

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

August 7, 2014 at 1:30 p.m.

1.	<u>13-31975-E-13</u> JACK/LINDA GANAS <u>14-2080</u> PLC-1 GANAS ET AL V. WELLS FARGO BANK, N.A.	MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT 6-30-14 [<u>32</u>]
----	---	--

Tentative Ruling: The Motion for Leave to File First Amended Complaint 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's Counsel and Office of the United States Trustee on June 30, 2014. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

The Motion for Leave to File First Amended Complaint 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 Leave to File First Amended Complaint is denied.

Plaintiffs Linda Mae Ganas and Jack George Ganas ("Plaintiffs") seek leave to file a First Amended Complaint. On March 14, 2014, Plaintiff filed this Adversary Proceeding objecting to the Claim of Wells Fargo Bank, N.A. ("Defendant") and claims arising under California Rosenthal Fair Debt

Collection Practices Act, California Civil Code §§ 1788-1788.32 ("Rosenthal Act"), Negligence, Fraud, the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 et. seq. ("RESPA"), Breach of Contract, and Conversion. Dckt. 1. In June 5, 2014, the court heard the Defendant's Motion to Dismiss, determining that the Plaintiffs failed to state a claim for relief under the Second, Third, Fourth, Fifth, Sixth and Seventh Claims for Relief (leaving the First Claim for relief - the objection to Defendant's proof of claim). Dckt. 40. The court allowed Plaintiff until June 30, 2014 to amend the adversary complaint and to file a motion for leave to amend. *Id.*

Plaintiffs attach the proposed amended complaint and a version with red-lined text. Exhibits, Dckt. 343.

DEFENDANT'S OPPOSITION

Wells Fargo Bank, N.A. ("Defendant") opposes the motion stating that none of Plaintiff's amended claims are sufficient to state a claim against Wells Fargo upon which relief can be granted. Defendant further points out that Plaintiff has included with its Motion a myriad of unauthenticated documents as exhibits that are subject to evidentiary objections. Essentially, Defendant states that Plaintiff's amended complaint is a waste of judicial resources for failing to allege sufficient facts to constitute valid claims against Defendant.

PLAINTIFF'S REPLY

Plaintiff served its Response to Defendant's Opposition on July 30, 2014. Plaintiff insists that its repeated filings of bankruptcy cases were not done in bad faith. Furthermore, Plaintiff withdraws its Fifth Cause of Action related to the Real Estate Settlement Procedures Act. As to the remaining causes of action for negligence, breach of contract and conversion, Plaintiff distinguishes this case from *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910 (9th Cir. 1996) and alleges that Defendant committed torts prior to the filing of the bankruptcy, not by the filing of the claim alone.

LEGAL AUTHORITY

Federal Rule of Civil Procedure 15(a) allows a party to amend its pleading once "as a matter of course", and requires that leave to amend "shall be freely given when justice so requires".

Federal policy favors determinations on their merits, therefore, the role of pleadings is limited and leave to amend pleadings should only be denied if the opposing party can demonstrate undue prejudice or bad faith on part of the moving party. *In re Kemmer*, 265 B.R. 224, 230 (Bankr. E.D. Cal. 2001). The purpose of Rule 15 is to facilitate decisions on the merits, rather than the form of pleadings or other technicalities. *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

In deciding whether to grant a motion to for leave to amend, a bankruptcy court considers the following factors: (1) undue delay, (2) bad faith, (3) futility of amendment, (4) prejudice to the opposing party, and (5) whether Plaintiff has previously filed an amendment. *Johnson v. Buckley*,

356 F.3d 1067, 1077 (9th Cir. 2004). Futility by itself is sufficient to justify the denial of a motion to amend. *Nunes v. Ashcroft*, 348 F.3d 815, 818 (9th Cir. 2003).

The proper test to be applied when determining whether a proposed amendment is legally sufficient, is the same as the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6). *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

REVIEW OF PROPOSED AMENDED COMPLAINT

To minimize arguments over the theoretical, the court requires that a party seeking leave to file an amended complaint include the draft pleading as an exhibit. The court does not want to waste the time and money of the parties, and the limited judicial resources with further motions to dismiss and further requests for leave to amend in a never ending spiral of procedural posturing by parties.

First, last, and foremost the only issue before the court is whether to grant leave to file an amended complaint. The court considers this in light of the basic pleading requirements of Federal Rules of Civil Procedure 8(a)(2), whether there is a "short and plain statement of the claim showing that the pleader is entitled to the relief," and 9(b), when "[a]lleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Bankr. 7007, 7008. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868, 884 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007) (The complaint must provide more than labels and conclusions, or a formulaic recitation of a cause of action; it must plead factual allegations sufficient to raise more than a speculative right to relief.); *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (The Court may consider "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.").

The relevant allegations in the First Amended Complaint are summarized by the court as follows:

I. General Allegations

- A. Defendant has filed a Proof of Claim which asserts a \$32,856.92 arrearage and a \$529.34 escrow shortage. The Proof of Claim does not list any unapplied funds.
- B. Plaintiff-Debtor received a January 6, 2014 statement from Defendant (Exhibit B) which lists unapplied funds and several offsets which are inconsistent with the Proof of Claim.
- C. Plaintiff-Debtor contends that Defendant has misapplied monies paid pre-petition.
- D. Plaintiff-Debtor cites to Proof of Claim 22 (Exhibit D) filed by Defendant in Debtors' prior second bankruptcy case (12-

21591) which shows four payments were made in 2012. The Proof of Claim filed in this case states that the "loan is due" for January 1, 2011 to September 1, 2013.

- E. Plaintiff-Debtor cites to Proof of Claim No. 20 (Exhibit E) filed Debtors third prior bankruptcy case (12-33377) which reflects that 5 payments were made in 2012 and 1 in 2013, but the Proof of Claim in the current bankruptcy case states that the loan is due for June 1, 2011.
- F. Plaintiff-Debtors assert that Defendant did misdirect and misapply payments."
- G. The Plaintiff-Debtors assert that Defendant misdirected and misapplied the payments so that it could assess and collect late charges.
- H. Plaintiff-Debtors assert that the escrow analysis is defective and does not reflect there being a \$529.34 escrow shortage.

II. Second Claim for Relief - Rosenthal Act Violation

Plaintiff-Debtors allege:

- A. Defendant misapplied payments in the second and third prior bankruptcy cases, and in misapplying the payments made a "misrepresentation" to the Plaintiff-Debtors. [Court note: Does not state how or where the misrepresentations were communicated - other than in the Proofs of Claim.]
- B. Prior to the commencement of the bankruptcy case the Defendant misapplied the payments made by the Debtor, which misapplication is a violation of the Rosenthal Act. [Court note: does not state what provision of the Rosenthal Act is violated.]
- C. Based on the Proof of Claim filed in the current bankruptcy case, there is a misrepresentation of the debt in violation of the Rosenthal Act.
- D. Defendant is a debt collection under the Rosenthal Act.
 - 1. Defendant, itself and through its agent [court note: unidentified agent] is collecting a debt as defined by California Civil Code § 1788.2(d).
 - 2. The obligation which is the subject of collection is a consumer credit transaction.
- E. The collection efforts are misstating the amount of the claim based on the pre-petition misapplication of payments.
- F. That Defendant does not have in place reasonable procedures

to avoid the misapplication of such pre-petition payments.

III. Third Claim for Relief - Negligence

Plaintiff-Debtors allege:

- A. Defendant has a duty to file an accurate Proof of Claim.
- B. Defendant misapplied pre-petition payments.
- C. The misapplication of payments works to the Defendant's financial advantage and is inconsistent with the "obligations of the contracts." [court note: No specific "obligations" in the contract are identified.]
- D. Defendant's breach their "duty" to file an accurate Proof of Claim. The information on the Proofs of Claims filed in the second and third prior cases shows that there is a misallocation of payments.
- E. Defendant's internal controls are so poor that they "do not even come close" to the "minimum standard of care" [court note: Unidentified standard of care[for similar positioned defendants.
- F. Due to Defendant's breach of "duty," Plaintiff-Debtors "have had to expend hours of expert assistance researching the claim, securing evidenced that the claim was not valid, ascertain that the errors in the proof of claim were really based on the misallocation of payments pre-petition and to retain counsel and file an adversary proceeding...."
- G. Defendant's conduct supports an award of punitive damages.

IV. Fourth Cause of Action - Fraud and Intentional Misrepresentation

- A. Defendant knew at the time of filing the Proof of Claim in the Plaintiff-Debtors' current bankruptcy case that the information was inaccurate.
- B. Defendant fraudulently and intentionally misapplied the payments to benefit itself to the detriment of the Plaintiff-Debtors.
- C. The Proof of Claim in this present case is evidence of Defendant's fraud and intentional misrepresentation.
- D. During the prior bankruptcy case, Defendant placed payments from the Chapter 13 Trustee into a "suspense account" or not allocated to the then current payment due, or allocated to other expenses.
- E. The Proof of Claim filed in the present bankruptcy case is not true.

- F. Defendant acted recklessly and without regard to the truth.
- G. The filing of the Proof of Claim in the present case has caused harm to the Plaintiff-Debtors, and was done to harass the Plaintiff-Debtors. [court note: No allegation is made that Plaintiff-Debtors reasonably relied upon and were damaged based on such reasonable reliance.]

V. Fifth Cause of Action - RESPA Violation

- A. The Escrow Analysis included in the Proof of Claim filed in the Plaintiff-Debtors present bankruptcy case does not conform to RESPA.
- B. The Escrow Analysis attached to the Proof of Claim does not take into account pre-petition payments which were placed in "impound."
- C. The Proof of Claim does not comply with 12 U.S.C. § 2609.

VI. Sixth Cause of Action - Breach of Contract

Plaintiff-Debtors allege,

- A. The Note (Exhibit C) upon which Defendant's Proof of Claim in the Current Bankruptcy Case requires that any payment "will be applied to interest before principal."
- B. Pre-petition payments were not applied by Defendant first to interest and then principal, but were "diverted" to "unapplied funds" or for other charges inconsistent with the payment provisions of the Note.
- C. Defendant breach the contract (Note) when payments made by Plaintiff-Debtors pre-petition were allocated other than intended by Plaintiff-Debtors. [court note: Complaint does not allege basis by which Plaintiff-Debtors may direct allocation of payments.]
- D. Payments were not applied by Defendant as required by the Note. [court note: No provisions of the Note are identified, and ¶ 79 of the Proposed First Amended Complaint is not clear in what it alleges.]
- E. The Deed of Trust contains an attorneys fees and costs provision. [court note: No allegation as to what such "provision" provides.] Plaintiff-Debtors request an award of attorneys fees.

VII. Seventh Cause of Action - Conversion

Plaintiff-Debtors allege,

- A. Defendant's misapplication of the pre-petition payments is a conversion of Plaintiff-Debtors' money.
- B. The conversion occurred because Defendant applied the payments to other obligations of the Plaintiff-Debtors under the Note and Deed of Trust - attorneys' fees, expenses, or placed in "unapplied funds" status.
- C. The conversion was done "solely to deprive" Plaintiff-Debtors of making payment so that Defendant could assess late payment charges and other costs.

Review of Referenced Exhibits

I. Exhibit A - Proof of Claim No.4 filed in Current Bankruptcy Case

- A. Part 3, amount necessary to cure.
 - 1. Monthly Installments
 - a. \$30,195.27
 - 2. For the Period
 - a. July 1, 2011 to
 - b. September 1, 2013
 - 3. Date Last Payment Received
 - a. September 12, 2013
 - 4. Pre-Petition Fees, Expenses, and Charges
 - a. \$2,661.65
 - (1) Includes Late Fees For
 - (a) May 17, 2010
 - (b) June 16, 2010
 - (c) August 16, 2010
 - (d) September 16, 2010
 - (e) November 16, 2010
 - (f) June 16, 2011
 - (g) July 18, 2011
 - (h) August 16, 2011
 - (i) September 16, 2011
 - (j) October 17, 2011
 - (k) November 16, 2011
 - (l) July 16, 2012
 - 5. Unapplied Funds

- a. \$0.00
- II. Exhibit F - Proof of claim No. 22 in 13-27895 (Fourth Prior Case)
 - A. No Proof of Claim filed by Defendant in case number 13-27895.
- III. Exhibit E - Proof of Claim No. 5 [misidentified as Proof of Claim No. 20 in the Proposed First Amended Complaint] in 12-33377 (Third Prior Case).
 - A. Part 3, amount necessary to cure.
 - 1. Installments
 - a. \$21,637.96
 - 2. For the Period
 - a. January 1, 2011 to
 - b. July 1, 2012
 - 3. Date Last Payment Received
 - a. June 14, 2012
 - 4. Pre-Petition Fees, Expenses, and Charges
 - a. \$6,475.05
 - (1) Includes Late Fees For
 - (a) May 17, 2010
 - (b) June 16, 2010
 - (c) August 16, 2010
 - (d) September 16, 2010
 - (e) November 16, 2010
 - (f) June 16, 2011
 - (g) July 18, 2011
 - (h) August 16, 2011
 - (i) September 16, 2011
 - (j) October 17, 2011
 - (k) November 16, 2011
 - (l) July 16, 2012
 - 5. Unapplied Funds
 - a. \$619.05
- IV. Exhibit D - Proof of Claim No. 9 [misidentified as Claim No. 22 in Proposed First Amended Complaint] in Case 12-21591 (Second Prior Case).

- A. Part 3, amount necessary to cure.
 - 1. Monthly Installments
 - a. \$15,943.76
 - 2. For the Period
 - a. December 1, 2010 to
 - b. January 1, 2012
 - 3. Date Last Payment Received
 - a. July 28, 2011
 - 4. Pre-Petition Fees, Expenses, and Charges
 - a. \$6,197.27
 - (1) Includes Late Fees For
 - (a) May 17, 2010
 - (b) June 16, 2010
 - (c) August 16, 2010
 - (d) September 16, 2010
 - (e) November 16, 2010
 - (f) June 16, 2011
 - (g) July 18, 2011
 - (h) August 16, 2011
 - (i) September 16, 2011
 - (j) October 17, 2011
 - 5. Unapplied Funds
 - a. \$104.08

In reviewing these Proofs of Claim filed in the Debtors' several bankruptcy cases, the court notes several things.

- A. The late fees being asserted by Defendant are not reduced, but are consistent, growing to the same twelve late fees listed in Proof of Claim No. 4 filed in the Current Bankruptcy Case and Proof of Claim No. 5 filed in the Debtors' Third Prior Case.
- B. The Proofs of Claim identify a progression in payments received by Defendant.
 - 1. In Proof of Claim No. 9 (Second Prior Case), Defendant states that the last payment received from Plaintiff-Debtors was on July 28, 2011.

2. In Proof of Claim No. 5 (Third Prior Case), Defendant states that the last payment received from Plaintiff-Debtors was on June 14, 2012.
 3. In Proof of Claim No. 4 (Current Bankruptcy Case), Defendant states that the last payment received from Plaintiff-Debtors was on September 1, 2013.
- C. The Proofs of Claim identify that payments made were applied to the oldest defaulted payment.
1. In Proof of Claim No. 9 (Second Prior Case), Defendant states that the installment payments of principal and interest are in default for the period December 1, 2010 to January 1, 2012.
 2. In Proof of Claim No. 5 (Third Prior Case), Defendant states that the installment payments of principal and interest are in default for the period January 1, 2011 to July 1, 2012. [This indicates one monthly payment was received and six more went into default.]
 3. In Proof of Claim No. 4 (Current Bankruptcy Case), Defendant states that the installment payments of principal and interest are in default for the period July 1, 2011 to September 1, 2013. [This indicates six monthly payments were received and applied to the oldest delinquencies and sixteen more went into default.]

DISCUSSION

This court thoroughly discussed the causes of action pled by Plaintiff in the Memorandum Opinion and Decision on the Motion to Dismiss, Dckt. 40. Plaintiffs filed a First Amended Complaint that is essentially identical in substance to their original Complaint, and includes only cosmetic rephrasing. The First Amended Complaint includes all the claims raised in the original Complaint (Plaintiff withdrawing the Fifth Cause of Action, for a RESPA Claim, in their Reply).

As addressed in this court's Memorandum Opinion and Decision, the conduct of parties in the claim process is governed by bankruptcy law, procedure, and the inherent powers of this bankruptcy court. The bankruptcy claims process is not one in which non-bankruptcy state and federal law claims are prosecuted - using the bankruptcy claims process as a thinly veiled excuse to use the bankruptcy as a grounds for non-bankruptcy causes of action.

Plaintiff's First Claim for Relief still states sufficient grounds to challenge the *prima facie* validity presumption of Defendant's claim.

The general allegations in the Complaint are that Defendant has misstated in the Proof of Claim the amount of the debt. While the Plaintiff-Debtors attempt to create the illusion that the contention is not

relating to the proof of claim by alleging that monies were "misapplied" prior to the filing of the Current Bankruptcy Case, they are clear in stating that the misconduct asserted is the claim asserted in Proof of Claim No. 4.

Plaintiff-Debtors state that such "pre-petition violations" must have occurred because they dispute how Defendant computes the claim asserted in Proof of Claim No. 4. In such a situation, the Plaintiff-Debtors are stating a simple objection to claim - a process which Congress has established under the Bankruptcy Code to give debtors a quick, affordable non-adversary proceeding judicial process for having determined by the bankruptcy judge.

In many respects, the General Allegations state a garden variety claims objection - the creditor mis-computes the payments made and the amount of the debt in the Proof of Claim. A debtor merely obtains copies of the payments made, has a simple accounting prepared of how the payments should have been properly applied, and states the amount of the claim as "properly computed" in the debtor's opinion. If the creditor disagrees, the creditor identifies the payments made, how the payments were applied and the "properly computed" claim in the creditor's opinion. Being presented with such simple evidence, the bankruptcy judge can then swiftly (and very economically) determine the correct amount of the claim and allow the bankruptcy case or reorganization to be promptly prosecuted as envisioned by Congress.

In asserting a violation under the Rosenthal Act, Plaintiff-Debtors assert that the filing of Proof of Claim No. 4, based on the alleged misapplication of pre-petition payments, is a "misrepresentation." This Cause of Action merely repeats what the court has already dismissed, a contention that an alleged erroneous proof of claim is the basis for a Rosenthal Act violation. It is not.

Merely adding a generic contention that Defendant "intentionally" misapplied some unidentified payments, does not state a claim for an alleged violation of the Rosenthal Act. Further, Plaintiff-Debtors make factually inconsistent statements within the Cause of Action - on the one hand relying on the statements of default in payments and making the general asserting that the Debtor upon which Proof of Claim No. 4 is based "has been satisfied, in full, prior to the filing of the bankruptcy of the debtor." FN.1.

FN.1. This contention raises another, disconcerting point - when are the Plaintiff-Debtors making truthful and accurate statements and allegations. The Plaintiff-Debtors have directed the court to their current bankruptcy case and multiple prior cases. On Schedule D in the Current Bankruptcy Case the Debtors state under penalty of perjury that Wells Fargo Bank, N.A. has a secured claim in the amount of \$75,403.50. In the Fourth Prior Case the Debtors state under penalty of perjury that Wells Fargo Bank, N.A. has a secured claim in the amount of \$75,403.50. 13-27895, Dckt. 1 at 18.

In the Third Prior Case the Debtors state under penalty of perjury in Schedule D that Wells Fargo Bank, N.A. has a secured claim in the amount of \$75,403.50. 13-27895, Dckt. 1 at 18. In the Second Prior Case the

Debtors state under penalty of perjury that Wells Fargo Bank, N.A. has a secured claim in the amount of \$75,403.50. 12-21591, Dckt. 1 at 18.

In all of the Current Bankruptcy Case, the Prior Cases, and the current Adversary Proceeding the Plaintiff-Debtors were and are represented by the same attorney. Other than what appears to be a "stock allegation" absent any specific facts in this Proposed First Amended Complaint, the Plaintiff-Debtors have consistently stated under penalty of perjury that they have an outstanding obligation owed to Defendant.

Additionally, in their Reply Brief, Plaintiff-Debtors argue that because they have confirmed a Chapter 13 Plan in their Current Bankruptcy Case, it is given res judicata effect. The Chapter 13 Plan provides for the Plaintiff-Debtors to make \$879.00 a month current installment payments to Defendant on this debt, as well as \$525.87 arrearage payments (for an \$31,551.92 arrearage). Chapter 13 Plan - Amended; 13-31975, Dckt. 28.No Additional Provisions are added to the Chapter 13 Plan effecting the Defendant's claim to be paid through the Plan. The Order confirming the Chapter 13 Plan - Amended does not state any additional terms, conditions, or amendments to that Plan. Confirmation Order; *Id.*, Dckt. 51.

For the Third Cause of Action, it is alleged that Defendant has committed negligence. In their Points and Authorities or Reply Plaintiff-Debtors do not offer the court any explanation as to why or how they are pleading a claim for negligence. They merely assert that the "negligence" occurred pre-petition. Notwithstanding that argument, the Proposed First Amended Complaint alleges that (1) Defendant had a duty to file an accurate proof of claim, (2) the Proof of Claim is not accurate because pre-petition payments (made apparently during prior bankruptcy cases) have been misapplied, and (3) Defendant has breached its duty to file an accurate Proof of Claim. On its face, the Proposed First Amended Complaint alleges that the filing of Proof of Claim No. 4 is the "negligence."

For the Fourth Cause of Action it is alleged that Defendant committed fraud and intentional misrepresentation. It is alleged that the "misrepresentation" occurred when Defendant filed Proof of Claim No. 4 which contained inaccurate information - based on Defendant allegedly having misapplied the payments made by Plaintiff-Debtors. It is asserted that Defendant "fraudulently and intentionally" misapplied the payments. Again, the "misrepresentation" is stated to be Proof of Claim No. 4 filed in the Current Bankruptcy Case. While stating that the Proof of Claim is a "misrepresentation," there are no allegations that (1) Plaintiff-Debtors reasonably relief upon such "misrepresentations" and (2) that such reliance resulted in Plaintiff-Debtors incurring damages. *Lazar v. Superior Court of Los Angeles County*, 12 Cal. 4th 631, 638 (1991), California five elements of fraud.

For the Sixth Cause of Action Plaintiff-Debtors allege a claim for "breach of contract." It is asserted, without citation to any specific language, that the contract provides that any payment will be applied to interest before principal. It is asserted that Defendant's diverted the payments to other changes inconsistent with this contract. While not alleging any specific provision of the Note, Plaintiff-Debtors direct the

court to read the Note which is Exhibit C to the Proposed First Amended Complaint. The Note is also attached to the various Proofs of Claim included by the Plaintiff-Debtors as exhibits to the Proposed First Amended Complaint.

Paragraph 3(A) of the Note does say that "monthly payments will be applied to interest before principal." However, the Proposed First Amended Complaint, as incorporating this Note, does not allege that all payments will first be applied to interest, then to principal, and then to any other amounts owed by Plaintiff-Debtors. Paragraph 6 of the Note provides for the Plaintiff-Debtors to pay a late fee and costs and expenses if there is a default under the Note. The Deed of Trust, Paragraph 3, which is attached to the Proofs of Claim which are exhibits to the Proposed First Amended Complaint provides for the application of payments made for principal, interest, taxes, and insurance are applied in the following order (1) prepayment charges, (2) taxes and insurance, (3) interest, (4) principal, and (5) late charges.

As plead, the Plaintiff-Debtor does not identify the contractual obligation, or allege, that any payments made must first be applied to interest and then to principal. The allegations for the "breach of contract" are that Proof of Claim No. 4 inaccurately states the amount of the debt because the payments are not properly applied and accounted for by the Defendant.

The Seventh and final cause of action is for Conversion. The Points and Authorities, and the Reply Brief do not provide the grounds for conversion in California. The Proposed First Amended Complaint includes a footnote citing *Haigler v. Donnelly*, 18 Cal.2d 674 (1941) for this Seventh Cause of Action.

The conversion allegations are that Defendant has misapplied the payments made by Plaintiff-Debtors. The "conversion" has occurred because the payments were applied to other obligations, such as attorneys' fees, expenses, or "unapplied funds." It is asserted that this has resulted in Defendant assessing additional late payment charges and other costs [which are not identified]. Conversion is defined as an actual interference with his ownership or right of possession of personal property of the plaintiff. *Moore v. Regents of University of California*, 51 Cal. 3d 120, 136 (1990). In the *Haigler* decision, the Supreme Court addressed the conduct of an agent (the broker) who failed to turn over monies of the principal generated from the sale of the principal's property. Plaintiff-Debtors provide no authorities as to how Defendant, applying payments to various obligation of the Plaintiff-Debtors, of monies paid to Defendant is interference with Plaintiff-Debtors' ownership of or right to possession of such monies of Defendant.

CONCLUSION

The court has required leave to file an amended complaint to avoid the situation which would be created if the Plaintiff-Debtors merely filed a first amended complaint. The Plaintiff-Debtors have not provided the court with allegations of claims other than arising from the filing of Proof of Claim No. 4. Additionally, for the conversion claim, on its face there is

not a California conversion claim pleaded.

The pleading by Plaintiff-Debtors appears to be based more on quantity rather than asserting proper claims. The Proposed First Amended Complaint is Seven Causes of Action spread over 89 paragraphs (not counting the duplicate paragraphs incorporated by reference). Merely contending that state law claims could exist because monies were "misapplied pre-petition" which rendered the Proof of Claim an independent breach of contract, negligence, Rosenthal Act violation, or fraud claim. On the face of the Proposed First Amended Complaint the Plaintiff-Debtors clearly continue to assert that the filing of the Proof of Claim is the basis for all of the various non-bankruptcy claims they seek to assert. The pleading is not helped by the inaccurate references to proofs of claims in the prior bankruptcy cases. Again, showing a strategy of burying the court in paper rather than substance.

While the court could just allow the Plaintiff-Debtors to file the defective Proposed First Amended Complaint, it will surely (as demonstrated by the opposition to the present motion) be met with another motion to dismiss. Further in light of the court's extensive ruling on the prior motion to dismiss, Memorandum Opinion and Decision, Dckt. 40, the consequences for the Plaintiff-Debtors could possibly be greater.

If the Plaintiff-Debtors believe that they have *bona fide* claims under applicable state law based on grounds other than Proof of Claim 4 filed in the Current Bankruptcy Case (or proofs of claim filed in prior cases), then they should clearly be pleaded as separate, independent claims.

Further, Plaintiff-Debtors can correctly identify proofs of claim upon which relief is sought as proper under the Bankruptcy Code and the inherent powers of this court. Further, the pleadings can clearly identify and allege the misapplications, if any, of monies, if such are grounds for independent claims. As discussed above, the court notes that the various proofs of claim referenced by the Plaintiff-Debtors reflects that payments were being applied to the monthly installments, with the delinquency date changing.

The court incorporates herein and makes part of this ruling by this reference its Memorandum Opinion and Decision on the prior motion to dismiss the complaint in this case. Memorandum Opinion and Decision, Dckt. 40.

The Motion to File the Proposed First Amended Complaint is denied. The denial is without prejudice to Plaintiff-Debtors seeking leave to file a further proposed amended complaint consistent with the ruling in this decision and the prior Memorandum Opinion and Decision (Dckt. 40).

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 File First Amended Complaint filed by Plaintiff having been presented to the court, and

upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is denied. The denial is without prejudice to Plaintiff-Debtors seeking leave to file a further proposed amended complaint consistent with the ruling in this decision and the prior Memorandum Opinion and Decision (Dckt. 40).