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3 **NOT FOR PUBLICATION**  
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6 UNITED STATES BANKRUPTCY COURT  
7 EASTERN DISTRICT OF CALIFORNIA

8 In re Case No. 09-62458-A-13  
9 ANA MARIA L. SANCHEZ DC No. DRJ-3

10 Debtor.  
11 \_\_\_\_\_/

12 FINDINGS OF FACT AND CONCLUSIONS OF LAW  
13 REGARDING DEBTOR'S OBJECTION TO CLAIM NO. 2  
14 OF J. P. MORGAN CHASE BANK

15 A hearing was held August 5, 2010, on the objection of  
16 debtor to the claim filed by J. P. Morgan Chase Bank ("Chase").  
17 At the hearing, the chapter 13 trustee stated that he would like  
18 to file two case citations that he thought might be helpful to  
19 the court and the parties. The court ordered the case citations  
20 to be filed by August 9, 2010, and responses to the case  
21 citations filed by August 19, 2010. The matter was deemed  
22 submitted as of August 19, 2010.

23 The basic facts are not disputed. They are as follows. The  
24 debtor and her husband were debtors in a prior chapter 13 case  
25 filed in August 2005 and numbered 05-16027 (the "Prior Case").  
26 The Prior Case was also a chapter 13 case. When the Prior Case  
27 was filed, the debtor and her husband were behind on payments on  
28 a mortgage debt owed to Washington Mutual Bank ("WAMU"). Chase  
is the successor to WAMU. In the Prior Case, the debtors

1 proposed a chapter 13 plan that provided for the WAMU claim as  
2 Class 1. The plan in the Prior Case provided for the chapter 13  
3 trustee to make regular ongoing monthly payments to WAMU in the  
4 amount of \$581.37 and to cure a mortgage arrearage estimated in  
5 that plan as \$650.

6 In the Prior Case, WAMU filed a proof of claim setting forth  
7 an arrearage of \$669.90 and indicating that the ongoing monthly  
8 mortgage payment including escrow amounts was \$571.38.

9 The court confirmed the plan in the Prior Case. WAMU's  
10 claim was entered by the trustee for payment of a Class 1 claim;  
11 that is, ongoing mortgage payments of \$581.37 and an arrearage of  
12 \$659.

13 The WAMU arrearage claim was paid in full through the Prior  
14 Case. In the Prior Case, the trustee made ongoing mortgage  
15 payments of \$581.37 to WAMU from October 2005 to October 2007.  
16 For reasons that have not been explained, the trustee ceased  
17 making ongoing mortgage payments to WAMU after October 2007.

18 WAMU never notified the debtors, the debtors' counsel, or  
19 insofar as the parties are aware, the chapter 13 trustee in the  
20 Prior Case that the required ongoing monthly mortgage payments  
21 were not being made. The debtors were paying those amounts each  
22 month to the chapter 13 trustee, but the chapter 13 trustee was  
23 not forwarding them to WAMU.

24 In the Prior Case, the debtors paid all payments required by  
25 the plan and completed the plan. On completion of the plan in  
26 the Prior Case, on October 23, 2008, the trustee filed and served  
27 on all parties in interest, including WAMU, a Preliminary Final  
28 Report and Account showing that the plan had been completed. The

1 Preliminary Final Report and Account also showed that the WAMU  
2 arrearage and mortgage claims had been paid in full. The  
3 Preliminary Final Report and Account was served on WAMU.

4 No objections were filed to the trustee's Preliminary Final  
5 Report and Account, and the case was closed on September 21,  
6 2009.

7 On or about September 2, 2009, Chase recorded a Notice of  
8 Default and Election to Sell, initiating foreclosure against the  
9 debtor's residence. In December 2009, Chase recorded a Notice of  
10 Trustee's Sale scheduling a foreclosure sale of the debtor's  
11 residence. The debtor filed the within chapter 13 case to stop  
12 that sale from going forward.

13 The required monthly payments of principal and interest on  
14 Chase's note were \$415.31, and the final payment was due February  
15 1, 2009. If the plan in the Prior Case had been properly  
16 administered, at the cessation of plan payments in the Prior Case  
17 on August 25, 2008, the debtor would have owed Chase five more  
18 payments of \$514.31, or \$2,571.55.

19 The debtor argues that as between herself and Chase, Chase  
20 was in a better position to become aware that the plan in the  
21 Prior Case was not being properly administered and to take  
22 action. Therefore, the debtor objects to Chase's claim based on  
23 the completion of payments in the Prior Case. According to the  
24 debtor, Chase's claim should be limited to \$2,571.55, the amount  
25 for the five more payments the debtor would have owed Chase if  
26 the payments she made in the Prior Case had properly been  
27 transmitted to Chase by the prior trustee.

28 The facts with respect to the amount of payments made in the

1 Prior Case and the report filed by the trustee in the Prior Case  
2 are substantiated by the declaration of the debtor and by the  
3 court taking judicial notice of the plan, the Notice of Filed  
4 Claims, and the Trustee's Preliminary Final Report and Account in  
5 the Prior Case, as well as the certificates of service of these  
6 documents.

7 Chase opposed the debtor's objection to its claim. Chase  
8 acknowledged that:

9 "for reasons unknown the Trustee ceased making monthly  
10 mortgage payments to Washington Mutual in November 2007.  
11 Instead of continuing to make the regular monthly mortgage  
12 payments owed by the Debtor under the terms of the Note and  
13 Deed of Trust, the Trustee ceased making payments after  
14 October 31, 2007, when a payment of \$408.81 was disbursed  
15 and the total payments reached \$14,943.06, which was the  
16 total debt amount listed by Washington Mutual on its proof  
17 of claim; however, at that time the principal balance  
18 remaining on the loan was approximately \$6,252.31. Since  
19 the obligation securing the claim was not set to mature  
20 until after the completion of the Plan, the Trustee should  
21 have continued to make the regular installment payments owed  
22 to Washington Mutual. Based on the Trustee's accounting,  
23 the funds that were to be paid to Washington Mutual were  
24 distributed to the unsecured creditors in error."

18 The thrust of Chase's opposition is that Chase was under no  
19 obligation to oppose the trustee's accounting. Chase knew that  
20 its claim would remain fully intact at the conclusion of the  
21 debtors' plan in the Prior Case and that its claim was not going  
22 to be modified by the plan other than allowing for an extended  
23 time to cure the pre-petition arrearages. Chase argues that it  
24 was the debtor's burden to notice and fix the problem caused by  
25 the mistake made by the trustee in the Prior Case. For that  
26 reason, and because it has not received the funds, Chase believes  
27 its claim in this case should be allowed in full.

28 In response, the debtor argues that Chase is barred by

1 collateral estoppel or issue preclusion from denying that it and/  
2 or its predecessor in interest received all payments to which  
3 they were entitled in the Prior Case. The debtor observes that  
4 the rules of issue preclusion are that:

5 "To foreclose relitigation of an issue under collateral  
6 estoppel: (1) the issue at stake must be identical to the  
7 one alleged in the prior litigation; (2) the issue must have  
8 been actually litigated in the prior litigation; and (3) the  
9 determination of the issue in the prior litigation must have  
10 been a critical and necessary part of the judgment in the  
earlier action [citation omitted] . . . When the issue for  
which preclusion is sought is the only rational one the fact  
finder could have found, then that issue is considered  
foreclosed, even if no explicit finding of that issue has  
been made."

11 Clark v. Bear Stearns & Co., 966 F.2d 1318, 1320-1321 (9<sup>th</sup> Cir.  
12 1992).

13 The debtor argues that the final decree in the Prior Case  
14 made a finding that the estate in the Prior Case had been fully  
15 administered. According to the debtor, that equates to a finding  
16 that Chase and/or its predecessor WAMU had received all that they  
17 were entitled to receive in the Prior Case. The debtor argues  
18 that:

19 "In entering the final decree in the prior case, the Court  
20 necessarily concluded that the plan payments required of the  
21 debtor had been collected and that those payments had been  
22 distributed to creditors in accordance with the plan. That  
conclusion binds Chase and precludes Chase from now denying  
that it received all of the payments it was required to  
receive in the prior case."

23 The dispute between Chase and the debtor is essentially a  
24 dispute about which party will bear the loss of the prior  
25 trustee's failure to make the payments required to Chase under  
26 the prior plan. In this regard, several reported decisions are  
27 helpful. These are In re Avery, 272 B.R. 718 (Bankr. E.D. Cal.  
28 2002); In re Kincaid, 316 B.R. 735 (Bankr. E. D. Cal. 2004); and

1 In re Estrada, 322 B.R. 149 (Bankr. E. D. Cal. 2005). All three  
2 cases were decided by Judge McManus.

3 In the Avery case, a creditor whose timely filed proof of  
4 claim was not paid by the chapter 13 trustee as required by the  
5 chapter 13 plan filed a motion to vacate the discharge of the  
6 chapter 13 debtor. The Averys had earlier filed a chapter 7  
7 case. In that case, AIF had filed a complaint objecting to  
8 dischargeability of a debt. The parties stipulated to entry of a  
9 nondischargeable judgment in the amount of \$11,756.90. The  
10 debtors then filed a chapter 13 petition. The chapter 13 plan  
11 proposed to pay \$350 a month for 60 months. This would have  
12 resulted in payment of 100% to general unsecured claims,  
13 including the judgment creditor in the nondischargeability  
14 action, AIF. AIF timely filed a proof of claim. The proof of  
15 claim was ambiguous on its face but copies of documents attached  
16 to the proof of claim made it clear that AIF did in fact have a  
17 monetary claim. The chapter 13 trustee was aware that AIF had  
18 filed a timely proof of claim and reported its claim in the  
19 notice of filed claims filed in the case. The notice erroneously  
20 reported the amount of AIF's proof of claim as \$0. The court  
21 concluded that the trustee's interpretation of AIF's proof of  
22 claim was unreasonable, particularly considering the fact that  
23 the debtors had scheduled the claim as undisputed, liquidated,  
24 and noncontingent. The debtors knew that AIF's claim was being  
25 treated as \$0 by the chapter 13 trustee but did nothing. The  
26 court also held that:

27 "The trustee's failure to pay AIF's claim in accordance with  
28 the plan should have come to light in connection with the  
case closing procedures which led to the approval of the

1 trustee's final report and account and the issuance of the  
2 debtor's discharge. Instead, the case closing procedures  
3 used by the chapter 13 trustee and approved by the court  
4 have only compounded the injustice to AIF. Without  
5 affording AIF prior notice and opportunity to object, the  
6 court approved the chapter 13 trustee's final report and  
7 account, gave the debtors their chapter 13 discharge,  
8 discharged the trustee from his duties, released the trustee  
9 and his surety from any liability, and closed the case."

10 272 B.R. at 725-726.

11 The court in Avery observed that:

12 "The trustee is fully accountable for his or her control and  
13 supervision of the plan payments. 11 U.S.C. § 704(2) and §  
14 1302(b)(1). The failure to account for the payments, or  
15 distributions to creditors not entitled to dividends, may  
16 subject the trustee to personal liability [citation  
17 omitted]."

18 Id., at 726.

19 The Avery court concluded that a big part of the problem was  
20 that while AIF was aware that it was entitled to 100% dividend,  
21 no one served the trustee's final report on AIF before the court  
22 approved the final report and the debtors received their  
23 discharge. The court stated:

24 "Had someone served it [the final report], AIF would have  
25 had an opportunity to point out to the trustee that he had  
26 misinterpreted its proof of claim and to demand payment in  
27 full in accordance with the plan."

28 Id., at 727-728.

The Avery court emphasized the importance of the debtor and  
creditors being served with the final report in a chapter 13 case  
before the court approves that report and discharges the debtor.

"It is vital to the accuracy of the final report that the  
debtor and creditors be served with it before the court  
approves it, discharges the debtor's liability for pre-  
petition claims, and discharges the trustee from his duties.  
The debtor knows what he has paid to the trustee and can  
object if the trustee has not accounted for all payments.  
Creditors know whether and how much the trustee has paid

1       them, and they will be motivated to object if the trustee  
2       erroneously reports that he has paid their claim in  
3       accordance with the plan."

4       Id., at 728.

5       Because AIF had received no notice, the court granted AIF's  
6       motion to vacate the entry of the debtor's discharge.

7       As a result of the Avery decision, the bankruptcy courts for  
8       the Eastern District of California modified the procedure for  
9       issuance of a chapter 13 discharge. The procedure now requires  
10      that prior to entry of a chapter 13 discharge, the trustee's  
11      preliminary final report along with notice of opportunity to  
12      object be served on the debtor and all creditors. It was that  
13      post-Avery procedure that was followed in the prior case here.  
14      Thus, in this case, WAMU/Chase was served with a copy of the  
15      preliminary final report in the prior case and had the  
16      opportunity to object to it.

17      In In re Kincaid, 316 B.R. 735, the debtors completed  
18      payments under their plan. However, based on the filed proofs of  
19      claim to which they had not objected, they failed to pay a  
20      creditor in full as required by their plan. For that reason, it  
21      was appropriate to dismiss the case. The court discussed Kincaid  
22      in the subsequent case of In re Estrada. 322 B.R. 149 (E.D. Cal.  
23      2005). In Estrada, the court characterized Kincaid this way:

24      "In Kincaid, for instance, the debtors' plan required that a  
25      secured claim be paid in full. To accomplish this, the  
26      debtors promised to pay \$300 a month for 42 months, a total  
27      of \$12,600. The debtors made all of these payments.  
28      However, the claim filed by the creditor exceeded \$12,600.  
The Notice of Filed Claims alerted the debtors to this  
problem. Rather than amend their plan to increase the plan  
payments in order to pay the secured claim in full, the  
debtors objected to the claim. Their objection was  
ultimately dismissed. By the time of the dismissal, the



1 debtors had made their 42<sup>nd</sup> plan payment and so could no  
2 longer modify their plan. See 11 U.S.C. § 1329(a). As a  
3 result, the claim was neither disallowed nor paid in full as  
4 promised by the plan. The debtors did not receive a  
5 discharge. Instead, their petition was dismissed."

6 Id. at 154.

7 This case is unlike Kincaid. In the Prior Case, the debtors  
8 made all the payments that the plan required, and the payments  
9 made were sufficient to enable the chapter 13 trustee to make the  
10 payments required to be made to Chase/WAMU. The debtors in the  
11 Prior Case properly paid funds to cure the prepetition arrearage  
12 on the mortgage, and they maintained the monthly ongoing payments  
13 to the creditor by paying them to the trustee as required by the  
14 plan. The trustee simply failed to transmit some of the ongoing  
15 payments to Chase.

16 Under the foregoing circumstances, the court is persuaded  
17 that the debtor has the better argument. The debtors made all  
18 the payments they were required to make under the plan in the  
19 Prior Case. The payments contemplated by that plan were  
20 sufficient to pay the arrearage to the creditor and also to  
21 maintain ongoing monthly mortgage payments. The trustee in the  
22 Prior Case simply failed to continue making the ongoing monthly  
23 mortgage payments. Instead, he appears to have paid those  
24 amounts to unsecured creditors.

25 The court agrees with the debtor that the creditor was in a  
26 better position to notice this problem. WAMU/Chase should have  
27 noticed that it was no longer receiving ongoing monthly mortgage  
28 payments from the trustee and inquired about this problem, which  
could have been easily resolved. The debtor had no way to  
discern easily that the trustee was not properly allocating the

1 payments made in the Prior Case. The creditor, on the other  
2 hand, was supposed to be receiving ongoing monthly mortgage  
3 payments. When the month came in which no payment was received,  
4 that should have alerted the creditor to do something about the  
5 problem. Instead, it waited, and then once the Prior Case was  
6 closed, commenced foreclosure proceedings.

7 For the foregoing reasons, the objection to claim is  
8 sustained. Counsel for debtor may submit a proposed form of  
9 order consistent herewith.

10 DATED: September 16, 2010

11 /S/

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13 WHITNEY RIMEL, Judge  
14 United States Bankruptcy Court  
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