Cir. 1977).

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

Grounds Stated in “Motion”

Here, no separate motion has even been filed. Defendants have combined the Notice of Hearing with the Motion in violation of Section (III)(A) of the Revised Guidelines for the Preparation of Documents. Defendant has not provided any grounds, merely unsupported conclusions of law. The insufficient statement made by Defendants in response to each cause of action is:

- A. Plaintiff “fails to state a claim upon which relief can be granted, pursuant to FRCP Rule 12(b)(6).”

That “ground” is merely a conclusion of law by Defendants. Presumably, Defendants believed that the court would make these conclusions, but the “grounds” cannot merely state the anticipated conclusions.

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

The Motion goes further to state that the grounds are found in:

- A. The Notice of Motion;
- B. Memorandum of Points and Authorities;
- C. Any pleadings of which the court takes judicial notice; and
- D. Whatever else Defendants present prior to or at the hearing.

The court generally declines the opportunity to do associate attorney work and assemble motions for the parties. It may be that Defendants believe that the Points and Authorities is “really” the motion and should be substituted by the court for the motion. That belief fails for multiple reasons. One is that under Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents, the motion and points and authorities are separate documents. The court has not waived that Local Rule for Movant.

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 the Adversary Proceeding filed by the Defendants 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 denied without prejudice.

2. [16-21305-E-13](#) **RODERICK/ROSEMARIE TAPNIO MOTION TO DISMISS MORTGAGE
[16-2155](#) **ELECTRONIC REGISTRATION
DS-2 **SYSTEMS, INC.
TAPNIO ET AL V. PARTNERS FOR 12-6-16 [\[47\]](#)
PAYMENT RELIEF DE II, LLC'S ET AL******

Final Ruling: No appearance at the January 12, 2017 hearing is required.

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's Attorney on December 6, 2016. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss 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). 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 to Dismiss is dismissed without prejudice.

Mortgage Electronic Registration Systems, Inc. ("Defendant") moves for the court to dismiss all claims against it in Roderick Tapnio and Rosemarie Tapnio's ("Plaintiff") Amended Complaint according to Federal Rule of Civil Procedure 12(b)(6).

On January 10, 2017, the court entered an order (Dckt. 57) dismissing Defendant from this Adversary Proceeding pursuant to the Stipulation (Dckt. 56) of the parties.

The requested relief having been previously granted, the Motion is dismissed without prejudice.

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

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

The Motion to Dismiss All Claims Against Defendant in this Adversary Proceeding filed by the Defendant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion to Dismiss is dismissed without prejudice, the relief having been granted by prior order pursuant to the Stipulation of the Plaintiff and Defendant.

3. [16-25210-E-13](#) **MARCO SIERRA**
[16-2184](#)
UST-1
U.S. TRUSTEE V. SIERRA

**MOTION FOR ENTRY OF DEFAULT
JUDGMENT**
10-27-16 [13]

Final Ruling: No appearance at the January 12, 2017 hearing is required.

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 Defendant, Chapter 13 Trustee, on October 27, 2016. By the court's calculation, 77 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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.

<p>The Motion for Entry of Default Judgment is granted.</p>
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The United States Trustee ("Plaintiff") filed the instant Motion for Default Judgment on October 27, 2016. Dckt. 13. Plaintiff seeks an entry of default judgment for injunctive relief against Marco Sierra ("Defendant") in the instant Adversary Proceeding No. 16-02184.

The instant Adversary Proceeding was commenced on September 8, 2016. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on September 9, 2016. Dckt. 3. The complaint and summons were properly served on Defendant. Dckt. 6.

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Fed. R. Bankr. P. 7055 by the Clerk of the United States Bankruptcy Court on October 20, 2016. Dckt. 11.

SUMMARY OF COMPLAINT

Plaintiff filed a complaint for injunctive relief against Defendant. The Complaint alleges that Defendant's current and five prior bankruptcy cases in this District are part of a series of twenty-three bankruptcy cases filed by Defendant and insiders of Defendant.

Plaintiff requests that the court enjoin Defendant from filing another bankruptcy case for a period of eight years, unless it is authorized after a pre-filing review by the chief bankruptcy judge in the district in which Defendant desires to file a bankruptcy case.

APPLICABLE LAW

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

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 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 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. 3d ed.)); *In re Kubick*, 171 B.R. at 661–62.

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 default judgment for injunctive relief is not entered against Defendant to prevent the filing of further abusive bankruptcy petitions. Defendant has filed twenty-three petitions and has not presented any reason to the court to believe that they will stop. As the Plaintiff alleges in the Complaint, monetary sanctions would be insufficient to make Defendant stop presenting abusive filings, only injunctive relief at this point will have an impact upon Defendant. Defendant cannot dispute the U.S. Trustee's records of the twenty-three cases filed by Defendant and insiders that were almost all dismissed for failure to file information.

The court finds that the Complaint is sufficient and the request for relief requested therein is meritorious. It has not been shown to the court there is or may be any dispute concerning material facts. Defendant has not contested any facts in this Adversary Proceeding. 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. The court finds it necessary and proper for the entry of a default judgment against the Defendant.

The court grants the default judgment in favor of Plaintiff and against Defendant Marco Sierra. The court shall enter judgment determining that Marco Sierra ("Defendant") is enjoined from filing, singly or jointly, another bankruptcy case in any district for a period of eight years beginning January 12, 2017, without first seeking and receiving the authorization of the chief bankruptcy judge of the district in which he wishes to file a bankruptcy petition. The court shall also authorize the Clerk of the Bankruptcy Court, and deputy clerks operating at the discretion and control of the Clerk of the Court in any District, to reject any petition attempted to be filed by Defendant during the eight-year period if there is not prior authorization from the chief bankruptcy judge of the corresponding district.

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

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

The Motion for Entry of Default Judgment filed by Plaintiff United States 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. The court shall enter judgment determining that Marco Sierra ("Defendant") is enjoined from filing, singly or jointly, another bankruptcy case in any district for a period of eight years beginning January 12, 2017, without first seeking and receiving the authorization of the chief bankruptcy judge of the district in which he wishes to file a bankruptcy petition.

IT IS FURTHER ORDERED that the Clerk of the Bankruptcy Court, and deputy clerks operating at the discretion and control of the Clerk of the Court in any

District, are authorized to reject any petition attempted to be filed by Defendant during the eight-year period if there is not prior authorization from the chief bankruptcy judge of the corresponding district.

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

4. [10-50941-E-13](#) **JOEL/MAGGIE DAUGHERTY** **MOTION FOR ENTRY OF DEFAULT**
[16-2192](#) **DAUGHERTY ET AL V. FLAGSTAR** **JUDGMENT AGAINST FLAGSTAR**
BANK, FSB ET AL **BANK, FSB**
11-16-16 [\[19\]](#)

Final Ruling: No appearance at the January 12, 2017 hearing is required.

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 Defendant on November 16, 2016. By the court’s calculation, 57 days’ notice was provided. 28 days’ notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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.

Joel Daugherty and Maggie Daugherty (“Plaintiff”) filed the instant Motion for Default Judgment on November 16, 2016. Dckt. 19. Plaintiff seeks an entry of default judgment against Flagstar Bank, FSB (collectively “Defendant”) in the instant Adversary Proceeding No. 16-02192.

The instant Adversary Proceeding was commenced on September 14, 2016. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on September 15, 2016. Dckt. 3. The complaint and summons were properly served on Defendant. Dckt. 6.

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Fed. R. Bankr. P. 7055 by the Clerk of the United States Bankruptcy Court on October 19, 2016. Dckt. 10.

REVIEW OF COMPLAINT

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

- A. Plaintiff owns real property commonly known as 1359 Keri Lane, Chico, California (“Property”). Plaintiff resides there as a primary residence.
- B. As of November 23, 2010, the date of the filing of the Chapter 13 bankruptcy case, the Property had a fair market value of approximately \$250,000.00.
- C. Plaintiff’s Chapter 13 Plan was confirmed on February 10, 2011; Plaintiff’s completed the Plan, and an order of discharge was signed on April 2, 2016.
- D. Plaintiff owned the Property at the time of filing for bankruptcy, and the Property was secured by two loans: a primary mortgage in favor of Defendant and second mortgage in favor of Branifer Financial, Inc., which was transferred or assigned to Defendant secured by a second deed of trust.
- E. Plaintiff filed a Motion to Value Secured Claim regarding the Property, which was granted on November 23, 2015, and the secured claim was determined to be in the amount of \$0.00 and wholly unsecured.
- F. On April 5, 2016, Defendant was served with the order of discharge.
- G. On June 27, 2016, Plaintiff’s counsel telephoned the office of the president of Defendant. As instructed, Plaintiff’s counsel prepared and e-mailed to Defendant a “Customer Dispute Form” requesting that Defendant reconvey the second deed of trust.
- H. Along with the Customer Dispute Form, Plaintiff’s counsel provided Defendant with the order of discharge, with the civil minute order signed by the court on November 23, 2015, granting Plaintiff’s Motion to Value Secured Claim, and with the second deed of trust.
- I. Defendant assigned its interest in the second deed of trust to NPA Associates, LLC (“NPA”) on June 13, 2016, which assignment was recorded with Butte County on June 27, 2016.
- J. On August 25, 2016, Plaintiff mailed to NPA’s agent for service of process, Jay Fusco, a letter informing NPA of the status of the second deed of trust, of Defendant’s improper transfer, and requesting NPA immediately reconvey the second deed of trust.

- K. Defendant and NPA failed and refused to reconvey the second deed of trust.
- L. As a result of Defendant's and NPA's conduct, Plaintiff has been damaged by losing the opportunity to obtain refinancing on the Property, take advantage of favorable interest rates, and has suffered from confusion, worry, and fear.

First Claim for Relief—Extinguishment of the Second Trust Deed Claim

Plaintiff alleges the following for the First Cause of Action:

- A. Included in the debts discharged is the Defendant's claim.
- B. Plaintiff began the process of refinancing the Property after receiving discharge and discovered that Defendant and NPA had failed to reconvey the second deed of trust, and Plaintiff was informed that the Second Deed of Trust would have to be paid for Plaintiff to seek refinancing of the primary mortgage on the Property.
- C. As a direct result of Defendant's conduct, Plaintiff has sustained attorneys' fees and costs under California Civil Code § 1717.

Second Claim for Relief—Violation of California Civil Code § 2941(d)

Plaintiff alleges the following for the Second Cause of Action:

- A. Included in the debts discharged is the Defendant's claim.
- B. Plaintiff notified Defendant of the Motion to Value Secured Claim and the discharge and informed Defendant that the Second Deed of Trust needed to be reconveyed.
- C. Pursuant to California Civil Code § 2941(a), thirty days having passed after the satisfaction of the mortgage by discharge in Case No. 10-50941, Defendant has failed to reconvey the Second Deed of Trust.
- D. As a direct result of Defendant's conduct, Plaintiff has sustained damages including but not limited to attorneys' fees and costs. Defendant is further liable for \$500.00 pursuant to California Civil Code § 2941(d).

Prayer

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

- A. Extinguish the Second Deed of Trust;
- B. Award attorneys' fees and costs;

- C. Award actual damages in an amount according to proof presented at trial;
- D. Award statutory damages; and
- E. For such other relief as the court deems just and proper.

APPLICABLE LAW

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

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 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 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. 3d ed.)); *In re Kubick*, 171 B.R. at 661–62.

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

Reconveyance

That First Cause of Action seeks a declaration as between the parties that the court's November 23, 2015 order is a real, enforceable order, and that it really means that Defendant's secured claim has a

value of \$0.00 (now that the Plan has been completed), and therefore, there is no debt for the Deed of Trust to secure.

Plaintiff states that on November 23, 2010, they filed a Chapter 13 bankruptcy case. As of that date, the Property had two liens encumbering the property: (1) First Deed of Trust in favor of Flagstar Bank, FSB and (2) Second Deed of Trust in favor of Branifer Financial, Inc., that was transferred or assigned to Defendant.

Plaintiff states that they completed their Chapter 13 plan, which required the Defendant to reconvey the Second Deed of Trust on the Property. Plaintiff was discharged on April 4, 2016. Case No. 10-50941, Dckt. 83.

According to the Trustee's Final Report and Account in the Plaintiff's bankruptcy case, Case Number: 10-50941, Debtor's Plan was confirmed on February 10, 2011, and completed on December 9, 2015. Bankr. E.D. Cal. No. 10-50941, Dckt. 73, February 9, 2016. The discharge of Plaintiff was entered on April 4, 2016. Bankr. E.D. Cal. No. 10-50941, Dckt. 83. Plaintiff states that more than thirty days have passed and Defendant has not reconveyed, and Plaintiff has been required to file an adversary proceeding.

Here, it appears that Plaintiff was entitled to the full reconveyance of the Second Deed of Trust on the Property. This court has addressed, in detail, the California state law, standard note and deed of trust contractual basis, and possible 11 U.S.C. § 506(d) basis for a creditor having the obligation to reconvey a deed of trust upon a debtor has successfully completed the Chapter 13 Plan that provides for the payment of the secured claim in the 11 U.S.C. § 506(a) determined amount. *In re Frazier*, 448 B.R. 803 (Bankr. E.D. Cal. 2011), *affd.*, 469 B.R. 803 (E.D. Cal. 2012) (discussion of "lien striping" in Chapter 13 case); *Martin v. CitiFinancial Services, Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. Cal. 2013).

Upon completion of the Chapter 13 Plan and its terms becoming the final, modified contract between the Debtor, Defendant, and creditors, there remains no obligation that is secured by the Second Deed of Trust. As a matter of California law, the Second Deed of Trust is void. FN.1. The lien is also rendered void by operation of 11 U.S.C. § 506(d) upon completion of the Chapter 13 Plan. *Martin v. CitiFinancial Services, Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. Cal. 2013).

FN.1. 4 WITKIN SUMMARY OF CALIFORNIA LAW, TENTH EDITION, § 117, citing California Civil Code § 2939 et seq.; Rest.3d, Property (Mortgages) § 6.4; 4 Powell § 37.33; C.E.B., 2 Mortgage and Deed of Trust Practice 3d, § 8.84; and 13 Am.Jur. Legal Forms 2d, § 179:511.

In addition, California Civil Code § 2941(b)(1) imposes a statutory obligation on the beneficiary under the deed of trust (Defendant in this Adversary Proceeding) to reconvey the deed of trust when the obligation secured has been satisfied. The Chapter 13 Plan having been completed and Defendant having been paid the full amount of the secured claim as finally determined pursuant to 11 U.S.C. § 506(a) and completion of the confirmed plan, that secured obligation has been satisfied.

California Civil Code § 2941(b)(1) requires that within thirty days of the obligation secured by a deed of trust having been satisfied, the beneficiary shall deliver to the trustee under the deed of trust an

executed request for reconveyance and supporting documents. The trustee under the deed of trust then has twenty-one days from receipt of the request for reconveyance to reconvey the deed of trust. Cal. Civ. § 2941(b)(1)(A). The trustee under the deed of trust, not the beneficiary, is responsible for providing a copy of the reconveyance to the owner of the property—here the Plaintiff. Cal. Civ. § 2941(b)(1)(B)(ii).

Here, the Plaintiff completed their plan on December 9, 2015. To date, Defendant has not reconveyed the Second Deed of Trust as required by § 2941 within thirty days after the obligation has been satisfied (here being after the completion of the Plan).

Statutory Penalty

The California Legislature has provided for a statutory forfeiture of \$500.00 (expressly stated as a forfeiture in the statute) in connection with the reconveyance of a deed of trust, as follows:

(d) The violation of this section shall make the violator 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).

Cal. Civ. § 2941(d). The grounds for the possible violations of California Civil Code § 2914 in connection with this Adversary Proceeding are (as summarized by the court):

- A. Within thirty calendar days after the obligation secured by any deed of trust has been satisfied, the beneficiary or the assignee of the beneficiary shall:
 - 1. execute and deliver to the trustee the original note, deed of trust, request for a full reconveyance, and other documents as may be necessary to reconvey, or cause to be reconveyed, the deed of trust.
 - 2. The trustee shall execute and record the reconveyance within twenty-one calendar days after receipt by the trustee of the original note, deed of trust, request for a full reconveyance, and fees as may be necessary to reconvey, or cause to be reconveyed, the deed of trust.
 - 3. The trustee shall deliver a copy of the reconveyance to the beneficiary or its servicing agent, if known.
- B. If the trustee has failed to execute and record, or cause to be recorded, the full reconveyance within sixty calendar days of satisfaction of the obligation, the beneficiary, upon receipt of a written request by the trustor, shall execute and acknowledge a document pursuant to Section 2934a substituting itself or another as trustee and issue a full reconveyance.

Cal. Civ. § 2924(b).

The thirty-day period at issue is for the beneficiary to execute and deliver the original note, deed of trust, and request for reconveyance to the trustee under the deed of trust. Plaintiff presents evidence, which is uncontradicted, that as of April 5, 2016, Defendant knew of the bankruptcy plan being completed and that the deed of trust had to be reconveyed.

Defendant failed to answer and offers no evidence that it took any action to provide the documents or demand the reconveyance within the thirty-day period.

Attorney's Fees

The Plaintiff requests attorneys' fees pursuant to California Civil Code §§ 1717 and 2941. For the § 1717 request, the Plaintiff argues that they are entitled to reimbursement of attorneys' fees under the reciprocal contractual attorneys' fees clause because the Second Deed of Trust contains an attorneys' fees and cost provision.

For their request pursuant to § 2941, the Plaintiff asserts that it they are entitled to fees as the prevailing party in this action.

Plaintiff provides evidence of the relevant provision at Paragraph 18 in the Second Deed of Trust or note stating that reasonable attorneys' fees are included in Plaintiff's rights. Exhibit 3, Dckt. 23.

CONCLUSION

Applying these factors, the court finds that the Plaintiff will be prejudiced if the Second Deed of Trust is not reconveyed, or if 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 Second Deed of Trust will cloud title and restrict Plaintiff's full and unfettered use of the real property and any 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 Flagstar Bank, FSB 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

Plaintiff seeks attorneys' fees pursuant to Civil Code Section 1717(a), which provides for attorney fees where the contract specifically provides attorneys' fees, which are incurred to enforce the contract, to the prevailing party.

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 § 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, Plaintiff states that the underlying contract has an attorneys' fees provision that, pursuant to § 1717(a), that is reciprocal. Plaintiff provides evidence at Paragraph 18 of the contract provision. Exhibit 3, Dckt. 23.

Plaintiff's counsel has also provided a billing statement, showing approximately 16.0 hours working on the complaint, preparation of entry of default, and hearing, for \$6,160.00 in attorneys' fees and \$63.22 in costs. Among those costs is a \$45.00 expense for the use of Court Call, which the court disallows because it is not the court's practice to allow an expense for time during which the attorney can be working on other matters, thus recouping any Court Call-related expenses. Total allowed costs then would be \$18.22.

CALIFORNIA CIVIL CODE § 2941

Plaintiff also seeks an award of \$500.00 pursuant to California Civil Code § 2941, which requires lenders to reconvey deeds of trust when the debt is satisfied.

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 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 \$500.00 pursuant to California Civil Code § 2941(d).

CONCLUSION

The court grants the default judgment in favor of Plaintiff and against Defendant Flagstar Bank, FSB and holds that the deed of trust is void. Attorneys' fees of \$6,160.00 and costs of \$18.22 are awarded. The court further awards \$500.00 pursuant to California Civil Code § 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 Plaintiff Joel Daugherty and Maggie Daugherty 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 Flagstar Bank, FSB against the real property commonly known as 1359 Keri Lane, Chico, California, APN 015-450-108-000, with the County Recorder for Butte County, California, is void, unenforceable, and of no force and effect. Further, the judgment shall adjudicate and determine that Flagstar Bank, FSB has no interest in the real property pursuant to the Second Deed of Trust.

IT IS FURTHER ORDERED that the Plaintiff is awarded \$6,160.00 in attorneys' fees and \$18.22 in costs. The award of attorneys' fees and costs is a joint and several liability with co-defendant NPA Associates, LLC.

IT IS FURTHER ORDERED that the Plaintiff is awarded \$500.00 pursuant to California Code § 2941(d) against Flagstar Bank, FSB, which is a separate liability of this defendant.

Counsel for the Plaintiff shall prepare and lodge with the court a proposed judgment consistent with this Order. The judgement shall provide that attorneys' fees and costs allowed by the court shall be enforced as part of the judgment.

5. [10-50941-E-13](#) **JOEL/MAGGIE DAUGHERTY**
[16-2192](#)
DAUGHERTY ET AL V. FLAGSTAR
BANK, FSB ET AL

MOTION FOR ENTRY OF DEFAULT
JUDGMENT AGAINST NPA
ASSOCIATES, LLC
11-16-16 [25]

Final Ruling: No appearance at the January 12, 2017 hearing is required.

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 Defendant on November 16, 2016. By the court’s calculation, 57 days’ notice was provided. 28 days’ notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). 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.

Joel Daugherty and Maggie Daugherty (“Plaintiff”) filed the instant Motion for Default Judgment on November 16, 2016. Dckt. 19. Plaintiff seeks an entry of default judgment against NPA Associates, LLC (“Defendant”) in the instant Adversary Proceeding No. 16-02192.

The instant Adversary Proceeding was commenced on September 14, 2016. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on September 15, 2016. Dckt. 3. The complaint and summons were properly served on Defendant. Dckt. 6.

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Fed. R. Bankr. P. 7055 by the Clerk of the United States Bankruptcy Court on October 26, 2016. Dckt. 16.

REVIEW OF COMPLAINT

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

- A. Plaintiff owns real property commonly known as 1359 Keri Lane, Chico, California (“Property”). Plaintiff resides there as a primary residence.
- B. As of November 23, 2010, the date of the filing of the Chapter 13 bankruptcy case, the Property had a fair market value of approximately \$250,000.00.
- C. Plaintiff’s Chapter 13 Plan was confirmed on February 10, 2011; Plaintiff’s completed the Plan, and an order of discharge was signed on April 2, 2016.
- D. Plaintiff owned the Property at the time of filing for bankruptcy, and the Property was secured by two loans: a primary mortgage in favor of Flagstar Bank, FSB (“Flagstar”) and second mortgage in favor of Branifer Financial, Inc., which was transferred or assigned to Flagstar secured by a second deed of trust.
- E. Plaintiff filed a Motion to Value Secured Claim regarding the Property, which was granted on November 23, 2015, and the secured claim was determined to be in the amount of \$0.00 and wholly unsecured.
- F. On April 5, 2016, Flagstar was served with the order of discharge.
- G. On June 27, 2016, Plaintiff’s counsel telephoned the office of the president of Flagstar. As instructed, Plaintiff’s counsel prepared and e-mailed to Flagstar a “Customer Dispute Form” requesting that Flagstar reconvey the second deed of trust.
- H. Along with the Customer Dispute Form, Plaintiff’s counsel provided Flagstar with the order of discharge, with the civil minute order signed by the court on November 23, 2015, granting Plaintiff’s Motion to Value Secured Claim, and with the second deed of trust.
- I. Flagstar assigned its interest in the second deed of trust to NPA Associates, LLC (“Defendant”) on June 13, 2016, which assignment was recorded with Butte County on June 27, 2016.
- J. On August 25, 2016, Plaintiff mailed to Defendant’s agent for service of process, Jay Fusco, a letter informing Defendant of the status of the second deed of trust, of Flagstar’s improper transfer, and requesting Defendant immediately reconvey the second deed of trust.
- K. Flagstar and Defendant failed and refused to reconvey the second deed of trust.
- L. As a result of Defendant’s and Flagstar’s conduct, Plaintiff has been damaged by losing the opportunity to obtain refinancing on the Property, take advantage of favorable interest rates, and has suffered from confusion, worry, and fear.

First Claim for Relief—Extinguishment of the Second Trust Deed Claim

Plaintiff alleges the following for the First Cause of Action:

- A. Included in the debts discharged is the Defendant's claim.
- B. Plaintiff began the process of refinancing the Property after receiving discharge and discovered that Flagstar and Defendant had failed to reconvey the second deed of trust, and Plaintiff was informed that the Second Deed of Trust would have to be paid for Plaintiff to seek refinancing of the primary mortgage on the Property.
- C. As a direct result of Defendant's conduct, Plaintiff has sustained attorneys' fees and costs under California Civil Code § 1717.

Second Claim for Relief—Violation of California Civil Code § 2941(d)

Plaintiff alleges the following for the Second Cause of Action:

- A. Included in the debts discharged is the Defendant's claim.
- B. Plaintiff notified Flagstar of the Motion to Value Secured Claim and the discharge and informed Defendant that the Second Deed of Trust needed to be reconveyed.
- C. Pursuant to California Civil Code § 2941(a), thirty days having passed after the satisfaction of the mortgage by discharge in Case No. 10-50941, Defendant has failed to reconvey the Second Deed of Trust.
- D. As a direct result of Defendant's conduct, Plaintiff has sustained damages including but not limited to attorneys' fees and costs. Defendant is further liable for \$500.00 pursuant to California Civil Code § 2941(d).

Prayer

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

- A. Extinguish the Second Deed of Trust;
- B. Award attorneys' fees and costs;
- C. Award actual damages in an amount according to proof presented at trial;
- D. Award statutory damages; and
- E. For such other relief as the court deems just and proper.

APPLICABLE LAW

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

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 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 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. 3d ed.)); *In re Kubick*, 171 B.R. at 661–62.

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

Reconveyance

That First Cause of Action seeks a declaration as between the parties that the court's November 23, 2015 order is a real, enforceable order, and that it really means that Flagstar's secured claim has a value of \$0.00 (now that the Plan has been completed), and therefore, there is no debt for the Deed of Trust to secure.

Plaintiff states that on November 23, 2010, they filed a Chapter 13 bankruptcy case. As of that date, the Property had two liens encumbering the property: (1) First Deed of Trust in favor of Flagstar Bank, FSB and (2) Second Deed of Trust in favor of Branifer Financial, Inc., that was transferred or assigned to Flagstar.

Plaintiff states that they completed their Chapter 13 plan, which required Flagstar to reconvey the Second Deed of Trust on the Property. Plaintiff was discharged on April 4, 2016. Case No. 10-50941, Dckt. 83.

According to the Trustee's Final Report and Account in the Plaintiff's bankruptcy case, Case Number: 10-50941, Debtor's Plan was confirmed on February 10, 2011, and completed on December 9, 2015. Bankr. E.D. Cal. No. 10-50941, Dckt. 73, February 9, 2016. The discharge of Plaintiff was entered on April 4, 2016. Bankr. E.D. Cal. No. 10-50941, Dckt. 83. Plaintiff states that more than thirty days have passed and Defendant has not reconveyed, and Plaintiff has been required to file an adversary proceeding.

Here, it appears that Plaintiff was entitled to the full reconveyance of the Second Deed of Trust on the Property. This court has addressed, in detail, the California state law, standard note and deed of trust contractual basis, and possible 11 U.S.C. § 506(d) basis for a creditor having the obligation to reconvey a deed of trust upon a debtor has successfully completed the Chapter 13 Plan that provides for the payment of the secured claim in the 11 U.S.C. § 506(a) determined amount. *In re Frazier*, 448 B.R. 803 (Bankr. E.D. Cal. 2011), *affd.*, 469 B.R. 803 (E.D. Cal. 2012) (discussion of "lien stripping" in Chapter 13 case); *Martin v. CitiFinancial Services, Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. Cal. 2013).

Upon completion of the Chapter 13 Plan and its terms becoming the final, modified contract between the Debtor, Defendant, and creditors, there remains no obligation that is secured by the Second Deed of Trust. As a matter of California law, the Second Deed of Trust is void. FN.1. The lien is also rendered void by operation of 11 U.S.C. § 506(d) upon completion of the Chapter 13 Plan. *Martin v. CitiFinancial Services, Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. Cal. 2013).

FN.1. 4 WITKIN SUMMARY OF CALIFORNIA LAW, TENTH EDITION, § 117, citing California Civil Code § 2939 et seq.; Rest.3d, Property (Mortgages) § 6.4; 4 Powell § 37.33; C.E.B., 2 Mortgage and Deed of Trust Practice 3d, § 8.84; and 13 Am.Jur. Legal Forms 2d, § 179:511.

In addition, California Civil Code § 2941(b)(1) imposes a statutory obligation on the beneficiary under the deed of trust (Defendant in this Adversary Proceeding) to reconvey the deed of trust when the obligation secured has been satisfied. The Chapter 13 Plan having been completed and Defendant having been paid the full amount of the secured claim as finally determined pursuant to 11 U.S.C. § 506(a) and completion of the confirmed plan, that secured obligation has been satisfied.

California Civil Code § 2941(b)(1) requires that within thirty days of the obligation secured by a deed of trust having been satisfied, the beneficiary shall deliver to the trustee under the deed of trust an executed request for reconveyance and supporting documents. The trustee under the deed of trust then has twenty-one days from receipt of the request for reconveyance to reconvey the deed of trust. Cal. Civ. § 2941(b)(1)(A). The trustee under the deed of trust, not the beneficiary, is responsible for providing a copy of the reconveyance to the owner of the property—here the Plaintiff. Cal. Civ. § 2941(b)(1)(B)(ii).

Here, the Plaintiff completed their plan on December 9, 2015. To date, Defendant has not reconveyed the Second Deed of Trust as required by § 2941 within thirty days after the obligation has been satisfied (here being after the completion of the Plan).

Statutory Penalty

The California Legislature has provided for a statutory forfeiture of \$500.00 (expressly stated as a forfeiture in the statute) in connection with the reconveyance of a deed of trust, as follows:

(d) The violation of this section shall make the violator 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).

Cal. Civ. § 2941(d). The grounds for the possible violations of California Civil Code § 2914 in connection with this Adversary Proceeding are (as summarized by the court):

- A. Within thirty calendar days after the obligation secured by any deed of trust has been satisfied, the beneficiary or the assignee of the beneficiary shall:
 - 1. execute and deliver to the trustee the original note, deed of trust, request for a full reconveyance, and other documents as may be necessary to reconvey, or cause to be reconveyed, the deed of trust.
 - 2. The trustee shall execute and record the reconveyance within twenty-one calendar days after receipt by the trustee of the original note, deed of trust, request for a full reconveyance, and fees as may be necessary to reconvey, or cause to be reconveyed, the deed of trust.
 - 3. The trustee shall deliver a copy of the reconveyance to the beneficiary or its servicing agent, if known.
- B. If the trustee has failed to execute and record, or cause to be recorded, the full reconveyance within sixty calendar days of satisfaction of the obligation, the beneficiary, upon receipt of a written request by the trustor, shall execute and acknowledge a document pursuant to Section 2934a substituting itself or another as trustee and issue a full reconveyance.

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The thirty-day period at issue is for the beneficiary to execute and deliver the original note, deed of trust, and request for reconveyance to the trustee under the deed of trust. Plaintiff presents evidence, which is uncontradicted, that as of April 5, 2016, Flagstar knew of the bankruptcy plan being completed and that the deed of trust had to be reconveyed.

Defendant failed to answer and offers no evidence that it took any action to provide the documents or demand the reconveyance within the thirty-day period.

Attorney's Fees

The Plaintiff requests attorneys' fees pursuant to California Civil Code §§ 1717 and 2941. For the § 1717 request, the Plaintiff argues that they are entitled to reimbursement of attorneys' fees under the reciprocal contractual attorneys' fees clause because the Second Deed of Trust contains an attorneys' fees and cost provision.

For their request pursuant to § 2941, the Plaintiff asserts that it they are entitled to fees as the prevailing party in this action.

Plaintiff provides evidence of the relevant provision at Paragraph 18 in the Second Deed of Trust or note stating that reasonable attorneys' fees are included in Plaintiff's rights. Exhibit 3, Dckt. 23.

CONCLUSION

Applying these factors, the court finds that the Plaintiff will be prejudiced if the Second Deed of Trust is not reconveyed, or if 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 Second Deed of Trust will cloud title and restrict Plaintiff's full and unfettered use of the real property and any 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 NPA Associates, LLC has not contested any facts in this Adversary Proceeding. 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

Plaintiff seeks attorneys' fees pursuant to Civil Code Section 1717(a), which provides for attorney fees where the contract specifically provides attorneys' fees, which are incurred to enforce the contract, to the prevailing party.

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 § 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, Plaintiff states that the underlying contract has an attorneys' fees provision that, pursuant to § 1717(a), that is reciprocal. Plaintiff provides evidence at Paragraph 18 of the contract provision. Exhibit 3, Dckt. 23.

Plaintiff's counsel has also provided a billing statement, showing approximately 16.0 hours working on the complaint, preparation of entry of default, and hearing, for \$6,160.00 in attorneys' fees and \$63.22 in costs. Among those costs is a \$45.00 expense for the use of Court Call, which the court disallows because it is not the court's practice to allow an expense for time during which the attorney can be working on other matters, thus recouping any Court Call-related expenses. Total allowed costs then would be \$18.22.

CALIFORNIA CIVIL CODE § 2941

Plaintiff also seeks an award of \$500.00 pursuant to California Civil Code § 2941, which requires lenders to reconvey deeds of trust when the debt is satisfied.

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 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 \$500.00 pursuant to California Civil Code § 2941(d).

CONCLUSION

The court grants the default judgment in favor of Plaintiff and against Defendant Flagstar Bank, FSB and holds that the deed of trust is void. Attorneys' fees of \$6,160.00 and costs of \$18.22 are awarded. The court further awards \$500.00 pursuant to California Civil Code § 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 Plaintiff Joel Daugherty and Maggie Daugherty 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 NPA Associates, LLC against the real property commonly known as 1359 Keri Lane, Chico, California, APN 015-450-108-000, with the County Recorder for Butte County, California, is void, unenforceable, and of no force and effect. Further, the judgment shall adjudicate and determine that NPA Associates, LLC has no interest in the real property pursuant to the Second Deed of Trust.

IT IS FURTHER ORDERED that the Plaintiff is awarded \$6,160.00 in attorneys' fees and \$18.22 in costs against defendant NPA Associates, LLC. The award of attorneys' fees and costs is a joint and several liability with co-defendant Flagstar Bank, FSB.

IT IS FURTHER ORDERED that the Plaintiff is awarded \$500.00 pursuant to California Code § 2941(d) against NPA Associates, LLC, which is a separate liability of this defendant..

Counsel for the Plaintiff shall prepare and lodge with the court a proposed judgment consistent with this Order. The judgement shall provide that attorneys' fees and costs allowed by the court shall be enforced as part of the judgment.