

UNITED STATES BANKRUPTCY COURT  
Eastern District of California

Honorable Ronald H. Sargis  
Chief Bankruptcy Judge  
Sacramento, California

October 12, 2016, at 2:30 p.m.

---

1. [16-21305-E-13](#) [16-2155](#) **RODERICK/ROSEMARIE TAPNIO** **STATUS CONFERENCE RE: AMENDED COMPLAINT**  
**TAPNIO ET AL V. PARTNERS FOR PAYMENT RELIEF DE II, LLC'S** **8-1-16 [6]**

Plaintiff's Atty: Peter Macaluso

Defendant's Atty:

Dhruv M. Sharma [Wells Fargo Bank, N.A.] Party dismissed on 9/13/16

Unknown [Partners for Payment Relief De II, LLC]

Adv. Filed: 8/1/16

Answer: None

1st Amd Complaint filed: 8/1/16

Answer: None

Nature of Action:

Declaratory judgment

Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

**The Status Conference is XXXXXXXXXXXXXXXXXXXXXXXXXX.**

Notes:

[DS-1] Motion to Dismiss Complaint for Failure to State a Claim Upon which Relief can be Granted filed on 9/1/16 [Dckt 9]; set for hearing 10/6/16 at 1:30 p.m.; Notice of Withdrawal of Motion to Dismiss Complaint filed 9/19/16 [Dckt 21]

Notice of Dismissal of Adversary Proceeding Against Defendant Wells Fargo Bank, N.A. filed 9/13/16 [Dckt 17]; Order of Dismissal of Adversary Proceeding Against Defendant Wells Fargo Bank, N.A. filed 9/14/16 [Dckt 18]

## OCTOBER 12, 2016 STATUS CONFERENCE

This Adversary Proceeding was commenced on August 1, 2016. On September 14, 2016, the court entered an order pursuant to Plaintiff-Debtor's stipulation to dismiss Wells Fargo Bank, N.A. as a defendant. The First Amended Complaint appears to have been served only on Wells Fargo Bank, N.A. as a party to this Adversary Proceeding. Dckt. 8. Plaintiff-Debtor has filed a Status Conference Statement (Dckt. 23) stating that Wells Fargo Bank, N.A. was erroneously named as a party. Plaintiff-Debtor states that he is preparing a further amended complaint to be filed against some unnamed person.

2. [16-23712-E-13](#)      **MIKE HAMMER**  
[16-2117](#)  
**HAMMER V. HAWAII ELECTRIC**  
**LIGHT COMPANY**

**CONTINUED STATUS CONFERENCE**  
**RE: COMPLAINT**  
**6-8-16 [1]**

Plaintiff's Atty: Pro Se  
Defendant's Atty: unknown

Adv. Filed: 6/8/16  
Answer: none

Nature of Action:  
Injunctive relief - imposition of stay  
Subordination of claim or interest  
Declaratory judgment

**The court ordering this Adversary Proceeding dismissed, the Status Conference is Removed From the Calendar.**

Notes:  
Continued from 8/10/16

## OCTOBER 12, 2016 STATUS CONFERENCE

The court issued its order on September 9, 2016 (Dckt. 10), setting the continued Status Conference for October 12, 2016, and for Mike Hammer, the Plaintiff-Debtor, to show cause why this Adversary Proceeding should not be dismissed for lack of prosecution. Plaintiff-Debtor was ordered to file and serve a Certification of Service for the summons and complaint, and a statement (documented by credible, properly authenticated evidence) that Plaintiff-Debtor is diligently prosecuting this Adversary Proceeding.

No Certificate of Service has been filed. Plaintiff-Debtor has not filed a statement or any evidence as ordered by the court.

Pursuant to the Order to Show Cause, this Adversary Proceeding is dismissed without prejudice.

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

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Order to Show Cause why this Adversary Proceeding should not be dismissed for lack of prosecution by Mike Hammer, the Plaintiff-Debtor; no response to the Order to Show Cause having been filed by the Plaintiff-Debtor, no certificate of service for the summons and complaint having been filed by Plaintiff-Debtor, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Order to Show Cause is sustained, and this Adversary Proceeding is dismissed without prejudice.

- 3. [07-27123](#)-E-13      **DOREEN GASTELUM**      **CONTINUED STATUS CONFERENCE**  
PGM-6      **RE: MOTION TO MODIFY ORDER FOR**  
**EVIDENTIARY HEARING**  
**6-12-15 [186]**

Debtor's Atty: Peter Macaluso

**The Status Conference is XXXXXXXXXXXXXXXXXXXXXXXXXXXX.**

Notes:  
Continued from 8/10/16

City of Chicago's Status Conference Statement filed 10/3/16 [Dckt 218]

**OCTOBER 12, 2016 STATUS CONFERENCE**

On October 5, 2016, Doreen Gastelum, the Debtor, filed her Status Conference Statement. Dckt. 220. Debtor states that the Parties are working to implement a settlement, making reference to the City of Chicago filing a motion (in Debtor's 2013 bankruptcy case) for leave to file a lien. In looking at the Docket for Debtor's 2013 bankruptcy case, 13-31441, the court cannot identify any recent motion filed by the City of Chicago seeking such relief. The last pleading in that file is the court's order, filed on January 28, 2016,



5. [16-22732-E-13](#) **DANNY RUE**  
[16-2165](#)  
**U.S. TRUSTEE V. RUE**

**STATUS CONFERENCE RE:**  
**COMPLAINT**  
**8-12-16 [1]**

Plaintiff's Atty: Allen C. Massey  
Defendant's Atty: Pro Se

Adv. Filed: 8/12/16  
Answer: 9/9/16

Nature of Action:  
Injunctive relief - other

**The Status Conference is XXXXXXXXXXXXXXXXXXXXXX**

Notes:

### **SUMMARY OF COMPLAINT**

The U.S. Trustee ("Plaintiff") has filed this Complaint seeking injunctive relief against Danny Rue, the Defendant-Debtor. It is alleged that Defendant-Debtor has filed twelve bankruptcy cases, with eleven since 2008 (with the 2008 case being dismissed in 2010). Of the nine prior Chapter 13 cases all have been dismissed. In some of the cases, Defendant-Debtor made some plan payments, while in others, Defendant-Debtor made no plan payments.

The relief sought is a pre-filing review injunction, to be effective for three years. Before being allowed to file another bankruptcy case during that period, Defendant-Debtor would first have to obtain the authorization of the chief bankruptcy judge in the district in which Defendant-Debtor desires to file a bankruptcy case.

### **SUMMARY OF ANSWER**

Defendant-Debtor filed his Answer on September 9, 2016. Dckt. 7. Defendant Debtor denies all of the allegations in the Complaint based on the statement that Defendant-Debtor "lacks information or belief sufficient to enable Defendant[-Debtor] to answer the allegations...." Answer ¶ 1.

The Answer then includes further statements which are summarized as follows:

- A. Defendant asserts that "Good Faith" has been his intention in filing the multiple bankruptcy cases.
- B. Law is superior to government.

C. Law must respect and preserve dignity.

D. Law must guard constitutional structures for a free society.

E. A “Declaration” that:

1. Defendant-Debtor’s intention to hold the highest regard for the law.
2. Defendant-Debtor has tried to perform his legal duties.
3. Defendant-Debtor has been hard working with his mortgage lender to solve the “problems.”

F. Defendant-Debtor’s current mortgage has a 8.975% adjustable interest rate. With a loan modification, Defendant-Debtor believes the fixed rate interest would be lowered to 2% to 3%.

G. Defendant-Debtor says that during the period the eleven prior bankruptcy cases were filed he had two shoulder surgeries. Though the medical bills were paid by Workers’ Compensation, there was an “issue” with Defendant-Debtor’s Workers’ Compensation payments.

H. Defendant-Debtor sent his last loan modification to the creditor on August 24, 2016.

I. Defendant-Debtor has been notified that the foreclosure sale on his home was set for September 29, 2016.

**REQUIRED PLEADING OF CORE AND NON-CORE MATTERS,  
CONSENT OR NON-CONSENT TO NON-CORE MATTER**

The basic pleading requirements of Federal Rule of Civil Procedure 8 for a complaint, including that the complaint “[m]ust contain: (1) a short and plain statement of the grounds for the court’s jurisdiction...,” apply to complaints in Adversary Proceedings. In addition to incorporating Rule 8, Federal Rule of Bankruptcy Procedure 7008 adds the additional pleading requirement concerning whether the matters in the complaint are core or non-core:

“Rule 8 F.R.Civ.P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy judge, **the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge.**”

Fed. R. Bankr. P. 7008 (emphasis added).

For a responsive pleading, Federal Rule of Bankruptcy Procedure 12(b) applies in adversary proceedings. Fed. R. Bankr. P. 7012(b). The Bankruptcy Rules add a further responsive pleading requirement concerning whether the matters are core or non-core, as well as the consent or non-consent for non-core matters by the responding party:

“(b) Applicability of Rule 12(b)-(I) F.R.Civ.P. Rule 12(b)-(I) F.R.Civ.P. applies in adversary proceedings. A responsive pleading **shall admit or deny an allegation that the proceeding is core or non-core**. If the response is that the proceeding is **non-core, it shall include a statement that the party does or does not consent** to entry of final orders or judgment by the bankruptcy judge. In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties.”

Fed. R. Bank. P. 7012(b) (emphasis added).

## **FINAL BANKRUPTCY COURT JUDGMENT**

Plaintiff alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Complaint ¶ 2, Dckt. 1. In his Answer, Plaintiff-Debtor does not plead the mandatory statements of jurisdiction and core or non-core proceeding. Fed. R. Bankr. 7012(b). Answer Dckt. 11. This matter arises under the Bankruptcy Code itself, is a core proceeding, and all orders and final judgment are to be entered by the bankruptcy judge.

## **STATUS CONFERENCE STATEMENTS**

Plaintiff U.S. Trustee filed a Status Conference Statement reviewing the attempts to conduct a discovery conference and recommending that the court set October 26, 2016, as the initial disclosure deadline and that discovery be completed by January 31, 2017. Defendant-Debtor did not file a separate Status Conference Statement.

## **ISSUANCE OF PRE-TRIAL SCHEDULING ORDER**

The court shall issue a Pre-Trial Scheduling Order setting the following dates and deadlines:

A. Plaintiff alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. §§ 1334 and 157(b), and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Complaint ¶ 2, Dckt. 1. In his Answer, Plaintiff-Debtor does not plead the mandatory statements of jurisdiction and core or non-core proceeding. Fed. R. Bankr. 7012(b). Answer Dckt. 11. This matter arises under the Bankruptcy Code itself, is a core proceeding, and all orders and final judgment are to be entered by the bankruptcy judge.

B. Initial Disclosures shall be made on or before **October 28, 2016**.

C. Discovery closes, including the hearing of all discovery motions, on **January 31, 2017**.



## OCTOBER 12, 2016 STATUS CONFERENCE

This Adversary Proceeding was commenced September 30, 2015. The Complaint has been amended and the court has determined facts and legal issues not in dispute as follows:

“The terms of the confirmed Chapter 11 Plan in Bankruptcy Case No. 11-27845, Ivan S. And Maretta P. Lee, Debtors, providing for the **“surrender”** and the to **“surrender and abandon”** the collateral as the treatment for the Classes 2d. and 2e. secured claim (11-27845, Dckt. 283) in the Plaintiff-Plan Administrators’ Chapter 11 Bankruptcy Case **provides for the termination of any stay on the right to foreclose** on the collateral, that the creditors holding such secured claims may foreclose on their respective collateral, and that the payment for those claims will be through, if an when any may occur, non-judicial foreclosure sales by the respective creditors, including assignees of such creditors, holding such claims.

Further, the court finds that **these provisions and the confirmed Second Amended Chapter 11 Plan**, with respect to the Class 2d. and 2e. secured claims, **do not transfer title of the collateral to the creditors, do not prohibit the creditors from foreclosing on the collateral, do not mandate the creditors to foreclose on the collateral, do not impose any mandatory or prohibitory injunctions** on the creditors with respect to their collateral, and **does not enjoin, stay, or prohibit the transfer of any of the claims**, including the security interest in the collateral for the claims provided for in Classes 2d. and 2e. of the confirmed Second Amended Chapter 11 Plan.”

Order, Dckt. 130 (emphasis added).

Only Plaintiff-Debtor filed a Status Conference Statement. Dckt. 131. In it Plaintiff-Debtor recasts the dispute, stating:

- A. “On May 3, 2016, Defendant Bank of America N.A., provided a proposed stipulation to resolve this adversary proceeding on behalf against Defendant Bank of America, N.A.”
- B. “Plaintiffs signed [without making any changes] before notary the settlement agreement and release sent to them by Bank of America, sent to counsel for Defendant Bank of America, Tim Ceperley on June 30, 2016 to resolve this matter with Defendant Bank of America and to have Bank of America dismissed from this adversary proceeding.”
- C. “Contrary to the settlement agreement and release signed by Plaintiffs, Defendant Bank of America refused to sign it.”
- D. “Based on its refusal to sign the settlement agreement and release, the motion of Bank of America for Judgment on the Pleadings must be denied.” [The court notes that no “motion for judgment on the pleadings” is pending, the court having ruled on such motion in August 2016.]

E. “The Bankruptcy Court did not direct Plaintiffs to execute the deed to trust to surrender the properties. Since the Bankruptcy Court did not direct Plaintiffs to execute the deed of trust to surrender the properties, Plaintiffs were not required to execute the deed of trust to surrender the properties. 11 U.S.C. § 1142.” [The court does not understand what “execut[ing] the deed of trust” has to do with the automatic stay being terminated by the confirmed plan. Possibly this is a clerical error, with Plaintiff-Debtor stating that the plan did not require the Plaintiff-Debtor to execute deeds in lieu of foreclosure or for the creditors to accept title in lieu of foreclosure or abandoning the collateral.]

F. “In violation of this adversary proceeding and the applicable Bankruptcy laws, Defendant City of Sacramento is proceeding with the lawsuit against Plaintiffs.”

[The Status Report does not state how the conduct of the City is in “violation of this adversary proceeding” and what “Bankruptcy law” is being violated.]

G. “On December 21, 2015, counsel for Defendant City of Sacramento that filed the lawsuit against Plaintiffs spoke with counsel for Plaintiffs. Counsel for Defendant City of Sacramento improperly stated that Plaintiff, Maretta Dunigan, was on title for the deed of trust for the property, and she should have entered a transfer of the deed of trust to transferred the title.”

[Again, there appears to be a clerical error, referencing a “deed of trust,” which is a security instrument, not a title instrument. That one of the Plaintiff-Debtors was on title to the property post-confirmation is consistent with the prior rulings of this court.]

H. “Counsel for Plaintiffs stated to counsel for Defendant City of Sacramento that Bank of America was to transfer the property, 272 Christine Drive, Sacramento, CA from Plaintiffs to Bank of America, N.A., by non-judicial foreclosure by a trustee, since it was to be transferred to Bank of America, N.A.”

[While this may be an accurate statement of what counsel for Plaintiff-Debtor stated, it is inconsistent with the confirmed Chapter 11 Plan and the August 2016 determinations of this court as to the effect of the plan. The Plan does not require “Bank of America, N.A. to transfer” title to the property.]

I. “[B]ank of America, N.A., acted improperly by not transferring the property, 272 Christine Drive, Sacramento, CA from Plaintiffs to Bank of America, N.A., by non-judicial foreclosure by a trustee, ...”

[Again, Plaintiff-Debtor continues to beat a dead horse, the court having determined that the Chapter 11 Plan did not require any creditor to foreclose, somehow transfer title from the Plaintiff-Debtor, or to accept title to their collateral.]

J. “Because Plaintiff, Maretta Dunigan, is still on the title and counsel for the City of Sacramento improperly claims that Plaintiffs should have transferred the deed of trust to transfer the title, the City of Sacramento is acting improperly and Plaintiffs will have to proceed with this

adversary proceeding since it is not possible to resolve this matter based on the position of the City of Sacramento.”

[As explained, the court is bewildered by this statement. It appears that Plaintiff-Debtor states that the City of Sacramento stated it was suing Plaintiff-Debtor because Plaintiff-Debtor held title to the property. If, as Plaintiff-Debtor originally contended that the Plan transferred title or required title to be transferred, then Plaintiff-Debtor needed to get title transferred out of Plaintiff-Debtor.]

K. “Based on the facts stated in the Second Amended Complaint, the pending adversary proceeding should proceed against Defendant City of Sacramento is acting improperly because Plaintiffs Maretta Dunigan and Ivan Lee were not required under the applicable Bankruptcy laws to transfer the deed of trust to the surrendered property.”

[The court does not understand Plaintiff-Debtor’s dispute with the City. Until a creditor elects to foreclose or someone will accept a deed from Plaintiff-Debtor, it is the Plaintiff-Debtor that owns the property.]

L. [The court has slightly reformatted the paragraph for clarity in discussion.] “Based on the facts stated in the Second Amended Complaint, if the stipulation is not signed by Defendant Bank of America, N.A., and filed with the Bankruptcy Court to resolve this matter, the pending adversary proceeding should proceed as against Bank of America, N.A., because

(1) since Bank of America, N.A., was the creditor of the two properties that were surrendered and abandoned at the time Bank of America, N.A., was the creditor, Bank of America, N.A., violated the bankruptcy court confirmation of the Chapter 11 Plan surrendering and abandoning the two properties by assigning the loans to IndyMac and Shellpoint after the properties were surrendered and abandoned and

(2) since Bank of America, N.A., was the creditor of the two properties that were surrendered and abandoned at the time Bank of America, N.A., was the creditor, Bank of America, N.A., violated the bankruptcy court confirmation of the Chapter 11 Plan surrendering and abandoning the two property by not transferring the property, 272 Christine Drive, Sacramento, CA from Plaintiffs to Bank of America, N.A., by non-judicial foreclosure by a trustee.”

[Plaintiff-Debtor offers no grounds by which an unexecuted stipulation becomes an enforceable contract between Plaintiff-Debtor and Bank of America, N.A. In light of the court’s determination of the Chapter 11 Plan as written by Plaintiff-Debtor, creditors were not required to transfer title to the properties, foreclose on the properties, or accept title to the properties.]

M. “Based on the absence of any relevant disputed material facts, if the parties do not execute a stipulation resolving this adversary proceeding, Plaintiffs intend to file a motion for summary judgment in this case for the issuance of a judgment confirming Defendants’ violation of the Court order approving the loan modification, injunctive relief, and for the damages, attorneys fees and costs Plaintiffs have been forced to incur due to Defendants’ actions in violation of the applicable Bankruptcy laws.”

N. “Since City of Sacramento is not willing to reach a stipulation to resolve the issues in this pending adversary case, Plaintiffs request the Court set a continued date for the status conference.”

As a fundamental matter, the court is unwilling to further “continue the status conference.” This Adversary Proceeding is now more than a year old and is one in which the parties, all of the parties, have not litigated it in a matter to push the actual issues to conclusion. Plaintiff-Debtor has taken a changing, bewildering series of positions ranging from the plan prohibiting foreclosure to Defendants violating the Plan because they did not foreclose. Plaintiff-Debtor has taken positions that are in conflict with the plain language of the Plan (written by Plaintiff-Debtor).

Defendant creditors can bring the hemorrhaging of time and money by just completing their foreclosure sale, getting their collateral to pay their claim, and move on. Instead, creditors (specifically Bank of America, N.A.) appears to act in a manner consistent with a creditor who has decided to abandon its collateral, take the write-off against profits, and let the borrower keep the collateral. This may be because Bank of America, N.A. does not want to address the issues raised by and obligations of an owner of the property being enforced by the City of Sacramento.

If Bank of America, N.A. seeks to retain its collateral, foreclose, and obtain payment on the outstanding obligation, it can advise the court of its hard deadlines for proceeding with the foreclosure. If Bank of America, N.A. has decided not to foreclose and obtain payment, the court will accommodate the bank and issue an order declaring the deed of trust void and that Plaintiff-Debtor holds title to the property free and clear of said deed of trust.

Though it may seem harsh, the court finds this to be an Adversary Proceeding that needs to be diligently prosecuted, in good faith, by all parties. It may be a proceeding in which the Defendants need to mobilize and push the case to judgment, concluding that the Plaintiff-Debtor is unable to prosecute the Complaint or appreciate the legal issues before the court. Such is the lot of many creditors as they fulfill their duties and obligations in federal judicial proceedings.

### **Prosecution of Case Since August 2016 Factual and Legal Determinations by the Court**

By its August 15, 2016 Order (Dckt. 130), the court determined the key issues for the parties – confirmation of the Plan did not transfer title to the properties from Plaintiff-Debtor and did not mandate that creditors transfer title from Plaintiff-Debtor to the creditors.

Though these key factual (determination of the “contract” created by the confirmed Plan) and legal issues, no party has taken any action in the prosecution of this case. It may be that such action is occurring outside these judicial proceedings (such as a nonjudicial foreclosure sale), but none of the Defendants have provided such information to the court. Plaintiff-Debtor appears, based on the most recent Status Report, to re-re-reargue matters for which the bell has been rung and Plaintiff-Debtor declared the loser.

**Discussion at October 12, 2016 Status Conference**

At the Status Conference, **XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX**.

**MAY 18, 2016 STATUS CONFERENCE**

At the hearing, the court and parties addressed the allegations in the Second Amended Complaint, Counterclaim, and Cross Claim. All parties were in agreement that the cornerstone issue is the legal effect of the confirmed Chapter 11 plan provisions that state the “surrender” and “surrender and abandon” treatment for the Bank of America, N.A. secured claim.

Bank of America, N.A. has filed a motion to dismiss the Second Amended Complaint. To rule on the Motion to Dismiss, the court would necessarily have to determined the legal effect of these terms as used in the confirmed Chapter 11 Plan. However, such motion would only determine that issue between Bank of America and the Plaintiff Plan Administrator/Debtor.

The determination of the legal effect of these provisions affects the rights and obligations of all parties to this Adversary Proceeding and a single determination of that legal question is necessary in this Adversary Proceeding. Therefore, the Parties agreed that Bank of America, N.A. would file a motion for judgment on the pleadings for the issue of the legal effect of confirming the plan which provides for the “surrender” and “surrender and abandonment” of Bank of American, N.A.’s collateral for satisfaction of the Bank’s claim.

Federal Rule of Civil Procedure 12(c) provides that after all pleadings have closed, a party may move for judgment on the pleadings. Though Bank of America, N.A. has not yet filed an answer to the Second Amended Complaint (the motion to dismiss having been filed), the parties agreed on the record to allow Bank of America, N.A. to file a motion for judgment on the pleadings on the issue of the legal effect of the provisions for the “surrender” and “surrender and abandon” provisions of the plan. The court concurs and so orders.

Bank of America shall file and serve the Motion for Judgment on the Pleadings on or before June 17, 2016. Oppositions and Responses to the Motion shall be filed and served on or before June 27, 2016. Replies, if any, shall be filed and served on or before July 1, 2016. The hearing on the Motion shall be conducted at 10:30 a.m. on July 7, 2016, with the hearing to be conducted in the Modesto, California courthouse of this Bankruptcy Court.

**State Court Proceeding**

The City of Sacramento addressed with the court an issue concerning the pending state court action in which it has named the Plaintiff Plan Administrator/Debtor concerning the two properties. The Plaintiff Plan Administrators/Debtor assert that said action is in violation of the plan. As agreed by all parties on the record, the court stays the City of Sacramento from any further prosecution of the California Superior Court, Sacramento County, Case No. 34-2015-00183449, through and including July 15, 2016, when said stay shall terminate without further order of the court.

## **Motion to Dismiss**

Bank of America, N.A. filed its Motion to Dismiss on March 31, 2016. Dckt. 98. In light of the agreement of the parties to proceed with a Motion for Judgment on the Pleadings for the issue of the plan terms, Bank of America, N.A. stated on the record that it dismissed the Motion to Dismiss without prejudice. The court shall issue an order to document the dismissal in the court's files.

## **SUMMARY OF COMPLAINT**

Ivan and Maretta Lee, the Plaintiff-Plan Administrators under the confirmed Chapter 11 Plan, have filed their Second Amended Complaint in this Adversary Proceeding. The allegations in the Second Amended Complaint are summarized as follows. The surrender of the Property, in light of the 11 U.S.C. § 1111(b) election of Bank of America, N.A., worked a full satisfaction of that creditor's secured claim, with no unsecured claim to be paid the Bank.

Neither the Chapter 11 Plan nor the court ordered the Plaintiff-Plan Administrators to execute a deed to effectuate the surrender or abandonment. The order confirming the Chapter 11 Plan also terminated the automatic stay. As the then Debtor in Possession, the Plaintiff-Plan Administrators confirmed a Chapter 11 Plan that provided for the "surrender" and "abandonment" of the real property commonly known as 2323-2331 Grove Avenue, Sacramento, California.

It is further alleged that after confirmation of the Chapter 11 Plan, Bank of America, N.A. failed to transfer the title to the property from the Debtors to Bank of America, N.A. This transfer was to be made by a non-judicial foreclosure sale.

It is further alleged that after confirmation, Bank of American, N.A. purported to transfer the note and deed of trust, which were satisfied by the surrender and abandonment, to IndyMAC and Shellpoint.

By Letter dated July 14, 2015, the City of Sacramento, California has made demand that the Plaintiff-Plan Administrator pay \$2,500.00 for the surrendered and abandoned property as monitoring fee.

It is further alleged that the foreclosure proceedings were in violation of the Chapter 11 Plan and have been placed on the Plaintiff-Plan Administrator's credit report.

The City of Sacramento has commenced a legal proceeding against Maretta Lee for penalties and equitable relief after the property was surrendered and abandoned.

### **First Claim for Relief**

The first claim seeks injunction relief against the City of Sacramento, enjoining it from proceeding with the litigation against Maretta Lee.

## Second Claim for Relief

This claim for relief appears to sound in declaratory relief, requesting a determination of the respective rights and obligations of the parties arising under the confirmed Chapter 11 plan as they relate to the “surrender” and “abandonment” of the Property.

## Third Claim for Relief

It is asserted that “Plaintiffs” do not have a valid lien or interest in the surrendered Property. The Chapter 11 Plan binds Bank of America, N.A., which requires the Bank to conduct a non-judicial foreclosure sale on the Property. The Plan, which provides for the “surrender” and “abandonment” of the Property also binds the City of Sacramento. No specific relief is requested.

## Fourth Claim for Relief

The Fourth Claim seeks avoidance of fraudulent transfer of surrendered properties and lawsuit. Plaintiff-Plan Administrators appear to be requesting that the court “avoid” the transfer of any alleged interest of Plaintiff-Plan Administrators in the notes and deeds of trust transferred by Bank of America, N.A. to Indymac and Shellpoint.

## **RESPONSE OF BANK OF AMERICA, N.A.**

Bank of America, N.A. has filed a Motion to Dismiss the Second Amended Complaint. Dckt. 98. Unfortunately, the “motion” consists of little more than a notice that the Bank is seeking such generic relief, and the grounds are stated as:

“The grounds for this motion are that Plaintiffs have failed to state a claim against Defendant upon which relief can be granted under Fed. Rule Civ. P. 12(b)(6). The Adversary Complaint’s defects are such that they are incurable and incapable of amendment; and Plaintiffs can prove no set of facts in support of their claims which would entitle them to relief.”

Dckt. 98.

Though the Second Amended Complaint may suffer from serious challenges, the “motion” is nothing more than a mere legal conclusions stated by the Bank. Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007 require that the motion itself *shall* “state with particularity the grounds” upon which the requested relief is based, not merely the legal conclusions of the movant. Local Bankruptcy Rule 9004-1 and the Revised Guidelines for Preparation of Documents require that a motion, the points and authorities, each declaration, other pleadings, and the exhibits (which exhibits may be combined into one document) be filed as separate documents.

Attached to the Motion as an addendum is what is identified as a “Points and Authorities.” This ten page addendum contains extensive factual allegations, citations, quotations, arguments, and contentions

in support of the motion. Most likely this is pages 7-9, the Introduction, in which the grounds upon which relief is based would be stated. Additional possible grounds may be found on page 10-11, 12, and 13.

## **SUMMARY OF ANSWER, CITY OF SACRAMENTO,**

The City of Sacramento (“Defendant-City”) filed an Answer on March 31, 2016. Dckt. 100. The Defendant-City specifically admits and denies the allegations of the Second Amended Complaint. The City of Sacramento also asserts twenty affirmative defenses.

## **COUNTERCLAIM AND CROSS-CLAIM OF CITY OF SACRAMENTO**

The City of Sacramento has filed a Counter Claim against Maretta Lee, one of the Plaintiff-Plan Administrators and a Cross Claim against Bank of America, N.A. Dckt. 100, starting on page 16. The City alleges that federal jurisdiction exists pursuant to 28 U.S.C. § 1334 and § 157, and further alleges that the Counterclaim and Cross-Claim are non-core proceedings. The City of Sacramento does not consent to a bankruptcy judge issuing the final orders and judgment for the Counter and Cross Claims.

The City first seeks a determination of whether it is Maretta Lee or Bank of America, N.A. which is responsible for the Property that is the subject of the “surrender” and “abandonment.” The City asserts that the Property is a public nuisance, and whichever person is the owner, that person is responsible for abatement of the nuisance.

Answer of Plaintiff-Plan Administrators

Maretta Lee has filed an Answer to the Counterclaim, specifically denying and admitting allegations of the Counter Complaint. Answer, Dckt. 102. Ms. Lee alleges seventeen affirmative defenses.

## **CONFIRMED CHAPTER 11 PLAN**

The following provisions are found in Plaintiff-Debtor’s confirmed April 20, 2012 Modified Plan, confirmed May 4, 2012, in the parent bankruptcy case:

### **ARTICLE 4: TREATMENT OF CLAIMS UNDER THE PLAN**

...

#### C. Classified Claims

...

2d. Bank of America, NA for 272 Christine Dr., Sacramento, CA

Debtor will surrender the collateral at 272 Christine Dr., Sacramento, CA, to Bank of America, NA, on the Effective Date of the Plan. The confirmation order would constitute an order for relief from stay. Any secured claim is satisfied in full

through surrender of the collateral. Due to the 11 U.S.C. Section 1111(b) election of [BANA], there will be no deficiency claim treated as a general unsecured claim.

2e. Bank of America, NA for 2323/2331 Grove Ave., Sacramento, CA

Debtor will surrender and abandon the collateral at 2323-2331 Grove Avenue to [BNYM], its assignees and/or successors in interest on the effective date of the Plan. The confirmation order would constitute an order for relief from stay, with the Federal Rule of Bankruptcy procedure 4001(a)(3) 14-day stay waived. Any secured claim is satisfied in full through surrender of the collateral. Due to the 11 U.S.C. Section 1111(b) election of [BNYM], there will be no deficiency claim treated as a general unsecured claim.

...

## **ARTICLE 15: GENERAL PROVISIONS**

...

### **O. Successors And Assigns**

The rights, duties and obligations of any Entity named or referred to in the Plan shall be binding upon, and shall inure to the benefit of, the successors and assigns of such Entity.

E.D. Cal. Bankr. Case No. 2011-27845, Dckt. 279, pp. 10, 20.

7. [10-29750-E-13](#)      **ANTONIO/MARIA RAMIREZ**  
[16-2096](#)  
**RAMIREZ ET AL V. BANK OF**  
**AMERICA, N.A.**

**CONTINUED STATUS CONFERENCE**  
**RE: COMPLAINT**  
**5-11-16 [1]**

Plaintiff's Atty: Peter G. Macaluso  
Defendant's Atty: unknown

Adv. Filed: 5/11/16  
Answer: none

Nature of Action:  
Declaratory judgment  
Validity, priority or extent of lien or other interest in property  
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

**The Status Conference is XXXXXXXXXXXXXXXXXXXXXXXXXXXX.**

Notes:  
Continued from 8/10/16. Parties reported that the matter had been settled, the lien release recorded, and the settlement agreement was being drafted.

**OCTOBER 12, 2016 STATUS CONFERENCE**

The Complaint was filed on May 12, 2016. The Complaint requests relief to clear a void deed of trust (Plaintiff-Debtor having completed the Chapter 13 Plan and having paid the § 506(a) determined value in full) from Plaintiff-Debtor's property.

No answer has been filed, which is not unusual as there is often little fight in this type of litigation to clear title. Given the statutory and contractual attorneys' fees, protracted litigation for the sake of litigation can be very expensive for the defendant creditor. Generally, if a complaint is filed in this type of action, it has the effect of getting the matter to the right person and the title issue quickly resolved.

Unfortunately, though this Adversary Proceeding has been pending for five months, the underlying issues have not been resolved.

Plaintiff-Debtor filed a unilateral Status Conference Statement on October 5, 2016. Dckt. 12. The one sentence report consists of "Defendant, Bank of America, N.A. and Plaintiffs have reached a mutual agreement and are in the process of executing the terms of settlement." Based on that, Plaintiff-Debtor requests a thirty-day continuance "to resolve the settlement."

The Status Report does not state that a settlement agreement has been executed. The Status Report does not state why, in the 153 days since this Complaint was filed, Defendant has not been able to reconvey the deed of trust. No information, other than the statement that there is some settlement, that this Adversary Proceeding is being diligently prosecuted by Plaintiff-Debtor or the Defendant.

8. [08-30669-E-13](#)      **CRECYNTHIA MCLUCAS**      **CONTINUED STATUS CONFERENCE**  
[16-2094](#)      **MCLUCAS V. NATIONAL CITY BANK**      **RE: COMPLAINT**  
**ET AL**      **5-11-16 [1]**

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

**Below is the court's tentative ruling.**

-----  
Plaintiff's Atty: Peter G. Macaluso  
Defendant's Atty: unknown

Adv. Filed: 5/11/16  
Answer: none

Nature of Action:  
Declaratory judgment  
Validity, priority or extent of lien or other interest in property  
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

**The Status Conference is removed from the Calender, the court having ordered dismissal of the Complaint without prejudice, without leave to amend. Fed. R. Civ. P. 4(m), Fed. R. Bank. P. 7004(a).**

Notes:

Continued from 8/10/16. On or before 10/10/16 the complaint shall be amended and served, or defaults of the defendants under the existing complaint entered and motions for entry of default judgments filed and served. If not, the court shall dismiss the complaint without prejudice and close this Adversary Proceeding.

**OCTOBER 12, 2016 STATUS CONFERENCE**

Plaintiff-Debtor reports that no answers have been filed. Additionally, Plaintiff-Debtor states that it appears that PNC Bank, N.A. has not been properly served. Plaintiff-Debtor requests that the court continue the Status Conference for sixty (60) days.

The Complaint in this Adversary Proceeding was filed on May 11, 2016. The Complaint requests relief to clear a void deed of trust (Plaintiff-Debtor having completed the Chapter 13 Plan and having paid the § 506(a) determined value in full) from Plaintiff-Debtor's property. While necessary, the complaint is neither unique nor legally complex.

The court raised the issue of whether this Adversary Proceeding should be dismissed due to lack of prosecution due to Plaintiff-Debtor's lack of prosecution. At the hearing, Plaintiff-Debtor provided an explanation that the court summarized as set forth in the Civil Minutes for the August 10, 2016 Status Conference:

"At the Status Conference counsel for the Plaintiff-Debtor reports that he may not have named the actual creditor, the loan having been transferred. Plaintiff-Debtor requests that the court continue the Status Conference to allow for the identification of the correct defendant, amendment of the complaint, and service, or if this is the correct defendant, obtaining entry of default and filing of a motion for a default judgment."

Dckt. 12.

Now, one hundred and fifty-three (153) days after the Complaint was filed and sixty-three (63) days after telling the court that the complaint may name the wrong party so the Status Conference should be continued, Plaintiff-Debtor indicates the right party is named by that service is deficient. Plaintiff-Debtor provides no explanation as to why it is now believed that the named defendant is accurate, and why, 153 days after the Complaint was filed, Plaintiff-Debtor has been unable to serve the Complaint.

The Supreme Court has made the various provisions of Federal Rule of Civil Procedure 4 applicable in Adversary Proceeding through Federal Rule of Bankruptcy Procedure 7004(a), including Federal Rule of Civil Procedure 4(m) [emphasis added], which provides:

"(m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, **the court--on motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant** or order that service be made within a specified time. But **if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.** This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A)."

Here, the court provided notice that the Complaint may be dismissed for failure to prosecute. In continuing the August 2016 Status Conference, the court ordered:

**"IT IS FURTHER ORDERED** that if the complaint has not been amended and served, or if defaults of the defendants under the existing complaint have not been entered and motions for entry of default judgments filed and served on or before

October 10, 2016, **the court shall dismiss the complaint without prejudice and close this Adversary Proceeding.**”

Order, Dckt. 14 (emphasis added).

The court has already continued the Status Conference once, based on the representations that Plaintiff-Debtor would diligently prosecute the case. Plaintiff-Debtor has provided different, and conflicting, reasons why this Adversary Proceeding is not being prosecuted.

Plaintiff-Debtor is not prosecuting this Adversary Proceeding and as clearly stated in the order continuing the hearing, the court now dismisses without prejudice this Adversary Proceeding. When Plaintiff-Debtor and their counsel are ready to diligently prosecute an adversary proceeding and clear title to the Plaintiff-Debtor’s property, a new adversary proceeding can be commenced, a complaint filed (naming a party against whom relief is properly sought) and served.

The Complaint is dismissed without prejudice, and the Clerk of the Court shall close this file.

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 continued Status Conference having been conducted, the summons and complaint not having been served with one hundred and fifty-three days having expired since the Complaint was filed, the court having previously ordered and provided notice that the Complaint would be dismissed and Adversary Proceeding closed if Plaintiff-Debtor did not prosecute this Adversary Proceeding (Order, Dckt. 11), the Plaintiff-Debtor reporting that either the wrong persons are named as defendant or that there has not been proper service of the summons and complaint (Civil Minutes, Dckt. 12, and Status Report, Dckt. 15), and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Complaint is dismissed without prejudice as to all defendants named in the Complaint, with no leave to amend.

The Clerk of the Court shall close the file for this Adversary Proceeding..

9. [16-21089-E-13](#)     STEPHEN MAR  
[16-2051](#)  
MAR V. UNIFUND CCR, LLC ET AL

CONTINUED STATUS CONFERENCE  
RE: COMPLAINT  
3-15-16 [1]

**Final Ruling:** No appearance at the October 12, 2016 Status Conference is required.  
-----

Plaintiff's Atty: Peter L. Cianchetta  
Defendant's Atty: unknown

Adv. Filed: 3/15/16  
Answer: none

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

**The Status Conference is continued to 2:30 p.m. on January 18, 2017, to afford the parties the opportunity to implement the settlement approved by the court on October 6, 2016, and dismiss the Complaint prior to the continued Status Conference. Civil Minutes, Dckt. 22.**

Notes:

Continued from 8/10/16. Parties requested a 60-day continuance to finalize the settlement agreement.

[PLC-1] Motion to Approve Settlement Agreement and Release filed 9/2/16 [Dckt 12]; set for hearing 10/6/16 at 1:30 p.m.