UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

April 9, 2015 at 1:30 p.m.

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1. 14-31202-E-13 DANILO/BRANKA POLJAK
14-2332 UST-1
U.S. TRUSTEE V. POLJAK ET AL

MOTION FOR ENTRY OF DEFAULT JUDGMENT
2-23-15 [18]

Final Ruling: No appearance at the April 9, 2015 hearing is required.

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

Correct Notice Provided. The Proof of service states that the Motion and supporting pleadings were served on Debtors, and Chapter 13 Trustee on February 23, 2015. By the court's calculation, 45 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). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The Motion for Entry of Default Judgment is granted

Plaintiff, Tracy Hope Davis, United States Trustee ("Plaintiff"), seeks entry of a default judgment against Danilo Poljak and Branka Poljak ("Defendant-Debtors"), in this adversary proceeding. Entry of a default judgment is authorized by Federal Rule of Civil Procedure 55(b)(2), as made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7055.

This adversary proceeding was commenced on December 2, 2014. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on December 3, 2014. Dckt. 2. The complaint and summons were properly served on Defendants. Dckt. 3.

Defendants failed to file a timely answer or response or a request for an extension of time. Default was entered against Defendants pursuant to Federal Rule of Bankruptcy Procedure 7055(a) by the Clerk of the United States Bankruptcy Court on January 23, 2015. Dckt. 13.

BACKGROUND

The Defendants have filed 11 different pro se bankruptcy petitions (either jointly or separately) including the most recent one on November 14,

2014 (Case No. 14-31203-E-13). All of the cases were chapter 13 cases. Out of the 11 cases filed, ten have been dismissed by the court for failure to file documents. The Defendants used the same social security number in their filings (xxx-xx-5532 Danilo and xxx-xx-5534 Branka) and the same street and mailing address in all of this filings, namely, 1680 Grey Owl Circle, Rosevill, California. ("Property").

In addition to the above mentioned 11 cases, Defendants previously filed one other case (97-37822), in which they were represented by counsel and obtained a Chapter 7 discharge. However, the Plaintiff is not including the Chapter 7 case in her serial filing allegations.

Plaintiff contends that the main reason the Defendants are continuing to file bankruptcy cases without complying with the proper requirements is to avoid foreclosure on the Property.

A summary of the 11 cases filed since February 2007 are as follows:

Case No. 1 (07-21106-B-13) was filed on February 20, 2007 by Danilo Poljak. The Defendants did not pay the full filing fee, failed to file schedules, and did not appear at the meeting of creditors. Therefore, the case was dismissed on April 30, 2007. Case No. 07-21106-B-13, Dckt. 20.

Case No. 2 (07-23263-D-13) was filed on May 3, 2007 by Danilo Poljak. The Defendants did not pay the full filing fee, failed to file schedules, and did not appear at the meeting of creditors. Therefore, the case was dismissed on July 9, 2007. Case No. 07-23263-D-13, Dckt. 27.

Case No. 3 (07-26086-B-13) was filed on August 2, 2007 by Danilo Poljak. The Defendants did not pay the full filing fee, failed to file schedules, and did not appear at the meeting of creditors. Therefore, the cases was dismissed on September 21, 2007. Case No. 07-26086-B-13, Dckt. 23. Additionally, a Motion for Relief from the Automatic Stay was filed by Countrywide Home Loans regarding the Defendant's Property. That motion alleged the Defendants were nine payments in arrears on the mortgage securing the property for a total of $52,415.63. The motion was denied as moot because the case had already been dismissed.

Case No. 4 (07-28389-B-13) was filed on October 10, 2007 by Danilo Poljak. The Defendant did not pay the full filing fee and filed a motion to extend the deadline to file schedules. That motion was granted on October 30, 2007. Dckt 8 & 12. The Defendant then filed a second motion to extend, which was denied on November 13, 2007. Case No. 07-28389-B-13, Dckt. 16 & 17. The schedules were never filed and the Defendant failed to appear at the meeting of creditors. Therefore, the case was dismissed on November 26, 2007. Case No. 07-28389-B-13, Dckt. 25.

Case No. 5 (08-21434-D-13) was filed on February 8, 2008 by Danilo Poljak. The Defendants did not pay the full filing fee, failed to file schedules, and did not appear at the meeting of creditors. Therefore, the cases was dismissed on April 7, 2008. Case No. 08-21434-D-13, Dckt. 17.

Case No. 6 (11-32019-B-13) was filed on may 13, 2011, by Branka Poljak. Defendants did not pay the full filing fee and filed a motion to extend the deadline to file schedules, which was denied on May 26, 2011. Case No. 11-

32019-B-13, Dckt. 6 & 15. The case was dismissed on June 3, 2011, prior to the meeting of creditors being held. Case No. 11-32019-B-13, Dckt. 17.

Case No. 7 (11-40887-A-13) was filed on August 26, 2011 by Branka Poljak. Defendant did not pay the full filing fee and filed a motion to extend the deadline to file schedules. That motion was granted on August 30, 2011 with a due date of September 23, 2011. Case No. 11-40887-A-13, Dckt. 7 & 9. Defendant did not appear at the meeting of creditors. Therefore, the case was dismissed on September 30, 2011. Case No. 11-40887-A-13, Dckt. 21.

Case No. 8 (11-47298-E-13) was filed on November 21, 2011, by Danilo Poljak. Defendant did not pay the full filing fee and filed a motion to extend the dealing to file schedules, which was granted on December 1, 2011. Case No. 11-47298-E-13, Dckt. 7 & 17. However, the schedules were never filed and the case was dismissed on December 20, 2011, prior to the meeting of creditors being held. Case No. 11-47298-E-13, Dckt. 19.

Case No. 9 (12-34889-C-13) was filed on August 15, 2012, by Branka Poljak. Defendant did not pay the full filing fee and filed a motion to extend the deadline to file schedules, which was denied on August 23, 2012. Case No. 12-34889-C-13, Dckt. 7 & 10. The case was dismissed on September 4, 2012, prior to the meeting of creditors being held. Case No. 12-34889-C-13, Dckt. 13.

Case No. 10 (12-39565-E-13) was filed on November 5, 2012, by Branka Poljak. Defendant did not pay the full filing fee and filed a motion to extend the deadline to file schedules, which was denied on November 8, 2012. Case No. 14-31202-E-13, Dckt. 7 & 9. The Schedules were never properly filed and the case was dismissed on November 26, 2012 prior to the meeting of creditors being held. Case No. 14-31202-E-13, Dckt. 15.

Case No. 11 (14-31202-E-13) was filed on November 14, 2014, by Danilo and Branka Poljak. Defendants did not pay the full filing fee and failed to file schedules. Therefore, the case was dismissed on November 25, 2014, prior to the meeting of creditors being held. Case No. 14-31202-E-13, Dckt. 8. However, the case remains open and on November 26, 2014 the Defendants filed a Motion to Vacate Dismissal of Case and a Motion to Extend the Dealing to File Schedules, which were both denied on December 2, 2014. Case No. 14-31202-E-13, Dckt. 11 & 13.

APPLICABLE LAW

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

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

Factors which the court may consider in exercising its discretion include:

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

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

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

DISCUSSION

The Plaintiff's arguments are well-taken. To comply with *In re McGee* the court must first determine if the Plaintiff established well-pleaded allegations, in light of default being entered. A review of the Plaintiff's Motion, a review of the court's docket for the Defendant-Debtors multiple filings in the past ten years, and the exhibits filed by the Plaintiff, show that the Plaintiff has sufficient support for the relief sought by the Plaintiff.

Next, the Court must follow the two step process from *McGee.* First, there must be an entry of the Defendant's default. Here, the Default was entered against Defendants pursuant to Federal Rule of Bankruptcy Procedure 7055(a) by the Clerk of the United States Bankruptcy Court on January 23, 2015. Dckt. 13. The second step requires the court the entry of the default judgment.

As noted, the entry of default judgment is within the discretion of the court and is generally not favored. *McCool* at 1470. This is true even when a party has defaulted and all requirements for judgment are met. Therefore, the court looks at a number of factors in considering its decision.

In the instant case, the factors weigh in the Plaintiff's favor. The Plaintiff, in her capacity as the United States Trustee for the district, is prejudiced by the repeated filings of the Defendant-Debtors who, over the past 11 bankruptcy cases, has shown no effort or intention to prosecute their cases in good faith. Furthermore, the facts show that this default is likely not due to excusable neglect, but rather an attempt by the Defendant-Debtors to protect their Property from being foreclosed upon. Furthermore, both the merits of the Plaintiff's claim and sufficiency of the complaint are well taken.

Furthermore, the court finds the Defendant-Debtors' 11 bankruptcy cases

(12 if counting the Chapter 7 case) is a prime example of serial filing. Here, the Debtor's are abusing the system to their own advantage, and to the detriment of everyone else. There is facially no good faith in the Defendant-Debtors repeated filings of bankruptcy cases, especially in light of all of them being dismissed due to a failure to prosecute the case, whether it be in filing necessary documents or paying required fees. The court will not allow the Defendant-Debtors the opportunity to continue to burden the court, the Plaintiff, their creditors, and any other party in interest from "sham" bankruptcies that the Defendant-Debtors have no interest or intention of prosecuting.

As to the relief requested, the bankruptcy courts are established by an act of Congress. 28 U.S.C. § 151. The All Writs Act, 28 U.S.C. § 1651(a), and 11 U.S.C. § 105 provide the bankruptcy courts with the inherent power to enter pre-filing orders against vexatious litigants. *Molski v. Evergreen Dynasty Corp*., 500 F.3d 1047 (9th Cir. 2007); *Gooding v Reid, Murdock & Co.*, 177 F. 684, (7th Cir. 1910); *Weissman v. Quail Lodge Inc.*, 179 F.3d 1194, 1197 (9th Cir. 1999); *In re Bialac* 15 B.R. 901, (B.A.P. 9th Cir. 1981), *aff'd*, 694 F.2d 625 (9th Cir. 1982). A court must be able to regulate and provide for the proper filing and prosecuting of proceedings before it. Section 105(a) expressly grants the court the power to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. Further, the court is authorized to *sua sponte* take any action or make any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process. This power exists and it does not matter whether it is being exercised pursuant to 11 U.S.C. § 105 or the inherent power of the court. *In re Volpert*, 110 F.3d 494, 500 (7th Cir. 2007).

The Court of Appeals for the Ninth Circuit restated the grounds and methodology for pre-filing review requirements as an appropriate method for the federal courts in effectively managing serial filers or vexatious litigants. *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007), *en banc* hearing denied, 521 F.3d 1215 (9th Cir. 2008); *see also In re Fillbach*, 223 F.3d 1089 (9th Cir. 2000). While maintaining the free and open access to the courts, it is also necessary to have that access be properly utilized and not abused. The abusive filing of bankruptcy petitions, motions, and adversary proceedings for purposes other than as allowed by law diminishes the quality of and respect for the judicial system and laws of this country.

As addressed by the Ninth Circuit in *Molski*, the ordering of a pre-filing review requirement is not to be entered with undue haste because such orders can tread on a litigant's due process right of access to the courts. As discussed in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982), the right to seek redress from the court is a protected right civil litigants. The issuing of a pre-filing order is to be made only after a cautious review of the pertinent circumstances.

However, the Ninth Circuit clearly draws the line that a person's right to present claims and assert rights before the federal courts is a not a license to abuse the judicial process and treat the courts merely as a tool to abuse others.

> Nevertheless, "[f]lagrant abuse of the judicial process cannot be tolerated because it enables one person to preempt the use of judicial time that properly could be used to consider the

> meritorious claims of other litigants." *De Long [v. Henneessey]*, 912 F.2d [1144,] 1148 [(9th Cir. 1990)]; *see O'Loughlin v. Doe*, 920 F.2d 614, 618 (9th Cir. 1990).

Molski, 500 F.3d at 1057. In the Ninth Circuit the trial courts apply a four-factor analysis in determining if and what type of pre-filing or other order should properly be issued based on the conduct of the party at issue.

1. First, the litigant must be given notice and a chance to be heard before the order is entered.

2. Second, the district court must compile "an adequate record for review."

3. Third, the district court must make substantive findings about the frivolous or harassing nature of the plaintiff's litigation.

4. Finally, the vexatious litigant order "must be narrowly tailored" to closely fit the specific vice encountered.

Molski, 500 F.3d at 1057-1058.

The Defendant-Debtors' repetitive filing of bankruptcy cases without the basic documents and otherwise failing to meet their basic duties as a debtor under the Bankruptcy Code demonstrates abusive conduct and misuse of the bankruptcy laws. Though the bankruptcy court is open to all and a person's financial, personal, or other missteps are not a bar to seeking the extraordinary relief available, debtors must seek the relief and prosecute the cases in good faith. In this case the Defendant-Debtors have chosen to repeatedly file a series of Chapter 13 cases in which they have failed to file necessary documents or pay the filing fees imposed by federal law. The Defendant-Debtors have demonstrated, through the repeated Chapter 13 cases which have not been prosecuted, that this and the prior Chapter 13 cases do not have merit as a reorganization.

The court is cognizant of the significant impact the filing of a bankruptcy case has on not only the Debtor, but creditors and other persons. Even if, due to the repeated filings and the provisions that Congress has placed in a subparagraph of a subsection of the Bankruptcy Code, the automatic stay does not go into effect, the mere presentation of a petition and the significant sanctions imposed on someone violating the stay can work to prevent creditors from legitimately enforcing their rights.

The Defendant-Debtors' failure to respond to the instant Motion just further evidences the Defendant-Debtors' lack of intention to prosecute their cases in good faith.

The court finds from the totality of the circumstances that Debtor's conduct in this case and prior cases before this court represents a bad-faith abuse of the bankruptcy code and its protections. Therefore the court orders the dismissal of this case and imposes the following sanctions pursuant to 11 U.S.C. §§ 105, 349, and the inherent power of the Federal Court:

1. Issuance of an injunction or bar on the filing of further

bankruptcy cases by the Defendant-Debtors, Danilo and Branka Poljak, for a period of two years unless the prior authorization is obtained from the Chief Bankruptcy Judge in the District in which they desires to file a bankruptcy case.

2. Requiring that the Defendant-Debtors, Danilo and Branka Poljak, pay all filing fees at the time a new case is commenced, and prohibiting them from obtaining a fee waiver or authorization to pay filing fees in installments.

3. Authorizing and ordering the Office of the Clerk to not file any bankruptcy petition filed by the Defendant-Debtors, Danilo and Branka Poljak, which is not approved for filing by the Chief Judge for the Bankruptcy District in which Defendant-Debtors attempts to file a bankruptcy case.

In granting the Motion for Entry of Default Judgment, the court orders the Plaintiff to prepare a judgment in accordance with the instant ruling and submit it to the court no later than xxxxx

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion For Entry of Default Judgment filed by the Plaintiff having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that Motion for Entry of Default Judgment be granted.
>
> **IT IS FURTHER ORDERED** that the Plaintiff shall prepare and submit a judgment in accordance with this ruling and submit it to the court no later than xxxxx.

2. 09-44339-E-13 GLEN PADAYACHEE **MOTION FOR ENTRY OF DEFAULT**
14-2282 PLC-1 **JUDGMENT**
PADAYACHEE V. TERRY, III **2-20-15 [15]**

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

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.

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant on February 20, 2015. By the court's calculation, 48 days' notice was provided. 28 days' notice is required.

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

The Motion for Entry of Judgment is denied without prejudice.

Glen Padayachee ("Plaintiff-Debtor") filed the instant Motion for Entry of Judgment on February 20, 2015. Dckt. 15.

Plaintiff-Debtor filed the instant Adversary Proceeding on September 30, 2014, after the Plaintiff-Debtor completed all the plan payments in the underlying Chapter 13 bankruptcy. Thomas Terry, III ("Defendant") was served and filed an answer on October 30, 2014. Dckt. 8.

Defendant, in his answer, stated that:

> Defendant has not refused to reconvey the Deed of Trust on said property and did not receive any communications from Plaintiff or Plaintiff's legal counsel with a request to reconvey Deed of Trust. Upon confirmation of Chapter 13 plan discharge, Defendant shall make every effort to complete a reconveyance of the Deed of Trust in a timely manner.

Dckt. 8.

On December 1, 2014, the Defendant caused to be recorded a Substitution of Trustee and Full Reconveyance with the Sacramento County Recorder. Dckt. 17, Exhibit B.

The Plaintiff-Debtor states that the only remaining issues is the request for attorney's fees, costs, and statutory penalty pursuant to Civil Code 2941.

The Plaintiff-Debtor argues that pursuant to Fed. R. Civ. P. 54 and Fed. R. Bankr. P. 7054, the Plaintiff-Debtor is entitled to the following monetary awards:

Attorney's Fee under contract or statute either Civil Code §§ 1717 or 2941(d)	$7,272.50
Statutory Penalty under Civil Code § 2941(d)	$500.00
TOTAL	$7,772.50

DISCUSSION

There is no general right to recover attorneys' fees under the Bankruptcy Code. *See In re Kord Enterprises II*, 139 F.3d 684 (9th Cir. 1998) (whether included as part of secured claim); *Heritage Ford v. Baroff (In re Baroff)*, 105 F.3d 439 (9th Cir. 1997) (prevailing party contractual attorneys' fees in nondischargeability action). Under the American Rule, the prevailing party is not entitled to collect reasonable attorneys' fees unless provided for by statute or contract. *Travelers Casualty & Surety of America v. Pacific Gas and Electric Company*, 549 U.S. 443, 448 (2007). (Enforcing contractual attorneys' fees provision for litigating issues arising under bankruptcy law.)

However, a prevailing party in a bankruptcy proceeding may be entitled to an award of attorney fees in accordance with applicable state law if state law governs the substantive issues raised in the proceedings." *In re Davison*, 289 B.R. 716, 722 (B.A.P. 9th Cir. 2003*),* quoting *Johnson v. Righetti* (*In re Johnson*), 756 F.2d 738, 741 (9th Cir.1985).

Federal Rule of Civil Procedure 54(a) defines a "judgment" as a decree and any order from which an appeal lies. Federal Rule of Bankruptcy Procedure 7054 applies Federal Rule of Civil Bankruptcy Procedure Rule 54(a)–(c) in bankruptcy adversary proceedings. Federal Rule of Bankruptcy Procedure 7054 allows for the recovery of costs to the prevailing party after the entry of judgment, except when a statute or the Bankruptcy Rules otherwise provides.

Here, the Plaintiff-Debtor argues that they are the "prevailing party" because the reconveyance was not timely provided and when it was provided, "it was the result of this adversary proceeding." Dckt. 18.

Nowhere in the Motion or any of its accompanying pleadings does the Plaintiff-Debtor argue that a judgment has been entered to justify any sort of reimbursement of fees pursuant to Fed. R. Civ. P. 54 and Fed. R. Bankr. P. 7054. Merely getting the reconveyance does not translate to the Plaintiff-Debtor being the prevailing party for purposes of attorney's fees. In the instant Adversary Proceeding, no order, decree, or judgment has been entered

"from which appeal lies." In fact, the court has not issued any orders in connection with this Adversary Proceeding.

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

Here, the Plaintiff-Debtor has not met the first prong for entry of default judgment as the Defendant has not defaulted nor was one entered.

The Plaintiff-Debtor appears to be asking the court to construe the fact that the Defendant reconveyed the deed of trust without the court needed to issue a judgment in the Adversary Proceeding is prima facie proof that Plaintiff-Debtor is the "prevailing party." As such, the Plaintiff-Debtor seeks to have the court find that because the Plaintiff-Debtor got what he was seeking in the Adversary Proceeding, that the remaining causes of actions should be ruled in his favor by a matter of course.

This is improper. The Plaintiff-Debtor has failed to state with particularity how and why the Plaintiff-Debtor is the "prevailing party" given that the court has not issued any order, decree, or judgments.

Without more, the court is not going to issue a judgment when there has been no defaults, rulings, orders, or anything that would justify issuing a judgment in favor of the Plaintiff-Debtor, specifically in the form of attorney's fees and penalties.

Therefore, 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 Entry of Judgment filed by 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 Motion is denied without prejudice.

3. 10-26240-E-13 STEVE/KRISTINE SCHARER
14-2253
SCHARER ET AL V. WELLS FARGO BANK, N.A.

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
10-9-14 [12]

Plaintiff's Atty: Selwyn D. Whitehead
Defendant's Atty: Regina J. McClendon; Lindsey E. Kress

Adv. Filed: 8/28/14
Answer: none

Amd Cmplt Filed: 10/9/14
Reissued Summons: 10/10/14
Answer: none

Nature of Action:
Dischargeability - other
Other (e.g. other actions that would have been brought in state court if unrelated to the bankruptcy case)

Notes:

Continued from 2/26/15. The Parties reported that they are engaged in substantive, constructive settlement negotiations.

4. 10-26240-E-13 STEVE/KRISTINE SCHARER — CONTINUED MOTION TO DISMISS
14-2253 LLL-3 — ADVERSARY PROCEEDING
SCHARER ET AL V. WELLS FARGO BANK, N.A. — 11-24-14 [29]

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

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.

Below is the court's tentative ruling.

The Motion to Dismiss is to grant the motion as to First, Second, Seventh, Eighth, and Ninth Causes of Action, and deny the Motion as to the remaining Causes of Action.

Wells Fargo Bank, N.A. filed a motion to Dismiss Steve and Kristine Scharer's ("Plaintiff-Debtors") First Amended Complaint for Failure to State a Claim on November 24, 2014. Dckt. 24.

STIPULATION

On February 11, 2015, Wells Fargo Bank, N.A. filed a stipulation between Wells Fargo Bank, N.A. and Plaintiff-Debtors to continue the hearing on the Motion. Dckt. 34. The Stipulation states that the parties are currently discussing whether a resolution of the case may be possible. The parties state that they have agreed to continue the Motion to April 9, 2015.

FEBRUARY 26, 2015 HEARING

The court continued the hearing to 1:30 p.m. on April 9, 2015 in light of the Stipulation.

COMPLAINT

Plaintiff-Debtors filed a Complaint for violations of RESPA, unjust enrichment, unlawful possession of estate property, breach of contract, fraud, negligence, and unlawful and unfair business practices on August 28, 2014. Dckt. 1.

The Plaintiff-Debtors allege 12 causes of action:

1. Real Estate Settlement and Procedures Act violation

a. Defendant failed to provide to Plaintiff-Debtors the advance w
b. Written disclosures relating to the trial loan payment period, as mandated by RESPA.

2. Home Owners' Loan Act violation

a. The Act applies because the loan originated with World Savings Bank.

b. Defendant has failed to provide Plaintiff-Debtors the advance written disclosures relating to the trial loan payment period, as mandated by HOLA.

3. Breach of Contract

a. Defendant entered into a trial loan payment period with Plaintiff-Debtors.

b. The Defendant breached the trial loan payment period by demanding that the Plaintiff-Debtors ay funds that have already been paid pursuant to the trial loan payment period.

4. Breach of Covenant of Good Faith and Fair Dealing

a. By entering into the trial loan payment period, Defendant owed Plaintiff-Debtors an implied covenant of good fath and fair dealing as well as a duty of care.

b. Defendant breached that covenant and duty during its performance of the contract, effectively destroying or injuring the right of Plaintiff-Debtors to receive the benefit of the trial loan payment period.

5. Actual Fraud

a. Defendant, through employee Prina Souza, deceived Plaintiff-Debtors by:

i. Asserting that the trial loan period payment would be credited to their account. Defendant deceived Plaintiff-Debtors by accepting and depositing three payments without complaint, leading Plaintiff-Debtors to believe there were no problems with the payments.

ii. Failing to disclose to Plaintiff-Debtors that the three trial period payments would not be credited to their mortgage account, that they might need to pay the three trial period payments again, and that the three trial period payments which Plaintiffs had already paid would become immediately due and payable at the end of the three month trial period. Furthermore, at no time did Defendants tell

Plaintiff-Debtors that if they made the three trial period payments Plaintiff-Debtors would owe a "prior unpaid amount" of $5,888.34 and that if they made the three trial period payments the Defendant would then demand an immediate payment of $8,832.51.

iii. Inducing Plaintiff-Debtors to enter into the trial payment period with the intent to deceive by: asserting facts which were not true which the Defendant did not believe to be true or; by making a false positive assertion, even though Defendant believed it to be true or; by suppressing facts that were true.

iv. Concealing or suppressing material facts relating to the trial payment period

v. Making materially false representations about the trial payment period.

vi. Damaging the Plaintiff-Debtors financially as a result of Defendant's above mentioned actions.

6. Common Law Fraud

a. Defendant had the actual intent to defraud Plaintiff-Debtors when it entered into the trial loan payment period.

b. Defendant had actual knowledge of the falsity of its promises.

c. Defendant had the intent to induce Plaintiff-Debtors' reliance to enter into the trial payment period with the Defendant.

d. Plaintiff-Debtor justifiably relied on Defendant's false statements about the trial payment period.

e. Plaintiff-Debtors have been financially damaged as a result of Defendant's fraud.

7. Constructive Fraud

a. Defendant's acts and/or omissions breached Defendant's legal or equitable duties, resulting in damage to Plaintiff-Debtors, even if Defendants acts and/or omissions were not otherwise fraudulent.

8. Negligent Loan Administration, Negligent Infliction of Emotional Distress

a. By entering into a trial payment period with Plaintiff-Debtors, Defendant owed Plaintiffs an implied covenant of

good faith and fair dealing and a duty of care.

b. Defendants negligently administered the trial payment period by failing to make the required disclosures to Plaintiff-Debtors, by failing to keep plaintiffs reasonably informed about the status of the disclosures to Plaintiffs, by failing to credit the trial payment period payments to Plaintiff-Debtors mortgage account, by failing to respond properly to Plaintiff-Debtors questions and concerns, by failing to provide information that a reasonably prudent bank would provide, and by demanding that Plaintiff-Debtors immediately submit duplicate payments.

c. During the trial payment period, Defendant failed to identify or disclose to Plaintiff-Debtors any damages, or penalties, that might result from Plaintiff-Debtors participation.

d. Every effort by Plaintiff-Debtors to resolve this dispute has been rebuffed. Defendant's lack of competence has made it unable to reasonably resolve this dispute.

e. As a result, Plaintiff-Debtors have suffered severe emotional distress, worry and anxiety.

f. Defendants negligence is the actual and proximate cause of Plaintiff-Debtors' emotional distress.

9. Business and Professions Code § 17200 Fraudulent Business Practices

a. Defendant has violated the law, committed fraud by misrepresenting to Plaintiff-Debtor material facts regarding the trial payment period and/or by failing to disclose material facts regarding the trial payment period.

b. Defendant's acts and/or omissions played a substantial part, or was substantial factor, inducing Plaintiff-Debtors to enter into the trial practice period.

c. Members of the general public are reasonably likely to have been deceived by Defendant's acts and/or omissions.

d. Plaintiff-Debtors have been financially damaged by Defendant's acts and/or omissions.

10. Business and Professions Code § 17200 Unfair Business Practices

a. Defendant has engaged in unfair business practices, which were immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Plaintiff-Debtors have been financially damaged as a result.

11. Business and Professions Code § 17200 Unlawful Business Practices

a. Defendant has engaged in unlawful business practices, resulting in financial damages to the Plaintiff-Debtor.

12. Intentional Infliction of Emotional Distress

a. Defendant's conduct has been extreme and outrageous.

b. Defendant has acted with the intention of causing, or with reckless disregard for the probability of causing, emotional distress.

c. Plaintiff-Debtor has suffered severe or extreme emotional distress.

d. Defendant's outrageous conduct is the actual and proximate cause of Plaintiff-Debtor's emotional distress.

MOTION

Law and motion pleading practice in adversary proceedings is governed by Federal Rule of Civil Procedure 7(b). Fed. R. Bankr. P. 7007. A motion filed in an adversary proceeding, must:

A. be in writing unless made during a hearing or trial;

B. **state with particularity the grounds** for seeking the order; and

C. state the relief sought.

Fed. R. Civ. P. 7(b)(emphasis added).

In the present Motion, the below grounds are stated without particularity. Defendants alleges the following:

1. The First Cause of Action for violation of RESPA should be dismissed because the disclosure requirements under RESPA do not apply to a trial loan payment period. Additionally the First Cause of Action should be dismissed because there is no private right of action under sections 2603 and 2604 of the statute. Lastly, the First Cause of Action should be dismissed because Plaintiff-Debtor does not allege any damages.

2. The Second Cause of Action for unlawfully taking possession of and exercising control over property of the estate should be dismissed because Plaintiff-Debtor's allegations fail to give Defendant fair notice in violation of Fed. R. Civ. P. 8(a).

3. The Third and Fourth Causes of Action should be dismissed because Plaintiff-Debtors' have not alleged the existence of a contract or the elements of a breach of contract claim, and have not alleged the meeting of the minds sufficient to support

the existence of any contract. Additionally, these causes of action should be dismissed because Plaintiff-Debtors have not alleged the existence of a written contract, and any contract is required to be in writing pursuant to the statute of fraud.

4. The Fifth, Sixth, and Seventh Causes of Action should be dismissed because Plaintiff-Debtors' fraud-based allegations do not meet the heightened pleading standard. Defendant also alleges that the causes of action should be dismissed because Plaintiff-Debtors have failed to allege a misrepresentation, failed to allege that the Defendant had knowledge of any false statements, Plaintiff-Debtors have not alleged justifiable reliance, and Plaintiff-Debtors have not alleged damages.

5. The Seventh Cause of Action for constructive fraud should be dismissed because such a claim requires the existence of a fiduciary duty, and Defendant has no fiduciary duty to Plaintiff-Debtors.

6. The Eighth Cause of Action for unjust enrichment should be dismissed because it is not a cause of action.

7. The Ninth Cause of Action for negligent loan administration and negligent inflection of emotional distress should be dismissed because Defendant did not owe Plaintiff-Debtors a duty of care. Defendant further alleges that the cause of action should be denied because Plaintiff-Debtors do not allege any injury as a result of any alleged breach because Defendant had no statutory duty under California law to actually give Plaintiff-Debtors a loan modification or accept their reduced monthly payments.

8. The Tenth Cause of Action should be dismissed because the First Amended Complaint does not set forth facts alleging extreme or outrageous conduct by Defendant nor does it indicate the nature or extent of mental suffering incurred as a result of Defendant's alleged conduct.

9. The Eleventh, Twelfth, and Thirteenth Causes of Action should be dismissed because Plaintiff-Debtors do not allege any unlawful, unfair, or fraudulent business practice. Additionally, Defendant argues these causes of action should be dismissed because Plaintiff-Debtors have not alleged they lost money or property as a result of Defendant's alleged conduct.

PLAINTIFF-DEBTORS' OPPOSITION

The Plaintiff-Debtors filed an opposition to the instant Motion on March 6, 2015. Dckt. 40. The Plaintiff-Debtors' respond as follows:

1. First Cause of Action - RESPA

   a. RESPA grants to borrower a private right of action in certain situations.

   b. RESPA does apply to loan modifications and trial loan

payment period. RESPA also applies generally to the servicing of mortgage loans.

c. Defendant violated federal law by not providing written disclosures relating to the trial loan payment period. Plaintiff-Debtors allege that the information provided by Defendant's is materially false and that the Plaintiff-Debtors have made every mortgage payment on time.

d. Additionally, Plaintiff-Debtors allege in the complaint that the Defendant falsely reported to Plaintiff-Debtors and Credit Reporting Agencies that they were past due.

e. The information in the transaction history is either false and misleading or it documents Defendant's malfeasance.

i. Defendant's misapplied or misappropriated Plaintiff-Debtors' mortgage payments in the amount of $72,750.41.

ii. The information in the transaction history materially contradicts the statement of indebtedness from Defendant dated June 13, 2014.

iii. The information in the transaction history materially contradicts Defendant's verbal statements.

f. Defendant is liable for Plaintiff-Debtors' damages including their attorney fees and costs because the Defendant unlawfully possessed and exercised control over Plaintiff-Debtors' funds, denied Plaintiff-Debtors' their right to use their own funds and unjustly retaining their timely payments for its own benefit at their expense, and responded to Plaintiff-Debtors' QWF with materially false information.

2. Second Cause of Action - Unlawfully Taking Possession of and Exercising Control Over Property of the Estate

a. Fed. R. Civ. P. 8(b) applies only to responsive pleadings and is inapplicable to complaints.

b. The Plaintiff-Debtors have set forth sufficient factual assertions to support the claim that Defendant unlawfully usurped control of Plaintiff-Debtors' post-petition funds and that Defendant continues to possess and control those funds.

c. Defendant's arguments relating to the Chapter 13 Plan have no merit because there is no requirement for the Plaintiff-Debtor to explain how the loan was integrated into the plan or how Defendant violated such terms of the plan.

3. Third and Fourth Causes of Action

a. Defendant has not addressed the facts alleged in the First Amended Complaint and Defendant improperly focuses on the terms found in the "Deed of Trust." Plaintiff-Debtors have alleged specific facts showing the Defendant has breached the 2007 loan contract and breached Defendant's duty of good faith and fair dealing.

b. Plaintiff-Debtors allege that the implied covenant of good faith and fair dealing was created when Plaintiff-Debtors and Defendant entered into the 2007 written loan contract.

c. Although the oral trial period payment period agreement is not enforceable, there are amply factual allegations showing that Defendant did enter into an oral contract with Plaintiff-Debtors. Defendant has breached a duty by denying that a real but unenforceable oral contract ever existed.

4. Fifth, Sixth, and Seventh Cause of Action

a. Plaintiff-Debtors have alleged "the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written."

b. The Plaintiff-Debtors' have alleged misrepresentations including both factually untrue statements and the omission of material facts.

c. It can be inferred from the factual allegations in the First Amended Complaint that Defendant knew that its statements were false and that it knew that its omissions were material. Defendant at all time had the true facts.

d. Plaintiff-Debtors have alleged in the First Amended Complaint the many facts which, taken as true, create the inference that Defendant intended to deceive and intended to induce reliance.

e. The facts alleged in the First Amended Complaint establish that Plaintiff-Debtors relied on Defendant's false statement and omissions and that the reliance was reasonable. Plaintiff-Debtors allege, for example, that when they entered into the 2007 written loan contract they were told either implicitly or explicitly that Defendant would keep an accurate accounting of the mortgage account. Plaintiff-Debtors assert that they justifiably relied on this expectation and opened the account.

f. The Defendant's alleged fraudulent acts cased Plaintiff-Debtors financial damage: (1) by falsely reporting to the Credit Reporting Agencies of delinquencies; (2) by unjustly charging and/or collecting penalties, late fees

and other charges; (3) by maintaining false and inaccurate accounting, Plaintiff-Debtors incurred additional attorney's costs and fees; (4) by falsely applying about $300.00 of each month's $2,944.17 mortgage payment to principal, making it almost impossible for them to ever pay off the mortgage; (5) by diverting, stealing, or absconding with the bulk of the funds that Plaintiff-Debtors actually paid each month, the payments have "disappeared;" (6) by being consistently unhelpful, and being unable or unwilling to resolve the dispute, the Plaintiff-Debtors have uncured additional expenses; (7) by inflicting extreme physical distress by stating they Plaintiff-Debtors are delinquent and threatening to foreclose.

5. Eighth Cause of Action

   a. Whether this court treats the Eighth Cause of Action as a cause of action or a claim for restitution based on unjust enrichment, Plaintiff-Debtors have alleged facts showing that it is entitled to restitution.

6. Ninth Cause of Action

   a. The First Amended Complaint is based on the written 2007 loan contract.

   b. The Defendant has breached its duty of care because its activities fall outside the scope of its conventional role as a mere lender of money.

7. Tenth Cause of Action

   a. Plaintiff-Debtors have alleged both that the Defendant's conduct was extreme or outrageous conduct and that they have suffered severe or extreme emotional distress.

8. Eleventh, Twelfth, and Thirteenth Causes of Action

   a. Plaintiff-Debtors have identified and factually alleged that Defendant has committed numerous specific violations of federal and state law. Plaintiff-Debtors have identified and factually alleged which specific acts committed by Defendant were unfair and/or fraudulent and the ongoing financial losses they have suffered as a result.

RESPONSE TO OPPOSITION

On April 2, 2015, the Defendant file a reply to the Plaintiff-Debtors' opposition. Dckt. 45.

The Defendant once again argues that the first cause of action should be dismissed because there is no private cause of action for failure to provide disclosures under RESPA. The Defendant additionally argues that the Plaintiff-

Debtors' attempt to subsume the alleged violation of Defendant in providing qualified written request into the cause of action, which was not pled in the complaint. The Defendant asserts that the Plaintiff-Debtors have not argued that Defendant is a servicer of the loan in the complaint nor plead damages that arose from the alleged failure to provide accurate information from the qualified written request. The Defendant also assert that the bases for the Plaintiff-Debtors' claim, namely the transaction history, do not support the allegations.

As to the second cause of action, the Defendant reasserts that argument that the Plaintiff-Debtors have not provided fair notice of how Defendant allegedly violated the bankruptcy stay. Furthermore, the Defendant points out that the Plaintiff-Debtors admit to paying the reduced payments for three months in their opposition.

The Defendant next argues that the third and fourth causes of action fail to state a claim because the Plaintiff-Debtors refer to a 2007 loan contract which is not attached to the complaint. The Defendant alleges that it is the Deed of Trust the Plaintiff-Debtors are relying on for these causes of actions. As such, the Defendant argues that the Plaintiff-Debtors fail to cite to specific portions of the Deed of Trust which the Defendant have violated. Furthermore, the Defendant argues that the admission by the Plaintiff-Debtors that they made reduced payments is evidence that they are the parties that breached the Deed of Trust. Additionally, the Defendant once again alleges that the oral trial loan payment period argument made by the Plaintiff-Debtors must fail because there was no "meeting of the minds."

In regards to the fifth, sixth, and seventh causes of action, the Defendant once again asserts that the Plaintiff-Debtors failed to plead with particularity as required by Fed. R. Civ. P. 9(b). As to the seventh cause of action (constructive fraud), the Defendant argues that the Plaintiff-Debtors conceded that a fiduciary duty must have existed. The Defendant reasserts its argument that no such duty exists.

The Defendant next argues that the eighth cause of action should be dismissed because the claim is not a cause of action and that the court should not interpret the cause of action as a claim for restitution.

As to the ninth cause of action, the Defendant reiterates its argument that no fiduciary relationship exist and there was no duty owed by the Defendant.

The Defendant restates that the tenth cause of action should be dismissed because the Plaintiff-Debtors fail to allege that the Defendant's actions were extreme or outrageous..

Lastly, the Defendant argues that the eleventh, twelfth, and thirteenth causes of action should be dismissed because the Plaintiff-Debtors have not lost any money or property as a result of the Defendant's actions.

FED. R. CIV. P. 12(b)(6) AND FED. R. BANKR. 7012 STANDARD

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 complaints contain a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. Fed. R. Civ. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.*, citing to 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235-36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action").

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether a motion to dismiss is to be granted should be resolved in favor of the pleader. *Pond v. General Electric 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 Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Rule 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1954 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-66 (2007). ("[A] plaintiff's obligation to provide 'grounds' of his 'entitle[ment]' to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.").

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

DISCUSSION

First Cause of Action

Defendant argues that the first cause of action fails because RESPA contains no language that it applies to trial loan payment period, there is no private right of action for violations of the disclosure requirements required by sections 2603 and 2604, and Plaintiff-Debtors failed to sufficiently allege facts regarding damages.

Fed. R. Civ. P. 8 does requires that the Plaintiff-Debtor "plead a short and plain statement of the elements of his or her claim, identifying the transaction or occurrence giving rise to the claim and the elements of the prima facie case." *Bautista v. Los Angeles County*, 216 F.3d 837,840 (9th Cir. 2000). However, it appears that the Plaintiff-Debtors have failed to state a

viable claim in which relief may be granted. Under RESPA, the alleged failure of the Defendant to provide certain disclosures to the Plaintiff-Debtor in connection with the trial loan payment plan does not provide for a private right of action, as compared to alleged failure to provide Qualified Written Requests pursuant to 12 U.S.C. § 2605.

A review of the First Amended Complaint shows that the Defendant is correct in that 12 U.S.C. §§ 2601, 2603, and 2604 do not provide for private right of action for violations. 11 U.S.C. § 2601, entitled "Congressional Findings and Purpose" does not provide for a private cause of action for the alleged misconduct alleged by the Plaintiff-Debtors. The same holds true for 11 U.S.C. § 2603, "Uniform Settlement Statement," and 11 U.S.C. § 2604, "Home Buying Information Booklets."

The court in *Alford v. Wachovia Bank/World Sav. Bank* discussed the scope of RESPA, particularly when a plaintiff alleges a cause of action due to a lender's failure to provide disclosures. No. CVF 10-0091 LJO SMS, 2010 WL 415260, at *1 (E.D. Cal. Jan. 26, 2010). The court stated:

> RESPA's purpose is to "curb abusive settlement practices in the real estate industry. Such amorphous goals, however, do not translate into a legislative intent to create a private right of action." *Bloom v. Martin*, 865 F.Supp. 1377, 1385 (N.D.Cal.1994), aff'd, 77 F.3d 318 (1996). "The structure of RESPA's various statutory provisions indicates that Congress did not intend to create a private right of action for disclosure violations under 12 U.S.C. § 2603 ... Congress did not intend to provide a private remedy ..." Bloom, 865 F.Supp. at 1384.

Id. at *11. The court concluded that "[t]he absence of a private right of action for RESPA disclosure violation dooms a purported RESPA claim based on disclosure violations." *Id.*

In the Opposition, Plaintiff-Debtors state that RESPA does provide a civil remedy, citing to 12 U.S.C. § 2605(f), which provides [emphasis added],

> "(f) Damages and costs. Whoever fails to comply with **any provision of this section** shall be liable to the borrower for each such failure in the following amounts:
>
> (1) Individuals. In the case of any action by an individual, an amount equal to the sum of--
>
> (A) any actual damages to the borrower as a result of the failure; and
>
> (B) any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed $ 2,000.
>
> ...
>
> (3) Costs. In addition to the amounts under paragraph (1) or (2), in the case of any successful action under this section, the costs of the action, together with any attorneys

> fees incurred in connection with such action as the court may determine to be reasonable under the circumstances.
>
> (4) Nonliability. A transferor or transferee servicer shall not be liable under this subsection for any failure to comply with any requirement under this section if, within 60 days after discovering an error (whether pursuant to a final written examination report or the servicer's own procedures) and before the commencement of an action under this subsection and the receipt of written notice of the error from the borrower, the servicer notifies the person concerned of the error and makes whatever adjustments are necessary in the appropriate account to ensure that the person will not be required to pay an amount in excess of any amount that the person otherwise would have paid."

The Opposition does not state what provisions of "this section," 12 U.S.C. § 2605, for which the violation is asserted. The Complaint and Opposition merely state that "RESPA was violated." The Section 2605 provisions relate to the assignment, sale, or transfer of loan servicing, and notice being required to be given by "each person who makes a federally related mortgage loan." 12 U.S.C. § 2605(a). Additionally, a servicer is required to provide notice to the borrower when there is a sale, assignment, or transfer of the servicing of the loan. 12 U.S.C. § 2605(b), (c).

Additionally, a servicer is required to respond to a Qualified Written Request made by the borrower. 12 U.S.C. § 2605(e). Plaintiff-Debtor clearly pleads that it made such a request, Defendant provided a detailed response, and Plaintiff-Debtor disputes that the response correctly reflects the payments made and properly applied for the loan. Plaintiff-Debtor goes further to allege that the detailed response provided by Defendant establishes that there is no default under the loan by Plaintiff-Debtor. On its face, the First Amended Complaint pleads compliance with this portion of § 2605(e).

As is the case here, the Plaintiff-Debtor merely alleges that "Defendant has violation federal law by failing to provide to Plaintiff-Debtors] the advance written disclosures relating to the TPP, as mandated by RESPA." There is no private cause of action under RESPA that allows the Plaintiff-Debtors the right to seek damages for the Defendant's alleged failure.

Furthermore, even assuming arguendo that there is a private cause of action available, the Plaintiff-Debtors failed to plead actual damages. While the Plaintiff-Debtors allege general damages in the complaint, the Plaintiff-Debtors fail to plead specific actual damages that arose due to the Defendant's alleged failure to provide disclosures. As the court in Alford stated, "[p]laintiffs must, at a minimum, also allege that the breach resulted in actual damages." Id. (internal citations omitted).

The general and implicit damages claimed in the complaint are not specifically tied to the first cause of action necessary to state a claim under RESPA, if a private right did actually exist. The Plaintiff-Debtors failed to plead sufficiently to tie the alleged violation under RESPA to any actual damages arising from that violation.

Therefore, because there is no private cause of action for failure to provide disclosures under RESPA and the Plaintiff-Debtors failed to allege actual damages from the breach, the Motion is granted as to the first cause of action and the first cause of action is dismissed.

Second Cause of Action

The Plaintiff-Debtors' second cause of action is the alleged unlawful taking possession of and exercising control over property of the estate. Defendant argues that this cause of action should be dismissed because Plaintiff-Debtors fail to give Defendant fair notice in violation of Fed. R. Civ. P. 8(a).

Essentially, the Plaintiff-Debtors are alleging that the post-petition wages they used to fund the post-petition monthly mortgage payments were property of the estate and that the Defendant unlawfully took possession of that property by: (1) accepting and depositing those payments; (2) by failing to credit the payments to Plaintiff-Debtors' mortgage account; (3) by refusing to acknowledge having received the payments; (4) by demanding that Plaintiff-Debtors pay funds that had already been paid; and (5) by unjustly charging penalties, late fees and other charges. The Plaintiff-Debtors argue, from what the court can discern, that this raises to the level of violating the automatic stay.

Here, the Plaintiff-Debtors are arguing that the alleged misallocation of the mortgage payments, after the monies were paid to Defendant, were a violation of the automatic stay. Unfortunately, this is not correct. Once the Plaintiff-Debtors paid the Defendant the mortgage payment, the monies were no longer property of the bankruptcy estate. To be "property of the estate," the bankruptcy estate must have an interest in the property. 11 U.S.C. § 541(a). No provision of 11 U.S.C. § 541 has been cited by Plaintiff-Debtors as providing that monies paid to a creditor continue to be property of the bankruptcy estate after payment, and as such, continue to be protected by the automatic stay. FN.1.

FN.1. The one authority cited by Plaintiff-Debtors is *Payne v. Mortgage Electronic Registration Systems, Inc.*, 387 B.R. 614 (Bankr. Kan. 2008), which held that while RESPA did not provide a statutory basis for a claim for alleged misapplied monies by a debtor could be a violation of the automatic stay, relying on 11 U.S.C. § 105 as a violation of the Chapter 13 confirmation order. *Id.* at 630. This broad statement appears to conflate the automatic stay, the confirmed Chapter 13 Plan, and the confirmation order into one combined § 105(a) exercise of power by the court. This court does not find such a statement persuasive in applying the Bankruptcy Code.

The confirmed Chapter 13 Plan of Debtor provides that upon confirmation "Any property of the estate scheduled under section 521 shall revest in Debtor on confirmation...." 10-26240, Dckt. 70. The Plaintiff-Debtors, pursuant to their confirmed amended plan, paid the Defendant directly the mortgage payment. Once the Plaintiff-Debtors paid the money to Defendant, the funds were no longer monies of the Plaintiff-Debtors, but monies of the Defendant paid as required by the Chapter 13 Plan.

The alleged misallocation of the funds appears to be a possible breach

of contract claim, a "simple" accounting dispute for which Plaintiff-Debtors may properly have the money paid under the plan determined by the court, or a possible violation by Defendant of the terms of the confirmed plan (the modified contract between the partie), but not a violation of the automatic stay. The Plaintiff-Debtors paid the mortgage payment to the Defendant – the Defendant did not perform "any act to obtain possession of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). Instead, the Defendant merely deposited the mortgage payment sent to them from the Plaintiff-Debtors.

The alleged wrong here is properly addressed in the third cause of action.

As to the Defendant's argument that the second cause of action failed to give fair notice as required by Fed. R. Civ. P. 8(a), the court does find that the Plaintiff-Debtor has failed to "plead a short and plain statement of the elements of his or her claim, identifying the transaction or occurrence giving rise to the claim and the elements of the prima facie case." *Bautista v. Los Angeles County*, 216 F.3d 837,840 (9th Cir. 2000). As discussed supra, the Plaintiff-Debtors has failed to plead what actions taken by the Defendant were, in fact, in violation of the stay.

Therefore, the Motion as to the second cause of action is granted and the second cause of action is dismissed without prejudice.

Third Cause of Action

Plaintiff-Debtors' third cause of action is an alleged breach of the 2007 mortgage loan contract by Defendant. The Defendant argues that the cause of action should be dismissed because the Plaintiff-Debtors have not alleged the existence of a contract or the elements of a breach, and have not alleged the meeting of the minds sufficient to support the existence of any contract. Further, the Defendant argues dismissal is proper because the Plaintiff-Debtors have not alleged the existence of a written contract.

The Defendant here misconstrues the grounds for which the Plaintiff-Debtors are alleging a breach of contract. The Defendant is operating under the presumption that the breach the Plaintiff-Defendants are alleging arises from the oral loan modification. This is not correct. As stated in the complaint and in the Plaintiff-Debtors' opposition, the Plaintiff-Debtors are alleging a breach of the underlying loan contract that was executed in 2007. The Plaintiff-Debtors are not alleging a breach of the oral loan modification that the Plaintiff-Debtors state took place in early 2014.

As evidenced by the Defendant's Memorandum, the Defendant's are arguing that the alleged breaches are to the loan modification and not the 2007 contract. The Defendant seems to argue that the alleged breaches are all in connection with the loan modification and not the 2007 contract because, as it argues, the contract does not provide for any of the warranties or representations that Plaintiff-Debtors state the Defendant breached. The Defendant then launches into a discussion on the invalidity of the oral loan modification.

However, the court finds that, assuming for the present motion all the alleged facts to be true as required under a Fed. R. Civ. P. 12(b)(6), the

Plaintiff-Debtors have stated a viable claim for relief. Whether the alleged breaches were in fact covered by the 2007 contract is a question of fact to be argued at trial, and not a question of law that can be determined at the 12(b)(6) stage of pleadings. The Plaintiff-Debtors have sufficiently pleaded a viable cause of action. Therefore, the Defendant's Motion as to the third cause of action is denied.

Fourth Cause of Action

Plaintiff-Debtors' fourth cause of action is a breach of covenant of good faith and fair dealing arising from the 2007 mortgage contract. The Defendant argues that the cause of action should be dismissed because the Plaintiff-Debtors have not alleged the existence of a contract or the elements of a breach, and have not alleged the meeting of the minds sufficient to support the existence of any contract. Further, the Defendant argues dismissal is proper because the Plaintiff-Debtors have not alleged the existence of a written contract.

However, for the same reasons stated supra, the Defendant convolutes the 2007 mortgage contract and the oral loan modification as the grounds for dismissal. The Plaintiff-Debtors' fourth cause of action specifically states that the alleged breach arises under the 2007 mortgage contract and not the oral loan modification.

Therefore, for the reasons states supra, the Motion is denied as to the fourth cause of action.

Fifth Cause of Action

Plaintiff-Debtors' fifth cause of action is a claim of actual fraud, pursuant to Cal. Civ. Code § 1572. The Defendant argues that the fifth cause of action should be dismissed because the Plaintiff-Debtors fail to meet the heightened pleading standard for fraud, specifically failing to allege facts of misrepresentation, Defendant's knowledge of any false statements, Defendant's intent to defraud or induce reliance, Plaintiff-Debtor's justifiable reliance, nor damages.

"A cause of action for fraud [under California law] requires the plaintiff to prove (a) a knowingly false misrepresentation by the defendant, (b) made with the intent to deceive or to induce reliance by the plaintiff, (c) justifiable reliance by the plaintiff, and (d) resulting damages." *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192 (9th Cir.2001) (quoting *Wilkins v. Nat'l Broadcasting Co., Inc.*, 71 Cal.App.4th 1066, 1082, 84 Cal.Rptr.2d 329 (1999)); *see also* Cal. Civil Code § 1572.

A review of the complaint shows that the Plaintiff-Defendant has pleaded with relatively specific facts the alleged fraud. The Plaintiff-Defendant provides specific names, dates, and statements by Defendant, through its employees, for which the Plaintiff-Debtors allege the fraud arose.

The Defendant, in its Memorandum, appear to only quote portions of the complaint to support its argument that the Plaintiff-Debtors have failed to plead sufficient facts. However, looking at the complaint and the fifth cause of action in its entirety shows that there are sufficient facts that, if accepted as true, provides for a viable cause of action. The Defendant is

attempting to take excerpts from the complaint as the entire alleged facts by Plaintiff-Debtors for each element. This is not correct. The Plaintiff-Debtors provide specific facts to support the claim of fraud.

The arguments made by the Defendant are beyond the scope of an Fed. R. Civ. P. 12(b)(6) motion but are instead to the factual issues which would be on the merits. The Defendant has not shown that, taking all the factual allegations in the complaint, which the Defendant has not fully considered in its Motion and Memorandum, that there is no plausible cause of action. The court finds that the Plaintiff-Debtors have sufficiently pled, even under the heightened pleading standard under Fed. R. Civ. P. 9, a viable cause of action that defeats a Fed. R. Civ. P. 12(b)(6) motion.

Therefore, the Motion as to the fifth cause of action is denied.

Sixth Cause of Action

The Plaintiff-Debtors' sixth cause of action is for common law fraud. The Defendant argues that the sixth cause of action should be dismissed because the Plaintiff-Debtors fail to meet the heightened pleading standard for fraud, specifically failing to allege facts of misrepresentation, Defendant's knowledge of any false statements, Defendant's intent to defraud or induce reliance, Plaintiff-Debtor's justifiable reliance, nor damages.

"The elements of common law fraud in California are: (1) a misrepresentation of a material fact (false representation, concealment, or nondisclosure); (2) knowledge of falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." *Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249, 259, 134 Cal. Rptr. 3d 588, 596 (2011), as modified (Dec. 28, 2011).

As discussed supra, the Defendant attempts to take incomplete excerpts from the complaint as evidence that the Plaintiff-Debtors have failed to adequately plead the specifics of the elements for common law fraud. However, a review of the complaint shows that, for the purposes of the sixth cause of action, the Plaintiff-Debtors adopt the same factual allegations for the fifth cause of action which provides sufficient detail and facts to support a claim of fraud pursuant to Fed. R. Civ. P. 9. Taken the alleged facts as true, the Plaintiff-Debtors pled sufficient facts to support a claim for common law fraud.

Therefore, the motion as to the sixth caus of action is denied.

Seventh Cause of Action

The Plaintiff-Debtors' seventh cause of action is for constructive fraud. The Defendant argues that the seventh cause of action should be dismissed because the Plaintiff-Debtors fail to meet the heightened pleading standard for fraud, specifically failing to allege facts of misrepresentation, Defendant's knowledge of any false statements, Defendant's intent to defraud or induce reliance, Plaintiff-Debtor's justifiable reliance, nor damages. Additionally, the Defendant argues that the Plaintiff-Debtors have failed to plead a fiduciary duty between the Defendant and Plaintiff-Debtors to support a claim of constructive fraud.

The court in *Dealertrack, Inc. v. Huber*, 460 F. Supp. 2d 1177, 1183 (C.D. Cal. 2006), provides an outline of the requirements for a claim of constructive fraud under California law:

> To state a claim for constructive fraud, a party must allege (1) a fiduciary or confidential relationship; (2) an act, omission or concealment involving a breach of that duty; (3) reliance; and (4) resulting damage. *Assilzadeh v. California Federal Bank*, 82 Cal.App.4th 399, 414, 98 Cal.Rptr.2d 176 (2000) ("Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship. As a general principle constructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another even though the conduct is not otherwise fraudulent." (citations omitted)). *See also In re Harmon*, 250 F.3d 1240, 1249, n. 10 (9th Cir.2001) (citing *Assilzadeh*, supra).

In terms of a borrower and a lender "[n]o fiduciary duty exists between a borrower and lender in an arm's length transaction. [A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." *Rufini v. CitiMortgage, Inc.*, 227 Cal. App. 4th 299, 312, 173 Cal. Rptr. 3d 422, 433 (2014), as modified on denial of reh'g (July 22, 2014) (citing *Ragland v. U.S. Bank Nat. Assn.*, supra, 209 Cal.App.4th at p. 206, 147 Cal.Rptr.3d 41; *Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096, 283 Cal.Rptr. 53) (internal citations omitted). "In California, the test for determining whether a financial institution owes a duty of care to a borrower-client involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm." Nymark v. Heart Fed. Sav. & Loan Assn., 231 Cal. App. 3d 1089, 1098, 283 Cal. Rptr. 53 (Ct. App. 1991)

Here, the Defendant is correct in stating that the Plaintiff-Debtors have failed to plead facts that shows that the relationship between the Defendant and Plaintiff-Debtors "exceed the scope" of the conventional borrower-lender relationship. The Plaintiff-Debtors merely allege that the existence of the 2007 contract caused a fiduciary relationship to be formed between the parties. As California law states, the mere existence of a loan does not create a fiduciary relationship. Instead, there most be something more than the "conventional role as a mere lender of money" to make the lender a fiduciary of the borrower. The Plaintiff-Debtors do not allege any agency or other specific facts that expand the relationship outside that of a normal lender-borrower that would weigh the *Nymark* factors in favor of establishing a fiduciary relationship.

While the Plaintiff-Debtors reassert the same allegations as in the fifth and sixth causes of action, the Plaintiff-Debtors have failed to allege specific facts that a fiduciary relationship existed.

Therefore, the Motion as to the seventh cause of action is granted, and the seventh cause of action is dismissed.

Eighth Cause of Action

The Plaintiff-Debtors' eighth cause of action is for unjust enrichment. The Defendant argues that the eighth cause of action should be dismissed because it is not an independent cause of action.

In California, it is appears that "[t]here is no cause of action in California for unjust enrichment." *Walker v. USAA Cas. Ins. Co.*, 474 F. Supp. 2d 1168, 1174 (E.D. Cal. 2007) *aff'd sub nom. Walker v. Geico Gen. Ins. Co.*, 558 F.3d 1025 (9th Cir. 2009) (citing *Melchior v. New Line Prods., Inc.*, 106 Cal.App.4th 779, 794, 131 Cal.Rptr.2d 347 (2003)) (internal quotations omitted). The majority of courts have found that "[u]njust enrichment is synonymous with the remedy of restitution," rather than an independent ground for relief. *Walker*, 474 F. Supp. 2d at 1174 (citing *Dinosaur Dev., Inc. v. White*, 216 Cal.App.3d 1310, 1314-15, 265 Cal.Rptr. 525 (1989)). While, some courts have found that unjust enrichment may be an independent cause of action (*see People v. Sarpas*, 225 Cal.App.4th 1539, 1662 (2014)), the majority of courts, including the Ninth Circuit have found that unjust enrichment is a restitution claim, rather than a cause of action. *See Chermaie v. HBB, LLC*, 554 Fed.Appx. 626, 628 (9th Cir. 2013)

The court finds persuasive the majority of the courts that have found that unjust enrichment is not a cause of action in and of itself, but rather a means for a party to seek restitution. The Plaintiff-Debtors have not provided facts or argument that persuades the court to go against the precedence that unjust enrichment is not an independent action.

Therefore, because California law does not recognize a claim for unjust enrichment, there are no facts that could be provided to support the eighth cause of action. The Motion is granted as to the eighth cause of action and the eighth cause of action is dismissed.

Ninth Cause of Action

The Plaintiff-Debtors' ninth cause of action is for negligent loan administration and negligent infliction of emotional distress. The Defendant argues that the ninth cause of action should be dismissed because the Defendant did not owe a duty of care nor did the Plaintiff-Debtors allege any injury as a result of any alleged breach.

In California, a negligent infliction of emotional distress is a tort of negligence which has the "elements of duty, breach of duty, causation and damages apply." *Flores v. EMC Mortgage Co.*, 997 F. Supp. 2d 1088, 1125 (E.D. Cal. 2014). "California law recognizes that 'there is no independent tort of negligent infliction of emotional distress' in that '[t]he tort is negligence, a cause of action in which a duty to the plaintiff is an essential element.' Id. (quoting *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 984, 25 Cal.Rptr.2d 550, 863 P.2d 795 (1993)).

As discussed supra, the Plaintiff-Debtors have failed to allege facts that the Defendant owed the Plaintiff-Debtors a fiduciary duty other merely due to the 2007 loan contract. While the Plaintiff-Debtors attempt to argue that

the Defendant acted outside the scope of the typical lender-borrower relationship in their opposition, the Plaintiff-Debtors rely on the alleged bad acts of the Defendant as the justification for the creation of the fiduciary duty. The *Nymark* test for determining if a financial institution owes a duty of act requires a showing of six factors. The Plaintiff-Debtors merely just allege the same bad acts as in the other causes of action, without providing specific showings that the Defendant did, in fact, act outside the scope of the typical lender-borrower relationship. The Plaintiff-Debtors appear to be relying on the court's interpretation of the bad acts as satisfying the six prongs of the *Nymark* test, which, unfortunately, is improper. Without more, and taking the facts as true for the purposes of this Motion, the Plaintiff-Debtors have not shown that the Defendant owed a duty.

Therefore, the Motion as to the ninth cause of action is granted, and the ninth cause of action is dismissed.

Tenth Cause of Action

The Plaintiff-Debtors' tenth cause of action is for intentional infliction of emotional distress. The Defendant argues that dismissal is appropriate because the Plaintiff-Debtors' failed to allege extreme or outrageous conduct nor did they allege the nature or extent of mental suffering incurred.

The elements of a cause of action for intentional infliction of emotional distress are "(1) the defendant engages in extreme and outrageous conduct with the intent to cause, or with reckless disregard for the probability of causing, emotional distress; (2) the plaintiff suffers extreme or severe emotional distress; and (3) the defendant's extreme and outrageous conduct was the actual and proximate cause of the plaintiff's extreme or severe emotional distress." *Ragland v. U.S. Bank Nat. Assn.*, 209 Cal. App. 4th 182, 204, 147 Cal. Rptr. 3d 41, 59-60 (2012) (citing *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001, 25 Cal.Rptr.2d 550, 863 P.2d 795.)

Courts have found that "[o]utrageous conduct is conduct that is intentional or reckless and so extreme as to exceed all bounds of decency in a civilized community." *Ragland* 209 Cal.App.4th at 204. "The defendant's conduct must be directed to the plaintiff, but malicious or evil purpose is not essential to liability." *Id.* "Whether conduct is outrageous is usually a question of fact." *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1045, 90 Cal.Rptr.3d 453.

Here, the question of whether the alleged acts of the Defendant were so outragues that they "exceed all bounds of decency" is a question of fact. Taking the allegations in the complaint as true, as proper on a Fed. R. Civ. P. 12(b)(6) motion, the Plaintiff-Debtors have stated a plausible claim, that if proven true, may entitle the Plaintiff-Debtors to the relief requested. The Plaintiff-Debtors have alleged extreme and outrageous conduct by the Defendant, have alleged they have suffered severe emotional distress (stomach problems, sleepless nights, etc.), have alleged that such maladies were caused by the alleged bad acts of the Defendant.

The Defendant argues that they have not pled sufficient facts to raise to that level of outrageous conduct. The court disagrees. Given the factual nature of the cause of action and the nature of 12(b)(6) motions, the court

finds that if the Plaintiff-Defendants prove the alleged facts in the complaint, then the Defendant may have, in fact, committed acts so extreme as to exceed all bounds of decency in our society.

Therefore, because the Plaintiff-Debtors have pled sufficient facts, the Motion is denied as to the tenth cause of action.

Eleventh, Twelfth, and Thirteenth Causes of Action

The Plaintiff-Debtors' eleventh, twelfth, and thirteenth causes of action is for fraudulent business practices, unfair business practices, under the Business and Professions Code § 17200. The Defendant argues that the cause of action should be dismissed because the Plaintiff-Debtors do not allege any unlawful, unfair, or fraudulent business practice and because the Plaintiff-Debtors have not alleged they lost money or property as a result of Defendant's alleged actions.

Section 17200 provides that unfair business practices include, "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any action prohibited by Chapter 1(commencing with Section 17500)." Section 17500 includes "false or misleading statements."

"The 'fraud' prong of the Business and Processions Code section 17200 is unlike common law fraud or deception. A violation can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage. Instead, it is only necessary to show that members of the public are likely to be deceived." *Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 647-48 (1996) (citing Committee on Children's *Television, Inc. v. General Foods Corp*., 35 Cal. 3d 197, 211 (1983)).

Further, "[a] practice can violate this section even if it is merely unfair and not unlawful." *Mangindin v. Wash. Mut. Bank*, 637 F. Supp. 2d 700, 709 (N.D. Cal. 2009). "In determining whether a particular business practice is unfair under Section 17200, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Id.* at 710.

The Defendant's Memorandum makes the argument that the Plaintiff-Debtors have not alleged the existence of any unlawful, unfair, or fraudulent business act or practice . Further, the Defendant argues that the Plaintiff-Debtors failed to plead with particularity and failed to allege actual damages.

However, the Defendant seems to neglect the fact that in the complaint, the Plaintiff-Debtors specifically incorporate the previous factual allegations, including the ten causes of action alleged. The eleventh, twelfth, and thirteenth causes of action all state which specific acts, as incorporated, the Plaintiff-Debtors base the cause of action on, whether it be the alleged breach of the 2007 loan contract or the fraud allegation, which are plausible grounds to support a claim under Business and Professions Code § 17200.

As to the Defendant's argument that the Plaintiff-Debtor has not pled sufficient facts as to the actual injury, the court is unpersuaded. At the 12(b)(6) level of review, the court must view the alleged facts as true. The actual injury purported by the Plaintiff-Defendants deals with the financial

damages arising from the alleged misallocation of mortgage payments which resulted in late fees, adverse credit reporting, and other penalty related damages. While the Plaintiff-Debtors are unable to actually provide a dollar amount at this point of the pleadings, this inability to specifically provide a monetary number does not negate the fact that the Plaintiff-Debtors have alleged a sufficient actual injury for purposes of the eleventh, twelfth, and thirteenth causes of action.

Therefore, the Motion as to the eleventh, twelfth, and thirteenth causes of action is denied.

RULING

The Motion to Dismiss is granted as to the first, second, seventh, eighth, and ninth causes of action and are dismissed without prejudice with leave to amend. The Motion to Dismiss is denied as to the third, fourth, fifth, sixth, tenth, eleventh, twelfth, and thirteenth causes of action.

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 filed by Wells Fargo Bank, N.A. having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is granted as to the first, second, seventh, eighth, and ninth causes of action and are dismissed without prejudice with leave to amend.
>
> **IT IS FURTHER ORDERED** that the Motion is denied as to the third, fourth, fifth, sixth, tenth, eleventh, twelfth, and thirteenth causes of action.
>
> **IT IS FURTHER ORDERED** Defendant shall file an answer to the Complaint on or before xxxxxxxxxxx, 2015.
>
> **IT IS FURTHER ORDERED** that Plaintiff-Debtors may seek leave to file an amended complaint. If such leave is requested, it shall be by noticed motion and a copy of the proposed amended complaint shall be provided as an exhibit in support of such motion.

5. 14-27755-E-13 ANTHONY FURR **CONTINUED STATUS CONFERENCE RE: COMPLAINT**
15-2012 **1-16-15 [1]**
FURR ET AL V. PENNYMAC HOLDINGS, LLC ET AL

Plaintiff's Atty: Pro Se
Defendant's Atty: Christopher O. Rivas

Adv. Filed: 1/16/15
Answer: none

Nature of Action:
Validity, priority or extent of lien or other interest in property

Notes:

[COR-1] Defendants' Motion to Dismiss Plaintiffs' Adversary Complaint filed 2/17/15 [Dckt 6], set for hearing 4/9/15 @ 1:30 p.m.

Defendants' Status Conference Statement filed 3/18/15 [Dckt 15]

6. **14-27755-E-13 ANTHONY FURR** **MOTION TO DISMISS ADVERSARY**
15-2012 COR-1 **PROCEEDING**
FURR ET AL V. PENNYMAC HOLDINGS, LLC ET AL **2-17-15 [6]**

APPEARANCE OF CHRISTOPHER O. RIVAS, ATTORNEY FOR PENHYMAC HOLDINGS, LLC REQUIRED FOR APRIL 9, 2015 HEARING TELEPHONIC APPEARANCE PERMITTED

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

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.

Below is the court's tentative ruling.

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on February 17, 2014. By the court's calculation, 51 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006).

Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Dismiss is granted and the Complaint is dismissed without prejudice.

PennyMac Loan Services, LLC and PennlyMac Holdings, LLC FKA PennyMac Mortgage Investment Trust Holdings I, LLC ("Defendant") filed this instant motion to dismiss the Adversary Complaint on February 17, 2015. Dckt. 7. This was in response to the complaint brought by Anthony Furr ("Plaintiff-Debtor") and Sara Stratton on January 1, 2015. Dckt. 1. The Defendant's request this court to dismiss the Plaintiff-Debtor's complaint for failure to state claim upon which relief can be granted pursuant to Federal Rules of Bankruptcy Procedure 7012(b) and Federal Rules of Civil Procedure 12(b)(6).

Specifically, Defendant contends that Plaintiff-Debtor's complaint does not comply with Federal Rule of Civil Procedure 8(a)(2), because it fails to provide Defendants with notice of its alleged wrongdoing. That Plaintiffs' challenge to the foreclosure sale fails, because they do not allege a violation of California's non-judicial foreclosure statutes, fail to allege tender, and there is a lack of prejudice.

FACTUAL BACKGROUND

Plaintiff-Debtor was the former owner of real property located at 2822 H Street, Sacramento, California ("Property"). The Plaintiff-Debtor's complaint states that he and his spouse, Sara K. Stratton, decided to seek a home improvement loan in 2004. Dckt. 1 This decision came after the home was partially condemned by the City of Sacramento Hazardous Building Dept and a court order was issued compelling repair and restoration. On or about June 14, 2005 the Ms. Stratton obtained a $568,000.00 mortgage loan ("Loan") secured by a promissory note and Deed of Trust to the Property. Dckt.1, Exhibits A & B. The Deed of Trust identifies United Financial Mortgage Corp. Ss the lender, First American as the trustee, and Mortgage Electronic Registrations Systems, Inc. ("MERS") as the beneficiary and nominee for the lender and the lender's successors and assigns.

The parties agree that only the Ms. Stratton signed the Note and Deed of Trust, and that she held the Property in her name from 1992 until 2004. In 2004 the Ms. Stratton then deeded half of the interest to the Plaintiff-Debtor. In 2014, the Plaintiff-Debtor claims that Ms. Stratton deeded the remaining interest in the Property in her name to the Plaintiff-Debtor. There are no allegations by the Plaintiff-Debtor that the lender, servicer, or assignee beneficiary of the Loan consented to either transfer.

On November 24, 2010, MERS recorded an assignment of its beneficial interest in the Deed of Trust to JP Morgan Chase Bank, N.A. ("Chase"), whom Plaintiff-Debtor alleges assumed the servicing of the loan in March 2010. Dckt.1, Exhibit C. Chase then substituted California Reconveyance Company as the trustee under the Deed of Trust. Dckt.1, Exhibit 3. California Reconveyance Company then recorded a Notice of Default against the Property the same day. Dckt. 1, Exhibit 4. According to the Notice, the loan was due for all payments owed since July 2009 for a total of $57,717.82 in arrears. Plaintiff-Debtor does not claim they have made any payments since that time.

The Ms. Stratton failed to cure her default, and on March 1, 2011 the trustee recorded a Notice of Trustee's Sale against the Property. Dckt. 1, Exhibit 5. The sale was postponed and on June 17, 2011, a new Notice of Trustee's Sale was recorded. Exhibit 6. According to the second notice the unpaid balance of the Loan with interest as of that date was for a total of $656,511.20.

On September 13, 2013, Chase executed an assignment of the beneficial interest in Plaintiff's Deed of Trust to PennyMac Mortgage Investment Trust Holdings I, LLC, now PennyMac Holdings. Thereafter the assignment was recorded in Sacramento County, and at or around this time Penny Loan Services acquired the servicing rights of the loan from Chase.

Following Ms. Stratton's July 2009 default, Plaintiff has engaged in the following acts:

(1) First Grant Deed: On or about May 27, 2004, before executing the Note and Deed of Trust, Ms. Stratton executed a Grant Deed transferring the real property to herself and Plaintiff-Debtor. The Grant Deed was not recorded until October 28, 2011 in Sacramento County Document No. 201110280798.

(2) First Bankruptcy (Case No. 12-22048): On or about February 1, 2012, Plaintiff-Debtor (pro se) filed Chapter 13 Bankruptcy. The case was dismissed on April 23, 2012 for unreasonable delays by Plaintiff-Debtor that were prejudicial to creditors. Dckt. 8.

(3) Second Bankruptcy (Case No. 12-28240): On April 27, 2012, Plaintiff-Debtor (pro se) filed another Chapter 13 Bankruptcy Case. On or about November 9, 2012 the Court entered an Order Dismissing the Case. Exhibit 1.

(4) State Court Action (Case No. 34-2013-00154258): On December 3, 2013, Plaintiff-Debtor filed a civil complaint against the Defendant in the California Superior Court. The Plaintiff-Debtor's judicial council form complaint purports to state three causes of action for "Intentional Tort, Products Liability, and Other." However, the Defendant have not been served with a summons and complaint in this action, and the case remains pending.

(5) Third Bankruptcy (Case No. 14-22297): On or about March 6, 2014, Plaintiff-Debtor filed a Chapter 13. On or about June 23, 2014 Defendant filed a Motion for Relief from Stay based upon failure to make post-petition payments, bad faith, and no equity. Exhibit 12. The Plaintiffs filed oppositions to the motion, but it was granted on or about July 22, 2014. Exhibit 11. The Order was entered on July 25, 2014 and recorded in the Official Records of Sacramento California on or about August 4, 2014. Exhibit 13. Thereafter, on or about July 15, 2014, the court dismissed the case for unreasonable delay. Exhibit 11.

(6) Second Grant Deed: On or about July 22, 2014, the same day the Court granted Relief from Stay in Case No. 14-22297, Stratton executed another Grant Deed transferring all of her interest in the Property to Furr. The Grant Deed was recorded on July 25, 2014 in the Official Records of Sacramento County as Document No. 201407251061. Defendant did not authorize this transfer in ownership to Furr. Exhibit 14.

(7) Fourth Bankruptcy (Case No. 14-27755): On or about July 30, 2014, two weeks after the Court dismissed Case No. 14-22297 Furr filed anout Chapter 13 Bankruptcy Case. Dckt. 15. On or about August 12, 2014 Furr filed a Motion to Extend the Automatic Stay. The Court denied the motion and an order was entered on September 16, 2014. Dckt. 15.

Defendant then filed a Motion for Relief from Automatic Stay on September 25, 2014. Exhibit 16. Furr opposed the motion the motion stating his plan provided adequate protection and that there was a break in chain of title in its claim to rights to the promissory note. Exhibit 17 & Dckt. 83. On October 29, 2014, the Court granted the Motion for Relief. Exhibit 18.

As of October 29, 2014, there were no other automatic stays in effect to prevent the Defendant from proceeding with its foreclosure sale of the Property. The Property was thus sold to Defendant at public auction on November 17, 2014. A Trustee's Deed Upon Sale was recorded in the official Records of Sacramento County, California, on November 19, 2014. Plaintiff-Debtors allege that they are still in possession of the Property by occupation of a tenant.

The Plaintiff-Debtors commenced the instant adversary case on January 16, 2015, which is captioned as an action "for wrongful foreclosure, violation California Homeowner's Bill of Rights", and appears to allege the Defendants lacked standing or authority to foreclose due to purported breaks in the chain of title and because Defendant is not the "holder" of the note.

PLAINTIFF-DEBTORS'S COMPLAINT

After reviewing the Plaintiff-Debtors's Complaint, which reads like a narrative and fails to set forth distinct causes of action, the court discerns the following. it is difficult for the court to discern precisely what the causes of action are, or even if there are any. Plaintiff prays for the following relief,

(1) An order setting aside the auction and sale deed obtained by the Defendant on November 17, 2014;

(2) That such deed be null and void;

(3)Such claim be declared wholly an unsecured.

Defendant Lacks Standing

First, the Plaintiff-Debtor argues that the Defendant lacks standing. Specifically, that the November 22, 2010 Chase Bank Assignment to Defendant did not give them all rights to enforce the debt that Chase Bank held and previously obtained through a MERS assignment of the Stratton promissory note.

The Plaintiff-Debtor believes that unless the Defendant can show the full chain of possession of any transfers, or negotiations of the note, and deed of trust prior to November 22, 2010 there can be no standing. For example, the date on the assignment to Chase Bank from MERS is questionable since Countrywide and all of its affiliates are not MERS members. Therefore, since there are other avenues by which other nonparties to the original negotiations could be in existence with equivalent claims as the Defendant.

The Plaintiff-Debtor's other standing argument pertains to the auction deed they obtained at the November 17, 2014 auction of the Property. The Plaintiff-Debtor believes that the Defendant must have demonstrated that it had the right to enforce the Stratton promissory note and to exercise the power of

sale of the Property before obtaining a relief from the automatic stay.

Defendant does not meet the UCC 3-301 Requirements.

The Plaintiff-Debtor's next argument states that the Defendant has not shown the court how it becomes qualified under UCC § 3-301. Defendant claims the status of a "Holder" or "Person entitled to enforce an instrument" under the state's UCC § 3-301, but the Plaintiff believes that others may have "Holder" status.

The Plaintiff-Debtor argues that CHL has a claim to the rights sought by the Defendant, because CHL received the original note directly at the table top where the original negotiation took place. Furthermore, there is not evidence to show that CHL assigned the instrument Defendant claims to have to any other party. The Plaintiff-Debtor further contends that the assignment from Chase Bank to the Defendant does not in fact mention the note being assigned.

The Plaintiff-Debtor contends that California UCC § 3-301 requires the Defendant, at the time they challenged the Plaintiff's right to property estate property, had to either be, (1) the holder of the instrument it sought to be enforced, (2) was a non-holder person who has the rights of a holder, or (3) a person not in possession of the instrument who is entitled to enforce the instrument. The Plaintiff-Debtor believes that the Defendant has established none of these, but rather relied on the declaration of an outside party.

The Plaintiff-Debtor argues that Defendant can only state that it is a non-payee with some rights to enforce the deed of trust and the note, because the note was originally made out and payable to Countrywide and not Defendant. The Plaintiff-Debtor's note was not endorsed to anyone and as such the Defendant cannot claim to have the power or right to enforce it.

Defendant's Foreclosure on the Property was Improper and Unlawful

Furthermore, the Plaintiff-Debtor states that the MERS has not properly assigned the note and deed of trust to Chase in November 2010. Therefore, the Chase Bank could not properly assign the note to the Defendant.

Finally, the Plaintiff-Debtor contends that United Financial Mortgage Corp ("UFMC") is the lender of the note in dispute, and MERS is the nominee of the lender solely for the benefit of the lender. Therefore, MERS cannot act for the benefit of the lender unless the lender exists legally, and since UFMC filed for Chapter 7 Bankruptcy July 13, 2007 they did not exist on November 22, 2010. Thus, there can be no enforceable assignment by an agent acting for or on behalf of a nonexistent principal.

DEFENDANT'S MOTION

Plaintiff-Debtors' Entire Adversary Complaint Fails to Set Forth a Claim for Relief

Defendant argues that Plaintiff-Debtors' Adversary Complaint does not comply with Federal Rule of Civil Procedure 8(a)(2), because it fails to provide Defendants with notice of their alleged wrongdoing. Instead, the Plaintiff-Debtors' complaint has conclusory assertions, legal conclusions, and

subjective characterizations. Additionally, the Defendant claims that the Plaintiff-Debtors' complaint, while captioned as an action for "Wrongful foreclosure, violation of California Homeowner's Bill of Rights," actually contains no claims or causes of action. Nowhere does the complaint allege a violation of California's non-judicial foreclosure statutes.

Plaintiff-Debtors' Challenge to the Propriety of Foreclosure is Incorrect

Defendant further argues that Plaintiff-Debtors' contentions stating that the November 17, 2014 foreclosure sale of the Property are improper or unlawful is fundamentally incorrect. The Plaintiff-Debtors' pray "for an order setting aside the auction and sale deed obtained by Defendant on November 17, 2014 while declaring that it had a security interest therein and that such deed be null and void and that such claim be declared wholly an unsecured claim. However, the Defendant states that this court has already rejected this argument when it twice granted Defendant's Motions for Relief from Automatic Stay. Therefore, the Defendant argues that the Plaintiff-Debtors cannot state a viable claim for this and a number of other reasons.

I. Plaintiff-Debtors Do not Allege a Violation of California's Non-Judicial Foreclosure Statutes

First, Defendant argues that Plaintiff-Debtors' allegation that Defendant lack standing or authority to foreclosure is belied by publicly-recorded documents. Furthermore, California Civil Code § 2924 provides the framework that when a deed of trust contains an express provision granting a power of sale, a "trustee, mortgagee or beneficiary or any of their authorized agents" may institute the foreclosure process.

The Defendant states that here the Deed of Trust contains the power of sale provision and identifies MERS as the beneficiary. On November 24, 2010, MERS recorded an assignment of its beneficial interest in the Deed of Trust to Chase. Chase then substituted California Reconveyance Company as the trustee under the Deed of Trust. California Reconveyance Company then recorded a Notice of Default against the Property that same day. The Plaintiffs never cured the default and on March 1, 2011, the trustee recorded a Notice of Trustee's Sale against the Property. The sale was postponed and on June 17, 2011 a new Notice of Trustee's Sale was recorded. Then on September 13, 2013, Chase executed an assignment of the beneficial interest in Plaintiff's Deed of Trust to Defendant, and was recorded in the official records of Sacramento County.

The Defendant contends that the foreclosure was stayed several times due to the numerous bankruptcies and transfers of the Property, but that the court still granted relief from stay on two occasions. Defendant then purchased the home at public action on November 17, 2014 with a Trustee's Deed Upon Sale recorded in the Official Records of Sacramento County, California on November 19, 2014. Therefore, the Defendant believes that the public record shows that foreclosure was proper.

The second argument Defendant states is that the Plaintiff-Debtors' suggestion that the Defendant is required to produce the note of prove they are holders to prove their standing or authority to foreclose runs counter to the law. The Defendant argues that California courts have concluded that the foreclosing beneficiary-creditor need not produce the promissory note or otherwise prove it holds the note to non-judicially foreclose on a real

property security. *Debrunner v. Deutsche Bank Nat. Trust Co.*, 204 Cal.App.4th 433, 440-42 (2012). Additionally, the Defendant believes that the courts reject the idea that the security interest is extinguished because the promissory note was separated from the Deed of Trust. *Id.* In fact California's non-judicial foreclosure process does not provide for a judicial action to determine whether the person initiating the foreclosure is indeed authorized to do so. *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal.App.4th 1149 (2011). Therefore, the Defendant argues that the Plaintiffs may not force them to prove their standing or authority to foreclose.

Next the Defendant states that Plaintiff-Debtors' contention that the California UCC requires Defendant to establish their right to enforce the promissory Note and Deed of Trust is incorrect. Defendant argues that UCC § 3-301 does not apply to non-judicial foreclosure proceedings as a matter of law. Defendant claims that the UCC has no bearing on the whether they must prove its standing to foreclose and is consistent with the fact that California's non-judicial foreclosure framework, Civil Code sections 2924-2924i, is exhaustive and imposes no such requirements. Therefore, the Plaintiff-Debtors cannot rely on the UCC to support their contentions.

Defendant further argues that the Plaintiff-Debtors' claims that there are deficiencies to the recorded assignments of the Deed of Trust, specifically that there is not mention of the promissory note being assigned is misplaced. Defendant believes that the Plaintiff-Debtors do not understand the difference between a promissory not and deed of trust, but instead consider them one and the same. The promissory note evidences the underlying obligation to repay the money owed, and the deed of trust is the instrument securing the debt in case the borrower defaults. Therefore, the Defendant argues that there is no requirement under the Civil Code that an assignment of deed of trust be recorded, and when an assignment of a deed of trust is recorded it is immaterial to whether the promissory not was assigned or transferred.

Defendant next contends that Plaintiff-Debtors' suggestion that the MERS assignment of its beneficial interest in the Deed of Trust to Chase was without legal effect is incorrect. The Defendant argues that since Stratton agreed in the Deed of Trust that the "beneficiary of this Security Instrument is MERS...and the successors and assigns of MERS," the Plaintiff-Debtors cannot allege that MERS did not hold an interest in the Deed of Trust. Defendant states that MERS had an interest in the Deed of Trust and was authorized to assign its interest. Furthermore, the Defendant claims that the Plaintiff-Debtors lack standing to challenge the assignments of the Deed of Trust because they are neither a party to the assignments nor a third party beneficiaries thereof. Therefore, the Defendant contends that Plaintiff-Debtors' MERS theory fails.

<u>Plaintiffs Fail to Allege Tender</u>

Defendant argues that Plaintiff-Debtors' challenge to the foreclosure proceedings further fail, because Plaintiffs cannot tender the amount due under the Loan. The Defendant believes that a debtor cannot challenge the foreclosure proceedings without first credibly alleging tender of the amount secured. *Alicea v. GE Money Bank*, No. 09-00091, 2009 WL 2136969, at 3 (N.D. Cal. July 16, 2009). Therefore, the Defendant states that this failure inhibits the Plaintiff-Debtors from challenging the propriety of foreclosure.

Plaintiffs' Claim(s) Fail for Lack of Prejudice

Defendant finally argues that their foreclosure related claims fail for lack of prejudice, because they do not dispute that someone is entitled to foreclose. The Defendant states that while Plaintiff-Debtors suggest that Defendant must prove their standing and authority to foreclose or else others might seek to enforce the note; they do not allege any entity other than Defendant owns the Loan. Furthermore, the Plaintiff-Debtors do not allege that any entity other than Defendant sought to enforce the loan or foreclose since they acquired the interest in the Loan. Defendant contends that even if someone else has an interest in the Property, that other entity is the one with standing to challenge Defendant's authority to foreclose. Therefore, the Defendant claims that the Plaintiff-Debtors fail on this ground as well.

APPLICABLE LAW

Law and motion pleading practice in adversary proceedings is governed by Federal Rule of Civil Procedure 7(b). Fed. R. Bankr. P. 7007. A motion filed in an adversary proceeding, must:

A. Be in writing unless made during a hearing or trial,

B. State with particularity the grounds for seeking the order; and

C. State the relief sought.

Fed. R. Civ. P. 7(b).

FED R. CIV. P. 12(b)(6) AND FED. R. BANKR. 7012 STANDARD

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 complaints contain a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. Fed. R. Civ. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.*, citing to 5 C. Wright & A. Miller, Fed. Practice and Procedure § 1216, at 235-36 (3d. Ed. 2004) ("The 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 which would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether a motion to dismiss is to be granted should be resolved in favor of the pleader. *Pond v. General Electric 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 Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Rule 12(b)(6), a plaintiff cannot "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss."

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. V. Twombly*, 127 S. Ct. 1955, 1964-66 (2007). ("A plaintiff's obligation to provide 'grounds' of his 'entitlement' to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.").

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

DISCUSSION

As stated supra, the Plaintiff-Debtors complaint is nine-pages in length and does not expressly plead causes of action in the complaint. Rather, the Plaintiff-Debtors provides a narrative of factual allegations and leaves it to the court to interpret the allegations to denominate the possible causes of action. While the court does view a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) in the light most favorable to the plaintiff, and even more so in the context of a pro-se plaintiff, the failure of the Plaintiff-Debtors to provide any claim for which the relief sought is justified makes it impossible for the court to allow this complaint to survive.

The Plaintiff-Debtors appear to plead the factual allegations as if they are true and are prima facie evidence of some undisclosed claim that justifies the relief sought. The Plaintiff-Debtors plainly fail to meet the requirements of Fed. R. Civ. P. 7. Rule 7(b) requires that the Plaintiff-Debtors "state with particularity the grounds for seeking the order." The Plaintiff-Debtors do not meet this and instead provide a narrative that they appear to wish the court to accept as true and grounds for a claim that they never specifically state in the complaint.

Furthermore, the underlying bankruptcy case was dismissed on April 1, 2015.

Jurisdiction was granted to the district courts and bankruptcy courts to the extent that issues arise under the Bankruptcy Code, in the bankruptcy case (such as administration of an asset), or relate to the (administration or outcome of a) bankruptcy case. 28 U.S.C. § 1334(a) and (b). However, recognizing this broad reach of federal court jurisdiction, Congress also provided that federal judges may, and in some situations are required to, abstain from hearing matters though federal court jurisdiction under § 1334 may exist. *See* 28 U.S.C. § 1334(c).

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

> (1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State

> courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

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

Here, the Plaintiff-Debtors appear to be asserting non-bankruptcy code claims, non-bankruptcy law case claims, and claims which are not related to the bankruptcy case. Rather, the Plaintiff-Debtor seeks to assert normal, state law claims in this specially created forum. The court cannot identify any issues or rights arising under the Bankruptcy Code or arising in the bankruptcy case, or any related to matters which effect the administration of the bankruptcy case or the bankruptcy law rights of the Debtor, for which the bankruptcy court should exercise jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157 in the place of the state court of general jurisdiction for these state law and non-bankruptcy law issued.

Before a federal court exercises its jurisdiction over parties, it must determine that there is a sufficient "case" or "controversy as required by the United States Constitution, Article III, Section 2, Clause 1, which states,

> Sec. 2, Cl 1. Subjects of jurisdiction.
>
> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

As stated by the Ninth Circuit Court of Appeals in *Southern Pacific Company v. McAdoo,* 82 F.2d 121, 121-122 (9th Cir. 1936),

> Unless this proceeding was within the original jurisdiction of the District Court, it could not be brought within that

> jurisdiction by removal. *In re Winn*, 213 U.S. 458, 464, 29 S. Ct. 515, 53 L. Ed. 873. Unless it presents a "case" or "controversy," within the meaning of section 2, art. 3 of the Constitution, it is not within the jurisdiction of any federal court. *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 259, 53 S. Ct. 345, 77 L. Ed. 730, 87 A.L.R. 1191; *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274, 289, 48 S. Ct. 507, 72 L. Ed. 880; *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 74, 47 S. Ct. 282, 71 L. Ed. 541.

The court cannot identify, and the Plaintiff-Debtors have not shown, a sufficient basis for this court exercising the broad grant of federal bankruptcy jurisdiction under the Article III, Section 2 of the United States Constitution requirement. Congress did not create, and the United States Bankruptcy Courts do not exist, as a "go to" alternative judicial process when a party does not want to litigate in the state court of general jurisdiction or the United States District Court if proper grounds exist for that court to exercise federal court jurisdiction pursuant to Article III of the United States Constitution. While very broad in scope, the exercise of federal judicial power pursuant to 28 U.S.C. § 1334 is limited to the matters arising under the Bankruptcy Code, arising in the bankruptcy case, or related to the bankruptcy case (which raises it's own constitutional issues as addressed by the Supreme Court in *Stern*).

To the extent that federal court jurisdiction could be stretched to somehow may this a "related to" matter, abstention pursuant to 28 U.S.C. § 1334(c)(1) is appropriate. There is no reason shown for this federal bankruptcy court to wrestle away from the California Superior Court the determination of these non-federal law issues which have no impact on any bankruptcy case before the court.

In light of the Plaintiff-Debtors failure to plead with particularity and to state a viable claim in which relief could be granted and the fact that the underlying bankruptcy case has been dismissed, the court grants the Motion to Dismiss and the complaint is dismissed. Further, there is no reason shown why this court should determine the claims, if any, for either the Plaintiff-Debtors or Defendant, in light of there being no Bankruptcy Code, arising in bankruptcy case, or related to bankruptcy case matters in this Adversary Proceeding.

STATEMENT OF NON-OPPOSITION

In preparing this matter the court noted that the Docket reflects the filing of a non-opposition to the Motion. Dckt. 17. Not relying on the mere docket entry, upon review the court noted that (1) the statement of non-opposition has been filed by Defendant and (2) the title affirmatively states that it is a "STATEMENT OF NON-OPPOSITION" to the Motion. This title indicates that the Defendant has from the Plaintiffs an affirmative statement that they do not oppose the Motion to Dismiss.

This title and the representation made by MOvant in filing the "STATEMENT OF NON-OPPOSITION" is misleading at best and fraudulent at worst. In reading the document, it is merely a situation where the Plaintiffs have not filed an opposition to the Motion. Further, the document quotes the Local Bankruptcy Rules stating that the failure to file a written opposition "may be

deemed a waiver of opposition" and that the court "may" exclude a party from argue the motion if no written opposition was filed. L.B.R. 9014-1(f)(1)(B). The Local Rule does not provide that the failure to file a written opposition is an affirmative "STATEMENT OF NON-OPPOSITION" or that a moving party is authorized to file a document consisting of a "STATEMENT OF NON-OPPOSITION" which misrepresents that a statement of non-opposition has been given by the opposing party.

At oral argument the court addressed with counsel for Movant the "STATEMENT OF NON-OPPOSITION" and whether the court should address such statement under the provisions of Federal Rule of Bankruptcy Procedure 9011. At the hearing **xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.**

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 Dismissal of Adversary Proceeding filed by Defendant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is granted and the Complaint is dismissed without prejudice.

7. 10-30359-E-13 ELIZABETH LUCHINI
13-2321 PLC-4
LUCHINI V. JPMORGAN CHASE BANK N.A.
ADV. CASE CLOSED 7/24/14

ORDER TO APPEAR FOR EXAMINATION (JPMORGAN CHASE BANK, N.A.)
2-26-15 [40]

No Tentative Ruling:

This is a post-judgment order to appear filed by the Judgment Creditor, Elizabeth Luchini, for the examination of the judgment debtor, JPMorgan Chase Bank N.A. The court signed the order on February 26, 2015. Dckt. 40.

JPMorgan Chase Bank, N.A. filed an objection to Judgment Creditor's Application for Order to Appear for Examination and Order to Appear for Examination on March 18, 2015. Dckt. 44. JPMorgan Chase Bank, N.A. objects pursuant to Fed. R. Civ. P. 45 and Fed. R. Bankr. P. 9016. JPMorgan Chase Bank, N.A. argues that the application is a state court form that is confusing and improper and that the information sought is protected by attorney client and work product privilege. Lastly, JPMorgan Chase Bank, N.A. argues that the deposition subpoena is harassing and improper.

The Order to Appear for Examination states that JPMorgan Chase Bank, N.A. is ordered to appear to "furnish information to aid in enforcement of a money judgment against" it and to "answer concerning property of the judgment debtor in [its] possession or control or concerning a debt [it] owe the judgment debtor." Dckt. 40.

JPMorgan Chase Bank, N.A. does not state in its objection what information in those two categories are protected by privilege nor what in the order is "confusing" or "harassing and improper." Further, JPMorgan Chase Bank, N.A. does not explain how a judgment debtor providing testimony concerning its assets for purposes of a judgment creditor enforcing a judgment would violate the attorney-client privilege. FN.1.

FN.1. The court takes the opportunity at this hearing for counsel for JPMorgan Chase Bank, N.A. to explain the good faith basis for the objection on the attorney-client privilege before determining when the court needs to address this objection further with the judgment debtor.

The court having signed the order to appear for examination, JPMorgan Chase Bank N.A. shall appear and furnish information to aid in the enforcement of the money judgment against him.