UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

Pursuant to District Court General Order 612, no persons are permitted to appear in court unless authorized by order of the court. All appearances of parties and attorneys shall be telephonic through CourtCall, which advises the court that it is waiving the fee for the use of its service by *pro se* (not represented by an attorney) parties through June 1, 2020. **The contact information for CourtCall to arrange for a phone appearance is: (866) 582-6878**.

April 30, 2020 at 11:00 a.m.

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1. **19-90440-E-7** **LESLIE KINSEY**
19-9015 **RLC-1**
MORGAN V. KINSEY

MOTION FOR SUMMARY JUDGMENT AND/OR MOTION FOR SUMMARY JUDGMENT
3-11-20 [24]

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant-Debtor, Chapter 7 Trustee, and Office of the United States Trustee on March 11, 2020. By the court's calculation, 50 days' notice was provided. 28 days' notice is required.

The Motion for Summary 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 Summary Judgment is granted.

Tom Morgan ("Plaintiff") filed the instant adversary proceeding on September 9, 2019, against Leslie Henry Kinsey ("Defendant-Debtor").

On March 11, 2020, Plaintiff filed the instant Motion for Summary Judgment and its accompanying Memorandum of Points and Authorities pursuant to Fed. R. Bankr. P. 7056. Dckt. 24, 26. Plaintiff asserts that there are no issues of material fact such that Plaintiff is entitled to judgment as a matter of law, and the debt is nondischargeable pursuant to 11 U.S.C. § 523(a)(2) and (6) as the judgment arose from fraud and fraudulent misrepresentation made by the Debtor/Defendant.

The court begins its consideration of the requested relief with the Motion itself and the grounds with particularity stated therein. Dckt. 24. Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007. The grounds stated with particularity consist of the following:

A. Debtor filed a Chapter 7 bankruptcy petition on May 13, 2019. *Id.* ¶ 1.

B. Plaintiff is listed as a judgment creditor on Defendant-Debtor's Schedule F. *Id.* ¶ 2.

C. Plaintiff filed a Complaint on September 9, 2019 in *pro se.* Plaintiff retained counsel and a First Amended Complaint was filed on March 5, 2020 seeking to have the obligation owed to Plaintiff determined nondischarageable pursuant to 11 U.S.C. § 523(a)(2) and (4). *Id.* ¶ 3.

D. Plaintiff obtained a default judgment against Debtor on October 9, 2001. The State Court specifically found fraud and a series of misrepresentations made by Defendant-Debtor. (A copy of the Judgment was attached to the First Amended Complaint.) *Id.* ¶ 4.

E. All issues necessary to deny Defendant-Debtor his discharge were actually litigated and necessarily determined in 2001. California's issue preclusion doctrine precludes relitigating those facts. *Id.* ¶ 5.

In the Memorandum of Points and Authorities, Plaintiff asserts that California's issue preclusion doctrine precludes re-litigation of fraud and fraudulent misrepresentations by Debtor/Defendant where the issues are identical to the issues actually litigated or necessary decided in the state court action. In this case, Plaintiff asserts, the fraud judgment is final, the parties are identical, and the issues were litigated or necessarily decided in the state court action.

A copy of the Default Judgement is filed as an Exhibit. Dckt. 27.

APPLICABLE LAW TO DETERMINE A MOTION FOR SUMMARY JUDGMENT

In an adversary proceeding, summary judgment is proper when "[t]he movant shows that

there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), incorporated by Fed. R. Bankr. P. 7056. The key inquiry in a motion for summary judgment is whether a genuine issue of material fact remains for trial. Fed. R. Civ. P. 56(c), incorporated by Fed. R. Bankr. P. 7056; *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248–50 (1986); 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.11[1][b] (3d ed. 2000). "[A dispute] is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute [over a fact] is 'material' only if it could affect the outcome of the suit under the governing law." *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 707 (9th Cir. 2008), citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. at 248 (1986).

The party moving for summary judgment bears the burden of showing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To support the assertion that a fact cannot be genuinely disputed, the moving party must "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations ..., admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A), incorporated by Fed. R. Bankr. P. 7056.

In response to a sufficiently supported motion for summary judgment, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine dispute for trial. *Barboza*, 545 F.3d at 707, citing *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1055–56 (9th Cir. 2002). The nonmoving party cannot rely on allegations or denials in the pleadings but must produce specific evidence, through affidavits or admissible discovery materials, to show that a dispute exists. *Id.* (citing *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In ruling on a summary judgment motion, the court must view all of the evidence in the light most favorable to the nonmoving party. *Barboza*, 545 F.3d at 707 (citing *County. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001)). The court "generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented." *Agosto v. INS*, 436 U.S. 748, 756 (1978). "[A]t the summary judgment stage [,] the judge's function is not himself to weigh the evidence and determine the truth of the matter[,] but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

APPLICATION OF ISSUE PRECLUSION TO A STATE COURT JUDGMENT

The bankruptcy court may give preclusive effect to a state court judgment as the basis for excepting a debt from discharge. *Harmon v. Kobrin (In re Harmon),* 250 F.3d 1240, 1245 (9th Cir. 2001). The court applies the forum state's law of issue preclusion. *Id.* Here, as was the case in *Harmon*, California is the relevant state law and under California law issue preclusion is only appropriate when five threshold factors are met : (1) the judgment is final; (2) the issue(s) are identical; (3) the proceeding was actually litigated; (4) the issue was necessarily decided in the former proceeding; and (5) the parties are the same or were in privity. *Id.* at 1245; *see also In re Riley*, 2016 WL 3351397, at *4 (B.A.P. 9th Cir. June 8, 2016) (*citing DNK Holdings, LLC v. Faerber,* 61 Cal.4th 813, 825 (2015)).

Moreover, the court is not required to apply issue preclusion even if the five threshold factors are met because the court is also charged with determining whether issue preclusion "furthers the public

policies underlying the doctrine." *In re Harmon*, 250 F.3d at 1245 (citing *Lucido v. Super. Ct.*, 51 Cal.3d 335, 342–42 (1990)). In short, the decision to apply issue preclusion is discretionary

The party asserting issue preclusion "carries the burden of proving a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action." *In re Lambert*, 233 Fed. Appx. 598, 599 (9th Cir. 2007).

Review of the Amended Complaint

On March 5, 2020, Plaintiff filed an Amended Complaint. Dckt. 22. Plaintiff hereby submits this amended Adversary Proceeding complaint, on the basis that Defendant's debt to the Plaintiffs is nondischargeable pursuant to 11 U.S.C. § 523 (a)(2) and (4) as debt incurred via false pretenses, a false representation and actual fraud. *Id*. ¶ 3. Plaintiff makes the following allegations:

> A. Plaintiff obtained a fraud judgment against Debtor/Defendant on October 9, 2001. In that judgment the court specifically found that Defendant committed fraud by making factual misrepresentation to Plaintiff as follows. *Id*. ¶ 6.
>
> B. Defendant-Debtor represented being a contractor, holding a California license number 702102. *Id*. at 20.
>
> C. Debtor represented that he had liability insurance. *Id*. at 22.
>
> D. Debtor represented that he had worker's compensation insurance. *Id*. at 23.
>
> E. Debtor represented that he would pay prevailing wages to employees. *Id*. at 24.
>
> F. The evidence established that none of these misrepresentations were true and were in fact false. *Id*. at 25-26.
>
> G. The Amended Complaint includes Exhibit 1, Default Judgment. *Id*. at 27-28.
>
> > a. The Default Judgment includes specific findings of the State Court of fraud, namely the same statements presented by counsel as this Amended Complaint.

Prayer for Relief

> H. A determination that the judgment entered by the Superior Court of California, County of Sonoma on October 9, 2001 is not discharged in Debtor's bankruptcy case; and
>
> I. For such other and further relief as the Court may deem just and proper.

SUMMARY OF ANSWER

Leslie Henry Kinsey ("Defendant-Debtor") filed an Answer on November 25, 2019. Dckt. 5.

The Answer includes:

A. An assertion that the Complaint fails to state a claim upon which relief can be granted, citing Federal Rule of Civil Procedure 12(b)(6).

B. Plaintiff has unclean hands.

C. Plaintiff did not provide money, property or services, or an extension of credit as a result of any fraud, false pretenses, or misrepresentation by Defendant-Debtor.

D. Defendant-Debtor is not a fiduciary of Plaintiff in connection with any fraud or defalcation, and Defendant-Debtor did not embezzle any monies or commit larceny.

E. Defendant-Debtor never had any intent to injury or damage Plaintiff, and never believed that harm or damage would be caused to Plaintiff or Plaintiff's property due to any wrongful act of Defendant.

F. Plaintiff was "*in pari delicto*" in connection with the facts and transactions underlying the State Court default judgment. Further, Plaintiff actively participated in, and/or directly benefitted from any wrongdoing by Defendant-Debtor.

G. Plaintiff did each and all of the following:

1. Consented to all acts or omissions by Defendant Debtor (Cal. Civ. § 3515);

2. Took advantage of his own wrong in connection giving rise to the State Court default judgment against Defendant-Debtor (Cal. Civ. § 3517);

3. Acquiesced in Defendant-Debtor's errors (Cal. Civ. § 3516); and

4. Received the benefit without taking the burden of the transactions giving rise to the State Court default judgment against Defendant-Debtor (Cal. Civ. § 3521).

DENIAL OF DISCHARGE LAW

Debt for False Pretenses, False Representations, or Actual Fraud Pursuant to 11 U.S.C. § 523(a)(2)(A)

11 U.S.C. § 523(a)(2)(A) requires the creditor demonstrate five elements:

(1) the debtor made ... representations;

(2) that at the time he knew they were false;

(3) that he made them with the intention and purpose of deceiving the creditor;

(4) that the creditor relied on such representations; [and]

(5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentations having been made.

In re Sabban, 600 F.3d 1219, 1222 (9th Cir. 2010). Creditor must show these elements by a preponderance of evidence. *In re Slyman*, 234 F.3d 1081, 1085 (9th Cir. 2000). 11 U.S.C. § 523(a)(2)(A) prevents the discharge of all liability arising from fraud. *Cohen v. de la Cruz,* 523 U.S. 213, 215 (1998).

Debt for Embezzlement or Larceny –
11 U.S.C. § 523(a)(4)

In section 523(a)(4), the term "while acting in a fiduciary capacity" does not qualify the words "embezzlement" or "larceny." Therefore, any debt resulting from embezzlement or larceny falls within the exception of clause (4). *In re Booker*, 165 B.R. 164 (Bankr. M.D.N.C. 1994); *see also In re Brady*, 101 F.3d 1165 (6th Cir. 1996); *In re Littleton*, 942 F.2d 551 (9th Cir. 1991).

The Ninth Circuit Court of Appeals laid out the elements for nondischargeability based on embezzlement in *Littleton v. Transamerica Commercial Finance*, 942 F.2d 551 (9th Cir. 1991).

> Under federal law, embezzlement in the context of nondischargeability has often been defined as "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *Moore v. United States*, 160 U.S. 268, 269, 40 L. Ed. 422, 16 S. Ct. 294 (1885). Embezzlement, thus, requires three elements: "(1) property rightfully in the possession of a nonowner; (2) nonowner's appropriation of the property to a use other than which [it] was entrusted; and (3) circumstances indicating fraud." *In re Hoffman,* 70 Bankr. 155, 162 (Bankr. W.D. Ark. 1986); *In re Schultz*, 46 Bankr. 880, 889 (Bankr. D. Nev. 1985).

Littleton v. Transamerica Com. Fin, 942 F.2d at 555.

As discussed in COLLIER ON BANKRUPTCY, a nondischargeable larceny is the wrongful taking of the property of another with the intent to convert the property to the taker's use without the consent of the owner of the property. 4 COLLIER ON BANKRUPTCY (SIXTEENTH EDITION) P 523.10[2]. The main difference between a larceny and an embezzlement is that the initial taking is wrongful for the larceny, while with the embezzlement the taker does not improperly obtain possession, but the wrongful act subsequently occurs. *Id.* As stated by the Ninth Circuit Court of Appeals in *Ormsby v. First America Title Company (In re Ormsby)*, 591 F.3d 1199 (9th Cir. 2010), a court is not bound by state law on what constitutes larceny, but *may* follow state law.

> Section 523(a)(4) prevents discharge "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). "For purposes of section 523(a)(4), a bankruptcy court is not bound by the state law definition of larceny but, rather, may follow federal common law, which defines larceny as a 'felonious taking of another's personal property with intent to convert it or deprive the owner of the same.' " 4 Collier on Bankruptcy P 523.10[2] (15th

ed. rev. 2008).

Id. at 1205. The Ninth Circuit then stated that it was not determining that there is a "fraudulent intent" requirement for a larceny to be nondischargeable, which is what the debtor in that case was arguing. The Ninth Circuit concluded:

> We make no determination concerning whether federal law requires a finding of fraudulent intent for larceny as Ormsby contends. Were we to find that larceny required fraudulent intent, the state court judgment would provide enough information to determine that the court found that his actions amounted to fraud, because "[i]ntent may properly be inferred from the totality of the circumstances and the conduct of the person accused." *Kaye v. Rose (In re Rose)*, 934 F.2d 901, 904 (7th Cir. 1991). The totality of the circumstances as described in the state court's findings of fact make clear that Ormsby acted with fraudulent intent. . . .

Id.

Under California Law, the crime of theft (larceny renamed theft in 1927; RUTTER GROUP-CALIFORNIA CRIMINAL LAW, § 8:1.LARCENY) occurs as defined in California Penal Code § 484 (emphasis added) when a person:

> [w]ho shall feloniously **steal, take, carry, lead, or drive away** the personal property of another, or who shall **fraudulently appropriate property which has been entrusted** to him or her, or who shall **knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money**, labor **or real or personal property**, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, **is guilty of theft**.

The elements of theft (larceny) are stated in the RUTTER GROUP-CALIFORNIA CRIMINAL LAW treatise as follows:

> § 8:2. Larceny—Essential elements of larceny
>
> There are four essential elements of the crime of larceny:
>
> 1. A taking;
>
> 2. Of the personal property of another;
>
> 3. Asportation of the property taken; and
>
> 4. The taking was done, without claim of right, to deprive the owner of his or her property permanently.[1]

The offense of theft by larceny is committed by a person who: (1) takes possession; (2) of personal property; (3) owned or possessed by another; (4) by

> means of trespass; (5) with intent to steal the property; and (6) carries the property away.[2] A leasehold interest is property subject to the theft statute.[3] The act of taking personal property from another's possession is always a trespass unless the owner consents to the taking freely and unconditionally or the taker has a legal right to take the property.[4]
>
> Consent procured by fraud is invalid, and the resulting offense is commonly called larceny by trick and device.[5] The intent to steal is the intent, without a good faith claim of right, to permanently deprive the owner of possession. If the taking has begun, the slightest movement of the property constitutes a carrying away or asportation.[6]
>
> The jury instruction for theft by larceny lists three elements: (1) a person took personal property of some value belonging to another; (2) when the person took the property he or she had the specific intent to deprive the other person permanently of the property; (3) the person carried the property away by obtaining physical possession and control for some period of time and by some movement of the property.[7] These elements are further discussed in §§ 8:3 to 8:11, below.

RUTTER GROUP-CALIFORNIA CRIMINAL LAW § 8.2 (footnote citations to California case law omitted).

Only personal property can be the subject of theft (larceny). *Id.*, § 8:5. The mere fact that someone is a co-owner or partner with the victim does not mean that the improper taking is not a theft (larceny). *Id.*, § 8:8.

DISCUSSION

A favorable ruling on Plaintiff's Motion for Summary Judgment is predicated on this court determining that the facts determined in the State Court Action track with the necessary elements of 11 U.S.C. §§ 523(a)(2) and 523(a)(4) and that the state court judgment should be afforded preclusive effect.

The damages stemming from Defendant-Debtor's Misrepresentations Constitute a Nondischargeable Debt

The court must first determine whether the facts established in the subject State Court Action judgment align with the necessary elements for a nondischargeablity determination pursuant to 11 U.S.C. §§ 523(a)(2) and 523(a)(4) [the Motion makes reference to 11 U.S.C. § 523(a)(6), but such relief is not requested in the Amended Complaint. The court takes the reference to (a)(6) as a clerical error]. The court finds that they do not.

Here the judgment was based upon damages arising from a breach of contract claim brought by Plaintiff to recover upon his claim. The court has reviewed the Default Judgment. Dckt. 27. In order for the judge to rule in favor of the Plaintiff and award damages, the judge determined amongst other things that Defendant-Debtor made false representations to Plaintiff regarding acting as a licensed contractor; having liability insurance; having worker's compensation insurance; and paying pay prevailing wages to employees. Judgment, Dckt. 27.

The offense of theft by larceny is committed by a person who: (1) takes possession; (2) of

personal property; (3) owned or possessed by another; (4) by means of trespass; (5) with intent to steal the property; and (6) carries the property away. While showing fraud, and the "taking" of the money, there is not a showing or finding of trespass.

State Court Judgment

The State Court Judgment, based on the findings of fact proven at trial, was entered in the amount of $24,332.00, in compensatory damages, interest through August 10, 2001 in the sum of $2,294.48, litigation costs in the sum of $240.50, and attorney's fees in the sum of $3,333.20 pursuant to court schedule, for a total of $30,200.18. *Id.* at 7-12.

Accordingly, the court finds that the judge's determination in the State Court Action necessarily decided all required elements of 11 U.S.C. §§ 523(a)(2)as set forth by the Ninth Circuit in *Jercich.*

The State Court Action should be afforded preclusive effect

The court first looks to whether Plaintiff has demonstrated that the subject judgement has satisfied the five threshold factors. The court concludes that Plaintiff has sufficiently established that the threshold factors have been met.

First, the judgment is final because Defendant-Debtor because no appeals seem to have been submitted.

Second, the issue(s) are identical because as discussed above, the issues litigated in the State Court Proceeding litigated the same facts necessary to make a determination under 11 U.S.C. §§ 523(a)(2).

The Defendant was found to: (1) have committed fraud by making factual misrepresentation to Plaintiff.(2) He misrepresented that he was a licensed contractor; (3) He misrepresented that he had liability insurance; (4) He misrepresented that he had worker's compensation insurance; (5) He misrepresented that he would pay prevailing wages to employees.

Third, the proceeding was actually litigated because though there was no trial the court made express findings through the Default Judgment.

Fourth, the issues were necessarily decided in the former proceeding, as noted above, the findings on Defendant-Debtor's misrepresentations required a determination that Defendant-Debtor committed certain willful and wrongful acts which track the elements of 11 U.S.C. 523(a)(2), as discussed below.

Fifth, and lastly, the parties are the same.

Next, the court must make a determination that applying issue preclusion further's public policies of the underlying doctrine. The court determines that it does.

Accordingly, the court determines that it is appropriate to afford the State Court Judgment preclusive affect in this adversary proceeding. Moreover, because the issues litigated in the State Court

Action necessarily establish that the elements of 11 U.S.C. §§ 523(a)(2) have been met, granting Summary Judgment is also appropriate.

The Motion is granted. The court shall enter judgment for Plaintiff determining that the judgement and the obligations owing on said judgment entered in *Morgan v. Kinsey*, California Superior Court for the County of Sonoma, Case Number SCV 227001; including all interest, fees, costs, expenses, and other amounts arising under applicable state law, are nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2). The State Court Judgment shall be enforced as provided by applicable non-bankruptcy law and, and shall not be replaced by the judgment entered in this court.

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 Summary Judgment filed by Tom Morgan ("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 Summary Judgment is granted. The court shall enter judgment for Plaintiff determining that the judgement and the obligations owing on said judgment entered in *Morgan v. Kinsey*, California Superior Court for the County of Sonoma, Case Number SCV 227001; including all interest, fees, costs, expenses, and other amounts arising under applicable state law, are nondischargeable pursuant to 11 U.S.C. § 523(a)(2).
>
> Counsel for Plaintiff Tom Morgan shall lodge within fourteen days of the entry of this Order a proposed judgment consistent with this Order.
>
> Requests for costs, expenses, and fees, if any, shall be made as provided in Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054.

2. **19-22653-E-7** **REECE/RODINA VENTURA** **MOTION TO AMEND**
20-2001 **PCB-1** **3-20-20 [19]**
VENTURA ET AL V. HARRINGTON ET AL

ADVERSARY PROCEEDING
DISMISSED: 03/10/2020

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff's Attorney on March 20, 2020. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion to Correct Order Dismissing Adversary Proceeding 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 Correct Order Dismissing Adversary Proceeding is xxxxx.

The present Motion has been filed by defendant Michael Harrington and his law office, The Law Offices of Michael Harrington, the other named defendant. The Motion seeks to amend the prior order of this court dismissing this Adversary Proceeding pursuant to the request of Plaintiff-Debtor Reece and Rodina Ventura at the March 4, 2020 Initial Status Conference. Civil Minutes, Dckt. 14.

At the Status Conference, the court pointed out to the parties that established Ninth Circuit law provides that relief for an alleged violation of the automatic stay be sought by motion, it being in the nature of contempt. If it was joined with other relief from which an adversary proceeding was required (Fed. R. Bankr. P. 7001), such as quiet title, then an adversary proceeding was required.

When this court issued the order dismissing the adversary proceeding without prejudice as requested by the Plaintiff-Debtor, it expressly ordered that each party were to bear it own costs and expense. Order, March 10, 2020. Getting this out of an adversary proceeding and into the law and motion practice is economically advantageous for all parties, while giving them the discovery and evidentiary trial rights.

On March 20, 2020, Defendant Michael Harrington filed a Motion for this court to correct the error in ordering the parties to bear their own fees and costs. The court summaries the grounds as follows:

A. At the time of Plaintiff-Debtor's oral motion to dismiss at the Status Conference, there was no agreement between the parties as to fees and costs.

B. The issue of fees and costs was not addressed and the court's order contains a clerical error that may properly be corrected pursuant to Federal Rule of Civil Procedure 60(a) and Federal Rule of Bankruptcy Procedure 9024.

C. That Defendant interprets the court's recitation of Ninth Circuit law to be that a motion was the only permitted method for asserting a violation of the stay.

Dckt. 19.

Plaintiff-Debtor responded with an Opposition. Dckt. 22. Plaintiff-Debtor first goes through a recitation of the underlying dispute.

Plaintiff-Debtor states that it made the request to dismiss in light of the court focusing the parties on the law and motion prosecution of a stay violation as being in the nature of contempt.

Plaintiff-Debtor concludes that if the issue of fees and costs with respect to this adversary proceeding are to be litigated, then the court should vacate the dismissal and allow the matter to proceed.

Defendant then filed a Reply Brief, Dckt. 24, arguing to the merits of the underlying dispute. Defendant cannot help himself, and chastises Plaintiff-Debtor for "false, meritless, personal attacks," their statements "are absolutely false," they make "a disorganized, dishonest and incomprehensible argument," and they are "lying to the Court."

Plaintiff-Debtor filed a Response to the Response (Dckt. 27) in which Plaintiff-Debtor's counsel states that it was his understanding that by dismissing this, the parties court walk away and "move on to other cases." It is not clear whether that means walking away from the alleged egregious violations of the automatic stay or just that they would be diligently prosecuted in the more cost friendly manner.

DISCUSSION

In considering the various arguments, the court first notes that much of Plaintiff-Debtor's opposition does not go to the grounds of the motion. That they believe the Attorney Defendants did wrong and that they violated the automatic stay is not at issue. With respect to Defendant's Response, the court is reminded of his undergraduate Shakespeare class and the classic line, "The Lady Doth Protest Too Much, Methinks." [FN. 1.]

FN. 1. Hamlet, Act III, Scene II; by William Shakespeare.

The court intentionally ordered that each party bear its own costs and expenses. For the Plaintiff-Debtor, the dismissal would reduce the legal fees and costs they would be incurring and paying on the road to a judgment, which would be recovered if they prevailed. Presumably the Defendants, attorney and law firm, are successful and profitable, and the proverbial "deep pocket" that consumer plaintiffs look for. For the Defendants, it would also reduce their costs and expenses, which even if they prevailed in the litigation and had a right to attorney's fees, they would be left trying to recover them from the bankrupt Plaintiff-Debtors.

On this point with respect to attorney's fees, the Complaint (Dckt. 1) is only asserting an alleged violation of the automatic stay. The basis for recovering attorney's fees for such alleged violation is provided for by Congress in 11 U.S.C. § 362(k) [emphasis added] as follows:

> (k)
> (1) Except as provided in paragraph (2), **an individual** injured by any willful violation of a stay provided by this section **shall recover actual damages, including costs and attorneys' fees**, and, in appropriate circumstances, may recover punitive damages.
>
> (2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

The statute provides for the individual debtor to recover attorney's fees as part of the actual damages resulting from a violation. It does not provide for a reciprocal right to recover fees for the person alleged to have violated the automatic stay.

On its face, Defendant's Motion appears to seek to preserve the Plaintiff-Debtor's right to recover attorney's fees from Defendant. While such is curious, the court considers the request.

In ordering that each party would bear its own fees and costs, such was limited to this Adversary Proceeding. The court would not presuppose to issue a ruling that would pre-adjudicate issues therein.

Refinement of Requested Relief

At the hearing, the Parties addressed the requested amendment of the order to reinstate the right to seek the recovery of attorney's fees (to the extent which a party has the legal right) and costs (which presumably are de minimis at this point) against the other.

Movant Defendant stated, **xxxxxxxxxx**