UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

August 16, 2018 at 11:00 a.m.

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1. **15-28908-E-13** **WILLIAM/SARAH MCGARVEY** **MOTION TO DISMISS ADVERSARY**
18-2053 **Kyle Schumacher** **PROCEEDING**
DKM-2 **7-18-18 [22]**

MCGARVEY V. USAA SAVINGS BANK

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 o f the matter.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor's attorneys Trustee on July 18, 2018. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss Adversary Proceeding is sustained and the Motion is dismissed without prejudice.

USAA Savings Bank ("Defendant") moves for the court to dismiss with prejudice all claims against it in Sarah McGarvey's ("Plaintiff-Debtor") Complaint according to Federal Rule of Civil Procedure 12(b)(6).

REVIEW OF FIRST AMENDED ADVERSARY COMPLAINT

As the court reads the Complaint, Plaintiff-Debtor alleges:

A. The Consumer Data Industry Association (the "CDIA") sets the industry standard for credit reporting. ¶ 12; Dckt. 18.

B. A guide published by the CDIA recommends creditors not report ongoing delinquencies after a bankruptcy is filed. ¶ 15.

C. A guide published by the CDIA recommends creditors fill out a Consumer Information Indicator ("CII") where a consumer has a special condition such as bankruptcy. ¶ 14–19.

D. The CDIA recommends using CII designation "D" to indicate a consumer has filed bankruptcy to indicate that creditors are not free to collect against the consumer. ¶ 20–24.

E. Creditors use credit reporting as a means to coerce payment from debtors; "Specifically, when consumers become delinquent on their debts creditors will often warn consumers that failure to pay their delinquent balance will result in their delinquency being reported to the major credit reporting agencies." ¶ 26–27.

F. Defendant "as a policy to enhance collection activities will call and send letters to debtors warning that failure to pay a debt will result in a delinquency being reported to the main credit bureaus." ¶ 35.

G. Defendant reports delinquencies for the purpose of coercing debtors to pay. ¶ 34.

H. Defendant knows that by failing to report the CCI "D" designation to indicate a consumer filed bankruptcy, together with continued reporting of the delinquency, that the Plaintiff-Debtor would be coerced into making payments because Defendant "knows that such reporting alerts other lenders that this debt SHOULD be paid but has not been paid." ¶ 36.

I. Defendant was sent actual notice of the automatic stay in Plaintiff-Debtor's Chapter 13 bankruptcy case, filed on November 16, 2015. ¶ 9–10; Dckt. 1.

J. Post-filing, Defendant continued to report on Plaintiff-Debtor's credit report that her account was in collections with a past-due balance owed. ¶ 11.

K. Defendant filed two separate claims in Plaintiff-Debtor's Chapter 13 bankruptcy case on January 26, 2016. ¶ 15.

L. Defendant, by failing to update its reporting on Plaintiff-Debtor's credit report, acted with intent and Plaint-Debtor believes the collections notation and past-due balance related to Defendant's claims will only be removed by paying the Defendant. ¶ 20–21.

M. Defendant is "simultaneously attempting to receive payment from" the Plaintiff-Debtor as well as under the Chapter 13 plan. ¶ 22.

N. Defendant's employee Beverly Bain ("Bain") received notice of Plaintiff-Debtor's dispute over the credit reporting and her bankruptcy filing, but intentionally failed to update the CII and continued reporting delinquency in an attempt to coerce payment. ¶ 46–51.

O. Plaintiff-Debtor argues Defendant willfully violated the automatic stay under 11 U.S.C § 362(a)(6) by reporting Plaintiff-Debtor delinquent and in collections on her credit report, by failing to report that the account was included in bankruptcy, and by continuing to report that information after Plaintiff disputed it with the credit reporting agencies.

REVIEW OF MOTION

The Motion responds to the Amended Complaint's claims with the following grounds:

A. Defendant alleges that Plaintiff-Debtor's First Amended Adversary Complaint failed to plead sufficient facts that support the claim that Defendant willfully and intentionally violated the automatic stay.

B. Defendant alleges that Plaintiff-Debtor's First Amended Adversary Complaint simply pleads legal conclusions based on the language of 11 U.S.C. § 362(k).

C. Defendant asserts that the Ninth Circuit Bankruptcy Appellate Panel decision, *In re Keller*, is controlling and that credit reporting is not a *per se* violation of the automatic stay.

D. Defendant argues that Plaintiff-Debtor fails to plead sufficient facts that would demonstrated Defendant violated the automatic stay through harassment or coercion.

E. Defendant argues that Plaintiff-Debtor's Amended Complaint continues to fail the pleading standard because the only new facts describe credit reporting standards and Defendant's alleged credit reporting activity.

PLAINTIFF-DEBTOR'S OPPOSITION

Plaintiff-Debtor filed an Opposition on August 2, 2018. Dckt. 26. Plaintiff-Debtor argues that newly added allegations of credit reporting standards show Defendant inaccurately reported information by failing to provide proper CII notation. Plaintiff-Debtor states that together, inaccurate reporting and active collections meet the requirements of *In re Keller*. Plaintiff-Debtor argues further that credit reports and the three major credit reporting agencies inherently involve collection activity. Plaintiff-Debtor argues finally that the conclusion of *In re Keller* is not binding and sho uld not be followed.

APPLICABLE LAW

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

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

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

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

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

FAIR CREDIT REPORTING ACT

The Fair Credit Reporting Act (the "FCRA") provides the following:

(a) Accuracy and fairness of credit reporting

The Congress makes the following findings:

(1) The banking system is dependent upon fair and accurate credit reporting. Inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence which is essential to the continued functioning of the banking system.

(2) An elaborate mechanism has been developed for investigating and evaluating the credit worthiness, credit standing, credit capacity, character, and general reputation of consumers.

(3) Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers.

(4) There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

(b) Reasonable procedures

It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

15 U.S.C.A. § 1681. The FCRA also provides:

(a) Duty of furnishers of information to provide accurate information

(1) Prohibition

(A) Reporting information with actual knowledge of errors

A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate.

(B) Reporting information after notice and confirmation of errors

A person shall not furnish information relating to a consumer to any consumer reporting agency if–

(i) the person has been notified by the consumer, at the address specified by the person for such notices, that specific information is inaccurate; and

(ii) the information is, in fact, inaccurate.

15 U.S.C.A. § 1681s-2.

DISCUSSION

The court has reviewed the Complaint itself and now adds to the analysis and counter-analysis of the Parties as to what is stated in the Complaint.

Defendant has argued that the mere act of credit reporting by a creditor, even post-petition, is not a *per se* violation of 11 U.S.C. § 362(a)(6). *In re Keller*, 568 B.R. 118, 122 (B.A.P. 9th Cir. 2017) (holding that post-petition credit reporting of overdue or delinquent payments, *without more*, does not violate the automatic stay as a matter of law). Plaintiff-Debtor argues that Defendant's willful reporting to credit agencies is a violation of the automatic stay, and has added to her Amended Complaint that Defendant's failure to add a CII notation indicating the consumer filed bankruptcy is a deviation from industry norm, constituting inaccurate reporting and demonstrating intent to coerce payment.

Plaintiff-Debtor argues that the requirements of *In re Keller* are "credit reporting plus." Dckt. 26. This is a fair characterization, however it is important to note that the "plus" is evidence indicating intent to harass or coerce. 568 B.R. at 123. Plaintiff-Debtor's allegations are summarily that Defendant continued business as usual. Plaintiff-Debtor seems to argue Defendant's failure to add CII notation (an alleged inaccurate reporting) is a gross deviation from alleged industry custom, but Plaintiff-Debtor also alleges industry custom is to stop reporting entirely after a bankruptcy filing (which Defendant has not done). ¶ 15. Dckt. 18. No facts have been pleaded to show Defendant is deviating from its own normal practice, as might have indicated a specific intent to harass or coerce. Similarly, Plaintiff-Debtor argues that Defendant's failure to correct its behavior after notice and these proceedings demonstrates intent, but Plaintiff-Debtor

is merely alleging conclusions and not facts. Plaintiff-Debtor's theories continue to lack any evidence of intent to coerce or harass as required by the *In re Keller* court. 568 B.R. at 123.

Plaintiff-Debtor continues to argue that all credit-reporting is designed to coerce collection. The FCRA makes specific congressional findings that "the banking system is dependent upon fair and accurate credit reporting," and "Consumer reporting agencies have assumed a vital role in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C.A. § 1681. Furthermore, the FCRA requires accurate reporting. 15 U.S.C.A. § 1681s-2. Plaintiff-Debtor's assertion that creditors should not report ongoing delinquencies after a bankruptcy is filed would mean creditors are *required* to submit false and inaccurate reports. Plaintiff-Debtor's interpretation of 11 U.S.C. § 362(a)(6) is in direct conflict with various provisions and the stated purpose of the FCRA.

The court also notes in its Amended Complaint Plaintiff-Debtor now alleges Defendant "as a policy to enhance collection activities will call and send letters to debtors warning that failure to pay a debt will result in a delinquency being reported to the main credit bureaus." ¶ 35. Dckt. 18. Plaintiff-Debtor's own argument contradicts itself. If credit reporting were for the sole purpose of coercing collection, Defendant would not need to call or write letters to debtors warning them of consequences. In any case, *In re Keller* is persuasive and credit reporting without more does not violate the automatic stay as a matter of law. 568 B.R. at 122.

The basis for the alleged violation of the automatic stay appears to rest on two alleged inactions. First, that Defendant did not change the balance due on the obligation to inaccurately state that it was $0.00. As counsel for Plaintiff-Debtor well knows, the discharge granted does not zero out, expunge, or exonerate the Debtor from pre-petition obligations. It just renders voids a judgment as to a determination of liability of personal liability (thus not enforceable post-discharge) of the debtor post-discharge and imposes a statutory injunction against post-petition enforcement of a discharged debt against exempt assets and post-petition acquired assets. 11 U.S.C. § 524(a).

Candidly, paragraphs 9 through 36 read like a legislative position paper drafted by Plaintiff-Debtor's counsel or cut and pasted from someone else's advocacy position paper for a change in the Fair Credit Reporting Act. It fails to state allegations of conduct of Defendant, but merely argues how some assert practices should or could be under the Fair Credit Reporting Act, without citation to law.

Beginning with paragraph 37, it appears that the actual alleged conduct, or lack of action, by Defendant consists of:

> ¶ 37. Plaintiff-Debtor filed bankruptcy on November 16, 2015.
>
> No allegations are made as to how Plaintiff Debtor is prosecuting the bankruptcy case.
>
> ¶¶ 38, 47. Defendant has notice of the bankruptcy case and has filed two proofs of claim therein.
>
> ¶ 30. Defendant has and continues to report there being an unpaid, delinquent obligation of Plaintiff-Debtor to Defendant.

> ¶ 42. Plaintiff-Debtor has filed a dispute, which has been sent to Defendant, stating that the information reported by Defendant to the consumer reporting agencies is inaccurate because it does not disclose that the debt is one for which Plaintiff-Debtor is in bankruptcy.
>
> ¶ 45. Defendant continues to report that there is a delinquent, unpaid debt of Plaintiff-Debtor to Defendant.
>
> ¶ 49. Defendant continues to report the information, failing to report that the Plaintiff-Debtor is in bankruptcy.
>
> ¶ 53. Defendant continues to report that there is a delinquent, unpaid debt of Plaintiff-Debtor to Defendant.
>
> ¶ 54. By credit reporting the above information, such reporting constitutes an attempt to collect the obligation because the only way Plaintiff-Debtor can sanitize (the court's characterization) the Plaintiff-Debtor's credit report and make it inaccurately expunge the unpaid obligation as if it never existed is for Plaintiff-Debtor to pay the debt owed to Defendant.

At best, it appears that the wrongful conduct alleged is that Defendant has not updated the information provided to the consumer reporting agencies to show that the valid, undisputed obligation owing by Plaintiff-Debtor is the subject of ongoing bankruptcy proceedings.

It appears from the Amended Complaint that Plaintiff-Debtor advocates/argues further, that the law should be that once someone files bankruptcy all information of pre-bankruptcy financial dealings should be expunged from the consumer's credit reports. No legal basis has been shown for such contention.

The law relating to consumer credit reporting agencies and the furnishing of information to such agencies begins with the Federal Fair Credit Reporting Act. 15 U.S.C. §§ 1681 et seq. In 15 U.S.C. § 1681c Congress provides what information is not to be in consumer report. These include:

> (1) bankruptcy cases that antedate the consumer report by more than 10 years;
>
> (2) civil suits, civil judgments, and criminal arrest records that antedate the consumer report by more than 7 years;
>
> (4) accounts placed for collection or charged to profit and loss which antedate the consumer report by more than 7 years.

No provision is made in 15 U.S.C. § 1681c to exclude information about unpaid obligations (other than the seven year period stated in (4) above) merely because the obligor has filed bankruptcy.

While Plaintiff-Debtor argues that there is an incentive for consumers to pay their debt so that it shows paid on a consumer report (so other potential lenders will want to lend the consumer new money), such does not turn a consumer report. As provided in 15 U.S.C. § 1681b(3)(A), the permissible purposes for the use of a consumer credit report is for a potential lender to use it in evaluating a proposed consumer

credit transaction. It is not a stretch to conclude that the existence of an unpaid obligation, the amount of the obligation, and the period of time of such delinquency would be relevant to a potential lender. This is true even if the consumer successfully went through a bankruptcy case and discharged (freed the consumer from future personal liability) the pre-bankruptcy debt.

As addressed above, the furnisher of information (here alleged to be the Defendant) has a statutory obligation to furnish accurate information. 15 U.S.C. § 1681s-2. In addition to having an obligation to report information, once reported the furnisher has an obligation to update the information to maintain the correctness thereof. 15 U.S.C. § 1681s-2(a)(2). In some respects, to the extent that Plaintiff-Debtor is arguing that Defendant should "correct" the information to have it inaccurately state that there is no obligation, it would appear that Plaintiff-Debtor is seeking to have Defendant violate these requirement of the Fair Credit Reporting Act.

The Fair Credit Reporting Act further mandates that the furnisher of information provide the date of delinquency of the reported obligation - necessitating that the furnisher report that the obligation is delinquent. 15 U.S.C. § 1681s-2(a)(5).

On its face, 15 U.S.C. § 1681s-2 does not require the reporting when a consumer files bankruptcy. 15 U.S.C. § 1601c(d) does require the consumer reporting agency to include the chapter under which a consumer has or had a bankruptcy case, if the consumer reporting agency includes information about the filing of a bankruptcy case by the consumer. But this provision does not mandate the reporting of the bankruptcy.

Now presented to the court, the only claim asserted against Defendant is that it failed to report that the obligation which it reported is included as part of Plaintiff-Debtor's bankruptcy case. It is alleged that Defendant has an obligation to update the information furnished to so disclose the existence of the bankruptcy case as to that debt. Whether such obligation exists, and if so that Defendant failed to do so, or that by failing to provide such information renders previously filed information inaccurate (even if no obligation exists to otherwise report the bankruptcy, such will be the subject of substantive proceedings in this Adversary Proceeding).

The Motion is granted for any and all other claims asserted in the Complaint, including a claim (to the extent asserted) that otherwise accurate information concerning the pre-petition obligation of Plaintiff-Debtor to Defendant is required to be deleted merely because Plaintiff-Debtor is prosecuting a bankruptcy case. As drafted, and applying the standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007), the First Amended Complaint does not state any claims, other than the one stated above, against Defendant.

Prosecution of Adversary Proceeding

Plaintiff-Debtor has commenced this Adversary Proceeding and has now slogged through four months of arguing over the form of the pleadings. Plaintiff-Debtor and her counsel in this Adversary Proceeding are well aware that alleged violations of the automatic stay are properly commenced as a contest matter. Plaintiff-Debtor and her counsel have already successfully prosecuted such a motion for violation of the automatic stay and for damages pursuant to 11 U.S.C. § 362(k). 15-28908; Motion for Sanctions and

Violation of Automatic Stay, Dckt. 61, and Order for damages, Dckt. 83. See Fed. R. Bankr. P. 9020, 9014; *In re Zumbrun*, 88 B.R. 250, 252 (B.A.P. 9th Cir. 1988).

While the Plaintiff-Debtor and counsel may choose to engage in the more time consuming, cumbersome, and correspondingly more expensive for Plaintiff-Debtor (assuming Plaintiff-Debtor prevails), such election does not automatically translate into reasonable and necessary attorney's fees damages included in 11 U.S.C. § 362(k). That Plaintiff-Debtor may want the luxury of an adversary proceeding, that does not mean that she can force creditor to pay for such otherwise unnecessary (and unnecessarily expensive) luxury.

The court is confident that Plaintiff-Debtor and Plaintiff-Debtor's counsel can bring into sharp focus the rights being asserted and the grounds on which they are based. Additionally, that motions in this Adversary Proceeding will be tightly drafted and be in compliance with Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007 (stating in the motion with particularity the grounds upon which the relief is based) and the related points and authorities will cite the court to statutes, regulations, case law, and other sources bearing on the issues then before the court and not merely repeat argumentative treatises of what could be beyond what the law provides.

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 Sarah McGarvey's ("Plaintiff-Debtor") First Amended Adversary Complaint filed by USAA Savings Bank ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is granted, and all claims against Defendant are dismissed, with the exception of the claim stated for the alleged failure of Defendant to update, correct, or include in the information reported that the asserted obligation owed to Defendant is included in Plaintiff-Debtor's bankruptcy case.
>
> **IT IS FURTHER ORDERED**, this being the First Amended Complaint, no leave to amend is automatically given to Plaintiff-Debtor. This is without prejudice to Plaintiff-Debtor's rights to seek leave to file a further amended complaint as provided in Federal Rule of Civil Procedure 15 and Federal Rule of Bankruptcy Procedure 7015. If such a motion is filed, Plaintiff-Debtor shall include as an exhibit a copy of the proposed further amended complaint to be filed.

2. **17-20220-E-7** **WILLIAM/FAYE THOMAS** **MOTION TO STRIKE**
18-2090 **Kristy Hernandez** **7-7-18 [10]**
LBG-1

PUTNAM V. THOMAS, JR. ET AL

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

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor and Office of the United States Trustee on July 9, 2018. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

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

The Motion to Dismiss Adversary Proceeding is sustained.

William Carter Thomas, Jr. ("Defendant" or "Debtor") moves for the court to dismiss all claims against it in Robert Putnam's ("Plaintiff") Complaint according to Federal Rule of Civil Procedure 12(b)(1) and (b)(6) for lack of subject matter jurisdiction under 28 U.S.C. § 157(b)–© and failure to state a claim.

Defendant filed a Chapter 13 case on January 13, 2017. Case No. 17-20220, Dckt. 1. On May 24, 2018, Defendant converted this case to one under Chapter 7. Case No. 17-20220, Dckt. 135. Hank Spacone has been appointed as the Interim Chapter 7 Trustee. Case No.17-20220, Dckt. 136. All property of the bankruptcy estate, including 100% of the shares of stock in APS, are under the exclusive control of the Chapter 7 Trustee. Case No. 17-20220, Schedule B, Dckt. 1 at 15; 11 U.S.C. §§ 541, 506.

Plaintiff filed this Adversary Proceeding challenging the dischargeability of debt on June 7, 2018. Case No. 18-02090, Dckt. 1.

MOTION TO DISMISS

The Motion responds to the Complaint's claims with the following grounds:

A. Plaintiff has no standing to bring the cause of action. Plaintiff claims that Defendant had a Fiduciary duty to the Plaintiff, which would create standing. Dckt. 10 at 2:10-12. However, Plaintiff never gives code sections or case law that make the Defendant (an individual or in his capacity as an officer of a corporation) a fiduciary to the Defendant as an attorney for the corporation. Dckt. 10 at 3:4-6.

B. Plaintiff attempts to assert that the corporation had a fiduciary duty to him as the attorney of the corporation and by extension the defendant debtor despite the fact that he had withdrawn from his position as counsel for the corporation of the Defendant. Dckt. 10 at 3:11-14.

C. A fiduciary relationship does exist between the corporation and the defendant. The plaintiff no longer represents or can speak on behalf of the corporation and so does not have that relationship. Dckt. 10 at 3:23-26.

D. Plaintiff has also failed to state a claim upon which relief can be granted. Plaintiff concludes with no case law, statute or factual assertions, the corporation or the defendant had a fiduciary duty to him. There is no basis for this as discussed above and so it is unsupported and cannot be a basis to grant his request. Dckt. 10 at 4:5-10.

E. Plaintiff "concludes" that defendant was "willful or malicious" with no stated facts upon which to assert those claims. Dckt. 10 at 4:11-12.

F. Plaintiff "concludes" that the underlying state court case was settled for a pecuniary amount without evidence. When in reality there are many other reasons that cases settle that are valuable (such as to resolve counter claims or because of the expense of litigation). Dckt. 10 at 13-16.

G. Plaintiff "concludes" without evidence that the settlement was to harm him but does not assert how he was harmed by a settlement with a third party (other than a loss of contingent fees or costs fronted by Plaintiff in a contingency fee case which plaintiff voluntarily withdrew from as counsel). Dckt. 10 at 17-20.

H. Plaintiff does not have a proper basis for his allegations. Dckt. 10 at 4:21-5:8.

I. Plaintiff is using cursory legal language to further a case that stand on nothing other than a "hunch" or "instinct" of the plaintiff. Dckt. 10 at 5:9-10.

PLAINTIFF'S OPPOSITION

Plaintiff-Debtor filed an Opposition on July 23, 2018. Dckt. 13. Plaintiff asserts that Defendant misunderstands the Complaint to say Debtor owes Plaintiff a fiduciary duty, whereas the Complaint actually alleges that Plaintiff is a secured creditor with a lien on property of the Estate. Dckt. 13 at 3:22-27. Plaintiff addresses lack of standing by pointing out he was the only secured creditor on Debtor's APS legal claim, which was settled without court approval as required in a bankruptcy case. Dckt. 13 at 4:7-16. Plaintiff adds he can add "numerous badges of fraud" to the pleadings. Dckt. 13 at 4:26-5:10. Plaintiff served Glen Van Dyke and Anthony Fritz with subpoenas and requests that he should be granted leave to amend the Complaint after receiving outstanding discovery. Dckt. 13 at 5:13-24.

APPLICABLE LAW

Failure to State a Claim for Relief

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

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

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

drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994) (citations omitted).

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

DISCUSSION

Defendant's Motion alleges Plaintiff is without standing, as his Complaint depends on an alleged fiduciary duty owed to him. Defendant misreads the Complaint. Plaintiff alleges generally:

1. The Complaint is an Adversary Proceeding to determine the dischargeability of a debt pursuant to Bankruptcy Rules 4007. Dckt. 1 at ¶ 1.

2. Defendant is indebted to Plaintiff in the amount of a $118,156.92 claim excepted from a discharge in bankruptcy. *Id*, ¶ 3.

3. Defendant incurred the debt because Plaintiff represented *Defendant* and his corporation, Affiliated Professional Services, Inc., before and after Defendant filed Chapter 13 bankruptcy. *Id*, ¶ 4.

4. Defendant committed fraud while serving in his fiduciary capacity over property of the bankruptcy estate under the Chapter 13 plan or incurred. *Id*, ¶ 4.

5. Defendant, alternatively, incurred Plaintiff's debt because Defendant caused willful and malicious injury to Plaintiff's property by settling El Dorado County Superior Case number PC20120541 for valuable consideration that Defendant has fraudulently concealed from Plaintiff and this court. *Id*, ¶ 4.

6. Pursuant to 11 U.S.C. § 523(a)(2)(B) discharge of Defendant would not apply to Plaintiff's claim. *Id*, at ¶ 5.

Plaintiff does not assert his standing arises from owed fiduciary duties. Rather, Plaintiff alleges clearly that he represented "Defendant and his corporation" in legal proceedings, both before and after the Chapter 13 case was filed. Dckt. 1 at ¶ 4. Plaintiff's standing is derived, assuming the allegations on the face of the complaint are true, from his status as a creditor with a lien on property of the estate. McGlinchy, 845 F.2d at 810. The breach of fiduciary duty referenced within Plaintiff's complaint is an allegation that Debtor breached duties owed to the property of the estate subsequent to filing the Chapter 13 case. Dckt. 1 at ¶ 4.

Plaintiff bases his Adversary Complaint vaguely on sections of 11 U.S.C. § 523. Plaintiff's allegations he is a creditor with a lien on property of the estate and his debt is nondischargeable are enough to convey standing. Plaintiff is in essence asserting his own claims.

Defendant's Motion also asserts Plaintiff failed to state a claim upon which relief can be granted. Defendant's arguments here are well-taken. While Plaintiff's Complaint is not completely without reference to legal grounds (*See*, Dckt. 1 at ¶ 5.), there is still no clear cause of action alleged. The section Plaintiff cites references nondischargeability based on the use of a false statement in writing. 11 U.S.C. § 523(a)(2)(B). Plaintiff also alleges "Defendant caused willful and malicious injury to Plaintiff's property," which likely refers to 11 U.S.C. § 523(a)(6). The Complaint's legal support and factual pleadings and grounds do not line up. It appears that at this stage, Plaintiff is unsure what cause of action he is proceeding under. Plaintiff's Complaint is essentially a recitation of various causes of action that might get his foot through the door. This does not meet the pleadings standards of 12(b)(6). Bell Atl. Corp., 550 U.S. at 556.

The court notes that part of Plaintiff's claim is that there has been a settlement of legal claims, property of the estate, for which Plaintiff does not currently know the factual details. Plaintiff seeks leave to amend his Complaint to allow time for limited and outstanding discovery. Dckt. 13 at 5:13-24.

The Motion to Dismiss Adversary Proceeding is warranted because the Complaint vaguely refers to various code sections that possibly could offer relief without pleading the necessary facts or grounds. The Motion is sustained with leave to amend so that Plaintiff can pursue limited discovery.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss Adversary Proceeding filed by William Carter Thomas, Jr. ("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 sustained and the Complaint is dismissed with leave to amend.
>
> **IT IS FURTHER ORDERED** that an amended complaint, if any, shall be filed and served on or before August 31, 2018.

3. **14-20321-E-13** **DWIGHT BROWN** **MOTION FOR ENTRY OF DEFAULT**
18-2081 **W. Scott de Bie** **JUDGMENT**
SDB-4 **7-17-18 [12]**

BROWN V. DREAM BUILDERS INVESTMENTS, LLC

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, creditors,on July 17, 2018. By the court's calculation, 30 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.~~

Before the court is what one might anticipate is a simple motion for entry of a default judgment to clear title to property after the secured claim, as determined pursuant to 11 U.S.C. § 506(a), has been paid in full and the Chapter 13 Plan was completed. Though the creditor refusing/failing to reconvey the deed of trust will have the privilege of paying mandatory statutory damages and contractual attorney's fees to the consumer debtor, some creditors believe it is financially advantageous to pay those fees instead of reconveying a deed of trust.

However, as the present situation shows, the situation can be much direr for the consumer debtor and consumerdebtor's attorney when the creditor, and creditor's predecessor, create a murky, cloudy chain of tile for the note and deed of trust. Such a situation could be construed (no such determination has been made in this matter, at this time) as a plan to create an ongoing cloud on title of the consumer's home, for which some future purchaser of the note will later demand payment.

REVIEW OF MOTION

Dwight Alan Brown ("Plaintiff-Debtor") filed the instant Motion for Default Judgment on July 17, 2018. Dckt. 12. Plaintiff-Debtor seeks an entry of default judgment against "Dream Builders Investments, LLC" (also identified in the Motion with the name "Dreambuilders Investments, LLC"), named as "Defendant" in the instant Adversary Proceeding No. 12-02081.

The instant Adversary Proceeding was commenced on May 31, 2018. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on May 31, 2018. Dckt. 3. The complaint and summons were 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 Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on July 13, 2018. Dckt. 11.

REVIEW OF COMPLAINT

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

A. Plaintiff-Debtor owns real property commonly known as 525 Carousel Drive, Vallejo, California ("Property"). Plaintiff-Debtor resides there as a primary residence.

B. As of January 4, 2014, the date of the filing of the Chapter 13 bankruptcy case, the Property had a fair market value of approximately $260,000.00.

C. Plaintiff-Debtor's Chapter 13 Plan was confirmed on August 13, 2014; Plaintiff-Debtor completed the Plan, and an order of discharge was signed on May 22, 2017.

D. Plaintiff-Debtor owned the Property at the time of filing for bankruptcy, and the Property was secured by two loans: a primary mortgage in favor of Ocwen Loan Servicing and second mortgage in favor of, which was transferred to Defendant and secured by a second deed of trust.

E. Plaintiff-Debtor filed a Motion to Value Secured Claim regarding the Property, which was granted on July 29, 2014, and the secured claim was determined to be in the amount of $0.00 and wholly unsecured. Dckt. 49.

F. On May 22, 2017, "Defendant" (identified in the caption of the Complaint as "Dream Builders Investments, LLC," Dckt. 1 at 1, and identified in the body of the Complaint as " Dreambuilders Investments, LLC") was served with the order of discharge.

G. Plaintiff-Debtor's counsel provided "Defendant" with the order of discharge, with the civil minute order signed by the court on July 29, 2014, granting Plaintiff-Debtor's Motion to Value Secured Claim, and with the second deed of trust.

H. "Defendant" was assigned its interest in the second deed of trust by Citigroup Global Realty Corp. Pursuant to bill of sale dated July 22, 2011. Exhibit. C. Dckt. 16. It is unclear when the original lienholder, Resmae Mortgage Corporation, assigned its interest because no transfer or assignment has been recorded.

J. On June 1, 2018, Plaintiff-Debtor mailed to "Defendant's" agent for service of process, Danel Singer, Esq., a letter informing Defendant of the status of the second deed of trust, of "Defendant's" improper transfer, and requesting Defendant immediately reconvey the second deed of trust.

K. "Defendant" failed and refused to reconvey the second deed of trust.

L. As a result of "Defendant's" and Assignee's conduct, Plaintiff-Debtor 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.

Claim for Relief—Extinguishment of the Second Trust Deed Claim

Plaintiff-Debtor alleges the following for its cause of action:

A. Plaintiff-Debtor continued receiving collection notices from the original holder of the Second Deed of Trust up to the filing of his petition. Plaintiff-Debtor discovered Subsequent to filing a Motion to Value Second Deed of Trust that there had likely been an assignment or transfer to "Defendant."

B. Debtor completed his confirmed Chapter 13 Plan on January 14, 2017; included in the debts discharged is "Defendant's" claim.

C. Over thirty days have passed since the satisfaction of the mortgage and "Defendants" are required to reconvey the Second Deed of Trust.

D. "Defendants" have failed to reconvey or release its Deed.

Prayer

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

A. Identify as an unsecured lien and treat as an unsecured claim the Second Deed of Trust held by "Defendant;"

B. Extinguish the Second Deed of Trust;

C. Execute and acknowledge a substitution of Trustee and issuance of a full reconveyance, authorizing a title insurance company to prepare and record a release of the deed of trust;

D. Award attorneys' fees and costs; 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. *Cashco Fin. Servs. v. McGee (In re McGee)*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.*

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

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

Id. at 1471–72 (citing 6 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.)); *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62 (B.A.P. 9th Cir. 1994).

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff-Debtor'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-Debtor did not offer evidence in support of the allegations. *See id.* at 775.

IMPROPERLY IDENTIFIED DEFENDANT

The court notes that "Defendant" has several names across the pleadings and evidence. Plaintiff-Debtor's Motion for Default Judgement identifies the defendant to be "Dream Builders Investments, LLC." Dckt. 12 at 1:28. Within the same Motion, Plaintiff-Debtor identifies the possible defendant as "Dreambuilders Investments, LLC." Dckt. 12 at 3:21. Plaintiff-Debtor's Motion depends on a Motion to Value which identified the possible defendant as " "Dreambuilders Investments, LLC." Case No. 14-20321, Dckt. 39. Plaintiff-Debtor's Notice of Hearing on Plaintiff-Debtor's Motion for Default Judgement purports to give notice to "Dream Builders Investments, LLC." Dckt. 13. The Proof of Service indicates that notice was provided to 6 different possible "Dreambuilders Investments, LLC" entities. Dckt. 17. The Declaration of Scott De Bie in support of the Motion identifies the possible defendant as both "Dream Builders Investments, LLC" and Dreambuilders Investments, LLC." Dckt. 15. The Declaration of Dwight Alan Brown also references both names. Dckt. 14. Plaintiff-Debtor's Summons and Notice of Status Conference and Entry of Default and Order RE: Default Judgement Procedures, Exhibits A and B respectively, were issued to "Dream Builders Investments, LLC." Dckt. 16.

The situation gets even more cloudy based on what Greg Palmer puts forward as his declaration under penalty of perjury. Exhibit C, Dckt. 16. Mr. Palmer states under penalty of perjury [FN.1.] that:

> 1. He is "Manager of Dreambuilders Investments, LLC" (not stating whether he is one manager of several or the sole manager, or if he is a managing member of the limited liability company). Exhibit C, first unnumbered paragraph, Dckt. 16 at 8.
>
> 2. Dreambuilders Investments, LLC acquired a significant number of mortgage loans from Citigroup Realty Corp. pursuant to a Bill of Sale dated July 22, 2011. The Bill of Sale is identified as Attachment 1 to the Declaration. *Id.*, second paragraph.
>
> 3. The Bill of Sale, *Id.* at 9, includes the following information:
>
> > a. On July 22, 2011, Citigroup Global Markets Realty Corp. sold to "Dreambuilder Investments, LLC" (the name of the buyer spelled different than as stated by Mr. Palmer in his declaration, leaving the "s" off of "Dreambuilder").
> >
> > b. The loans are set forth on Schedule I attached to the Bill of Sale. (No Schedule I is included with this Attachment to the Declaration.)
> >
> > c. The sale and transfer includes the mortgages and agreements providing security for the note.
> >
> > d. The Bill of Sale is signed by Gregory Palmer as the Manager for Dreambuilder Investments, LLC; and by Peter D. Steinmetz as the authorized agent for Citigroup Global Markets Realty Corp.

4. The portfolio of loans purchase include that of the Plaintiff-Debtor. Mr. Palmer states that this is loan #3193 on the Bill of Sale, but no copy of the attachment is not provided for the court to review. *Id.*, Declaration third paragraph.

5. Mr. Palmer further states that on June 11, 2014 (three years later) Citigroup Global Markets Realty Corp. "process the transfer of the Loan via MERS." Mr. Palmer does not provide any testimony as to what is meant by the transfer not being processed for three years. *Id.*, fourth paragraph.

6. Mr. Palmer further testifies that the "transfer" that was "processed" by Citgroup Global Markets Realty Corp. was done so that it would be correctly reflected in the MERs system. *Id.* (Mr. Palmer does not provide any testimony as to the transfer of the note or deed of trust to accurately be reflected in the real property records by which the Plaintiff-Debtor can be determine to have clear title, or that the deed of trust continues to cloud Plaintiff-Debtor's title.

7. Mr. Palmer testifies that he is the agent for services of process for "Dreambuilder's" (having placed the apostrophe showing single possessive). *Id.*, fifth paragraph.

FN.1. The court notes two issues with Mr. Palmer's statement. First, this is a purported declaration submitted improperly as an exhibit. Second, 28 U.S. Code § 1746 requires an affirmation under penalty of perjury that the testimony provided is "true and correct." Mr. Palmer's "declaration" affirms that it is "true and correct to the best of [his] knowledge." What has been provided, therefore, does not appear to be testimony given under penalty of perjury, but statements made with "plausible deniability" for whatever it said - if it turns out not to be actually true. The court will give Mr. Palmer the benefit of the doubt and hold him to these statements as having been made pursuant to the requirements of Federal Rules of Evidence 601 and 602.

A review of the note and deed of trust for the secure claim that has been valued and provided for in Plaintiff-Debtor's Chapter 13 Plan discloses the following information:

A. Note Dated November 10, 2006, Exhibit D, Dckt. 20 at 3-4.

1. Payee if Resmae Mortgage Corporation, 8 Pointe Drive Brea, California. Note ¶ 1.

2. On page 2 of the Note is an endorsement by ResMAE Mortgage Corporation transferring the Note to Lehman Brothers Bank, FSB. *Id.* at 4. There also appears to be an endorsement in blank by Lehman Brothers Bank, FSB (which is undated and partially illegible). *Id.*

B. Deed of Trust Recording Date of November 18, 2006, Exhibit E, Dckt. 20 at 5-13.

1. Resmae Mortgage Corporation is identified as the lender, with MERS as the nominee named as the beneficiary. *Id.* at 5.

Exhibit F filed in support of the Motion is a printout from the New York Department of Corporations website showing information for "Dreambuilder (singular) Investments, LLC." Dckt. 20 at 14. This information for Dreambuilder Investments, LLC states that it has no registered agent and that its "DOS Process" address is:

Dreambuilder Investments, LLC
30 Wall Street
6th Floor
New York, New York 10005. [FN.2.]

FN.2. A review the New York State Department of State Division of Corporations is consistent with the address and information provided by the Plaintiff-Debtor.

https://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_token=C85B1A53E8AA09D248C29C04594456797489EEDC1880A08FE73618EB16EADB94EED14286172D74B01D4AB7AD98002FDC&p_nameid=AC947C03A82CCA49&p_corpid=5ABFD5121B98B8D9&p_captcha=15177&p_captcha_check=C85B1A53E8AA09D248C29C04594456797489EEDC1880A08FE73618EB16EADB9408D697F953D9C5E281563866686ACA12&p_entity_name=%44%72%65%61%6D%62%75%69%6C%64%65%72%20%69%6E%76%65%73%74%6D%65%6E%74%73&p_name_type=%41&p_search_type=%42%45%47%49%4E%53&p_srch_results_page=0

Nothing has been provided to the court showing that either "Dreambuilder Investment, LLC," "Dreambuilders Investments, LLC," or "Dream Builders Investments, LLC" are the creditor holding the secured claim that has been valued and the real party in interest for which the court may declare the deed of trust void and of no force and effect.

It appears that this shortcoming in the current Motion rests not at the feet of the Plaintiff-Debtor or his counsel, but at the feet of "Dreambuilder Investments, LLC" (if the court uses the name show on the Department of Corporation printout, Exhibit F, Dckt. 20), "Dreambuilders Investments, LLC" (as stated by Greg Palmer under penalty of perjury in his Declaration, Exhibit C, Dckt. 16), "Dreambuilder Investments, LLC (as stated in the bill of sale by Gregory Palmer signing for Dreambuilder Investments, LLC, and Peter Steinmetz for Citigroup Global Markets Realty Corp, *Id.*), and Citgroup Global Markets Realty Corp.

REVIEW OF CALIFORNIA SECRETARY OF STATE RECORDS

The court has reviewed the California Secretary of State's Official Website on which information is provided concerning corporations and limited liability companies authorized to do business in the state of California. For the name "Dreambuilders Investments, LLC,[FN.3.] the following information is provided:

200416710167 DREAMBUILDERS INVESTMENTS, LLC

Registration Date:	05/28/2004
Jurisdiction:	CALIFORNIA
Entity Type:	DOMESTIC
Status:	CANCELED
Agent for Service of Process:	SYNTA HUMPHRIES 2209 E 29TH ST OAKLAND CA 94606
Entity Address:	4100 REDWOOD RD STE 387 OAKLAND CA 94619-2363
Entity Mailing Address:	*
LLC Management	Managers

and

200619310118 DREAMBUILDERS INVESTMENTS, LLC

Registration Date:	06/23/2006
Jurisdiction:	CALIFORNIA
Entity Type:	DOMESTIC
Status:	FTB SUSPENDED
Agent for Service of Process:	MHARLA ORTEGA 5632 WEAVER PL OAKLAND CA 94619
Entity Address:	4100 REDWOOD RD #387 OAKLAND CA 94619
Entity Mailing Address:	*
LLC Management	Member Managed

FN.3.
https://businesssearch.sos.ca.gov/CBS/SearchResults?SearchType=LPLLC&SearchCriteria=dreambuilders+Investments&SearchSubType=Keyword

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For "Dreambuilder Investments, LLC" there are no entities with that name reported by the California Secretary of State.

LEXISNEXIS Public Records

A review of LEXISNEXIS online records (which the court acknowledges are not evidence upon which a final ruling is to be made) discloses that "Dreambuilders Investments, LLC's" name (with an Oakland, California address) appears in connection with title to eight parcels of real property. [FN.4] The "Dreambuilder Investments, LLC" name (with a South Carolina address) appears with respect to one property. [FN.5.]

FN.4.
https://advance.lexis.com/publicrecordshome/?pdmfid=1000200&crid=675eb626-bf68-4d74-b005-d40305aadd88

FN.5.
https://advance.lexis.com/publicrecordshome/?pdmfid=1000200&crid=675eb626-bf68-4d74-b005-d40305aadd88

For Dreambuilders Investments, LLC, a nationwide search discloses twenty-seven entities, with addresses that include: New York, New York; Oakland, California; Ogden, Utah; St. Louis, Missouri; Puyallup, Washington; Fort Lauderdale, Florida; Saint Joseph, Missouri; Silverado, California; Detroit Lakes, Minnesota; Jersey City, New Jersey; Austin, Texas; Norman, Oklahoma; Los Angeles, California, Plantation, Florida; and Conshohocken, Pennsylvania. [FN. 6.]

For Dreambuilder Investments, LLC, a nationwide search discloses thirty-five entities, with addresses that include: Silverado County, California; Pittsburgh, Pennsylvania; New York, New York; Las Vegas Nevada; Henderson, Nevada; Princeton, New Jersey; Atlanta, Georgia; Orlando, Florida; Fort Mill, South Carolina; West Lake, Texas; Detroit Lakes, Minnesota; Tifton, Georgia; and Bettendorf, Iowa. [FN. 7.]

FN.6.
https://advance.lexis.com/publicrecordshome/?pdmfid=1000200&crid=675eb626-bf68-4d74-b005-d40305aadd88.

FN.7.
https://advance.lexis.com/publicrecordshome/?pdmfid=1000200&crid=675eb626-bf68-4d74-b005-d40305aadd88.

DISCUSSION

The Motion does not state with particularity the relief requested (Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007), but merely requests that the court enter a default judgment in Plaintiff-Debtor's favor. Dckt. 12 at 5. The Complaint requests that the court:

> a. Issue an Order (which term can include a judgment in an adversary proceeding) that the deed of trust be found to be an unsecure claim that was discharged in the Plaintiff-Debtor's bankruptcy case. Complaint, prayer ¶ a., Dckt. 1 at 4.
>
> b. The court issue an order that the deed of trust is of no force and effect. *Id.* at 5, ¶ b.

c. Find that seventy-five days have passed since the mortgage (obligation secured by the deed of trust) was satisfied, a substitute trustee under the deed of trust may be appointed, the substitute trustee may issue a full reconveyance, and the title insurance company may prepare and record a release of the deed of trust. *Id.* ¶ c.

d. Attorney's fees and costs be awarded Plaintiff-Debtor. *Id.* ¶ d.

Plaintiff-Debtor states that on January 14, 2014, they filed a Chapter 13 bankruptcy case. As of that date, the Property had two liens encumbering it: (1) First Deed of Trust in favor of Ocwen Loan Servicing, and (2) Second Deed of Trust in favor of Dream Builders Investments, LLC, which it had been assigned.

Plaintiff-Debtor states that Chapter 13 plan payments were completed, which required Defendant to reconvey the Second Deed of Trust on the Property. Plaintiff-Debtor was discharged on May 22, 2017. Case No. 14-20321, Dckt. 86.

According to the Trustee's Final Report and Account in Plaintiff-Debtor's bankruptcy case, Case No. 14-20321, Debtor's Plan was confirmed on August 13, 2014, and completed on January 14, 2017. Bankr. E.D. Cal. No. 14-20321, Dckt. 77, March 24, 2017. The discharge of Plaintiff-Debtor was entered on May 22, 2017. Bankr. E.D. Cal. No. 14-20321, Dckt. 86. Plaintiff-Debtor states that more than thirty days have passed and that Defendant has not reconveyed, requiring Plaintiff-Debtor to file an adversary proceeding.

Here, it appears that Plaintiff-Debtor was entitled to full reconveyance of the Second Deed of Trust on the Property. This court has addressed—in detail—California state law, the standard note and deed of trust contractual basis, and possible 11 U.S.C. § 506(d) basis for a creditor being obligated to reconvey a deed of trust upon a debtor successfully completing a Chapter 13 plan that provides for the payment of the secured claim in the 11 U.S.C. § 506(a) determined amount. *Martin v. CitiFinancial Servs., Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. Cal. 2013); *In re Frazier*, 448 B.R. 803 (Bankr. E.D. Cal. 2011), *aff'd sub nom. Frazier v. Real Time Resolutions, Inc.*, 469 B.R. 889 (E.D. Cal. 2012) (discussing "lien striping" in Chapter 13 case).

Upon completion of the Chapter 13 Plan and its terms becoming the final, modified contract between Plaintiff-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.8. The lien is also rendered void by operation of 11 U.S.C. § 506(d) upon completion of the Chapter 13 Plan. *In re Martin*, 491 B.R. at 127–30.

FN.8. 4 B.E. WITKIN ET AL., WITKIN SUMMARY OF CALIFORNIA LAW § 117 (10th ed. 2005) (citing CAL. CIV. CODE § 2939 et seq.; RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 6.4; 4 POWELL § 37.33; 2 C.E.B., MORTGAGE AND DEED OF TRUST PRACTICE § 8.84 (3d ed.); 13 AM.JUR. LEGAL FORMS § 179:511 (2d ed.)).

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 the confirmed plan having been completed, 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. CODE § 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, Plaintiff-Debtor. CAL. CIV. CODE § 2941(b)(1)(B)(ii).

Here, Plaintiff-Debtor completed the plan on January 14, 2017. 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).

CONTINUED HEARING FOR PRESENTATION OF EVIDENCE BY DREAMBUILDERS INVESTMENTS, LLC, DREAMBUILDER INVESTMENTS, LLC, AND CITIGROUP GLOBAL MARKETS REALTY CORP.

While the court clearly has subject matter jurisdiction for this Adversary Proceeding and clearing title from the cloud created by the deed of trust, there is a question as to having the real party in interest creditor before the court for which an effective judgment can be entered. Just as the Plaintiff-Debtor and his counsel do not desire to have an ineffective judgment entered and Plaintiff-Debtor having to further litigation against a purported "bona fide purchaser" of the note and deed of trust, the court does not engage in entering "maybe effective - maybe not" orders and judgments.

Fortunately for the Plaintiff-Debtor, counsel for Plaintiff-Debtor, and the court, the parties whose transactions (and apparent lack of documentation) have created the confusion can clear this up with the presentation of evidence at a continued hearing.

Therefore, the court orders Dreambuilder Investments, LLC, Dreambuilders Investments, LLC, and Gregory Palmer, as the identified manager of the entity(ies) named Dreambuilder Investments, LLC and Dreambuilders Investments, LLC to appear in court at the continued hearing and:

1. Present in open court the original note dated November 10, 2006, for which the property is identified as 525 Carousel Drive, Vallejo, California; the lender is identified as ResMae Mortgage Corporation; the obligation amount is stated to be $95,800.00; and the borrower is identified as Dwight Brown; a copy of which Note is attached as Exhibit to the Order Continuing the hearing; and

2. File not less than seven (7) days before the hearing file and serve on counsel for the Plaintiff-Debtor any and all documents which he presents as a basis for the court determining that Dreambuilder Investments, LLC or Dreambuilders Investments, LLC is the current owner of the

Note and the person against whom the court can issue an effective judgment determining that the deed of trust securing the Note is void and of no force and effect.

The court further orders that Citigroup Global Markets Reality Corp. and Peter D. Steinmetz, the authorized agent for Citigroup Global Markets Reality Corp., which is identified as the entity who sold the Note to Dreambuilder Investments, LLC, appear at the continued hearing and:

1. Present in open court the original documents by which Citigroup Global Markets Reality Corp. sold and transferred the Note dated November 10, 2006, for which the property is identified as 525 Carousel Drive, Vallejo, California; the lender is identified as ResMae Mortgage Corporation; the obligation amount is stated to be $95,800.00; and the borrower is identified as Dwight Brown; a copy of which Note is attached as Exhibit to the Order Continuing the hearing, and the deed of trust securing the Note to Dreambuilder Investments, LLC; and

2. File not less than seven (7) days before the hearing file and serve on counsel for the Plaintiff-Debtor any and all documents which he presents as a basis for the court determining that Dreambuilder Investments, LLC or Dreambuilders Investments, LLC is the current owner of the Note and the person against whom the court can issue an effective judgment determining that the deed of trust securing the Note is void and of no force and effect.

While the court may have been able to track down the actual defendant, the facts are far from clear. It is easy to understand why Plaintiff-Debtor struggled to definitively identify the defendant. Creditors in this case, the sophisticated parties, have neglected the chain of title. Plaintiff-Debtor has obtained a discharge but is burdened with a cloud over her title. The failure of the proper party to reconvey as required by California Civil Code § 2941 has no doubt resulted in increased expenses and costs to Plaintiff-Debtor. It is unclear why the proper party here would risk the statutory fine and liability for attorney's fees under California Civil Code § 2941(b)(1) or California Civil Code § 1717.

Notwithstanding Plaintiff-Debtor having the right to have the deed of trust declared void and title to his property cleared from the current cloud thereon by the deed of trust, the record is not clear that Dream Builders Investments, LLC, Dreambuilders Investments, LLC, or Dreambuilder Investments, LLC is the actual holder of the note. However, that can be addressed by Dreambuilder(s) Investments, LLC and Citigroup Global Markets Reality Corp

The court shall issue a Chambers Prepared Order (not 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 Dwight Alan Brown ("Plaintiff-Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the hearing on the Motion for Entry of Default Judgment is continued to10:30 a.m. on xxxxxxxxx, to allow for the presentation of

evidence by Dreambuilder Investments, LLC and Dreambuilders Investments, LLC, and Citigroup Global Markets Reality Corp. (which is the person purported to have transferred the Note below to Dreambuilder Investments, LLC or Dreambuilders Investments, LLC) establishing that Dreambuilder Investments, LLC and Dreambuilders Investments, LLC is the creditor in the Plaintiff-Debtor's bankruptcy case responsible for reconveying the deed of trust securing said Note.

IT IS FURTHER ORDERED that Dreambuilder Investments, LLC, Dreambuilders Investments, LLC, and Gregory Palmer, as the identified manager of the entity(ies) named Dreambuilder Investments, LLC and Dreambuilders Investments, LLC appear in court at the xxxxxxxxx continued hearing – No Telephonic Appearance Permitted For Mr. Palmer – and:

1. Present in open court the original note dated November 10, 2006, for which the property is identified as 525 Carousel Drive, Vallejo, California; the lender is identified as ResMae Mortgage Corporation; the obligation amount is stated to be $95,800.00; and the borrower is identified as Dwight Brown; a copy of which Note is attached as Exhibit to the Order Continuing the hearing; and

2. File not less than seven (7) days before the hearing file and serve on counsel for the Plaintiff-Debtor any and all documents which he presents as a basis for the court determining that Dreambuilder Investments, LLC or Dreambuilders Investments, LLC is the current owner of the Note and the person against whom the court can issue an effective judgment determining that the deed of trust securing the Note is void and of no force and effect.

The Clerk of the Court shall serve Gregory Palmer, individually and as the authorized agent at the following addresses:

Gregory Palmer, Individually and as Manager
Dreambuilder Investments, LLC
30 Wall Street
6th Floor
New York, New York 10005.

Gregory Palmer, Individually and as Manager
Dreambuilder Investments, LLC
30 Wall Street
6th Floor
New York, New York 10005.

IT IS FURTHER ORDERED that Peter D. Steinmetz, the authorized agent for Citigroup Global Markets Reality Corp. executing the Bill of Sale, which is identified as the entity who sold the Note to Dreambuilder Investments, LLC, and

Citigroup Global Markets Reality Corp. shall appear at the xxxxxxxxx continued hearing – No Telephonic Appearance Permittted for Mr. Steinmetz – and:

1. Present in open court the original documents by which Citigroup Global Markets Reality Corp. sold and transferred the Note dated November 10, 2006, for which the property is identified as 525 Carousel Drive, Vallejo, California; the lender is identified as ResMae Mortgage Corporation; the obligation amount is stated to be $95,800.00; and the borrower is identified as Dwight Brown; a copy of which Note is attached as Exhibit to the Order Continuing the hearing, and the deed of trust securing the Note to Dreambuilder Investments, LLC; and

2. File not less than seven (7) days before the hearing file and serve on counsel for the Plaintiff-Debtor any and all documents which he presents as a basis for the court determining that Dreambuilder Investments, LLC or Dreambuilders Investments, LLC is the current owner of the Note and the person against whom the court can issue an effective judgment determining that the deed of trust securing the Note is void and of no force and effect.

The Clerk of the Court shall serve Citigroup Global Markets Reality Corp. and Peter D. Steinmetz, individually and as the authorized agent of Citigroup Global Markets Reality Corp. at the following addresses:

Peter D. Steinmetz, Individually and Authorized Agent
Citigroup Global Markets Realty Corp.
388 Greenwich Street
19th Floor
New York, NY 10013

Peter D. Steinmetz, Individually and Authorized Agent
CT Corporation System, Agent for Service of Process
Citigroup Global Markets Realty Corp.
111 Eighth Ave 13TH FL
New York, NY 10010

Richard Isenberg, CEO
Citigroup Global Markets Realty Corp.
390 Greenwich Street
New York, NY 10013

IT IS FURTHER ORDERED that Citigroup Global Markets Realty Corp. and Peter D. Steinmetz may jointly request on or before xxxxxxxxx, that another equally or more knowledgeable officer or senior representative for Citigroup Global Markets Realty Corp. be authorized to appear in person at the xxxxxxxxx, hearing as the representative of Citigroup Global Markets Realty Corp. and that Mr. Steinmetz be relieved of the obligation to appear in compliance with this Order.

4. **09-22188-E-13** **RICK SILLMAN**
18-2063 **Pro Se**

MOTION TO ORDER TRANSFERS AND FOR FRAUDULENT ATTEMPTS OF THE SILLMAN V. TALCOTT ET AL DEFENDANT
7-6-18 [59]

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 Defendants on July 5, 2018. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion to Avoid Transfers for 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 Avoid Transfers is denied without prejudice.

On July 6, 2018, Plaintiff Rick Sillman ("Plaintiff" or "Movant") filed this Motion for the Court to Order the Transfers from Defendant Walker to Defendant Talcott, From Defendant Talcott to Defendant Jackson, Void, and cancelled, for the Fraudulent Attempts of the Defendants to Defeat the Debtor/Plaintiff's Judgement Lien on Defendant John Walker "15 & 16" Powtan Trail ("Motion to Avoid Transfers" or "Motion"). Plaintiff names as defendants Lisa Talcott, Quancy Jackson, and John Walker (collectively "Defendants"). The property subject to this action is 15 & 16 Powtan Trail, Yankee Hill, California (the "Property").This Motion is part of an Adversary Proceeding arising from a judgment entered for Movant against John Walker in the amount of $45,000.00 on January 14, 2014, in Adversary Proceeding 12-2023. That judgment was affirmed on appeal in *Walker v. Sillman*, E.D. Cal. No. 2:14-cv-0587, on March 20, 2015. 12-2023, Dckt. 210. The court's file in that Adversary Proceedings shows two abstracts of judgment having been issued—one on December 13, 2016, and the other on October 20, 2017.

Adversary Proceeding 12-2023 between Mr. Sillman and Mr. Walker presented the court with a number of challenges—the makings of both Plaintiff and Defendant. For Plaintiff, as the court noted in its Memorandum Opinion and Decision

> "From the presentation of the parties and pleadings in this case, it is clear to the court that the Plaintiff-Debtor (who so admitted to the court) copes with mental health issues. His ability to focus on the significant matters on issues before the court appears to be compromised, leading to his being distracted by other issues. From what was presented, this is exactly the type of person who a less than honorable creditor might believe could be the subject to improper influence and unable to reasonable protect his rights. Whether Murphy's Law further compounded the problems in this case or Walker and his attorneys devised a strategy intended to "run over" the Plaintiff-Debtor, this court will never know, in large part due to the Plaintiff-Debtor's limitations in presenting evidence to the court. At best for Walker, he and his attorneys devised an ill-conceived strategy which worked to obfuscate the real issue and divert attention from the violation of the automatic stay."

12-2023; Memorandum Opinion and Decision FN. 45, Dckt. 158. As is clear in the above, the challenges from Plaintiff were identified as mental health issues, while for Defendant, John Walker and his counsel did not so impress the court that such mental health challenges were at the heart of their conduct, but that it was "at best" an ill-conceived strategy to hide Mr. Walker's continuing violation of the automatic stay.

SUMMARY OF MOVANT'S COMPLAINT

Plaintiff has filed HIS Complaint in *pro se*, attempting to assert his legal rights himself. The court attempts to summarize the contentions and rights that Plaintiff believes he is (and can) assert in an adversary proceeding as follows.

However, before beginning the summary, the court first notes that Plaintiff's Chapter 13 Case was dismissed on July 30, 2010. 09-22188; Order, Dckt. 33. There is no bankruptcy case pending for Plaintiff in this District.

A. Plaintiff identifies himself as "Debtor in possession of judgment plaintiff for his adversary complain. . . ." Complaint, p. 2: 2–3; Dckt. 1.

B. "Defendants [in the first adversary proceeding] and their counsel did not alert the Court, the Debtor, or the standing trustee that they John Walker and Lisa Talcott] were a married couple, at any time during the bankruptcy, adversary, or appeal, when they had such duty." *Id.*, ¶ 6.

C. The defendants named by Plaintiff in the Complaint are:

1. John Walker, and Lisa Talcott (his wife), are judgment debtors under the judgment in the first adversary proceeding.

2. "Defendant Coldwell Banker Ponderosa Real Estate in Paradise, California, Seller John Walker's listing company for judgment liened '15 & 16' Powtan Trail, listed on or before June 1, 2014." *Id.*, ¶ 10.

3. "Defendant Tray Davis, John Walker's listing broker, an employee broker of Coldwell Banker Ponderosa, on or before June 1, 2014." *Id.*, ¶ 11.

4. "Defendant Mid Valley Title and Escrow (Main), Chico, California Title Company for '15 & 16' judgment liened Powtan Trail." *Id.*, ¶ 12.

5. "Defendant Mid Valley Title and Escrow (branch), Paradise, California, company that did title search for '15 & 16' Powtan Trail." *Id.*, ¶ 13.

6. "Defendant Dan Hunt, President of Mid Valley Title and Escrow in Chico, California." *Id.*, ¶ 14.

7. "Defendant Tami Barlow, Vice-President of Mid Valley Title and Escrow in Paradise, California." *Id.*, ¶ 15.

8. "Defendant Heidi Gomez, Title Officer for Mid Valley Title and Escrow, Paradise, California, who did the title search on '15 & 16' Powtan Trail." *Id.*, ¶ 16.

9. "Defendant Quincy L. Jackson, 'Buyer' of '15 & 16' Powtan Trail." *Id.*, ¶ 17.

D. Plaintiff recorded an abstract of judgment against the '15 & 16' Powtan Trail property. *Id.*, ¶ 18.

E. "Exhibit "F", which is attached hereto, and specifically incorporated by reference, is a true certified copy of "Debtor's proof of Defendant John Walker's attempt to wait until the last minute before the sale and do a voidable interspousal transfer to Lisa Talcott, his wife, to attempt to avoid the judgment lien." *Id.*, ¶ 23.

1. Exhibit F is titled "Interspousal Transfer Grant Deed" and bears a recorder stamp stating that it was recorded on December 2, 2016. Dckt. 6, pages 64–66 of Exhibits. The Abstract of Judgment filed as Exhibit A by Plaintiff has a recording date of July 3, 2014. *Id.*, pages 1–2 of Exhibits. The abstract of judgment states it was recorded in Butte County, California and recorder stamp states it was recorded in Butte County, California, approximately 29 months before the recording of the Interspousal Transfer Grant Deed.

F. For the First Cause of Action, Plaintiff seeks to "avoid" the immediate transfer by the Interspousal Grant Deed and then subsequent deeds in the

chain of title pursuant to 11 U.S.C. §§ 547, 548 549. Though it appears that various theories could possibly be asserted, including the judgment lien itself, there is no bankruptcy trustee, or Chapter 13 debtor or a debtor in possession, to exercise the avoiding powers for a bankruptcy estate. As stated above, Plaintiff's bankruptcy case was dismissed long ago.

G. It appears that the title company Defendants are named as cooperating with the transfers, even though they knew of the judgment lien. If the judgment lien was of record, one only needs to review California real property law to understand the effect of that lien on the property and the responsibility of people taking to property subject to such judgment lien.

H. Much of the Complaint focuses on Plaintiff asserting that he demanded payment on his lien from various people, but that none of them would pay him. From the complaint, it appears that Plaintiff's mental health issues have continued, impairing his ability to enforce his rights. Additionally, Plaintiff is not an attorney, and various enforcement of judgment tactics and claims to be brought against various persons involved in the alleged transfers that would be apparent to a creditor attorney, bank attorney, collection attorney, or collection agency would not be apparent to a lay person.

I. It is alleged that there was damage to the property, Defendant Jackson obtained payment of insurance proceeds, stated that the insurance more than paid him for his investment in the property, and has refused to address the judgment line.

J. The Second Cause of Action seeks recovery of property of the bankruptcy estate pursuant to 11 U.S.C. § 550 and the Third Cause of Action for disallowance of claim. As stated above there is no bankruptcy case pending in which there a bankruptcy estate and no claims at issue to be adjudicated.

K. Much of the Complaint is a long recitation of how Plaintiff believes he has been wronged. In the Fourth Cause of Action, he asserts that these allegations constitute a claim under California Business and Professions Code §§ 17200 and 1750. It appears that some of these claims relate to the title company not enforcing Plaintiff's judgment lien, while others date back to the alleged violations of the automatic stay, for which the issues have already been litigated as to John Walker and Lisa Talcott in the first adversary proceeding.

L. The Fifth Cause of Action is stated to be one for fraud and deceit. It appears that this case is premised on the title company and persons involved in the alleged transfers not honoring or enforcing Plaintiff's judgment lien.

Motion to Avoid Transfers Filed by Plaintiff

On July 6, 2018, Plaintiff filed the present Motion. Dckt. 59. Plaintiff's Motion alleges the following:

1. After Plaintiff obtained a successful judgement order, Defendants sold the encumbered property between spouses, and then to a known friend or associate in an attempt to prevent Plaintiff's recovery of the lien. Dckt. 59 at 2:13-18.

2. Defendant Jackson insured the Property shortly after aquiring it; subsequently, a tree 'fell' on the Property causing damage. *Id*. at 2:20-25.

3. Defendant Jackson devalued the Property "maybe 20,000.00" by failing to perform adequate repairs after the tree fell, which Plaintiff asserts is now below the value of the lien. *Id*. at 3:1-10.

4. Damages need to be assessed against Defendant Jackson for illegally profiting from voidable transfers, and for causing Plaintiff's litigation expenses. *Id*. at 3:13-23.

5. The cost to repair the property and Defendant Jacksons's damage caused will costs Plaintiff significantly. *Id*. at 3:25-4:1.

6. Defendant Walker never paid property taxes on '5' when he had illegal possession of it for over 4 years, causing arrearages in $3,000.00 despite having the ability to pay. *Id*. at 4:1-7.

7. Plaintiff has hired the services of "Truthfinder" as a means to and has obtained important information connecting the three parties named as defendants. *Id*. at 4:9-18.

OPPOSITION OF DEFENDANT TALCOTT

Defendant Lisa Talcott filed an opposition to this Motion on July 30, 2018. Dckt. 109. Defendant Talcott notes that Plaintiff's Motion merely reiterates facts alleged in his Adversary Complaint. Dckt. 109 at 2:6-8. Talcott points out that Plaintiff cites to no statutory authority allowing him to void referenced transfers. Dckt. 109 at 2:9-10.

Talcott's main arguments are that 1) Plaintiff's interest in the Property never amounted to more than a recorded judgement lien, not property of the Estate subject to avoidance, 2) Avoidance is limited to prepetition transfers, whereas the transfers of the Property took place subsequent to the 2009 filing, and 3) a determination of whether a transaction was fraudulent and voidable must be done by adversary proceeding and this Motion is merely a way to fast-track the pending Complaint. Dckt. 109 at 2:11-28.

PLAINTIFF'S REPLY

On August 7, 2018, Plaintiff filed a Reply to Defendant Talcott's Opposition. Dckt. 119. It is unclear what Plaintiff's Reply *actually* replies to, but the Reply requests the disposition of the Property. Dckt. 119 at 10-17. The Reply states Defendant Jackson's argument that a Memorandum of Points and authorities was received. Dckt. 119 at 1:22-2:9. This seems to address Plaintiff's Motion for Sanctions which bases itself on not receiving any responsive pleadings, but it is unclear. Dckt. 46. Plaintiff adds that Defendant Jackson wants the court to overlook the fraudulent manner of transfer without consideration (Dckt. 119 at 11-21); Defendant Jackson stepped into a situation he knew to be in pending lawsuit, has average or above intelligence and therefore cannot dispute knowledge of the legal proceedings (Dckt. 119 at 4-8); Defendant Jackson has received service and chose to do nothing (Dckt. 119 at 10-13.); Plaintiff believed his lien was part of and should be treated in bankruptcy, but also asserts ths court has authority to determine state law matters (Dckt. 119 at 15-23); Defendant Jackson is not suffering loss due to and actually fraudulently profited from insurance proceeds (Dckt. 119 at 3:25-4:8); and because Defendant suffers no loss and is unaffected by the disposition of the Property the transfers "will be liable for . . . whatever the Court Orders as well." Dckt. 119 at 4:10-17.

APPLICABLE LAW

Review of Minimum Pleading Requirements for a Motion

The Supreme Court requires that the motion itself state with particularity the grounds upon which the relief is requested. FED. R. BANKR. P. 9013. The Rule does not allow the motion to merely be a direction to the court to "read every document in the file and glean from that what the grounds should be for the motion." That "state with particularity" requirement is not unique to the Bankruptcy Rules and is also found in Federal Rule of Civil Procedure 7(b).

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. *See* 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. *See* 556 U.S. 662 (2009).

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

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

stay, motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

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

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

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

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

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

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

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

DISCUSSION

The Defendant's arguments are well-taken. Plaintiff's Motion is a broad recitation of facts and conclusions without any actual cause of action. No legal citation is provided to guide the court towards any valid claim, either, as would be required by Federal Rule of Bankruptcy Procedure 9013. Dckt. 46. Plaintiff's factual basis for the Motion appears to be a series of transfers performed in a fraudulent way. However, Plaintiff does not plead what makes the transfers fraudulent.

The complaint outlines that the first transfer took place after Plaintiff received a judgement order from this court. Dckt. 59 at 13-15. That necessitates that transfer took place after Plaintiff's bankruptcy filing and outside the period considered for fraudulent transfers.11 U.S.C. § 548. The court acknowledges Plaintiff is *Pro Se*, but cannot sift through Plaintiff's factual pleadings in an attempt to develop possible causes of action for him. It appears, given the case history, that Plaintiff, being *Pro Se*, is merely trying to collect on his judgement lien and simply does not know how.

Most significantly, the powers the Plaintiff seeks to exercise are those of a bankruptcy trustee. There is no bankruptcy case pending in which such powers could be exercised by a trustee, debtor in possession, or Chapter 13 debtor.

The Motion is Granted and the Complaint 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 for the Court to Order the Transfers from Defendant Walker to Defendant Talcott, From Defendant Talcott to Defendant Jackson, Void, and cancelled, for the Fraudulent Attempts of the Defendants to Defeat the Debtor/Plaintiff's Judgement Lien on Defendant John Walker "15 & 16" Powtan Trail ("Motion to Avoid Transfers") filed by Plaintiff Rick Sillman ("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 to Avoid Transfers is denied without prejudice.

5. **09-22188-E-13** **RICK SILLMAN** **MOTION FOR SANCTIONS**
18-2063 **Pro Se** **6-27-18 [46]**

SILLMAN V. TALCOTT ET AL

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 Defendants on June 21, 2018. By the court's calculation, 56 days' notice was provided. 28 days' notice is required.

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

The Motion for Sanctions is denied without prejudice.

This Motion for Sanctions was filed by Plaintiff Rick Sillman ("Plaintiff" or "Movant") July 5, 2018. Dckt. 46. The Motion is part of an Adversary Proceeding arising from a judgment entered for Movant against John Walker in the amount of $45,000.00 on January 14, 2014, in Adversary Proceeding 12-2023. That judgment was affirmed on appeal in *Walker v. Sillman*, E.D. Cal. No. 2:14-cv-0587, on March 20, 2015. 12-2023, Dckt. 210. The court's file in that Adversary Proceedings shows two abstracts of judgment having been issued—one on December 13, 2016, and the other on October 20, 2017.

Adversary Proceeding 12-2023 between Mr. Sillman and Mr. Walker presented the court with a number of challenges—the makings of both Plaintiff and Defendant. For Plaintiff, as the court noted in its Memorandum Opinion and Decision

> "From the presentation of the parties and pleadings in this case, it is clear to the court that the Plaintiff-Debtor (who so admitted to the court) copes with mental health issues. His ability to focus on the significant matters on issues before the court appears to be compromised, leading to his being distracted by other issues. From what was presented, this is exactly the type of person who a less than honorable creditor might believe could be the subject to improper influence and unable to reasonable protect his rights. Whether Murphy's Law further compounded the

> problems in this case or Walker and his attorneys devised a strategy intended to "run over" the Plaintiff-Debtor, this court will never know, in large part due to the Plaintiff-Debtor's limitations in presenting evidence to the court. At best for Walker, he and his attorneys devised an ill-conceived strategy which worked to obfuscate the real issue and divert attention from the violation of the automatic stay."

12-2023; Memorandum Opinion and Decision FN. 45, Dckt. 158. As is clear in the above, the challenges from Plaintiff were identified as mental health issues, while for Defendant, John Walker and his counsel did not so impress the court that such mental health challenges were at the heart of their conduct, but that it was "at best" an ill-conceived strategy to hide Mr. Walker's continuing violation of the automatic stay.

SUMMARY OF MOVANT'S COMPLAINT

Plaintiff has filed HIS Complaint in *pro se*, attempting to assert his legal rights himself. The court attempts to summarize the contentions and rights that Plaintiff believes he is (and can) assert in an adversary proceeding as follows.

However, before beginning the summary, the court first notes that Plaintiff's Chapter 13 Case was dismissed on July 30, 2010. 09-22188; Order, Dckt. 33. There is no bankruptcy case pending for Plaintiff in this District.

A. Plaintiff identifies himself as "Debtor in possession of judgment plaintiff for his adversary complain. . . ." Complaint, p. 2: 2–3; Dckt. 1.

B. "Defendants [in the first adversary proceeding] and their counsel did not alert the Court, the Debtor, or the standing trustee that they John Walker and Lisa Talcott] were a married couple, at any time during the bankruptcy, adversary, or appeal, when they had such duty." *Id.*, ¶ 6.

C. The defendants named by Plaintiff in the Complaint are:

1. John Walker, and Lisa Talcott (his wife), are judgment debtors under the judgment in the first adversary proceeding.

2. "Defendant Coldwell Banker Ponderosa Real Estate in Paradise, California, Seller John Walker's listing company for judgment liened '15 & 16' Powtan Trail, listed on or before June 1, 2014." *Id.*, ¶ 10.

3. "Defendant Tray Davis, John Walker's listing broker, an employee broker of Coldwell Banker Ponderosa, on or before June 1, 2014." *Id.*, ¶ 11.

4. "Defendant Mid Valley Title and Escrow (Main), Chico, California Title Company for '15 & 16' judgment liened Powtan Trail." *Id.*, ¶ 12.

5. "Defendant Mid Valley Title and Escrow (branch), Paradise, California, company that did title search for '15 & 16' Powtan Trail." *Id.*, ¶ 13.

6. "Defendant Dan Hunt, President of Mid Valley Title and Escrow in Chico, California." *Id.*, ¶ 14.

7. "Defendant Tami Barlow, Vice-President of Mid Valley Title and Escrow in Paradise, California." *Id.*, ¶ 15.

8. "Defendant Heidi Gomez, Title Officer for Mid Valley Title and Escrow, Paradise, California, who did the title search on '15 & 16' Powtan Trail." *Id.*, ¶ 16.

9. "Defendant Quincy L. Jackson, 'Buyer' of '15 & 16' Powtan Trail." *Id.*, ¶ 17.

D. Plaintiff recorded an abstract of judgment against the '15 & 16' Powtan Trail property. *Id.*, ¶ 18.

E. "Exhibit "F", which is attached hereto, and specifically incorporated by reference, is a true certified copy of "Debtor's proof of Defendant John Walker's attempt to wait until the last minute before the sale and do a voidable interspousal transfer to Lisa Talcott, his wife, to attempt to avoid the judgment lien." *Id.*, ¶ 23.

1. Exhibit F is titled "Interspousal Transfer Grant Deed" and bears a recorder stamp stating that it was recorded on December 2, 2016. Dckt. 6, pages 64–66 of Exhibits. The Abstract of Judgment filed as Exhibit A by Plaintiff has a recording date of July 3, 2014. *Id.*, pages 1–2 of Exhibits. The abstract of judgment states it was recorded in Butte County, California and recorder stamp states it was recorded in Butte County, California, approximately 29 months before the recording of the Interspousal Transfer Grant Deed.

F. For the First Cause of Action, Plaintiff seeks to "avoid" the immediate transfer by the Interspousal Grant Deed and then subsequent deeds in the chain of title pursuant to 11 U.S.C. §§ 547, 548 549. Though it appears that various theories could possibly be asserted, including the judgment lien itself, there is no bankruptcy trustee, or Chapter 13 debtor or a debtor in possession, to exercise the avoiding powers for a bankruptcy estate. As stated above, Plaintiff's bankruptcy case was dismissed long ago.

G. It appears that the title company Defendants are named as cooperating with the transfers, even though they knew of the judgment lien. If the judgment

lien was of record, one only needs to review California real property law to understand the effect of that lien on the property and the responsibility of people taking to property subject to such judgment lien.

H. Much of the Complaint focuses on Plaintiff asserting that he demanded payment on his lien from various people, but that none of them would pay him. From the complaint, it appears that Plaintiff's mental health issues have continued, impairing his ability to enforce his rights. Additionally, Plaintiff is not an attorney, and various enforcement of judgment tactics and claims to be brought against various persons involved in the alleged transfers that would be apparent to a creditor attorney, bank attorney, collection attorney, or collection agency would not be apparent to a lay person.

I. It is alleged that there was damage to the property, Defendant Jackson obtained payment of insurance proceeds, stated that the insurance more than paid him for his investment in the property, and has refused to address the judgment line.

J. The Second Cause of Action seeks recovery of property of the bankruptcy estate pursuant to 11 U.S.C. § 550 and the Third Cause of Action for disallowance of claim. As stated above there is no bankruptcy case pending in which there a bankruptcy estate and no claims at issue to be adjudicated.

K. Much of the Complaint is a long recitation of how Plaintiff believes he has been wronged. In the Fourth Cause of Action, he asserts that these allegations constitute a claim under California Business and Professions Code §§ 17200 and 1750. It appears that some of these claims relate to the title company not enforcing Plaintiff's judgment lien, while others date back to the alleged violations of the automatic stay, for which the issues have already been litigated as to John Walker and Lisa Talcott in the first adversary proceeding.

L. The Fifth Cause of Action is stated to be one for fraud and deceit. It appears that this case is premised on the title company and persons involved in the alleged transfers not honoring or enforcing Plaintiff's judgment lien.

MOTION FOR SANCTIONS

Plaintiff on June 27, 2018, filed a Motion for Sanctions against the Title Company Defendants, John Walker, Lisa Talcott, and Quincy Jackson for not answering the Complaint. Dckt. 46. The Motion asserts as follows:

1. Summons was issued May 7, 2018 providing that written answer must be provided within 30 days. *Id.* at ¶ 1.

2. Defendants have had proper notice and are aware of the ability to seek one 30-day extension. Id. at ¶ 3.

3. 10 days have lapsed past that 30 day period without answer. *Id.* at ¶ 4.

4. No effort to comply (answer) had been made until a meet and confer call made some time after the 30 period. *Id.* at ¶ 4.

5. As Defendants had proper service and are aware of the ability to requests extension, it is appropriate to seek sanctions to Defendants. *Id.* at ¶ 5.

Plaintiff requests the court consider monetary sanctions in the sum of $1,000.00 to $3,000.00, along with whatever other punishment the court finds just.

OPPOSITION OF LISA TALCOTT

Lisa Talcott ("Talcott" or "Defendants") filed an opposition on July 30, 2018. Dckt. 111. Talcott opposes the Motion on the grounds that she did file a timely answer. Dckt. 111 at 2:11-12. Talcott states she preserved her right to responsive pleading by filing a motion to dismiss on June 19, 2018. Dckt. 35. Talcott notes that the hearing on the motion to dismiss was continued to August 30, 2018. Dckt. 96. Talcott requests the Motion be denied with prejudice.

OPPOSITION OF COLDWELL BANKER

Defendants Coldwell Banker Ponderosa Real Estate and Troy Davis ("Coldwell Banker" or "Defendants") filed an opposition on July 30, 2018. Dckt. 105. Coldwell Banker notes at outset that Plaintiff is representing himself, has competency issues, and has advised them he is seeking counsel. Dckt. 105 at 9-12. Coldwell Banker adds that despite circumstances, Plaintiff has caused substantial harm through unwarranted burdens and unnecessary attorney's fees and costs, and should be liable for sanctions. Dckt. 105 at 2:12-16. Coldwell Banker asserts further that they filed an answer on July 10, 2018 (Dckt. 60.), and that Plaintiff fails to actually assert any grounds or evidence for his claims.

APPLICABLE LAW

Review of Minimum Pleading Requirements for a Motion

The Supreme Court requires that the motion itself state with particularity the grounds upon which the relief is requested. FED. R. BANKR. P. 9013. The Rule does not allow the motion to merely be a direction to the court to "read every document in the file and glean from that what the grounds should be for the motion." That "state with particularity" requirement is not unique to the Bankruptcy Rules and is also found in Federal Rule of Civil Procedure 7(b).

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. *See* 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). The

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

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

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

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

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

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

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

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

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

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

DISCUSSION

The Defendants' arguments are well-taken. Most persuasive is that Plaintiff does not provide any grounds upon which he bases the Motion. Movant has not provided any guidance as to what grounds he is basing his request on. No legal support is provided in the entirety of Plaintiff's Motion. Dckt. 46. Plaintiff's factual basis for seeking sanctions is that Defendants allegedly did not answer his Complaint despite having notice. Responsive pleadings are simply not required, and do not give cause for sanctions. The court acknowledges Plaintiff is *Pro Se*, but the court cannot entertain groundless motions that are so far off base.

If a summons and complaint are not responded to, a plaintiff may seek the entry of the non-responding party's default and then the entry of a judgment – if the plaintiff can present the court with evidence and legal authority to support the granting of such judgment.

The Motion is denied 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 for Sanctions was filed by Plaintiff Rick Sillman ("Plaintiff" or "Movant") ("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 for Sanctions is denied without prejudice.