UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

November 12, 2014 at 2:30 p.m.

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1. 14-20309-E-13 PATRICK/JENNIFER RESTORI
14-2187
RESTORI ET AL V. NATIONSTAR MORTGAGE LLC

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
8-15-14 [11]

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: Bernard J. Kornberg

Adv. Filed: 6/26/14
Amd Complaint Filed: 8/15/14

Answer: none

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

Notes:

Continued from 10/9/14 to be heard in conjunction with motion to dismiss.

2. 14-20309-E-13 PATRICK/JENNIFER RESTORI — **CONTINUED MOTION TO DISMISS**
14-2187 BJK-2 — **ADVERSARY PROCEEDING**
RESTORI ET AL V. NATIONSTAR MORTGAGE LLC — **8-29-14 [16]**

Tentative Ruling: The Motion to Dismiss First Amended Complaint for Failure to State a Claim 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 Debtor's Attorney on August 28, 2014. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss First Amended Complaint for Failure to State a Claim 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 court's decision is to grant the Motion Dismiss First Amended Complaint for Failure to State a Claim and dismiss the First Amended Complaint.

STATUS OF PROCEEDINGS

This Adversary Proceeding was commenced by Patrick Lee Restori and Jennifer Michele Restori ("Plaintiff-Debtors") asserting an Objection to Proof of Claim No. 5 filed by Nationstar Mortgage, LLC ("Defendant") and additional relief for which an adversary proceeding was required. Defendant filed a this Motion to Dismiss which asserted that the First Amended Complaint failed to state a claim for which relief could be granted and that it should be dismissed pursuant to Federal Rule of Civil Procedure 12(b) and Federal Rule of Bankruptcy Procedure 7012.

The first hearing on the Motion was conducted on October 9, 2014. Due to an unavoidable scheduling conflict, counsel for the Plaintiff-Debtors was unable to attend that hearing. For that hearing the court had prepared an extensive tentative ruling addressing for the parties several issues concerning the First Amended Complaint. The substantive of the tentative ruling was included by the court in the Civil Minutes for the October 9, 2014 hearing. Civil Minutes, Dckt. 28.

The significant issue which the court identified was that the First Amended Complaint and the Opposition to the Motion seemed to ignore Proof of Claim No. 5, including the attachments, and the actual financial data. The Defendant's Motion and Response also seemed to ignore the actual financial data, providing the court with hypothetical loans, rather than the data provided in Proof of Claim No. 5 itself. The court conducted a review of Proof of Claim No. 5, in light of the contention in the First Amended Complaint that "Principal + Arrearage ≠ Amount of Claim." The court constructed a series of charts, as would a creditor or debtor attorney, to analyze the claim being asserted.

Rather than granting the Motion at the October 9, 2014 hearing, the court continued the hearing and ordered supplemental briefing. In the Order continuing the hearing and for supplemental briefing, the court provided the parties with the analysis of what information is provided in Proof of Claim No. 5 and the charts. In order to properly consider the Motion to Dismiss, the First Amended Complaint, and whether the Plaintiff-Debtors were, or could, sufficiently plead such claims, the court concluded,

> "To properly consider this Motion and whether the First Amended Complaint should survive, it is necessary that Plaintiff-Debtors, based solely on the information in Proof of Claim No. 5 and the attachments thereto, provide the court with their analysis of what can and cannot (explaining why it cannot) be computed for Defendant's Proof of Claim - not merely state that principal plus arrearage does not equal the claim amount. If Plaintiff-Debtors believe that the information on Proof of Claim No. 5 is insufficient or inconsistent with the claim amount, they must specifically identify at what points in the analysis there is missing information which precludes the computation."

Order, Dckt. 25.

The Supplemental Briefs ordered by the court required, and were limited to,

A. Plaintiff-Debtors providing the court with their detailed computations of the secured claim based on the information in Proof of Claim No. 5.

B. Replies by Defendant limited solely to the computations

provided in the Plaintiff-3 Debtors' in the Supplemental Brief.

Id.

Plaintiff-Debtors' Supplemental Brief

The "computations" provided by Plaintiff-Debtors in their Supplemental Brief consists of a 10 page Supplemental Brief (Dckt. 30), 6 pages of exhibits (Dckt. 31), and an 11 page declaration provided by David Pereira (Dckt. 32). The Supplemental Brief contains extensive legal arguments and citations – well beyond providing the court with "detailed computations of the secured claim based on the information in Proof of Claim No. 5. The court culls from the Supplemental Brief the following "detailed computations" based on Proof of Claim No. 5,

A. The Amortization Table prepared for Plaintiff-Debtors "reveals that after the January 1, 2014 payment is applied the balance is $276,475.98."

B. The Proof of Claim balance is $285,917.45.

C. The Amortization Schedule reveals that $26,187.04 of interest *Id.* due for the payments during the period July 1, 2012 through January 1, 2014.

D. Proof of Claim lists $27,222.13 in interest due (a difference of $1,035.09).

Supplemental Brief, Dckt. 30. The Supplemental Brief then instructs the court to review the Amortization Table/Schedule and declaration to determine the "detailed computations."

Exhibit A, the Loan Amortization Schedule, provided by Plaintiff-Debtors as part of their "detailed computations" consists of the following. This amortization table was created using the Microsoft Excel loan amortization program.

A. The beginning loan balance is $317,000.00.

B. It is amortized over 30 years, with 360 equal monthly payments.

C. The first payment is due on September 1, 2005.

D. The monthly payments are $1,875.18.

E. This payments consists of only principal and interest [not including any escrow payments for insurance or taxes for the property securing the loan].

F. The Amortization Schedules shows that the principal balance after the January 1, 2014 payment (assuming all payments to that date were timely made) would be $276,475.98.

Exhibit A, Dckt. 31.

The Plaintiff-Debtors filed their Chapter 13 bankruptcy case on January 13, 2014.

From the "detailed computations" provided in the Supplemental Brief the court understands what the Plaintiff-Debtors want to allege is:

A. Properly computed, the principal amount of Defendant's claim was $276,475.98 as of the January 13, 2014 commencement of this bankruptcy case (based on the Amortization Schedule, not the actual payments made by the Plaintiff-Debtor).

B. Properly computed, the interest arrearage for Defendant's claim was $26,187.04 (based on the Amortization Schedule, not actual payments made by Plaintiff-Debtors).

C. Plaintiff-Debtors cannot compute any arrearage for property taxes, insurance, or any costs which Defendant asserts were advanced or unpaid.

In addition to failing to comply with the Order for supplemental briefing to provide detailed computations of how Plaintiff-Debtors computed the claim (rather than the insufficient grounds stated in the complaint that "principal + arrearage≠ claim amount"), as discussed below, the Supplemental Brief fails to show the court that Plaintiff-Debtors can clearly, state the necessary grounds to defeat a motion to dismiss for failure to state a claim. FN.1.

FN.1. The court continued the hearing and ordered the Supplemental Briefing as a courtesy to Plaintiff-Debtors' counsel, rather than granting the motion and requiring counsel to file a motion for leave to file a second amended complaint. Unfortunately, the Plaintiff-Debtors took it merely as an opportunity to argue irrelevant legal points, advance grounds not stated in the First Amended Complaint, and attempt to portray the payment of a mortgage as an extremely complex transaction that exceed the ability of attorneys and experts to clearly state what they assert is owed.

Plaintiff-Debtors offer an amortization schedule prepared by David Pereira. Dckt. 31, Exh. A. This amortization schedule shows that after the January 1, 2014 payment is applied, the balance is $276,475.98. However, this presumes that all principal and interest payments had made during the period of June 1, 2012 through January 1, 2014. They had not been made by the

Plaintiff-Debtors.

Plaintiff-Debtors are correct when they state that the July 1, 2012 principal balance shown on their Amortization Schedule of $285,917.45 is different than the $285,723.86 stated in the Proof of Claim – a difference of ($193.59) less than the Amortization Schedule. This is a -0.06771% less than Plaintiff-Debtors compute on their Amortization Schedule.

Though not alleged in the First Amended Complaint, Plaintiff-Debtors argue that they dispute the simple interest calculation of interest because it is different than the interest amounts which are computed on the Amortization Schedule. As stated by Defendant and this court above, such a contention is not financially sound as it computes interest on a reducing principal balance. The principal balance was not being reduced because the Plaintiff-Debtors were not making the payments. This error is obvious on the face of the Amortization Schedule – though ignored by the Plaintiff-Debtors and their expert.

Defendant's Supplemental Brief

Defendant's Supplemental Brief responds in kind to that of the Plaintiff-Debtors, addressing both the computation point and then the other, extraneous points that Plaintiff-Debtors chose to argue.

Defendant provides its "detailed computation" by directing the court to the information provided in Proof of Claim No. 5. The analysis is distilled by the court as follows.

A. Plaintiff-Debtors' note, like most other mortgage loans, calculates interest using a simple interest method, although an amortization table may be used to facilitate billing.

B. Defendant next asserts that the note controls the amounts owed under the Proof of Claim. Nothing in the note calls for a waiver of interest if a payment is made late or demands that payments be made according to the amortization schedule. The note only calls for payment of simple interest. Defendant's use of an amortization schedule to facilitate collection is not a waiver of its right to collect interest due because of defaulted payments. *See George v. Midland Mortg. Co. (In re George)*, 2005 WL 6960199 (9th Cir. Aug. 11, 2005).

C. As of the January 14, 2014 commencement of the bankruptcy case, the Plaintiff-Debtors were in default for the regular, amortized loan payments for the months July 1, 2012 through January 1, 2014 (twenty payments, which include interest accruing from June 1, 2014).

D. The Proof of Claim lists $27,222.13, which is the simple

interest that accrued on the static principal balance for that time. The principal balance at the time was $285,723.86 and the interest rate was 5.875%. Thus, interest accrued at $45.98 per day over the 592 days the loan was in default. That totals $27,222.13.

E. The accrued interest of $27,222.13, which is computed on the principal balance as of July 1, 2012.

FN.2.

FN.2. The court tests this part of Plaintiff-Debtors' analysis using Plaintiff-Debtors' Amortization Schedule (Exhibit A, Dckt. 31) upon which Plaintiff-Debtors' based their "detailed computation." The principal balance as shown on the Amortization Schedule as of the asserted July 1, 2012 default is $285,917.45. (Defendant asserts that the principal arrearage as of July 1, 2012 is $285,723.86, a ($193.59) difference.) The interest rate for the loan is 5.875% (as stated in the Note attached to Proof of Claim No. 5 and used by Plaintiff-Debtors in the Amortization Schedule).

Annual, simple interest at 5.875% on a principal balance of $285,917.45 equals $16,797.65. A month's interest can be computed one of two ways. First, the $16,16,797.65 can be divided by 12 and the resulting quotient is $1,399.80. This is an average monthly amount, which does not take into account 28 (29 during a leap year), 30, and 31 day months. Multiplying $1,399.80 time 19.45 months (June 1, 2012 through January 14, 2014) yields a product of $27,226.19 as the interest arrearage computation. (Defendant states that the interest arrearage is $27,222.13, a $4.06 difference.)

A more refined analysis would be to determine the per-day interest accrual, multiple that times the actual number of days for each of the 19.45 months, and determine the interest arrearage due. Annual interest of $16,797.65 divided by 365 yields a per-day interest quotient of $46.02 of interest per day. If the creditor uses a 360 day year to compute, the court computes the per day interest rate to be $46.66.

For the period June 1, 2012 through January 14, 2014, the court computes that there were 610 calendar days. 610 days multiplied by $46.02 interest per day yields an accrued interest computation of $28,072.79.

F. Plaintiff-Debtors' use of the amortization table to add up the interest payments contains an error in computing interest on a reduced principal balance for the June 1, 2012 through January 2014 period, when no principal payments were made by the Plaintiff-Debtors.

Federal Rule of Civil Procedure 12(b)(6)

The court extended the courtesy to Plaintiff-Debtors' counsel to file a supplemental brief to provide "detailed computations" of how Plaintiff-Debtors computed the claim, rather than the insufficient grounds stated in the complaint that "principal + arrearage≠ claim amount," and Plaintiff-Debtors misused that limited opportunity to argue other issues and provide a declaration. That does not change the nature of this Motion, which is a Rule 12(b)(6) motion to dismiss. The issue is whether the First Amended Complaint, as pleaded by the Plaintiff-Debtors is sufficient. This is not a summary judgment motion or one in which the court resolves conflicting evidence.

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).

REVIEW OF MOTION

Defendant filed Proof of Claim No. 5 in the parent bankruptcy case as a secured claim. Plaintiff-Debtors filed this Adversary Proceeding, in which the First Cause of Action in the First Amended Complaint is an Objection to Proof of Claim No. 5.

This Motion to Dismiss requires an analysis of Proof of Claim No. 5, including the attachments thereto, and raises several points which need to be addressed by the parties. Proof of Claim No. 5 asserts a total secured claim in the amount of $319,372.42. It also asserts that there is a pre-petition arrearage of $44,128.01. The Mortgage Proof of Claim Attachment, which is part of Proof of Claim No. 5, states that the principal balance is $285.723.86.

At this point, Plaintiff-Debtors' review of Proof of Claim No. 5 stops. Plaintiff-Debtors argue that if the principal amount is $285,723.86 and the arrearage is $44,128.01, then "simple math" leads one to conclude that the total claim should be $329,851.87. However, Proof of Claim No. 5 asserts only a $319,372.42 secured claim – $10,479.45 less than Plaintiff-Debtors would compute it to be using the information included in Proof of Claim No. 5. From this inconsistency, Plaintiff-Debtors allege:

a. The $319,372.42 amount "[h]as no reasonable relationship to the amounts owed as on [sic] their claim,..."

b. "None of the numbers reflected on the POC can be reconciled."

c. The detail provided in the Proof of Claim "is insufficient for any kind of expert or professional to reconcile the difference between the actual amount demanded in the claim ($319,372.42) and the principal balance ($285,723.86) plus the cure amount ($44,128.01)."

First Amended Complaint ¶¶ 16, 17, 18.

The Motion to Dismiss the First Amended Complaint consists of one-half of one page of pleading. The grounds stated with particularity upon which the Motion is based (Fed. R. Civ. P. 7(b) and Fed. R. Bankr. P. 7007) merely states that, "[t]he first cause of action for objection to claim fails to allege any facts which would defeat the prima facie validity of the claim." Motion, Dckt. 16. On its face, such "grounds" do not support dismissal of the First Amended

Complaint. The First Amended Complaint clearly alleges that the numbers stated in Proof of Claim No. 5 are internally inconsistent and thereby inherently incorrect. Rather than stating with particularity grounds in the Motion, Defendant merely spouts the base legal standard of Federal Rule of Bankruptcy Procedure 12(b)(6) and Federal Rule of Bankruptcy Procedure 7012.

In "support" of the Motion, Defendant filed a nine-page Points and Authorities. Dckt. 18. It appears that the grounds required to be stated in the Motion are buried among the citations, quotations, and arguments in the Points and Authorities. The portion of the Points and Authorities stating Defendant's "simple" basis for contending that the First Amended Complaint fails to state a claim in the cause of action runs six pages.

DEFENDANT'S ANALYSIS IN THE POINTS AND AUTHORITIES

Though not stated in the Motion, Defendant does provide in its Points and Authorities a narrative analysis Proof of Claim No. 5. Though somewhat obscured, Defendant does walk through the key points. These are summarized as follows:

1. "Adding the arrears to the principal balance double-counts the principal payments included in the arrears, and thus one would expect this number to be higher than the total balance of the Loan." Points and Authorities, pg. 2:9-11.

2. "The sole challenge to the claim which is stated in any detail arises out of a supposed inconsistency on the face of the claim...Pursuant to Debtors, these numbers render the proof of claim defective as inconsistent because the sum of the principal amount and the arrearage amount is greater than the total balance of the claim." Id., pg 3:21-26.

3. "Attachment A [sic.] show that Debtors failed to make 19 pre-petition installment payments from 7/1/12 to 1/1/2014 for total arrears of $35,628.42 in principal and interest payments." Id., pg. 4:7-8.

4. "Based on the terms of the loan and arrears, it would be clear error if the principal balance and arrearage balance equaled the total balance of the loan." Id., pg. 4:9-10.

5. "By adding the arrears and principal balance together, Debtors are double-counting the principal balance included in the arrears payments." Id., pg. 4:13-14.

6. "Attachment A breaks down the financial of the loan in detail." Id., pg. 5:28.

7. "In the first section, it breaks down the unpaid principal and

interest balance. As to interest, it shows that interest accumulated... from June 1, 2012 to January 14, 2014 for a total of $27,222.13." Id., pg. 6:1-3.

8. "Attachment A...lists a total of $9,839.87 in total pre-petition charges." Id., pg. 6:4-5.

9. "However, as Attachment A notes, the escrow shortage of $6,507.65 is only to be used in calculating the arrears. Attachment A then lists the actual escrow balance of $4,434.49 and states that this is the number to be used in calculating the total claim amount." Id., 6:5-8. FN.3.

10. When adding together the numbers from Attachment A (and not using the pre-petition arrearage shown in Part 2 of Attachment A but using the pre-petition arrearage shown in the separate Secured claim Breakdown), Defendant states, "[a]nd then subtract the suspense amount of $1,340.28 for a total balance of, you guessed it, $319.372.42." *Id.*, pg. 6:19-20.

FN.3. In footnote 2 to the Points and Authorities, Defendant explains why two different numbers are stated concerning the single "arrearage." This explanation is not provided in Attachment A. It is explained that the "arrearage" listed in the pre-petition arrearage includes the future post-petition escrow amounts which would not have to be paid if the Plaintiff-Debtors paid the loan in full as of the date the bankruptcy case was filed.

PLAINTIFF-DEBTORS' OPPOSITION RELATING TO FIRST CAUSE OF ACTION

The Plaintiff-Debtors filed an opposition to the instant Motion on September 24, 2014. Dckt. 21. The Opposition does not provide an analysis of the information in Proof of Claim No. 5, but merely repeatedly advances the conclusion that "the math just does not add up." However, as shown by the court's review of Proof of Claim No. 5, the math, on its face, appears to "add up" for the financial information provided.

Plaintiff-Debtors seek to defeat the Motion to Dismiss by asserting a violation of 12 C.F.R. § 1026.36. However, such a claim is not pleaded in the Objection to Claim. Rather, it is merely argued that principal plus arrearage does not equal amount stated for secured claim, therefore Proof of Claim No. 5 is inherently unreliable.

DISCUSSION

The court considers the First Amended Complaint filed by the Plaintiff-Debtors. The court had hoped that the supplemental briefing to force both

parties, specifically the Plaintiff-Debtors, to provided a "detailed computation" of what they asserted the claim to be would force the parties to focus on the actual claim and not generic allegations. What has been shown is that the Plaintiff-Debtors are computing the claim on a hypothetical basis, relying on the Amortization Schedule for payments not made by the Plaintiff-Debtors.

First Cause of Action - Objection to Claim

Nationstar in the instant motion argues that the first cause of action for objection to claim fails as the complain fails to allege any facts that would defeat the prima facie validity of the claim.

The First Amended Complaint states the Objection to the Claim as,

> d. Proof of Claim No. 5 filed by Defendant asserts a $319,372.42 secured claim.
>
> e. Proof of Claim No. 5 states the claim to consist of,
>
> i. Principal Balance.....$285,723.86
>
> ii. Cure Amount.....$ 44,128.01
>
> f. When Plaintiff-Debtors add together the Principal Balance and Cure Amount, it totals $329,851.87.
>
> g. The difference between the total of the Principal Balance and Cure Amount, and the $319,372.86 secured claim amount cannot be "reconciled."
>
> h. Proof of Claim No. 5 is "insufficient for any kind of expert or professional" to reconcile the difference."

First Amended Complaint, Dckt. 11.

This First Amended Complaint fails to 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). It merely states the obvious, adding the principal balance and the aggregate of defaulted monthly mortgage installments cannot equal the amount of the claim. The monthly mortgage installments includes both an interest payment and a principal payment.

The balance of the Objection to Claim consists of manifesto of allegations against mortgage lenders. It includes various points and authorities, argued in the abstract. The First Amended Complaint does not state grounds which apply to Proof of Claim No. 5, other than the "Principal + Arrearage ≠ Amount of Claim," Plaintiff-Debtors do not state any plausible

grounds for objecting to Proof of Claim No. 5.

The Motion is granted and the First Cause of Action, Objection to Claim, is dismissed.

Second Cause of Action - Declaratory Judgment

Defendant argues that the second cause of action for declaratory relief fails as the complaint does not allege any cognizable defect in the claim. Further, Plaintiff-Debtors may not bring a claim for declaratory relief when it duplicates a cause of action created by the bankruptcy code.

The First Amended Complaint states that "Plaintiff seeks a Declaratory Judgment to FRBP §7001(7) as the Plaintiff needs equitable relief and FRBP § 7001(9) as declaratory relief is needed to determine the rights of the parties and the actual amounts owed by the Debtor/Plaintiff since it appears [Defendant has] failed to submit a claim that can be reconciled." Dckt. 11, paragraph 48.

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.4. "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).

FN.4. 28 U.S.C. §2201 provides:

> § 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.

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.*

Here, the declaratory judgment sought is subsumed into the first cause of action objection to claim.

First, the court notes that Fed. R. Bankr. P. 7001 is merely an operative procedural rule. The rule, itself, does not provide for a cause of action but instead just requires that an adversary proceeding be filed when a party is seeking a declaratory or equitable relief. Fed. R. Bankr. P. 7001(7).

Furthermore, the Debtor is seeking a declaratory and/or equitable relief on the matter "to determine the rights of the parties and the actual amounts owed by the Debtor/Plaintiff." The question of what the actual amount owed on the secured claim is one that would be determined in the First Cause of Action on the objection to claim. It would be necessary when ruling on the objection to claim to determine what the actual value of the secured claim.

While the Plaintiff-Debtors do argue in their opposition that the declaratory relief is also asking "to determine the rights of the parties applying contract law regarding the controversy created related to the issue of breaching the contract and conversion," (Dckt. 21, pg. 7) the First Amended Complaint does not provide for any causes of actions under either breach of contract or conversion. Instead, the First Amended Complaint in the first cause of action makes generalized and opaque allegations concerning the note and deed of trust and accusations of breach of contract and conversion. These do not rise to a level of individual, stand-alone causes of actions that the court needs to determine the rights of the parties nor is it the declaratory relief the Debtor explicitly requests in the complaint. The court will not issue advisory opinions on what causes of actions the Plaintiff-Debtors may or may not be able to bring.

Because the second cause of action seeks a determination of the value of the secured claim held by Nationstar, which is subsumed into the first cause of action, the court grants the Motion as to the second cause of action and dismisses the second cause of action for declaratory relief.

Third Cause of Action - Attorneys' Fees

Nationstar argues that Plaintiff-Debtors' final cause of action for attorneys' fees fail as Plaintiff-Debtors are not the prevailing party under Cal. Civ. Code § 1717(a).

The First Amended Complaint states that:

> ¶51. By contract, the underlying obligation with the [Plaintiff-Debtors], [Plaintiff-Debtors] contends the contract has an attorney's fees provision. As such, under California Civil Code § 1717, a reciprocal contractual attorneys' fees statute, the Plaintiff is entitled to reimbursement of attorney's fees.
>
> ¶52. By statute, pursuant to California Civil Code § 1670.5, [Plaintiff-Debtors] is entitled to attorneys fees as the prevailing party in this action.

Dckt. 11, pg 8.

The requirements of claims for attorneys' fees in the Bankruptcy Code are set out by Federal Rule of Bankruptcy Procedure 7008(b), which provides that:

> A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third party complaint, answer, or reply as may be appropriate.

Courts have split on the issue of what constitutes a party having properly "pleaded as a claim in a complaint...., answer or reply" the right to attorneys' fees. This court identifies one line of cases from bankruptcy courts holding that a "claim" for attorney's fees does not need to be pleaded in the body of a complaint. *See First Nat'l Bank v. Bernhardy* (In re Bernhardy), 103 B.R. 198, 199 (Bankr. N.D. Ill. 1989) (holding, without discussing Rule 7008(b), that "[t]here is no provision in the Code or the rules that requires [a debtor] to plead a request for attorney's fees" and that if there were such a provision requiring specific pleading, a prayer for "'such other relief as is just' is sufficient"); accord, *Thorp Credit, Inc. v. Smith* (*In re Smith*), 54 B.R. 299, 303 (Bankr. S.D. Iowa 1985) ("[T]here [is no] good reason to hold that such pleading is required. 'Since § 523(d) clearly states that the debtor is entitled to costs and reasonable attorney's fees, the creditor is on notice that loss of his claim could result in his being assessed those fees and costs.'") (quoting *Commercial Union Ins. Co. v. Sidore* (*In re Sidore*), 41 B.R. 206, 209 (Bankr.W.D.N.Y.1984)).

This court applies a plain language reading of the requirements of Federal Rule of Bankruptcy Procedure 7008 (a) and (b), and Federal Rule of Civil Procedure 8(b). FN.5.

FN.5. The Supreme Court has been very clear in reading and applying the "plain language" stated by Congress in statutes. *Hartford Underwriters Insurance Company v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989). The basic direction is that Congress says in a statute what it means and means in a statute what it says. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992); (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917)); *United Savings Association of Texas v. Timbers of Inwood Forest Associates*, LTD., 484 U.S. 365, 371 (1988). This court will not presuppose that the Supreme Court or Congress, in adopting the Federal Rules of Bankruptcy Procedure, did so expecting that an inferior court would not first look to the plain language meaning of the Rule.

This is consistent with the holding of the Bankruptcy Appellate Panel in *In re Carey*, finding:

> The Complaint clearly stated in its first paragraph that Appellant sought an award of attorney's fees from the Debtor. In Paragraph 1 of the Complaint, Appellant identified the Promissory Note as a basis for its claim. In Paragraph 7 of the Complaint, Appellant referenced the Debtor's execution of the Replacement Guarantee. In Paragraph 10 of the Complaint, Appellant noted that it previously filed a complaint against the Debtor in the Marin County Superior Court seeking damages including attorney's fees. In its First Claim for Relief in the Complaint, Appellant realleged the first 18 paragraphs of the Complaint, including Paragraphs 1, 7 and 10. Finally, in its Prayer for Relief, Appellant requested a judgment for damages "including principal, accrued and accruing interest, costs, and attorney's fees."

In re Carey, 446 B.R. at 392.

The general pleading requirements for a complaint in federal court were addressed by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and restated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In discussing the minimum pleading requirement for a complaint, which only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 7(a)(2), the Supreme Court reaffirmed that more than "an unadorned, the-defendant-unlawfully-harmed-me accusation" is required. *Iqbal*, 556 U.S. at 678-679.

Further, a pleading which offers mere "labels and conclusions" of a "formulaic recitations of the elements of a cause of action" are insufficient. *Id*. A complaint must contain sufficient factual matter, if accepted as true, "to state a claim to relief that is plausible on its face." *Id*. It need not be probable that the plaintiff (or movant) will prevail, but there are sufficient grounds that a plausible claim has been pled.

Here, the Plaintiff-Debtors merely cite to California statutes that may or may not be applicable to the instant adversary proceeding. The court finds that Plaintiff-Debtors have not pleaded properly under Fed. R. Bankr. P. 7008(b). The Plaintiff-Debtors have not provided enough information to state grounds for relief or to properly explain why the contract and the two California statutes that the Plaintiff-Debtors base their claim on entitles them to the relief sought.

While the Plaintiff-Debtors do admit in their supplemental brief that Cal. Civ. Code § 1670.5 "Unconscionable Contract" was not the appropriate code section under which to request attorney's fees, the basis of their third cause of action remains insufficient. The Plaintiff-Debtors merely partially quote part of the Note as grounds in which attorney's fees are to be rewarded. Upon review of the Note, the cited section states:

> (E) Payment of Note Holder's Costs and Expenses: If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

Dckt. 11, Exhibit B, pg. 26. However, the Plaintiff-Debtors have not explained how or why the right to costs and expenses when the Note Holder has required immediate payment in full is applicable to the instant objection to claim. The Plaintiff-Debtors have failed to meet the pleading requirement of Fed. R. Bankr. P. 7008(b) as to why this contract provision is applicable and entitles them to attorney's fees.

Assuming arguendo, that the paragraph 6(E) of the Note applies, the Plaintiff-Debtors are not the "prevailing party" under Cal. Civ. Code § 1717 for reciprocal attorney fees. Cal. Civ. Code § 1717 states in relevant part,

> (a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in

addition to other costs.

Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.

Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void.

(b)(1) The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. Except as provided in paragraph (2), the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section.

(2) Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section.

Where the defendant alleges in his or her answer that he or she tendered to the plaintiff the full amount to which he or she was entitled, and thereupon deposits in court for the plaintiff, the amount so tendered, and the allegation is found to be true, then the defendant is deemed to be a party prevailing on the contract within the meaning of this section.

Where a deposit has been made pursuant to this section, the court shall, on the application of any party to the action, order the deposit to be invested in an insured, interest-bearing account. Interest on the amount shall be allocated to the parties in the same proportion as the original funds are allocated...

As discussed supra, Plaintiff-Debtors have failed to prevail on the previous two causes of actions by failing to state a claim upon relief can be granted. Therefore, because the first and second causes of action are dismissed for failure to state a claim, the Plaintiff-Debtors are not the "prevailing party" and are not entitled to attorney's fees under Cal. Civ. Code § 1717. The Plaintiff-Debtors have failed to raise any factual allegations that are enough to raise a right to relief above the speculative level as to the award of attorney's fees and the third cause of action is dismissed.

NO LEAVE TO FILE AMENDED COMPLAINT GRANTED

Having reviewed the Plaintiff-Debtors' "detailed computation" of the disputed claim, the court does not grant leave to further amend the complaint. It appears that Plaintiff-Debtors, counsel, and their expert need to reconvene and determine what bona fide objection, if any, exists to Proof of Claim No. 5 and how such grounds can be stated in a complaint. The pre-petition interest on the face of Proof of Claim No. 5 is ($4.06) less and the principal amount of the claim is ($193.59) less than the amounts stated on and computed from the Amortization Schedule.

In light of the Plaintiff-Debtors' Supplemental Brief stating the "detailed computation" (and their failure to comply with the order for supplemental briefing), the court is not confident that automatically allowing Plaintiff-Debtors to file a second amended complaint would result in a minimally sufficient complaint.

The court shall issue an interlocutory order dismissing the First Amended Complaint without leave to amend. The court will delay entering the final order until December 1, 2014.

Plaintiff-Debtors shall file a motion for leave to file a second amended complaint, if any, on or before December 1, 2014. If no such motion is filed, the court shall issue the final order granting the motion and dismissing the First Amended Complaint. The dismissal will be with prejudice.

If Plaintiff-Debtors file a timely motion for leave to file a second amended complaint, a copy of the proposed second amended complaint shall be filed as an exhibit in support of the motion. In preparing and filing a motion for leave to file a second amended complaint and drafting the proposed second amended complaint, if any, Plaintiff-Debtors shall first review the basic requirements for pleading claims in federal court and shall insure that a second amended complaint, if any, shall set forth enough factual matter to establish plausible grounds for the relief sought.

If a motion for leave to file a second amended complaint is granted, then the final order granting the Motion to Dismiss the First Amended Complaint shall be without prejudice. If the motion for leave to file a second amended complaint is denied, the order dismissing the First Amended Complaint shall be

with 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 First Amended Complaint for Failure to State a Claim filed by Nationstar Mortgage, LLC having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss First Amended Complaint for Failure to State a Claim is granted as to the First, Second, and Third Causes of Action and the case is dismissed.
>
> This is an Interim Order, with the final order of the court to be entered as set forth in this order. The court will delay entering the final order until after December 1, 2014.
>
> **IT IS FURTHER ORDERED** that Plaintiff-Debtors shall file a motion for leave to file a second amended complaint, if any, on or before December 1, 2014. If no such motion is timely filed, the court shall issue the final order granting the motion and dismissing the First Amended Complaint. The dismissal will be with prejudice.
>
> **IT IS FURTHER ORDERED** that if Plaintiff-Debtors file a timely motion for leave to file a second amended complaint, a copy of the proposed second amended complaint shall be filed as an exhibit in support of the motion. In preparing and filing a motion for leave to file a second amended complaint and drafting the proposed second amended complaint, if any, Plaintiff-Debtors shall first review the basic requirements for pleading claims in federal court and shall insure that a second amended complaint, if any, shall set forth enough factual matter to establish plausible grounds for the relief sought.
>
> If a motion for leave to file a second amended complaint is granted, then the final order granting the Motion to Dismiss the First Amended Complaint shall be without prejudice. If the motion for leave to file a second amended complaint is denied, the order dismissing the First Amended

Complaint shall be with prejudice.

3. 08-24727-E-13 JAE LEE AND KI CHUNG
14-2272
LEE ET AL V. HFC ET AL

STATUS CONFERENCE RE: COMPLAINT
9-16-14 [1]

Plaintiff's Atty: Mark A. Wolff
Defendant's Atty: unknown

Adv. Filed: 9/16/14
Answer: 10/31/14

Nature of Action:
Declaratory judgment
Validity, priority or extent of lien or other interest in property
Recovery of money/property - other

Notes:

Stipulation to Extend Time for Defendant, Household Finance Corporation of California, to Respond to Initial Complaint by 14 Days filed 10/20/14 [Dckt 7]; no order approving

Answer filed 10/31/14

SUMMARY OF COMPLAINT

The Complaint asserts that Defendants obtained judgments against Plaintiff-Debtors prior to the commencement of the Plaintiff-Debtors' Chapter 13 Bankruptcy Case. Defendants recorded abstracts of judgment for each of the judgments. Plaintiffs have completed their Chapter 13 Plan and received their discharge. It is alleged that Defendants did not obtain a judgment lien against the personal property assets of the Plaintiff-Debtors, including their business (restaurant) assets. Defendants are asserting lien rights against the personal property assets of the Plaintiff-Debtors. This conduct has interfered with the Plaintiff-Debtors sale of their assets.

Plaintiff-Debtors seek a determination that the Defendants have violated the discharge injunction, damages for such violation, and a declaration that the Defendants have no liens against or interests in the personal property of the Plaintiff-Debtors.

SUMMARY OF ANSWER

Defendant Household Finance Corporation of California. The Answer admits and denies specific allegations in the Complaint.

FINAL BANKRUPTCY COURT JUDGMENT

The Complaint alleges that jurisdiction exists for this Adversary Proceeding pursuant to 28 U.S.C. § 1334 and 157. Bankruptcy cases and this adversary proceeding have been referral to this bankruptcy court from the United States District Court for the Eastern District of California. Further, that this is a core proceeding before this bankruptcy court pursuant to 28 U.S.C. § 157(b)(2)(A), (C), L), and (O). Complaint, ¶¶ 1, 2, Dckt. 1. The Defendant admits the jurisdiction and that this is a core proceeding. Answer, ¶ 2, Dckt. 8. Fed. R. Bank. P. 7012 requires that a defendant admit or deny whether the adversary proceeding is a core proceeding. To the extent that any issues in this Adversary Proceeding are related to proceedings, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all claims and issues in this Adversary Proceeding referred to the bankruptcy court.

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

a. The Plaintiff alleges that jurisdiction exists for this Adversary Proceeding pursuant to 28 U.S.C. § 1334 and 157. Bankruptcy cases and this adversary proceeding have been referral to this bankruptcy court from the United States District Court for the Eastern District of California. Further, that this is a core proceeding before this bankruptcy court pursuant to 28 U.S.C. § 157(b)(2)(A), (C), L), and (O). Complaint, ¶¶ 1, 2, Dckt. 1. The Defendant admits the jurisdiction and that this is a core proceeding. Answer, ¶ 2, Dckt. 8. Fed. R. Bank. P. 7012 requires that a defendant admit or deny whether the adversary proceeding is a core proceeding. To the extent that any issues in this Adversary Proceeding are related to proceedings, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all claims and issues in this Adversary Proceeding referred to the bankruptcy court.

b. Initial Disclosures shall be made on or before -----, 2014.

c. Expert Witnesses shall be disclosed on or before ----------, 2013, and Expert Witness Reports, if any, shall be exchanged on or before ----------, 2014.

d. Discovery closes, including the hearing of all discovery motions, on ----------, 2015.

e. Dispositive Motions shall be heard before -----------, 2015.

f. The Pre-Trial Conference in this Adversary Proceeding shall be conducted at ------- p.m. on ------------, 2015.

4. 09-44339-E-13 GLEN PADAYACHEE **STATUS CONFERENCE RE: COMPLAINT**
14-2266 **9-9-14 [1]**
PADAYACHEE V. U.S. BANK
NATIONAL ASSOCIATION

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: Robert S. McWhorter

Final Ruling: No appearance at the November 12, 2014 Status Conference is required.

The Status Conference is continued to 1:30 p.m. on December 11, 2014.

On October 8, 2014, Defendant U.S. Bank, N.A. filed a Motion to Dismiss the Complaint. It is asserted that the Complaint (1) fails to state a claim for which relief may be granted and (2) that federal court jurisdiction may not properly be exercised for the claims alleged in the Complaint. The court continues the status conference to be held in conjunction with the motion to dismiss.

Adv. Filed: 9/9/14
Answer: none

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

Notes:

[NOS-1] U.S. Bank National Association's Motion to Dismiss Complaint filed 10/8/14 [Dckt 7], set for hearing 12/11/14 at 1:30 p.m.

5. 10-26240-E-13 STEVE/KRISTINE SCHARER
14-2253
SCHARER ET AL V. WELLS FARGO BANK, N.A.

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

Continued to 1/21/15 by order dated 11/3/14 [Dckt 24]

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

Final Ruling: No appearance at the November 12, 2014 Status Conference is required.

The Status Conference is continued to 1:30 p.m. on January 21, 2014.

Adv. Filed: 8/28/14
Amd Cmplt Filed: 10/9/14

Answer: none

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

Notes:

[LLL-2] Stipulation Extending Defendant's Deadline to Respond to First Amended Complaint filed 10/22/14 [Dckt 21]; Order granting filed 11/3/14 [Dckt 23]

Joint Discovery Plan filed 11/5/14 [Dckt 26]

6. 09-26842-E-13 ROBERT SISEMORE **STATUS CONFERENCE RE: COMPLAINT**
14-2246 **8-22-14 [1]**
SISEMORE V. GREEN TREE SERVICING, LLC

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: Adam N. Barasch

Adv. Filed: 8/22/14
Answer:

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

Notes:

Stipulation to Extend Responsive Pleading Deadline for Defendant Green Tree Servicing LLC filed 9/17/14 [Dckt 7]; Order approving filed 9/17/14 [Dckt 9]

SUMMARY OF COMPLAINT

The Complaint alleges that Defendant's secured claim was valued at $0.00 by the court pursuant to 11 U.S.C. § 506(a). Further, that Plaintiff-Debtor has completed his chapter 13 Plan, having provided for the $0.00 secured claim of Defendant. Plaintiff-Debtor seeks a determination that the deed of trust securing Defendant's claim is void and that Plaintiff-Debtor holds title to the real property free and clear of said lien. Damages and attorneys' fees are sought relating to the Defendant's failure to reconvey the void deed of trust.

7. 11-27845-E-11 IVAN/MARETTA LEE
14-2060
LEE ET AL V. SELECT PORTFOLIO SERVICING, INC. ET AL

CONTINUED STATUS CONFERENCE RE: COMPLAINT
2-20-14 [1]

Plaintiff's Atty: Raymond E. Willis
Defendant's Atty:
Sanford Shatz [Select Portfolio Servicing, Inc.]
Adam N. Barasch [Bank of America, N.A.]

Adv. Filed: 2/20/14
Answer: none

Nature of Action:
Injunctive relief - other
Declaratory judgment

Notes:

Continued from 10/15/14. On or before 10/30/14, the Plaintiff-Debtors and Select Portfolio Servicing, LLC are to file a joint scheduling statement for (1) Select to provide a written statement of the information required for the negotiations for establishing a payment schedule for the post-petition arrearage, (2) the time for Plaintiff-Debtors to respond, and (3) for the parties to meet and confer regarding the information.

If the matter has not been resolved, the court will either appoint a mediator to assist in the resolution or set a discovery schedule for this Adversary Proceeding.

Joint Scheduling Statement filed 10/31/14 [Dckt 28]

Plaintiff's Status Conference Statement filed 11/3/14 [Dckt 30

8. 11-46148-E-7 ASHWINDAR KAUR
13-2342
EDMONDS V. MATHFALLU ET AL

PRE-TRIAL CONFERENCE RE: COMPLAINT TO RECOVER AVOIDABLE TRANSFERS
10-31-13 [1]

Final Ruling: No appearance at the November 12, 2014 Pre-Trial Conference is required.

Plaintiff's Atty: Carl W. Collins
Defendant's Atty: Pro Se

Adv. Filed: 10/31/13
Answer: 2/11/14

Nature of Action:
Recovery of money/property - other

The Pretrial Conference is continued to 2:30 p.m. on January 21, 2015.

NOVEMBER 12, 2014 PRETRIAL CONFERENCE

The court having granted summary judgment for the Plaintiff and the proposed judgment lodged with the court, the Pre-Trial Conference is continued to 2:30 p.m. on January 21, 2015.

Notes:

Scheduling Order-
Initial disclosures by 3/31/14
Close of discovery 7/17/14
Dispositive motions heard by 9/26/14

[CWC-1] Plaintiff's Motion for Summary Judgment filed 8/20/14 [Dckt 28]; Order denying in part and granting in part filed 9/26/14 [Dckt 39]

Bill of Costs filed 11/4/14 [Dckt 40]

9. 11-46148-E-7 ASHWINDAR KAUR
13-2343
EDMONDS V. KAUR ET AL

PRE-TRIAL CONFERENCE RE: COMPLAINT TO RECOVER AVOIDABLE TRANSFERS
11-1-13 [1]

Final Ruling: No appearance at the November 12, 2014 Pre-Trial Conference is required.

Plaintiff's Atty: Carl W. Collins
Defendant's Atty: Pro Se

Adv. Filed: 11/1/13
Answer: none

Nature of Action:
Recovery of money/property - other

The Pretrial Conference is continued to 2:30 p.m. on January 21, 2015.

NOVEMBER 12, 2014 PRETRIAL CONFERENCE

The court having granted summary judgment for the Plaintiff and the proposed judgment lodged with the court, the Pre-Trial Conference is continued to 2:30 p.m. on January 21, 2015.

Notes:

Scheduling Order-
Initial disclosures by 3/31/14
Close of discovery 7/17/14
Dispositive motions heard by 9/26/14

[CWC-1] Plaintiff's Motion for Summary Judgment filed 8/20/14 [Dckt 28]; Order denying in part and granting in part filed 9/26/14 [Dckt 36]

Bill of Costs filed 11/4/14 [Dckt 38]

10. 11-25267-E-13 MIKE KENDRICK
14-2259
KENDRICK, JR V. CITIMORTGAGE, INC.

STATUS CONFERENCE RE: COMPLAINT
9-4-14 [1]

Final Ruling: No appearance at the November 12, 2014 Status Conference is required.

The Status Conference is continued to 2:30 p.m. on January 21, 2015.

NOVEMBER 12, 2014 STATUS CONFERENCE

The Plaintiff-Debtor reports that Defendant's counsel has contacted Plaintiff's counsel and requested that the Status Conference be continued to allow Defendant the opportunity to record the deed of reconveyance and the parties to resolve this matter without further litigation. Plaintiff-Debtor requests that the Status Conference be continued for sixty days.

Plaintiff's Atty: Douglas B. Jacobs
Defendant's Atty: unknown

Adv. Filed: 9/4/14
Answer: none

Nature of Action:
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 the bankruptcy case)

Notes:

Plaintiff's Status Conference Statement filed 10/29/14 [Dckt 8]

SUMMARY OF COMPLAINT

The Complaint alleges that Defendant's secured claim was valued at $0.00 by order of the court. The Plaintiff has completed his Chapter 13 Plan, having provided for the $0.00 secured claim. The Plan having been completed, there is no remaining debt secured by the deed of trust securing Defendant's claim. Plaintiff seeks a judgment determining the deed of trust to be void and to hold title free and clear of such lien or interest. Further, damages and attorneys' fees for brining this action.

SUMMARY OF ANSWER

The Answer admits and denies specific allegations in the Complaint.

The Answer asserts that Paragraph 3 of the complaint states legal conclusions regarding jurisdiction and venue, "and as such, do not require a response from [Defendant]." That statement is incorrect. Federal Rule of Bankruptcy Procedure 7012(b) [emphasis added] provides,

> (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.

The failure to deny an allegation is deemed to be an admission what has been alleged. Fed. R. Civ. P. 8(a)(8), Fed. R. Bankr. P. 7008.

FINAL BANKRUPTCY COURT JUDGMENT

The Complaint alleges that jurisdiction exists for this Adversary Proceeding pursuant to 28 U.S.C. § 1337 (which appears to be a typographical error in light of the grant of federal court jurisdiction for bankruptcy cases and related matters existing pursuant to 28 U.S.C. § 1334) and 157, and the referral to this bankruptcy court from the United States District Court for the Eastern District of California. Further, that this is a core proceeding before this bankruptcy court pursuant to 28 U.S.C. § 157(b)(2)(K) and (L). Complaint, ¶ 3, Dckt. 1. The Defendant fails to deny the allegations of jurisdiction and that this is a core proceeding. Answer, ¶ 3, Dckt. 10. To the extent that any issues in this Adversary Proceeding are related to proceedings, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all claims and issues in this Adversary Proceeding referred to the bankruptcy court.

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

a. The Plaintiff alleges that jurisdiction exists for this Adversary Proceeding pursuant to 28 U.S.C. § 1337 (which appears to be a typographical error in light of the grant of federal court jurisdiction for bankruptcy cases and related matters existing pursuant to 28 U.S.C. § 1334) and 157, and the referral to this bankruptcy court from the United States District Court for the Eastern District of California. Further, that this is a core proceeding before this bankruptcy court pursuant to 28 U.S.C. § 157(b)(2)(K) and (L). Complaint, ¶ 3, Dckt. 1. The Defendant fails to deny the allegations of jurisdiction and that this is a core proceeding. Answer, ¶ 3,

Dckt. 10. To the extent that any issues in this Adversary Proceeding are related to proceedings, the parties consented on the record to this bankruptcy court entering the final orders and judgement in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all claims and issues in this Adversary Proceeding referred to the bankruptcy court.

b. Initial Disclosures shall be made on or before -----, **2014**.

c. Expert Witnesses shall be disclosed on or before ----------, 2013, and Expert Witness Reports, if any, shall be exchanged on or before ----------, 2014.

d. Discovery closes, including the hearing of all discovery motions, on ----------, 2014.

e. Dispositive Motions shall be heard before ----------, 2014.

f. The Pre-Trial Conference in this Adversary Proceeding shall be conducted at ------- p.m. on ----------, 2014.

11. 14-23471-E-11 ERROL/SUZANNE BURR **CONTINUED STATUS CONFERENCE RE: COMPLAINT**
14-2184 **6-24-14 [1]**
BURR ET AL V. SHINE ET AL

Continued to 1/21/15 at 2:30 p.m. by order dated 11/3/14 [Dckt 38]

Final Ruling: No appearance at the November 12, 2014 Status Conference is required.

The Status Conference is continued to 1:30 p.m. on January 21, 2015.

Plaintiff's Atty: Steven A. White
Defendant's Atty:
Betsy S. Kimball [Raymond E. Shine]
Unknown [Shine & Compton; Shine, Compton & Nelder]
Real Party in Interest:
J. Luke Hendrix [Susan K. Smith]

Adv. Filed: 6/24/14
Answer:
Raymond E. Shine 7/7/14

Nature of Action:

Determination of removed claim or cause
Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)
Declaratory judgment

Notes:

12. 11-48050-E-7 STAFF USA, INC.
MHK-4

CONTINUED EVIDENTIARY RE: MOTION FOR ORDER TO SHOW CAUSE 7-18-13 [257]

No 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.

CONT. FROM 12-12-13, 10-24-13, 8-29-13

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

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney, Chapter 11 Trustee, all creditors, and Office of the United States Trustee on July 18, 2013. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion for Order to Show Cause 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 XXXX

NOVEMBER 12, 2014 HEARING

At the hearing, -----

OCTOBER 15, 2014 HEARING

At the hearing, Counsel for the Professional Corporation presented the court with W. Austin Cooper's declaration and the declaration of a Nurse

Practitioner stating that Mr. Cooper could return to "school/work" after November 9, 2014. Counsel and Mr. Cooper, through his declaration, stated that Mr. Cooper was having to undergo a heart procedure.

The court continues the hearing to afford Counsel for W. Austin Cooper, a Professional Corporation, and W. Austin Cooper, who is litigating this matter in pro se the opportunity to provide the court with the declaration from Mr. Cooper's cardiologist providing credible testimony as to Mr. Cooper's medical condition and whether he will be able to participate as a party, in pro se or with counsel, and be a witness.

On or before October 31, W. Austin Cooper, a professional corporation shall file and serve the declaration of Mr. Cooper's treating physician who can competently testify as to his ability to participate in this Contested Matter.

OCTOBER 1, 2014 HEARING

Robert Cameron, attorney for W. Austin Cooper, a Professional Corporation, filed with the court a notice of unavailability of W. Austin Cooper because of medical reasons. It is unknown at this time whether the medical impairment is short-term or long-term, for which a personal representative may need to be appointed for Mr. Cooper personally. W. Austin Cooper is representing himself, in *pro se*.

No Direct Testimony Statements was presented by any of the parties. Only the Plan Administrator has presented exhibits, 1-17. The time for presenting Direct Testimony States and Exhibits has closed, and has not been extended by the court due to this eve of trial stated disability and requested continuance.

The court ordered that a Status Conference will be conducted on October 15, 2014 at 9:59 a.m. to determine when the evidentiary hearing should be conducted and whether Mr. Cooper has a long term medical impairment which will require the appointment of a personal representative. If there is such impairment and the Plan Administrator cannot call Mr. Cooper as an adverse witness, the parties shall address whether there is a reasonable accommodation which can be made for Mr. Cooper to provide "hostile" testimony when called by the Plan Administrator and proper rebuttal testimony, or whether such testimony on both sides is not available.

JULY 9, 2014 HEARING

No appearance was made at the hearing by W. Austin Cooper or W. Austin Cooper, a Professional Corporation. The issued an Evidentiary Hearing Order setting the following dates and deadlines:

A. Evidence shall be presented as provided in Local Bankruptcy

Rule 9017-1.

B. The Evidentiary Hearing shall be conducted at 9:30 a.m. on October 1, 2014

C. Responses to evidentiary objections shall be filed, lodged with the court, and served by September 24, 2014.

D. September 17 – Hearing Briefs and Evidentiary Objections shall be filed, lodged with the court, and served on or before September 17, 2014.

E. W. Austin Cooper and W. Austin Cooper, a Professional Corporation, shall lodge with the court and serve Direct Testimony Statements and Exhibits on or before September 10, 2014.

F. Thomas A. Aceituno, the Chapter 7 Trustee, shall lodge with the court and serve Direct Testimony Statements and Exhibits on or before August 27, 2014.

G. The Order shall also provide,

The court further ordered that pursuant to Federal Rule of Bankruptcy Procedure 9014(c), the court made Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 effective and each Rule applies in this Contested Matter for the Order to Show Cause. No default of a party shall be entered by the Clerk of the Court until after July 25, 2014.

MAY 28, 2014 HEARING

At the hearing it was asserted by W. Austin Cooper that it is his professional corporation which must be a party to this matter, as he asserts that it is the Corporation which received all payments and that W. Austin Cooper did not personally receive any of the monies at issue.

Pursuant to the concurrence of the Trustee and W. Austin Cooper, pursuant to Federal Rule of Civil Procedure 19 and Federal Rules of Bankruptcy Procedure 7019, 9014; the court joins W. Austin Cooper, a Professional Corporation, as a respondent to the Order to Show Cause and the Trustee's Motion requesting the Order to Show Cause. In each place in the Motion and the Order to Show Cause where the reference is made to "W. Austin Cooper," it is deemed to also state that it also applies to W. Austin Cooper, a Professional Corporation."

At the hearing W. Austin Cooper confirmed that he is the agent for service of process for W. Austin Cooper, a Professional Corporation. The California Secretary of State website provides the same information, with an

address of 2150 River Plaza Dr., Ste 164, Sacramento, California 95833 for the agent.

PRIOR HEARING

Jon Tesar, Chapter 11 Trustee requested an order that directs W. Austin Cooper, a Professional Corporation to show cause why it should not be required to disgorge a payment made to Cooper by the Debtor for legal services in this Chapter 11 case.

Trustee filed a Notice of Intent to continue the hearing on the motion, as he has received notice that attorney Cooper will be unable to make a timely appearance in regard to this matter due to health concerns.

Trustee states he will appear at the hearing to request that the hearing be continued to a date and time agreeable to interested parties and to the court. The court continued the hearing to October 24, 2013.

OCTOBER 24, 2013 HEARING

The parties have not filed any supplemental pleadings explaining whether an agreement was reached. Mr. Cooper has not filed a response to the Motion to date.

13. 10-23577-E-11 GLORIA FREEMAN **CONTINUED EVIDENTIARY HEARING RE: ORDER TO SHOW CAUSE 3-1-13 [571]**

No 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.

Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Debtor on November 30, 2012. By the court's calculation, 36 days' notice was provided. 28 days' notice is required.

The Motion for Administrative Expenses 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 has continued the hearing to allow the parties in interest to consider the settlement in the context of other matters in this case and related bankruptcy cases.

The court's decision is to xxxxx

NOVEMBER 12, 2014 HEARING

At the hearing, ------

OCTOBER 15, 2014 HEARING

At the hearing, Counsel for the Professional Corporation presented the court with W. Austin Cooper's declaration and the declaration of a Nurse Practitioner stating that Mr. Cooper could return to "school/work" after November 9, 2014. Counsel and Mr. Cooper, through his declaration, stated that Mr. Cooper was having to undergo a heart procedure.

The court continues the hearing to afford Counsel for W. Austin Cooper, a Professional Corporation, and W. Austin Cooper, who is litigating this matter in pro se the opportunity to provide the court with the declaration from Mr. Cooper's cardiologist providing credible testimony as to Mr. Cooper's medical condition and whether he will be able to participate as a party, in pro se or with counsel, and be a witness.

On or before October 31, W. Austin Cooper, a professional corporation shall file and serve the declaration of Mr. Cooper's treating physician who can

competently testify as to his ability to participate in this Contested Matter.

OCTOBER 1, 2014 HEARING

Robert Cameron, attorney for W. Austin Cooper, a Professional Corporation, filed with the court a notice of unavailability of W. Austin Cooper because of medical reasons. It is unknown at this time whether the medical impairment is short-term or long-term, for which a personal representative may need to be appointed for Mr. Cooper personally. W. Austin Cooper is representing himself, in *pro se*.

No Direct Testimony Statements was presented by any of the parties. Only the Plan Administrator has presented exhibits, 1-17. The time for presenting Direct Testimony States and Exhibits has closed, and has not been extended by the court due to this eve of trial stated disability and requested continuance.

The court ordered that a Status Conference will be conducted on October 15, 2014 at 9:59 a.m. to determine when the evidentiary hearing should be conducted and whether Mr. Cooper has a long term medical impairment which will require the appointment of a personal representative. If there is such impairment and the Plan Administrator cannot call Mr. Cooper as an adverse witness, the parties shall address whether there is a reasonable accommodation which can be made for Mr. Cooper to provide “hostile” testimony when called by the Plan Administrator and proper rebuttal testimony, or whether such testimony on both sides is not available.

JULY 9, 2014 HEARING

The Motion is continued to 9:30 a.m. on October 1, 2014.

JULY 1, 2014 HEARING

The Motion is continued to be addressed upon conclusion of the Orders to Show Cause to disgorge fees from W. Austin Cooper and/or W. Austin Cooper, a Professional Corporation.

MAY 28, 2014 HEARING

It is reported to the court that as part of the settlement between the Trustee/Plan Administrator and Laurence Freeman, the Trustee/Plan Administrator anticipates being able to resolve this Motion and several other disputes with Gloria Freeman.

PRIOR HEARINGS

Motion for Administrative Expenses by Staff U.S.A. Trustee

Thomas Aceituno, the successor Chapter 7 Trustee to Jonathan Tesar, the former Chapter 11 Trustee in case number 11-48050-E-11, Staff U.S.A., seeks an order allowing an administrative claim in the amount of $103,792.79 in favor of the Staff Estate. FN.1. Jon Tesar stated that this claim was incurred as an administrative claim in connection with preserving the bankruptcy estate of Gloria Freeman. Jon Tesar stated that November 30, 2012 was the last day to file and serve a motion for allowance of administrative expenses in the instant case.

Because this matter has been pending for so long and was originally asserted by Jonathan Tesar as the Chapter 11 Trustee, the court has continued to use in this ruling he name "Jon Tesar" as the identifier for the person filing the Motion and asserting the claim – which is deemed a reference to the Thomas Aceituno, as successor to Jonathan Tesar as the fiduciary of the bankruptcy estate, serving as the current Chapter 7 Trustee.

Background

Jon Tesar states that on February 16, 2010 Debtor Gloria Freeman filed a Chapter 11 petition and on January 11, 2011 David Flemmer was appointed Trustee of the Freeman Estate. Jon Tesar states that on August 1, 2011 Staff filed a Chapter 11 petition in the Northern District of California and the case was later transferred to the Eastern District. Jon Tesar states that on June 13, 2012 the court approved his appointment as trustee of the Staff Estate, a position which he continues to hold.

Jon Tesar states that Debtor was the president of Staff, sole shareholder of Staff, the debtor in possession of Staff, and was responsible for Staff's business assets and financial affairs. Jon Tesar states that once he was appointed Trustee on June 13, 2012 Debtor's authority to control Staff ended. Jon Tesar states that after Debtor's petition date and before he was appointed Trustee of Staff, Debtor caused Staff to make disbursements for the benefit of Debtor's Estate and/or the benefit of Debtor personally.

Jon Tesar argues that the amounts disbursed total $103,792.79 and were likely to some benefit to the Staff Estate. Jon Tesar states that it is necessary for him to further analyze the disbursements to determine the extent of the benefit and necessity of making various expenditures. Jon Tesar states that the disbursements appear to include attorneys' fees, insurance, and travel. Jon Tesar states that he will communicate with Trustee Flemmer to reach a consensus on the allowability of the administrative expenses.

Jon Tesar seeks an order allowing an administrative claim in favor of Staff Estate in the maximum about of $103,792.79.

Opposition by Trustee Flemmer

Trustee David Flemmer objects to the motion for allowance of administrative claim since Trustee Flemmer is currently filing orders to show cause why certain counsel should not be required to disgorge funds received from Staff. Trustee Flemmer requests that the court continue the hearing to a time that aligns with the briefing schedule issued for the orders to show cause.

Trustee Flemmer states that he does not dispute that transfers were made from the Staff Estate to the Freeman Estate. Trustee Flemmer states that Staff made the transfers without the knowledge or consent of the Trustee Flemmer and that presumably Debtor authorized the transfers.

Trustee Flemmer states that the transfers can be divided into four categories:

1.	Auction 10/Premium Access--	$791.36
2.	Gloria Freeman Personal Expenses/Life, Health and Disability Insurance-------	$41,961.02
3.	Legal Fees and Expenses----	$56,530.97
4.	Transfers for the Benefit of Larry Freeman----------	$4,509.44
	Total	$103,792.79

Trustee Flemmer states that it appears that Jon Tesar's request for administrative expenses is based on two bases: (1) Jon Tesar may claim that Staff was insolvent at the time of the transfer and that the transfers constituted a prohibited dividend pursuant to California Corporations Code sections 501 and 506 or a fraudulent transfer pursuant to California Code of Civil Procedure section 3439. (2) Jon Tesar seeks an administrative claim pursuant to § 503(b)(1)(A) on the grounds that transfers constituted the actual, necessary costs and expenses of preserving the estate.

Trustee Flemmer objects to the allowance of an administrative expense except as to the "Legal Fees and Expenses" category. Trustee Flemmer states that as to the "Legal Fees and Expenses" category he is filing an application for orders to show cause why counsel should not disgorge such fees and costs. Trustee Flemmer states that Jon Tesar's motion for allowance of administrative expenses is moot to the extent that money is returned to Staff.

Auction 10/Premium Access: Trustee Flemmer states that Auction Ten and Premium Access are businesses owned and operated by Debtor, but which have provided no benefit to the Freeman Estate. Trustee Flemmer states that there is no evidence that the Freeman Estate benefitted from these transfers and the

court should not allow an administrative expense related to these transfers. Trustee Flemmer states that, to the extent such transfers are prohibited dividends, they are offset by amounts owed to Debtor for services rendered.

Gloria Freeman Personal Expenses/Insurance: Trustee Flemmer states that Debtor caused Staff to transfer an amount of $18,003.37 for payment of Debtor's personal expenses with an additional $23,957.65 for life, health, and disability insurance. Trustee Flemmer states that Debtor was entitled to reasonable compensation for services provided to Staff, but that the expenses sought by Staff span 26 months. Trustee Flemmer states there is no evidence that Debtor was paid a salary during this time, but that Jon Tesar should be provided an opportunity to provide such evidence if it exists.

Trustee Flemmer states that transfers to Debtor from March 2010 through May 2012 are more fairly characterized as compensation for services rather than payment of an illegal dividend. Trustee Flemmer states that the transfers, which are equivalent to $1,554 per month, are reasonable compensation for operating Staff. Trustee Flemmer states that if the transfers are considered compensation for services they are not "actual, necessary costs and expenses of preserving the estate." § 503(b)(1)(A). Trustee Flemmer requests that the court deny the request for administrative expenses.

Legal Fees and Expenses: Trustee Flemmer states that Staff has uncovered transfers totaling $56,530.97 to attorneys hired to work for Debtor or her companies. Trustee Flemmer states that Staff does not have documentation supporting the services provided by these attorneys and it is unclear whether the services were performed for Debtor or for her companies. Trustee Flemmer states that of the total amount paid for legal services, $15,000-$20,000 was paid to Austin cooper, $16,933 to Steve Berniker, and smaller amounts were paid to other counsel.

Trustee Flemmer states that it is possible for Jon Tesar to recover payments for legal fees under other theories if the work was performed for one of Debtor's companies such that there is no showing of a benefit to the Freeman Estate. Trustee Flemmer states that there is no basis to recover from the Freeman Estate. Trustee Flemmer state that he and Jon Tesar have attempted, albeit unsuccessfully, to obtain information from Mr. Cooper regarding the nature of the services provided and the value to the estate.

Transfers to Larry Freeman: Trustee Flemmer states that the amount of 44,509.44 was transferred to Larry Freeman and it is unclear how these transfers could be considered an administrative expense.

Debtor's Opposition

On May 23, 2013 Debtor filed an opposition supporting the Chapter 11 Trustee's position to deny the motion. Debtor states that she disagrees with Chapter 11 Trustee's position regarding attorney's fees and expenses and states

that said fees and the fees for Berniker were for the benefit of Staff USA.

Debtor states that she deferred her salary of $6,000 per month and $60 per hour as a pharmacist from April 2010 to June 2012. Debtor states that in 2011 and 2012 she did not receive a salary. Debtor states that Staff USA used the premium shipping accounts of Premium Access. Debtor states that expenses characterized as "personal expenses" are not actually personal expenses and instead were expenses for the benefit of Staff USA. Debtor states that expenses for healthcare and dental were part of group employee plans. Debtor states that expenses for restaurants and travel were incurred when she was on assignments in Daly City, St. Helena, and Clearlake. FN.1.

FN.1 Gloria Freeman's explanation does little to enhance her credibility in this or the various related proceedings. While she now states that she "deferred" her $6,000.00 a month salary, she filed monthly operating reports in the Staff USA case in which she affirmatively stated that there were no post-petition accounts receivable owing.

Debtor states that Mr. Cooper was her personal attorney and received payment of $15,000 out of her personal accounts prior to the bankruptcy filing.

Chapter 11 Trustee's Supplemental Opposition

Chapter 11 Trustee states that if the court orders Mr. Berniker or Mr. Cooper to disgorge some or all of the fees paid by Staff USA, Inc. said fees should not form the basis of a further administrative claim against the estate. Chapter 11 Trustee states that if disgorgement is ordered he does not oppose payment directly to Staff USA, Inc.

Regarding fees paid by Staff USA, Inc. to Mr. Berniker, the Chapter 11 Trustee states that if disgorgement is not ordered the court should find that the estate is not liable for administrative expenses since the services provided by Mr. Berniker did not generate a direct benefit to the estate. Chapter 11 Trustee states that recover against Mr. Freeman was obtained in separate litigation, not the litigation Mr. Berniker worked on.

Regarding fees of Austin Cooper Chapter 11 Trustee states that Mr. Cooper acknowledges that the subject fees were solely for the benefit of other entities and not for the benefit of the estate. Chapter 11 Trustee requests that the instant motion be decided in connection with the orders to show cause for Mr. Berniker and Mr. Cooper.

Discussion

At the hearing, the Staff USA Trustee stated that the request for administrative expenses was limited to the monies paid to attorneys or for legal fees of persons other than Staff USA. The Staff USA Trustee withdraws

the request for allowance of an administrative expense for the benefits and reimbursements paid to Gloria Freeman.

The Trustee stated that since the filing of the Motion some additional amounts of attorneys' fees have been identified. The court continues the hearing on this Motion to July 11, 2013, to be heard in conjunction with the Status Conferences on the Orders to Show Cause for attorneys paid by Staff USA, Inc. for services provided to Gloria Freeman. The parties to the Orders to Show Cause will identify all of the attorneys' fees at issue, which are the attorneys' fees which are the subject of this Motion.

14. 10-23577-E-11 GLORIA FREEMAN **CONTINUED MOTION FOR**
MHK-1 **ADMINISTRATIVE EXPENSES**
11-30-12 [516]

No 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.

The Order to Show Cause was served by the Clerk of the Court on Gloria Freeman ("Debtor"), Trustee, and other parties in interest on March 4, 2013.

The court's decision is to xxxx.

NOVEMBER 12, 2014 HEARING

At the hearing, -----

OCTOBER 15, 2014 HEARING

At the hearing, Counsel for the Professional Corporation presented the court with W. Austin Cooper's declaration and the declaration of a Nurse Practitioner stating that Mr. Cooper could return to "school/work" after November 9, 2014. Counsel and Mr. Cooper, through his declaration, stated that Mr. Cooper was having to undergo a heart procedure.

The court continues the hearing to afford Counsel for W. Austin Cooper, a Professional Corporation, and W. Austin Cooper, who is litigating this matter in pro se the opportunity to provide the court with the declaration from Mr. Cooper's cardiologist providing credible testimony as to Mr. Cooper's medical condition and whether he will be able to participate as a party, in pro se or

with counsel, and be a witness.

On or before October 31, W. Austin Cooper, a professional corporation shall file and serve the declaration of Mr. Cooper's treating physician who can competently testify as to his ability to participate in this Contested Matter.

OCTOBER 1, 2014 HEARING

Robert Cameron, attorney for W. Austin Cooper, a Professional Corporation, filed with the court a notice of unavailability of W. Austin Cooper because of medical reasons. It is unknown at this time whether the medical impairment is short-term or long-term, for which a personal representative may need to be appointed for Mr. Cooper personally. W. Austin Cooper is representing himself, in *pro se*.

No Direct Testimony Statements was presented by any of the parties. Only the Plan Administrator has presented exhibits, 1-17. The time for presenting Direct Testimony States and Exhibits has closed, and has not been extended by the court due to this eve of trial stated disability and requested continuance.

The court ordered that a Status Conference will be conducted on October 15, 2014 at 9:59 a.m. to determine when the evidentiary hearing should be conducted and whether Mr. Cooper has a long term medical impairment which will require the appointment of a personal representative. If there is such impairment and the Plan Administrator cannot call Mr. Cooper as an adverse witness, the parties shall address whether there is a reasonable accommodation which can be made for Mr. Cooper to provide "hostile" testimony when called by the Plan Administrator and proper rebuttal testimony, or whether such testimony on both sides is not available.

JULY 11, 2013 HEARING

The court continued the Status Conference to 10:30 a.m. on August 29, 2013.

JUNE 6, 2013 HEARING

The court ordered that a Status Conference for the instant Order to Show Cause shall be held at 10:30 a.m. on July 11, 2013. Furthermore, the court ordered that the parties shall file and serve Status conference Reports on or before June 21, 2013.

MAY 16, 2013 HEARING

The hearing was continued to 10:30 a.m. on June 6, 2013.

ORDER TO SHOW CAUSE - MARCH 1, 2013

The court issued an order to show cause on March 1, 2013. Dckt. 571. The order to show cause stated:

> David Flemmer, the Chapter 11 Trustee, requested that the court issue an Order to Show Cause why attorney Austin Cooper, who represented Gloria Freeman while she was the Debtor in Possession in this case, should not be required to disgorge payments made by Staff USA, Inc. ("Staff") and by Debtor for legal services provided to Gloria Freeman, the former Debtor in Possession. In addition to representing the former Debtor in Possession, Mr. Cooper also represented Staff USA, Inc., Sunfair, LLC, and Plazaria, LLC, all related entities to the Debtor in this case.
>
> Pursuant to 11 U.S.C. § 328 the court may deny compensation if a professional is not a disinterested person, or represents or holds an interest adverse to the interest of the estate. Mr. Cooper can only be authorized to be employed if he is disinterested. Mr. Cooper has not made this showing and instead attempted to represent the Debtor, Staff USA, Inc., Sunfair, LLC, and Plazaria, LLC.
>
> Pursuant to 11 U.S.C. § 329 an attorney representing a debtor must file with the court a statement of the compensation paid or to be paid. The requirements of § 329 are mandatory and failure to comply forfeits any right to receive compensation. *Peugeot v. United States Trustee (In re Crayton)*, 192 B.R. 970, 981 (B.A.P. 9th Cir. Cal. 1996) (modified by *In re Thao Tran Nguyen*, 447 B.R. 268, 277 (B.A.P. 9th Cir. 2011) regarding application of American Bar Association Standards for imposing sanctions for attorney misconduct). In *Crayton* a debtor's attorney accepted payment from a debtor, did not seek employment as required by the Bankruptcy Code, and did not file a Rule 2016(b) statement, pursuant to Federal Rule of Bankruptcy Procedure 2016. The debtor's attorney refused to return the fees and the Bankruptcy Court issued an order to show cause why fees should not be disgorged. *Id*. at 973. The Bankruptcy Appellate Panel affirmed the bankruptcy court decision ordering disgorgement of fees. *Id*.
>
> Federal Rule of Bankruptcy Procedure 2016 implements § 329. Subsection (a) of Rule 2016 provides for compensation or reimbursement upon application. Subsection (b) requires disclosure of compensation already paid to, or agreed to be paid to, an attorney representing the debtor and applies

regardless of whether the attorney applies to the court for compensation. Disclosure under Rule 2016(b) must include all payments or agreements to pay during the year preceding bankruptcy and disclosure must be precise and complete. 9 COLLIER ON BANKRUPTCY ¶ 2016 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.).

Upon determining that an attorney has violated § 329 and Rule 2106 the court has the authority to order disgorgement of fees. *Hale v. United States Trustee (In re Basham)*, 208 B.R. 926, 930-931 (B.A.P. 9th Cir. Idaho 1997)(holding that court order disgorging fees was appropriate where debtor's counsel did not timely file disclosure of compensation statements and that the Bankruptcy Court could have ordered the disgorgement of all fees); *Crayton* at 981. When the court determines that an attorney has acted with "complete disregard" for the procedures and requirements of the Code and Rules, the court has discretion to determine whether counsel may receive any fees, regardless of the reasonableness of such fees. *Law Offices of Nicholas A. Franke v. Tiffany (In re Lewis)*, 113 F.3d 1040, 1045-1046 (9th Cir. Cal. 1997). The court's ability to order disgorgement of all fees is

grounded in the inherent authority over the debtor's attorney's compensation. The Bankruptcy Code contains a number of provisions (e.g., §§ 327, 329, 330, 331) designed to protect the debtor from the debtor's attorney. *See, e.g., In re Walters, 868 F.2d 665, 668 (4th Cir. 1989)* (noting that § 329 and Rule 2017 are designed to protect the creditors and the debtor against overreaching by attorney). As a result, several courts have recognized that the bankruptcy court has broad and inherent authority to deny any and all compensation when an attorney fails to meet the requirements of these provisions...*Matter of Prudhomme, 43 F.3d 1000, 1003 (5th Cir. 1995)*("Additionally, the court's broad discretion in awarding and denying fees paid in connection with bankruptcy proceedings empowers the bankruptcy court to order disgorgement as a sanction to debtors' counsel for nondisclosure.")

Lewis at 1045. Further, the source of the payment to debtor's counsel is not relevant as the court may order disgorgement irrespective of the payment's source. *Id*.

Here, Debtor's Counsel, Mr. Cooper, is asserted to have demonstrated complete disregard for the requirements of § 329 and the procedures of Rule 2016 by failing to seek court

approval for employment as Debtor's counsel in this Chapter 11 case and disclosing the compensation he did and was receiving. The Chapter 11 Trustee has provided sufficient evidence establishing that Mr. Cooper received payment for representing Debtor. Unlike the debtor in *Hale* who eventually filed a disclosure of compensation, Mr. Cooper never sought court approval and failed to disclose compensation.

As a result, the court exercises its power and discretion to order disgorgement of all fees received by Debtor or third parties in connection with Mr. Cooper's representation of Debtor in this case.

The court issues this Order to Show Cause why Austin Cooper should not be required to repay all funds received from the Debtor, Staff USA, Inc., and any source in connection with his representation of the Debtor. The Chapter 11 Trustee's motion, declaration, memorandum of points and authorities, and exhibits, Dckts. 549, 551, 552, and 560, are appended to this Order to Show Cause as Addenda 1, 2, 3, and 4, and incorporated herein by this reference.

IT IS ORDERED that the Motion to for Order to Show Cause is granted.

IT IS FURTHER ORDERED that attorney Austin Cooper shall file and serve a statement setting forth the information required by Federal Rule of Bankruptcy Procedure 2016(a) on or before April 1, 2013.

IT IS FURTHER ORDERED that attorney Austin Cooper is to file and serve a response on or before April 1, 2013, to this Order to Show Cause why Austin Cooper should not be required to disgorge $20,000.00 or such other amount established at the hearing for all payments made to him by Staff USA, Inc. or other sources for representation of Gloria Freeman, the former Debtor in Possession in this case. The grounds for disgorgement are as set forth in this Order to Show Cause, including the Motion, Declaration, Points and Authorities, and Exhibits for the issuance of this Order to Show Cause, Dckts. 549, 551, 552, and 560, copies of which are appended hereto as Addenda 1, 2, 3, and 4.

IT IS FURTHER ORDERED that attorney Austin Cooper is to file and serve a response on or before April 1, 2013 to the Order to Show Cause why Austin Cooper should not be required to return the $15,000.00 retainer disclosed in Debtor's Disclosure of Compensation of Attorney for Debtors form filed

March 1, 2010 and all other payments disclosed on the statement or received relating to representation of Gloria Freeman, the former Debtor in Possession.

IT IS FURTHER ORDERED that on or before April 15, 2013, the Chapter 11 Trustee, the U.S. Trustee, and any other party in interest shall file and serve a Reply, if any, to Mr. Cooper's Response to the Order to Show Cause.

IT IS FURTHER ORDERED that the hearing on Order to Show Cause shall be conducted at 10:30 a.m. on May 16, 2013.

FEBRUARY 28, 2013 HEARING

Trustee David Flemmer seeks an order to show why attorney Austin Cooper should not be required to disgorge payments made by Staff USA, Inc. ("Staff") and by Debtor for legal services provided to Gloria Freeman, the former Debtor in Possession and currently the Debtor.

Background

Trustee states that at the time Debtor commenced the instant chapter 11 case on February 16, 2010 Debtor was the 50% shareholder or member in a number of corporations and limited liability companies including Staff. Trustee states Debtor was also in the middle of divorce proceedings involving her former spouse, Larry Freeman. Trustee states attorney Austin Cooper represented Debtor in her chapter 11 case even though the court never approved Mr. Cooper's employment. Trustee states that Debtor's Disclosure of Compensation of Attorney for Debtors form indicated that Mr. Cooper was paid $15,000 on February 15, 2010, one day before the chapter 11 filing.

Sunfair, LLC

Trustee states that on June 4, 2010 Debtor cause her wholly owned limited liability company, Sunfair, LLC, to commence a chapter 11 case. Trustee states that Mr. Cooper represented Sunfair, LLC, receiving a retainer of $2,461, even though the court never approved his employment. Trustee states that Staff paid for the retainer.

Plazaria, LLC

Trustee states that on June 4, 2010 Debtor caused her wholly owned limited liability company Plazaria, LLC to commence a chapter 11 case. Trustee states that Mr. Cooper represented Plazaria, LLC, receiving a retainer of $2,461, even though the court never approved his employment. Trustee states that Staff paid for the retainer.

Trustee states that on January 4, 2011 he was appointed Trustee and

engaged in negotiations with Larry Freeman until May 2011 at which point Mr. Freeman retained new counsel. Trustee states that on August 31, 2011 Trustee commenced an adversary proceeding against Mr. Freeman.

Staff

Trustee states that on September 1, 2011 Staff filed a chapter 11 petition and that Mr. Cooper represented Staff even though the court never approved his employment. Trustee states that on May 29, 2012 the court appointed Jon Tesar as the chapter 11 trustee in the Staff bankruptcy case.

***Flemmer v. Freeman* Adversary Proceeding**

Trustee states that during the adversary proceeding Mr. Freeman's counsel passed away and Mr. Freeman retained a third attorney. Trustee states a settlement was reached and approved on July 19, 2012. Trustee states that Mr. Freeman recently received an undisclosed refund from the IRS in the amount of $130,000, which Trustee contends is property of the bankruptcy estate.

***Freeman v. Flemmer* Adversary Proceeding**

Trustee states that Mr. Freeman commenced an adversary proceeding against Trustee seeking declaratory relief regarding ownership of the tax refund. Trustee states Mr. Cooper represents Mr. Freeman in the adversary proceeding.

Trustee states that on November 30, 2012 Jon Tesar, trustee for Staff, filed a motion in the instant case for seeking allowance of administrative claims. Trustee states that he supports a portion of the claim and alleges that Staff made five payments of $5,000 to Mr. Cooper after the instant bankruptcy was filed on February 16, 2010. Trustee states that Jon Tesar argues that payments to Mr. Cooper by Staff were actually dividends to Debtor and that Debtor later used these dividends to pay Mr. Cooper.

Relief Requested

Trustee states that at issue is whether Mr. Cooper should retain payments made by Staff to Mr. Cooper. Trustee requests that the court issue an order to show cause to afford Mr. Cooper an opportunity to explain the background of payments made to him. Specifically Trustee asks that the court (I) issue an order to show cause why Mr. Cooper should not be required to disgorge payments received directly or indirectly from Debtor or Staff and (ii) issue an order requiring Mr. Cooper to file a current statement setting forth all of the information required by Federal Rule of Bankruptcy Procedure 2016.

First, Trustee argues that if Mr. Cooper received payment from Staff that was made for the benefit of Debtor the payments should be reimbursed by the Freeman Estate. Jon Tesar, in his motion for allowance of administrative

expenses, seeks between $15,000 and $20,000 in payments from Staff. Trustee states that if Jon Tesar is correct the court should require Mr. Cooper to return the funds to the Freeman Estate so that payments can be returned to Staff. Trustee states that the basis for payments to Mr. Cooper is crucial to determining whether Jon Tesar's request for administrative expenses can be granted and that the court must determine whether the payments to Mr. Cooper were for legal services provided to Debtor.

However, Trustee argues that if the payments were property of the Freeman Estate Mr. Cooper is not entitled to retain such payments without court approval of his appointment pursuant to 11 U.S.C. § 327 and approval of compensation pursuant to 11 U.S.C. § 330. Trustee states that to date Mr. Cooper has not sought court approval for his employment and suggests that the court establish a deadline for seeking such approval.

Trustee states that in the event Mr. Cooper cannot obtain court approval for his employment the court should order disgorgement of Mr. Cooper's fees and all amounts paid from property of the Freeman Estate. Trustee states that even if Mr. Cooper is able to establish that the challenged payments did not come from property of the Freeman Estate Jon Tesar may have other avenues to recover payments, including §§ 329, 548, or Federal Rule of Bankruptcy Procedure 2017.

Second, Trustee argues that Mr. Cooper must seek court review of the $15,000 retainer he received. Trustee states that this sum is subject to court review pursuant to § 329 to the extent that the retainer was used to pay pre-petition attorney fees. Trustee states that he does not know whether the $15,000 retainer was the only amount paid to Mr. Cooper in connection with this case and requests an order requiring Mr. Cooper to file a supplemental statement setting for the information required by Rule 2016(a).

Federal Rule of Bankruptcy Procedure 2016(a) provides for compensation or reimbursement upon application. Subsection (b) provides information relevant to allowance of fees to professionals under 11 U.S.C. § 329. The attorney (or any professional to be hired by the debtor in possession or trustee) is required to disclose compensation already paid to, or agreed to be paid to, an attorney representing the debtor and applies regardless of whether the attorney applies for compensation. Disclosure under Rule 2016(b) must include all payments or agreements to pay during the year preceding bankruptcy and disclosure must be precise and complete. 9 Collier on Bankruptcy ¶ 2016 (Alan N. Resnick & Henry J. Sommer eds. 16th ed.). The disclosure must be supplemented for additional monies received.

The court finds that issuance of an order to show cause is necessary to determine whether amounts paid from the Staff Estate to counsel for the former Debtor in Possession and the $15,000.00 disclosed retainer must be disgorged. The grounds for disgorgement include failing to be authorized as counsel for the former Debtor in Possession and failure to comply with Federal

Rule of Bankruptcy Procedure 2016, failing to obtain authorization to be employed as counsel for Debtor in Possession, and failing to obtain authorization to be paid fees for such representation.

15. 14-22679-E-7 DENNIS FLORES
14-2193
FLORES V. NATIONSTAR MORTGAGE, LLC ET AL

CONTINUED STATUS CONFERENCE RE: COMPLAINT
7-1-14 [1]

Final Ruling: No appearance at the November 12, 2014 Status Conference is required.

Status Conference is continued to 10:30 a.m on December 11, 2014.

Plaintiff's Atty: Mark Lapham
Defendant's Atty: unknown

Adv. Filed: 7/1/14
Answer: none

Nature of Action:
Recovery of money/property - preference
Recovery of money/property - fraudulent transfer
Validity, priority or extent of lien or other interest in property
Dischargeability - willful and malicious injury
Injunctive relief - other
Declaratory judgment

Notes:

Continued from 9/10/14

[RHS-1] Order to Show Cause re (1) law of prosecution or (2) why the Chapter 7 Trustee should not be substituted as the Plaintiff real party in interest filed 9/19/14 [Dckt 13]; set for hearing 11/6/14 at 1:30 p.m.

[MWL-1] Stipulation to move hearing of Order to Show Cause filed 10/31/14 [Dckt 18]; tentative ruling to continue to 12/11/14 at 10:30 a.m.

[MJB-1] Stipulation for Extension of Time to Respond to Complaint filed 10/30/14 [Dckt 17]; Order approving filed 11/3/14 [Dckt 22]