

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis  
Bankruptcy Judge  
Sacramento, California

May 6, 2014 at 1:30 p.m.

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1. [12-35521](#)-E-13 CHRISTOPHER DEAN CONTINUED MOTION TO COMPROMISE  
PGM-6 Peter G. Macaluso CONTROVERSY/APPROVE SETTLEMENT  
AGREEMENT WITH COLLEGE GREENS  
EAST HOMEOWNER AND EUGENE  
BURGER MANAGEMENT CORP  
2-10-14 [[167](#)]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 7 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on February 10, 2014. By the court's calculation, 29 days' notice was provided. 35 days' notice is required. The hearing having been continued, the court will deem sufficient notice having been provided.

**Tentative Ruling:** The Motion to Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 2002(a)(3).

**The court's tentative decision is to deny the Motion to Compromise.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

**NOTICE**

Debtor brings this Motion to Compromise pursuant to Federal Rule of Bankruptcy Procedure 9014-1(f)(1). However, Federal Rule of Bankruptcy Procedure 2002(a)(3) requires that motions to approve compromises must have twenty-one days notices. With the required 14 day opposition for 9014-1(f)(1) notices, 35 days notice is required. By the court's calculation, 29 days' notice was provided.

All of the major, active parties in interest in this case have appeared in connection with this Motion and are prepared to address the issues at the continued hearing. The court determines that the notice given is sufficient.

**REVIEW OF MOTION**

Plaintiff, the Debtor in the Chapter 13 case, seeks approval of a

compromise between himself and estate, and Defendants College Greens East Homeowner and Eugene Burger Management Corporation ("Homeowners Association") resolving all disputes between these parties within the adversary proceeding filed on September 12, 2013, case no. 13-02289-E ("Adversary Proceeding"), as well as all disputes between these parties concerning the terms and conditions of the Plaintiff's plan of reorganization.

Plaintiff states that he fell into arrears in the payments to the Homeowners Association for the real property located at 2718 Adriatic Way, Sacramento, California. As a result, the Homeowners Association thereafter initiated a nonjudicial foreclosure of the subject property on January 11, 2012 and subsequently obtained the property's title. Following this, Plaintiff filed the Adversary Case alleging irregularities in the foreclosure process by the Homeowners Association as well as a breach of loan modification agreement with the Subject Property's senior lien-holders, Defendants Cenlar FSB and San Francisco Fire Credit Union.

As to Plaintiff and the Homeowners Association, a full and complete settlement of the adversary action has been achieved and a written agreement was signed by the parties. The terms of the settlement agreement are the following:

- A. The Homeowners Association agrees to restore title to the Property to Plaintiff conditioned upon:
  - 1. The disbursement of a pre-confirmation amount of \$6,000.00 from existing funds held by the Trustee,
  - 2. Plaintiff's agreement to repay the past debt accruing for the remaining unpaid homeowner's dues,
  - 3. Plaintiff's agreement to provide ongoing monthly payments to the Homeowners Association for monthly and annual dues and assessments as a Class 1 claim, and
  - 4. Plaintiff's agreement to pay the remaining balance of the past debt over the duration of the Chapter 13 Plan as Class 1 arrearage.

Per the terms of the agreement, the Rescission of the Trustee's Deed will be recorded upon the approval of this motion to compromise, the disbursement of the \$6,000.00 to Homeowner's Association from the Chapter 13 Plan, and the confirmation of the Chapter 13 Plan set for hearing on April 29, 2014.

#### **OPPOSITION**

The Chapter 13 Trustee filed opposition, stating that Debtor is attempting to set plan terms without the proper notice required by Local Bankruptcy Rule 3015-1(d)(1). Trustee requests that the motion be continued to April 29, 2014, to be heard with the Debtor's Motion to Confirm.

The Trustee also notes that the Debtor's Exhibits contain the Stipulation for Dismissal Upon Settlement Provisions and Agreement. The

Trustee is concerned with the portion that states Plaintiff agrees to "repay the past debt accruing for the remaining unpaid homeowner's association dues of (insert total)." The Stipulation fails to input a total amount. The Trustee states that it is not clear that the \$13.67 stated in the amended plan is sufficient to pay the ongoing HOA monthly an annual dues.

## **RESPONSE**

Debtors agree to a continuance to allow the Motion to be heard with the confirmation hearing on April 29, 2014. Debtor intends to request an APO payment of \$6,000.00 be disbursed by the Trustee to cure pre-petition disputes so that the HOA will reconvey title to the Debtor.

## **DISCUSSION**

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Construction)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-425 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;
2. Any difficulties expected in collection;
3. The complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it; and
4. The paramount interest of the creditors and a proper deference to their reasonable views.

*In re A & C Props.*, 784 F.2d 1377, 1381 (9th Cir. 1986); *In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Here, the Debtor states that the Agreement resolves all disputes between Plaintiff and the Homeowners Association to the adversary action and allows the matter to be resolved without the time and expense of a trial.

### **Probability of Success**

Debtor argues that based on a pure reading of the statutes involved in this litigation, there is a strong basis for success, however, the value of the damages sought would remain at issue.

### **Difficulties in Collection**

Debtor states that based on the provisions of the settlement, difficulty in collection is not an issue.

### **Expense, Inconvenience and Delay of Continued Litigation**

Debtor argues that the litigation has been pending since September

2013. The proposed settlement resolves the disputes without the time and expense of trial, is self-executing, and will not require court involvement.

**Paramount Interest of Creditors**

The Debtor argues that settlement is in the paramount interests of creditors since as the compromise provides prompt payment to creditors which could be consumed by the additional costs and administrative expenses created by further litigation.

**The Settlement is Dependant on Confirmation of  
The Third Amended Plan - Which Has Been Denied**

One of the contingencies of the proposed Settlement is that the court confirm the Third Amended Chapter 13 Plan. The court has denied confirmation of that plan.

Further, as draft, in light of the Debtor's inability to fund a Chapter 13 Plan, order the payment of monies to the Homeowners Association appears to be a post-petition preferential transfer of monies to an party who may not even be a creditor - The Homeowners Association having foreclosed prior to confirmation.

Approval of the Compromise 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 to Compromise filed by the Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is denied without prejudice.

2. [12-35521-E-13](#) CHRISTOPHER DEAN  
PGM-5 Peter G. Macaluso

CONTINUED MOTION TO CONFIRM  
PLAN  
2-5-14 [[161](#)]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Chapter 13 Trustee, all creditors, parties requesting special notice, and Office of the United States Trustee on February 5, 2014. By the court's calculation, 82 days' notice was provided. 42 days' notice is required.

**Tentative Ruling:** The Motion to Confirm the Plan has been set for hearing on the notice required by Local Bankruptcy Rule 3015-1(d)(1), 9014-1(f)(1), and Federal Rule of Bankruptcy Procedure 2002(b). The Trustee and a creditor having filed an opposition, the court will address the merits of the motion at the hearing. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

**The court's tentative decision is to deny the Motion to Confirm the Amended Plan.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

11 U.S.C. § 1323 permits a debtor to amend a plan any time before confirmation.

#### **TRUSTEE'S OPPOSITION**

The Chapter 13 Trustee opposes the motion on the basis that it is not clear if the Debtor can make the payments under the plan or comply with the plan. The Trustee offers evidence that the Debtor is \$2,200.00 delinquent in plan payments. This is strong evidence that the Debtor cannot afford the plan payments or abide by the Plan and is cause to deny confirmation. 11 U.S.C. §1325(a)(6).

The Trustee also states that the sum of months in Section 101 of the plan is 61 months, which is contrary to 11 U.S.C. § 1325(b)(1)(B), with the applicable commitment period of 60 months.

Additionally, the Trustee states the Debtor failed to provide an arrearage dividend to College Green East listed in Class 1 of the plan.

Lastly, the Trustee states that the monthly dividend to Class 1 creditor College Green Ease must be at least \$15.00 pursuant to Federal Rule of Bankruptcy Procedure 3010(b). The Debtor lists the monthly contract installment as \$13.67.

## **CREDITOR' S OPPOSITION**

Creditor San Francisco Fire Credit Union opposes the motion on the basis that the proposed plan violates 11 U.S.C. § 1322, stating that a plan cannot modify a security interest in real property that is the Debtor's principal residence. Creditor states that the proposed treatment of its claim is not clear. The claim is listed in Class 1 of the plan, but contemplates that Creditor will provide Debtor will a modification that will cure the pre and post petition arrears on the loan and allow Debtor to make ongoing monthly payments. Creditor argues that there are no pre-petition arrears by virtue of the second modification. Creditor also states that to the extend the plan requires Creditor to agree to further modify the loan to address the post-petition arrearage, such requirement constitutes an impermissible modification of its claim.

Creditor also argues that Debtor lacks sufficient income to fund the plan. Creditor states that Debtor's Schedule I states monthly income of \$4,200, which is the amount Debtor proposes to contribute to his plan each month. However, Creditor argues that Debtor's monthly net income is calculated based, in part, on \$2,300 of rental income that he purportedly receives from the subject real property. Debtor has represented that he no longer collects this income as a result of College Greens' eviction of the tenant from the Property. Creditor states that once this income is subtracted, Debtor does not have positive monthly income, a fact that is compounded once the monthly mortgage payment due to Creditor - which Debtor omitted from his Amended Scheduled J - is taken into account.

Lastly, Creditor states that the case and this plan were not filed in good faith. Creditor states that at the time the petition was filed, Debtor did not have regular monthly income and was thus ineligible for Chapter 13 relief. Creditor states that while Debtor has amended his schedules to account for additional monthly revenue, he lacks positive monthly income, rendering this plan unconformable. Creditor also argues that Debtor misrepresented the state of title to the property when he filed and used this case to reside at or collect rent from the property despite the fact he is no longer the record owner of the parcel and is in substantial default under the loan.

## **DEBTOR' S RESPONSE**

Counsel for Debtor responds, stating that the Debtor has yet to gain possession of the residence and that the plan would be feasible but for the Defendant College Greens reconveying the property to Debtor. Debtor concedes that he has failed to make the payment required because he is still not in possession, and is in a temporary rental unit which has required his disposable income. Debtor acknowledges that he is \$4,400.00 delinquent.

Debtors acknowledges that the is not feasible at this time, but requests a continuance so that possession of the real property can be completed.

## **DISCUSSION**

First, as Debtor concedes, the plan is not feasible at this time,

Debtor being delinquent \$4,400.00 under the terms of the plan.

### **Summary of Plan**

The terms of the Debtor's Third Amended Chapter 13 Plan are summarized as follows.

- I. Funding of Third Amended Chapter 13 Plan (60 month term) by Debtor.
  - A. \$10,430.00 for the first 16 months of the Chapter 13 Plan and
  - B. \$2,200.00 a month for the remaining 44 months of the plan.
- II. Administrative Expenses
  - A. \$3,000.00 to be paid to Counsel for the Debtor;
  - B. Chapter 13 Trustee fees (projected at 6% to be \$132.00 a month).
- III. Class 1 Secured Claims
  - A. San Francisco Fire Credit Union
    - 1. \$0.00 pre-petition arrearage, based on asserted February 1, 2014 effective loan modification.
    - 2. \$0.00 post-petition arrearage (five months), based on asserted February 1, 2014 effective loan modification.
    - 3. \$1,757.38 current post-petition monthly installment.
  - B. College Greens East Homeowners Association
    - 1. \$1,160.58 arrearage to be paid at the rate of \$13.67.
- IV. Class 2 Secured Claims
  - A. San Francisco Fire Credit Union
    - 1. \$40,155.00 claim secured by a second deed of trust, with secured claim valued at \$0.00. (Order, Dckt. 35, valuing secured claim to be \$0.00.)
- V. Class 3 Secured Claim, Surrender of Collateral
  - A. None
- VI. Class 5 Priority Unsecured Claims
  - A. State Board of Equalization Taxes
    - 1. \$2,457.21

- B. Employment Development Department Taxes
  - 1. \$1,086.03
- C. Sacramento County Child Support Services - DSO
  - 1. \$2,700.00
- VII. Class 6 Designated Unsecured Claims
  - A. None
- VIII. Class 7 General Unsecured Claims
  - A. 0.00% Dividend on projected \$252,946.00 of general unsecured claims.
- IX. Property of the estate shall revert in the Debtor upon confirmation.
- X. Additional Provisions
  - A. College Green East Homeowners Association shall received a "lump sum payment" of \$6,000.00 as provided in the Stipulation between the Parties.
    - 1. This represents the post-petition arrearage and "costs" current.
  - B. San Francisco Fire Credit Union is to provide a loan modification which cures the pre and post-petition arrearage, setting the current monthly to be \$1,757.38, effective April 1, 2014.
  - C. Debtor's Counsel to apply for an additional \$5,000.00 in attorneys' fees.

Third Amended Plan, Dckt. 165.

#### **Review of Debtor's Current Finances**

This bankruptcy case was commenced on August 24, 2012, and is now nearing its second anniversary. As confirmed by the Debtor in response to the Trustee's objection to confirmation, the Debtor was two months in arrears - \$4,400.00. This default causes the court great concern. Additionally, when a Chapter 13 case drags on and the Debtor has been unable to commit to and perform regular monthly payments, the court needs to closely review the current finances for the Debtor to determine whether the future promised payments are feasible. For the first sixteenth months of this case the Debtor has been able to pay only \$10,430.00 - which averages only \$651.87 a month. The required promised monthly plan payments (which is in default) is 387% of the actual payments made the by the Debtor in this case so far.

The Debtor has provided his Declaration in support of confirmation of this Third Amended Chapter 13 Plan. Dckt. 163. In his declaration the Debtor testifies that he has not "missed" any payments (presumably as provided under the Third Amended Chapter 13 Plan). He asserts that the delinquency asserted by the Trustee does not exist based on San Francisco Fire Credit Union having granted the Debtor a loan modification and failing "to protect the property from foreclosure by the Homeowners Association as these arrears were to be assumed in the loan modification."

The Debtor further testifies that he will be able to make the payments under the Third Amended Chapter 13 Plan based on his income from employment with Connect Reality and "family support I anticipate...for the remainder of the plan." The Debtor offers no testimony as to his income with Connect Reality, how it has, or has not, changed over the past two years of this case, and the extent of the "family support."

### **Prior Schedules I and J Filed by Debtor**

Original Schedule I lists the Debtor as being a real estate agent with Connect Reality #2400 (employed for six months), with \$1,500.00 of regular income from the operation of his business. The Debtor also lists \$1,000.00 a month of "Family Help Until Sales Commissions Increase. Dckt. 1 at 30. As of the commencement of this case the Debtor's income was \$2,500.00 a month, \$1,000.00 of which was "family support." No income from real property is listed on Original Schedule I.

On Original Schedule J the Debtor lists \$2,350.00 a month in expenses. *Id.* at 31. This includes \$800.00 a month for rent or mortgage, which includes property taxes and property insurance. The Debtor states no expense for home maintenance. The Debtor lists monthly expenses of (1) \$150.00 for food, (2) \$5.00 for clothing, (3) \$10.00 for laundry and dry cleaning, (4) \$0.00 for medical and dental expenses, (5) \$125.00 for transportation, (6) \$130.00 for auto insurance, (7) \$632.00 for alimony or support, and \$250.00 for business expenses (which included an additional \$200.00 for vehicles expenses).

On February 1, 2013, the Debtor filed his First Amended Schedules I and J. Dckt. 56. On First Amended Schedule I the Debtor was no longer employed by Connect Reality #2400, but was a Pipe Fitter for California Environmental Systems, Inc. (having been employed for one month). His income was stated to be \$7,983.17, from which he had \$2,048.17 withheld for taxes and Social Security (25%) and \$789.00 for a "DSO." (Which the court interprets to be a Domestic Support Obligation as defined under the Bankruptcy Code.) This left the Debtor with \$5,144.56 in "Average Monthly Income."

On First Amended Schedule J the Debtor listed \$4,984.48 in expenses, including an \$1,734.48 payment for a mortgage (including property taxes and insurance) and a \$349.00 for payments on a "2<sup>nd</sup> Dot." *Id.* at 5. On this First Amended Schedule J the Debtor shows monthly expenses of (1) \$100.00 for home maintenance, (2) \$600.00 for Food, (3) \$50.00 for clothing, (4) \$50.00 for clothing, (5) \$0.00 for laundry and dry cleaning, (6) \$0.00 for medial and dental expenses, (7) \$800.00 for transportation, (8) \$230.00 for automobile insurance, and (9) \$632.00 for alimony or support.

## Second Amended Schedules I and J Filed by Debtor

The only "current" financial information provided by the Chapter 13 Debtor is found in Second Amended Schedules I and J filed on July 23, 2013. Dckt. 95. On Second Amended Schedule I the Debtor states that he has \$2,300.00 a month in income from real property and \$1,900.00 a month in unemployment benefits.

On Second Amended Schedule J the Debtor lists \$2,000.00 a month in expenses. The court notes the following:

- A. This does not include any expense for rent or mortgage, property taxes, or home insurance.
- B. \$0.00 expense for home maintenance.
- C. \$200.00 a month for food.
- D. \$10.00 a month for clothing.
- E. \$10.00 a month for laundry and dry cleaning.
- F. \$10.00 a month for medical and dental expenses.
- G. \$250.00 for transportation.
- H. \$5.00 for recreation.
- I. \$0.00 for health insurance.
- J. \$230.00 for automobile insurance.
- K. \$0.00 for income taxes.
- L. \$1,000.00 DSO payment. (It is noted that the DSO payment was increased to \$1,581.00, which the Debtor stated he was fighting.)

It appears that the above statement of expenses under penalty of perjury is a fabrication - constructed solely to reach a pre-conceived "monthly net income" number of \$2,200.00 - the proposed plan payment amount. There is no showing that the expenses stated, such as (1) \$200.00 a month for food, (2) no home maintenance expense, (3) \$10.00 for clothing, (4) \$250.00 for transportation (gas and vehicle maintenance), (5) nothing for business expenses, and (6) nothing for taxes (income and self-employment, if required) are reasonable, truthful, honest, and in good faith.

Further, on Amended Schedule I the Debtor lists \$2,300.00 a month in income from real property. However, the Debtor fails to list any expenses (such as maintenance, property taxes, insurance) relating to such income. Again, this appears to be a fanciful number and the absence of expenses merely a thinly veiled fiction to mislead the court and parties in interest.

The Debtor states in his Declaration that he is now employed with

Connect Reality. However, he withholds from the court any information about this employment, including, (1) how long he has been employed, (2) how much money he has actually been making, (3) his expenses, (4) the income and self-employment taxes, if any, and (5) the stability of the income.

#### **Treatment of San Francisco Fire Credit Union Claim**

The Debtor asserts that based on a loan modification no payments have been due San Francisco Fire Credit Union during this case, with the first "current" post-petition payment having come due in April 2014. Further, that the loan modification cured the pre-petition arrearage.

San Francisco Fire Credit Union has filed an opposition, which is supported by the declaration and exhibits filed in connection with its pending motion for relief from the automatic stay. San Francisco Fire Credit Union admits to there being several loan modifications with the Debtor, which description is summarized as follows:

- a. January 12, 2005 Loan Modification.
- b. October 1, 2009 Modification of payment terms of First Loan Modification.
- c. December 2012 Second Third Loan Modification, conditioned on the Debtor making an initial payment of \$5,000.00.
- d. San Francisco Fire Credit Union asserts that monthly payments under the Second Loan Modification have been due and unpaid since February 2013. In the opposition, San Francisco Fire Credit Union asserts that there is a \$22,525.35 arrearage which is not provided for in the Third Amended Chapter 13 Plan.

#### **Assets of the Estate**

The Debtor does not provide the court with any new information concerning the assets of the estate. Looking at Schedule A filed in this case (Dckt. 1 at 16), one piece of real property is listed as owned by the Debtor - 2718 Adriate Way, Sacramento, California. On Schedule A the Debtor lists San Francisco Fire Credit Union as having two claims secured by the Adriate Way Property. Schedule D lists two secured claims for San Francisco Fire Credit Union. *Id.* at 21.

Schedule G listed by the Debtor does not list any executory contracts or leases. *Id.* at 28.

#### **Proposed Chapter 13 Plan is Feasible or Confirmable**

The Debtor is in default in the payments required under the confirmed Chapter 13 Plan. Even if the Debtor could generate the \$4,400.00 arrearage in the required plan payments and the current \$2,200.00 payment in one month, the Debtor has not shown that the proposed plan is feasible. FN.1.

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FN.1. The Debtor having \$6,600.00 in one month of "extra" disposable income raises the additional concern that Debtor may not be truthfully disclosing his income. If the Second Amended Schedules I and J were to be taken as true, the Debtor could not have \$6,600.00 of disposable income in one month to cure the arrearage and make the current monthly payment.  
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The Debtor purported expenses are not credible. First, the information is approximately nine months old and conflicts wildly with prior statements of expenses made under penalty of perjury. Second, the information in Second Amended J appears to be created out of hole cloth, with fictional number to produce the pre-determined net monthly income figure of \$2,200.00. The expenses are not reasonable, rational, or bear any semblance to reality. The food, clothing, laundry, and health care expenses are unreasonable. There are no business expenses. The Debtor has created an "income" amount from real property, with no corresponding expenses.

From reviewing the Original and First Amended Schedules I and J, it is clear that the Debtor is merely making up numbers in hope that he can prolong a bankruptcy case with the illusion that he is attempting to reorganize under Chapter 13 in good faith.

In addition to an illusory real property income figure, the Debtor further relies upon \$1,000.00 in support (or gifts) from anonymous family members. No person has stepped forward to provide a declaration as to this support (gifts).

With respect to San Francisco Fire Credit Union the proposed Third Amended Chapter 13 Plan provides only for making future payments on what the Debtor states are the terms of the latest loan modification. No provision is made for curing the arrearage which San Francisco Fire Credit Union asserts or providing a "bond" for these disputed amounts if the Debtor uses the automatic stay in lieu of obtaining an injunction in non-bankruptcy court litigation over his alleged dispute (whether there is an arrearage) with San Francisco Fire Credit Union.

This court has permitted debtors to use the automatic stay in lieu of obtaining an injunction (and possibly having to post a bond) as part of a plan to litigate an underlying dispute with a creditor. The court generally requires that the necessary undisputed current payment and arrearage amount be paid. The disputed portion is held by the Chapter 13 Trustee (or placed in a blocked account) each month which the court can then use for Federal Rule of Civil Procedure 60(c) damages if the creditor was improperly enjoined from exercising its rights. The monies can also then be used to fund the plan to make the payments ultimately determined owing to that creditor, or if not owed to a creditor holding a secured claim, then the monies are part of the debtor's projected disposable income to fund the Chapter 13 plan. *In re De la Salle*, Bankr. E.D. Cal. 10-29678, Civil Minutes for Motion to Dismiss or Convert (DCN: MBB-1), Dckt. 230 (Bankr. E.D. Cal. 2011), affirm., *De la Salle v. U.S. Bank, N.A. (In re De la Salle)*, 461 B.R. 593 (B.A.P. 9th Cir. 2011).

The Debtor has failed to provide for the secured claim of San

Francisco Fire Credit Union as required under the Bankruptcy Code. The Debtor's unilateral determination that nothing is owed does not supercede the Bankruptcy Code.

The amended Plan does not comply with 11 U.S.C. §§ 1322 and 1325(a) and is not confirmed.

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 Confirm the Chapter 13 Plan filed by the 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 Motion to Confirm the Plan is denied and the proposed Chapter 13 Plan is not confirmed.

3. [12-35521](#)-E-13 CHRISTOPHER DEAN CONTINUED MOTION FOR RELIEF  
PD-2 Peter G. Macaluso FROM AUTOMATIC STAY  
2-20-14 [[172](#)]  
SAN FRANCISCO FIRE CREDIT  
UNION VS.

**Tentative Ruling:** The Motion for Relief From the Automatic Stay 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.**

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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 Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on February 21, 2014. By the court's calculation, 32 days' notice was provided. 28 days' notice is required.

The Motion for Relief From the Automatic Stay 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 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 court's decision is to grant the Motion for Relief From the Automatic Stay.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Movant San Francisco Fire Credit Union ("Movant") seeks relief from the automatic stay with respect to real property commonly known as 2718 Adriatic Way, Sacramento, California. Movant argues that cause exists to terminate the stay under 11 U.S.C. § 362(d)(1) because Debtor is in default on 13 post-petition payments due and owing. Further, Movant argues that relief is property under 11 U.S.C. § 362(d)(2) in that there is no equity in the property and the property is not necessary for a reorganization.

**TRUSTEE'S RESPONSE**

The Chapter 13 Trustee filed a response to the motion verifying that the Debtor has no confirmed plan and the last motion to confirm was dismissed on March 5, 2014. To date Debtor has paid the Trustee a total of \$10,430.00.

**DEBTOR'S OPPOSITION**

Debtor opposes the motion on the basis that the subject property is subject to an on-going adversary proceeding. Debtor states the adversary proceeding with regards to the Home Owners Association has been resolved, disbursement is set via the Trustee and possession is being transferred back to the Debtor so that disbursements are again possible.

**ADEQUATE PROTECTION PAYMENTS ORDERED BY THE COURT**

The court authorized the Chapter 13 Trustee to disburse from the monies paid by the Debtor in this case an adequate protection payment in the amount of \$3,468.96 to San Francisco Fire Credit Union and continued the hearing to be heard with the Motion to Dismiss.

**DISCUSSION**

The court has continued the hearing on this Motion, with the consent of San Francisco Fire Credit Union to allow the Debtor to get to the hearing on confirmation of the Third Amended Chapter 13 Plan. That Plan has been

denied confirmation for several different reasons, including the court determining that (1) it was not feasible, (2) Debtor failed to provide the court with credible current income and expense information (or any credible income and expense information during this case), (3) the Third Amended Chapter 13 Plan does not provide for the payment of San Francisco Fire Credit Union's secured claim as required under the Bankruptcy Code, and (4) the Third Amended Chapter 13 Plan does not provide for the use of the automatic stay in lieu of an injunction while the Debtor diligently prosecutes his litigation with San Francisco Fire Credit Union.

As set forth in the Debtor's Schedules there is no equity in the Real Property. Schedules A and D, Dckt. 1. The Debtor has not been able to confirm a Chapter 13 Plan in this case and has not carried his burden of proof that the Real Property is "necessary for an effective reorganization." After almost two years in the case, the Debtor has shown that there is not a reorganization in prospect. Further, trying to save this over-encumbered property appears to be preventing any effective reorganization.

The Debtor's Opposition is based on there being a loan modification with Movant. The Debtor asserts that he is prosecuting an Adversary Proceeding with Movant over the asserted loan modification. As shown by the pleadings, the Debtor's contention is that the loan modification requires that no payments be made to creditor until April 2014, while the Movant asserts an obligation of the Debtor to have made, and that he has defaulted in, payments from February 2013 forward.

Cause exists to terminate the automatic stay for cause. This case has ground on, with little, if any, progress, having been made by the Debtor. In its March 26, 2014 order continuing the hearing, the court required that the Chapter 13 Trustee disburse to Movant \$3,468.96, which represents the April and May 2014 payments for Movant. Nothing else has been paid or provided for Movant's claim. Movant is not adequately protected for its interest in this over-encumbered Property.

Further, the Debtor has demonstrated that he is not able to prosecute a plan to confirmation in this case. This constitutes further cause with respect to Movant, Movant's interest in the Property, and the failure to provide for the arrearage if Debtor is wrong in his assertion that there is no arrearage due to a loan modification.

There is no equity in this Property. The Property has a value of \$179,000.00 and is subject to Movant's \$310,500.00 claim secured by a first deed of trust and Movant's \$49,000.00 claim secured by a second deed of trust. Schedules A and D, Dckt. 1. The court has previously entered an order determining that Movant's secured claim for which the collateral is the second deed of trust has a value of \$0.00 pursuant to 11 U.S.C. § 506(a). Order, Dckt. 35. This was based on Movant's claim secured by the first deed of trust exhausting all of the Debtor's value in the property. Civil Minutes, Dckt. 28.

The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P.

9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay, including defaults in post-petition payments which have come due. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates. Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the Property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). The court determines that there is no equity in the property for either the Debtor or the Estate, and the property is not necessary for any effective reorganization in this Chapter 13 case.

The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.

No other or additional relief is granted by the court.

The court shall issue an 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 Relief From the Automatic Stay filed by San Francisco Fire Credit Union 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 automatic stay provisions of 11 U.S.C. § 362(a) are immediately vacated to allow San Francisco Fire Credit Union, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 2718 Adriatic Way, Sacramento, California, California.

No other or additional relief is granted.

4. [12-35521](#)-E-13 CHRISTOPHER DEAN  
[13-2289](#)  
DEAN V. COLLEGE GREENS EAST  
HOMEOWNER ET AL

STATUS CONFERENCE CONTINUED RE:  
COMPLAINT  
9-12-13 [[1](#)]

Plaintiff's Atty: Peter G. Macaluso  
Defendant's Atty:  
Joshua B. Clark [College Greens East Homeowner; Eugene Burger Management  
Corp.]  
Brian A. Paino [Cenlar F.S.B.; San Francisco Fire Credit Union]

Adv. Filed: 9/12/13  
Answer: none

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

Notes:

Continued from 4/29/14 by request of the court to be heard in conjunction  
with other matters on calendar.

5. [12-35521-E-13](#) CHRISTOPHER DEAN  
[13-2289](#) PGM-1  
DEAN V. COLLEGE GREENS EAST  
HOMEOWNER ET AL

CONTINUED MOTION FOR LEAVE TO  
FILE FIRST AMENDED COMPLAINT  
3-3-14 [[51](#)]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff, Defendants' Attorneys, Chapter 13 Trustee, and Office of the United States Trustee on March 3, 2014. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

**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).

**The court's tentative decision is to deny the Motion for Leave to File Amended Complaint.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Plaintiff-Debtor seeks leave to amend the complaint to plead with specificity the request for declaratory relief in determining in this case that the mortgage loan modification granted through the mortgage holder's servicing agent is enforceable and valid or in the alternative a breach of contract. Plaintiff-Debtor states that this modification was granted only for Plaintiff-Debtor to be told later that the home was lost in a pre-petition foreclosure and that the modification was thus fruitless, resulting the Plaintiff-Debtor being locked out of the residence.

Plaintiff-Debtor states that he has reached a settlement agreement with the Homeowner's Association, pending court approval, which will dismiss them from this Adversary Proceeding. Plaintiff-Debtor now seeks a declaratory judgment on whether the loan modification agreement is still binding on Defendants San Francisco Fire Credit Union and Cenlar, FSB ("Defendants"), or in the alternative if there is a breach of contract.

#### **DEFENDANTS' OPPOSITION**

Defendants San Francisco Fire Credit Union and Cenlar, FSB ("Defendants") oppose the motion on the basis that the proposed amended complaint filed in support of the motion contain nearly identical claims as he previously asserted against Defendants. Defendants also argue that the ownership claim has not basis because Defendants do not nor have ever

claimed to be the owner of the property but that the Homeowner's Association has been the record owner by virtue of a pre-petition foreclosure sale. The Defendants also argue the breach of contract claim is meritless because there is no contract that states they must protect the subject property from another party's foreclosure sale.

Defendants argue that the amended complaint is devoid of any factual averments establishing that a ownership dispute exists between Plaintiff and Defendants. Defendants state that Plaintiff-Debtor has not established that declaratory relief will serve any useful purpose as between himself and Defendants, and that they have honored the Modification, as evidenced by their amended claim. As such, Defendants state there is no actual controversy regarding the parties rights' under the loan.

Defendants also argue that the claim for breach of contract fails because it does not identify the contractual provision that Defendants purportedly breached, as one for protecting the subject real property from the Homeowner's Association's foreclosure sale does not exist. Defendants states that despite multiple attempts by them to pursue foreclosure alternatives with Plaintiff-Debtor (the last of which culminated in the Modification), Plaintiff-Debtor has failed to satisfy his obligations to Defendants.

#### **PLAINTIFF'S REPLY**

Plaintiff-Debtor filed a reply, stating he had hoped that this adversary would have been resolved by now, in that the Homeowner's Association agreed to stipulate a dismissal of this case as to Defendants College Greens East Homeowners Association and Eugene Burger Management Corporation. Plaintiff-Debtor states the stipulation will authorize the Trustee to disburse approximately \$6,000.00, thereby restoring title and possession to the Plaintiff-Debtor and allowing the Plaintiff-Debtor thirty (30) days to restore the damage caused by the eviction of the tenants.

Plaintiff-Debtor states he is hopeful that upon possession he can initiate payments pursuant to the loan modification, re-capitalizing the post-petition arrears, and thereafter dismissing this action with prejudice. As such, Plaintiff-Debtor requests a continuance of this motion for approximately (90) ninety days. Additionally, the Debtor/Plaintiff would suggest the parties agree to Bankruptcy Dispute Resolution in order to facilitate a judicially economic resolution to this matter.

#### **DISCUSSION**

"A party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. § 15(a)(2), as incorporated by Fed. R. Bankr. P. 7015. There is a strong policy of liberal authorization to amend pleadings in the Federal Courts. *In re Kashami*, 190 B.A.P. 875 (9th Cir. 1995). In situations where Plaintiff's causes of actions have been dismissed without leave to amend, the Plaintiff bears the burden of proving there is a reasonable possibility of amendment. *Blank v. Kirwan*, 39 Cal.3d 311 (1985).

While there is a strong policy of liberal authorization to amend pleadings in the Federal Courts, the court is correct to deny leave where there is undue delay, bad faith, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice to the opposing party. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Moore v. Kayport Package Exp., Inc.* 885 F.2d 531 (9th Cir. 1989). Furthermore, an amendment that would serve no useful purpose, i.e. be subject to a motion to dismiss, should not be allowed. *Foman v. Davis* 371 U.S. at 182.

The proposed Amended Complaint seeks the following relief and determination against the Defendants:

- A. First Cause of Action - Declaratory Relief: Plaintiff alleges there is a dispute as to ownership rights to the subject property and seeks a judicial determination of the rights and obligations of the parties, including a statement of the amount of contractual monthly payments proper due, the correction of the accounting and a declaration as to which party's interpretation is correct.
  
- B. Second Cause of Action - Breach of Contract: Plaintiff alleges Cenlar failed to protect the subject property from foreclosure before offering Plaintiff a loan modification and that Defendants have therefore not satisfied their obligations under the contract.

It appears the proposed Amended Complaint is very similar to the original complaint filed against Defendants. The court will not merely allow the Plaintiff to amend a pleading to restate contentions which, after previous briefing were determined against the Plaintiff.

Even assuming that the legal conclusions alleged are true, it appears on the face of the proposed Amended Complaint that the pleadings fall short of stating "plausible claims" against the remaining Defendants. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). While the court does not pre-judge the merits on a Rule 12(b) motion, it appears the Plaintiff has not properly plead sufficient claims against Defendants, as the court previously addressed in the Defendants Motion to Dismiss. See Civil Minutes, Dckt. 41. In its ruling, the court noted,

Plaintiff-Debtor does not cite to any specific provision of the Deed of Trust to support his breach of contract claim.

Plaintiff-Debtor only generally alleges that Defendant breached some unspecified provisions of the contract by allowing College Greens to foreclose the Property. This allegation is insufficient to state a claim for breach of contract. Furthermore, there appear to be no provisions under the Deed of Trust requiring SFFCU or Cenlar to protect Plaintiff-Debtor from a foreclosure by a homeowner's association.

In his Opposition to this Motion, the

Plaintiff-Debtor alludes to the Proof of Claim and Objection to Confirmation of the Plan not being consistent with the loan modification entered into between the Plaintiff-Debtor and SFFCU. Opposition, 12-35521 Dckt. 32. (Claim asserting a pre-petition arrearage and escrow arrearage.) The Proof of Claim stating the arrearage was filed on October 10, 2012. 12-35521 Proof of Claim No. 4. The Notice of Mortgage Payment Change was filed on November 12, 2012. The Objection to Confirmation by SFFCU was filed on October 2, 2012. 12-35521 Dckt. 15.

The courts order approving the Loan Modification with SFFCU was filed on March 6, 2013. 12-35521 Dckt. 70. All of the events referenced in the Opposition filed by the Plaintiff-Debtor (which are not stated in the Complaint) occurred prior to there being a loan modification approved by the court.

If there is an actual dispute between the Plaintiff-Debtor and SFFCU, then it could possibly be addressed by or through (1) the confirmation hearing at which the court determines if the SFFCU claim is properly provided for in the plan, (2) an objection to the claim, or (3) an adversary proceeding in which there is a claim asserted that SFFCU has and is breaching the contract as amended by the court approved loan modification.

The Plaintiff-Debtor fails to plead a claim for breach of contract by the Defendants. The Motion is granted. Because no controversy may exist or, in light of the settlement reported by the Plaintiff-Debtor and College Greens East, Dckt. 34, the controversy may be resolved through the Chapter 13 Plan confirmation process, the court does not grant leave to amend at this time. If such a controversy exists and the Plaintiff-Debtor concludes that it would not likely be resolved through the confirmation or objection to claim process, Plaintiff-Debtor may seek leave to file a first amended complaint which leave will be freely granted by the court. The court requiring a motion for leave to file a first amended complaint is done to manage this Adversary Proceeding litigation and not have the Plaintiff-Debtor feel compelled to file an amended complaint or it being argued they waived such right, and setting off a new round of possibly unnecessary motions in this Adversary Proceeding.

*Id.* Plaintiff-Debtor attempt to amend the complaint regarding the breach of contract claim is not sufficient as it does not allege any factual grounds that there has been a breach of *the court approved loan modification*. The claim is nearly identical to the original complaint in which the court dismissed against the Defendants.

Furthermore, the court may only grant declaratory relief where there is an actual controversy within its jurisdiction. *Am. States Ins. Co. v.*

*Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). However, it is a controversy in which the litigation may not yet require the award of damages. *Id.*

The Declaratory Relief Cause of Action seeks a determination of a dispute as to ownership of the Property between the Plaintiff-Debtor and these Defendants. However, Plaintiff-Debtor has not stated what any such dispute is between himself and these Defendants. There is no contention that these Defendants assert any ownership interest in the Property. Rather, these Defendants have asserted a secured claim in the Plaintiff-Debtor's Chapter 13 case. From the pleadings in that case relating to the confirmation of the proposed Third Modified Plan, there is a dispute with the Plaintiff-Debtor asserting that no payments were due under a loan modification until April 2014, with the creditor asserting that payments were due commencing February 2013, and that the Plaintiff-Debtor has defaulted in all payments since that time.

From the pleadings, the court cannot identify any dispute for which declaratory relief has been requested against these Defendants.

For the Breach of Contract Cause of Action, it appears that the alleged breach was that these Defendants "breached their duty to protect the Subject Property from foreclosure." The court cannot identify any basis alleged in the proposed first amended complaint for these Defendants to have such a duty to Plaintiff-Debtor. The Plaintiff-Debtor does not allege any specific contractual or statutory provision creating such duty.

Possibly the Plaintiff-Debtor believes (or hopes) that such a duty could be found to exist in the Loan Modification approved by the court. Other than generally referencing the Loan Modification, he does not allege any provision of that contract. Though it is not the court's responsibility to draft pleadings for the parties, the court reviewed the Loan Modification Agreement attached as Exhibit 1 to the proposed first amended complaint. The court could not identify any contractual provision stating a duty for these Defendants to protect the property from foreclosure by the Homeowners Association.

As there has not been pleaded a dispute between the rights of Plaintiff-Debtor and these Defendants, there is not a basis for the court to adjudicate the rights and interests of the Plaintiff-Debtor and the Defendants. The court does not grant the motion to allow the Plaintiff-Debtor to file an Amended Complaint against Defendants for breach of contract and declaratory relief.

Finally, as the Plaintiff-Debtor has not been able to prosecute a Chapter 13 Plan to confirmation in 21 months of this case, it appears more and more likely that there is no reorganization taking place. Rather, the Plaintiff-Debtor is seeking to use the automatic stay, without prosecuting a reorganization, in lieu of litigating his claims in state court (or United States district court if a non-bankruptcy basis for federal court jurisdiction exists) and obtaining the appropriate injunctive relief. This not only raises Article III "case or controversy" issues under the United States Constitution, but a federal court abstaining from hearing related to

matters under 28 U.S.C. § 1334(c)(2) when the non-bankruptcy issues have little "related to" impact on the bankruptcy case. Though the court does not base the present ruling on the Article III "case or controversy" or the § 1334(c) abstention grounds, such issues may well be forthcoming for the parties.

The motion for leave to amend is denied. The court makes no ruling on the merits of any claims asserted in this Adversary Proceeding

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 Leave to Amend 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. The court makes no ruling on any claims asserted by Plaintiff-Debtor in this Adversary Proceeding, with the dismissal of the complaint and the denial of this motion for leave to amend being expressly without prejudice to any rights and claims which have been, or may be, asserted in this Adversary Proceeding. Such will be left for the Plaintiff-Debtor to litigation in a court with proper jurisdiction thereover.

6. [12-35521-E-13](#) CHRISTOPHER DEAN  
[13-2289](#) SC-1  
DEAN V. COLLEGE GREENS EAST  
HOMEOWNER ET AL

CONTINUED MOTION TO DISMISS  
ADVERSARY PROCEEDING  
10-21-13 [[20](#)]

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor-Plaintiff and Debtor-Plaintiff's Attorney on October 21, 2013. By the court's calculation, 44 days' notice was provided. 28 days' notice is required.

**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).

**The court's decision is to deny the Motion to Dismiss Adversary Proceeding.** 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. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

#### **PRIOR HEARINGS**

Defendants College Greens East Homeowner's Association, Inc. and Eugene Burger Management Corporation ("Defendants") move for an order dismissing the adversary complaint filed September 12, 2013 by Plaintiff Christopher D. Dean for failure to state a claim upon which relief may be granted.

Defendants allege Plaintiff's first cause of action, for violation of **California Civil Code sections 1367.1 and 1367.4**, fails to state a cause of action because the authorizing statutes do not provide for a private cause of action to enforce its terms, Plaintiff has not alleged an ability to tender, and Plaintiff does not allege why he failed to tender the amounts owed within the statutory redemption period provided by the California Code of Civil Procedure, which has now expired, and he cannot show prejudice.

Defendants also allege that Plaintiff's second cause of action, for declaratory relief, fails to state a cause of action because there are no facts to support the Plaintiff's claims that a present justiciable controversy exists between these moving Defendants and the Plaintiff. The declaratory relief action is based upon the same set of facts as the first cause of action to set aside the foreclosure sale, which itself is fatally defective.

#### **PLAINTIFF'S RESPONSES**

Debtor-Plaintiff filed a reply to the Motion to Dismiss stating that both parties have agreed to a dismissal of this case, with certain conditions. Debtor-Plaintiff requests that the Motion to Dismiss be continued so the parties can prepare and file the stipulation.

On November 27, 2013, the parties filed the Notice of Pending Settlement and Stipulation Continuing Motion to Dismiss. The Stipulation agrees to a ninety day continuance of the Motion to Dismiss.

Based on the Debtor-Plaintiff reply, the court continued the hearing to afford the Plaintiff-Debtor the opportunity to consummate the reported settlement in this Adversary Proceeding and prosecute his Chapter 13 Plan, as well as determine if an amended complaint should be filed. See Civil Minutes from December 4, 2013 hearing on motion to dismiss filed by Cenlar FSB and San Francisco Fire Credit Union, DCN: PD-1.

Plaintiff filed a second response on March 3, 2014, stating that both parties have agreed to dismissal of this case as to Defendants College Greens East Homeowners Association and Eugene Burger Management Corporation, as reflected in the Motion to Compromise set in the bankruptcy case on March 11, 2014. The Motion was continued to April 29, 2014, to be heard in conjunction with the Motion to Confirm.

The court having denied the Motion to Compromise, the agreement to dismiss this case does not appear controlling on this matter.

#### **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

Where, as here, the assessment lien was recorded after January 1, 2003, sections 1367.1 and 1367.4 expressly impose certain conditions that an association must satisfy before the assessment lien may be enforced by judicial foreclosure. Cal Civ. Code § 5705, formerly Cal. Civ. Code § 1367.1, subd. (m) (repealed 2014). These conditions include notice requirements, beginning with the prelien notice mandated by section 1367.1, subdivision (a). *Id.* The association may initiate foreclosure of a lien for a delinquent assessment only where the lien “has been validly recorded.” Cal. Civ. Code § 5705, formerly 1367.4, subd. (c)(2) (repealed 2014).

Section 5690 (formerly section 1367.1) provides remedies for an association's failure to comply with the mandatory prelien and preforeclosure procedures and notice requirements set forth in sections 1367.1 and 1367.4. In *Diamond v. Superior Court*, 217 Cal. App. 4th 1172, 1192 (Cal. App. 6th Dist. 2013) the court determined that unless a homeowners association strictly complies with the notice requirements of section 1367.1, the assessment lien is not valid, was recorded in error, and may not be enforced by judicial foreclosure.

Here, Plaintiff alleges that Defendants failed to send him a copy of the recorded notice of delinquent assessment by certified mail within ten (10) days of the recording. Complaint ¶ 41. Plaintiff also states that Defendants allegedly failed to send him a copy of the pre-foreclosure notice of his right to demand alternative dispute resolution. *Id.* ¶ 42. Plaintiff alleges that Defendants failed to personally serve Plaintiff with the notice of the Homeowner Board’s Executive session vote to initiate foreclosure proceedings on the property in the minutes of the next monthly meeting of the Board open to all members. *Id.* ¶ 43. Plaintiff alleges that the notice of delinquent assessment was not recorded and that Defendants did not mail by certified mail Plaintiff a copy of the recorded notice of assessment. *Id.* ¶¶ 44-46.

Based on the allegations set forth in the complaint on the first cause of action, which the court must take as true and are construed in the light

most favorable to the plaintiff, the Plaintiff has set forth enough factual matter to establish plausible grounds for relief.

Second Cause of Action

Declaratory relief is an equitable remedy distinctive in that it allows adjudication of rights and obligations on disputes regardless of whether claims for damages or injunction have arisen. See Declaratory Relief Act, 28 U.S.C. § 2201. FN.1. "In effect, it brings to the present a litigable controversy, which otherwise might only be tried in the future." *Societe de Conditionnement v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981). The party seeking declaratory relief must show (1) an actual controversy and (2) a matter within federal court subject matter jurisdiction. *Calderon v. Ashmus*, 523 U.S. 740, 745 (1998). There is an implicit requirement that the actual controversy relate to a claim upon which relief can be granted. *Earnest v. Lowentritt*, 690 F.2d 1198, 1203 (5th Cir. 1982).

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FN.1. 28 U.S.C. §2201,

§ 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

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The court may only grant declaratory relief where there is an actual controversy within its jurisdiction. *Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143 (9th Cir. 1994). The controversy must be definite and concrete. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). However, it is a controversy in which the litigation may not yet require the award of damages. *Id.*

As there appears to be an actual controversy within this jurisdiction as to the first cause of action, violations of California Civil Code sections 1367.1 and 1367.4, the court finds sufficient allegations set forth in the complaint on the second cause of action.

**CONCLUSION**

This complaint should not be dismissed as it appears that the plaintiff alleges sufficient factual allegations to support his claims. Therefore, the Motion to Dismiss 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 to Dismiss Adversary Proceeding filed by Defendants having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion is denied.