UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

November 16, 2017, at 11:00 a.m.

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1. 15-28108-E-11 WILLARD BLANKENSHIP

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 10-17-15 [1]

Debtor's Atty: Stephen M. Reynolds

The Status Conference is xxxxx.

Notes:
Continued from 11/1/17. No phone appearances permitted for this continued status conference for any parties with offices or residences within 100 miles of the Sacramento Federal Courthouse.

NOVEMBER 16, 2017 STATUS CONFERENCE

As of the court's November 13, 2017 review of the Docket in this bankruptcy case, no further pleadings have been filed by the Plan Administrator/Debtor or any other party in interest.

On November 1, 2017, two and one-half minutes before the prior Status Conference, the Plan Administrator/Debtor filed his Quarterly Post-Confirmation Report. In it the Plan Administrator/Debtor states that $418,702.00 in payments are required under the Confirmed Chapter 11 Plan, the cash balance held by the Plan Administrator/Debtor at the end of calendar quarter (September 30, 2017) was $157,154.12; that the Plan Administrator/Debtor made payments of $325.32 in the calendar quarter ending September 30, 2017; and that $129,028.22 had been disbursed by the Plan Administrator/Debtor to date. Dckt. 218.

At the November 16, 2017 Status Conference, counsel for the Plan Administrator/Debtor reported xxxxxxxxxxxxxxxxxxxxxxxxxxx.

NOVEMBER 1, 2017 STATUS CONFERENCE

No further pleadings have been filed by any parties in interest in this bankruptcy case. At the hearing, counsel for the Plan Administrator/Debtor advised the court that though the parties had serious discussions and worked out the terms of a resolution of the disputes in July 2017, it was only now that the attorneys would begin the drafting of such possible settlement documents. Possibly, in the upcoming weeks, documents may be completed and then work on a motion to amend the plan begun. For the Plan

Administrator/Debtor, resolution of this dispute was not a priority matter because it would not be for several months when monies would be available to perform any stipulation. Counsel for Creditors and the two Creditors identified below have not taken any action to document any purported settlement or agreement.

This case has been beset with mishandling of issues, misstatements of the law, and failure to prosecute the case. As discussed in prior rulings, part of the problem arises from the Plan Administrator/Debtor obtaining a reverse mortgage for terms other than that as represented to Creditors and the court in the confirmed plan. The "don't worry, we don't need to address these problems now" attitude of the Plan Administrator/Debtor and his counsel bode ill for them and the prospects of the confirmed plan in this case. Rather, they sound in the nature of delay for the sake of doing something different in the future, fomenting further litigation for litigation's sake, and continuing in the "litigation death dance" that was pursued by these parties in state court.

As the court addressed in detail in denying the Plan Administrator/Debtor's Motion to Approve Proposed Distribution to change the distribution to be made to Michael Kletchko and Patrick Ruedin, Civil Minutes, Dckt. 210, the less than stellar conduct of the parties and their attorneys include:

> It is often said that a party "earns" the opponent it has in litigation. It appears, based on the conduct of Creditors and the Plan Administrator/Debtor, they are cut from the same bolt of litigation and ethical cloth.
>
> The court has previously addressed the shortcomings of the Plan Administrator/Debtor, Creditors [Michael Kletchko and Patrick Ruedin], and their respective counsel in their 'prosecution' of this bankruptcy case. Examples include:
>
> > [1] failure of Plan Administrator/Debtor to file evidence in support of motion to confirm; Civil Minutes, p. 8, Dckt. 149;
> >
> > [2] Creditors filing an 'objection' to administrative fees which stated no specific opposition; Civil Minutes, p. 4, Dckt. 150;
> >
> > [3] Denial of Creditors' motion to dismiss the case, Creditors not stating grounds for dismissal; Civil Minutes, p. 4–6, Dckt. 103;
> >
> > [4] Dismissing Creditors contention that the recording of their judgment lien was not based on an 'antecedent debt,' Creditors cannot ignore the statutory presumption of insolvency under 11 U.S.C. § 547, the contention of forbearance was not supported by the evidence, and Creditors asserted "baseless grounds" in requesting relief; Civil Minutes, p. 6–8, Dckt. 62;
> >
> > [5] Dismissal of Creditor's complaint against non-debtor third-parties for relief under 11 U.S.C. § 523 for failing to state a claim for which relief could be granted against nondebtors under that provision of the Bankruptcy Code; Adv. Pro. 16-2010, Civil Minutes, p. 13–14; and

> [6] Creditors failing to show any legal basis for trying to unilaterally exercise the powers of a debtor in possess/trustee under 11 U.S.C. §§ 547 and 548; id., p. 15–16;
>
> In Adversary Proceeding 16-2010 the court perceived the litigation conduct of Plan Administrator/Debtor and Creditors to be 'sandbox litigation,' well below that required in federal court proceedings. 16-2010; Civil Minutes, p. 15–16, Dckt. 38. The court observed that the pleadings disclosed a 'toxic, less than professional, relationship between [Creditors and Plan Administrator/Debtor] in the State Court [proceedings that set the stage for the bankruptcy case filing].' *Id.*, p. 17. The Civil Minutes include extensive quotations of the less than professional conduct that one expects from parties engaging in litigation, even in state court...
> . . .
> Based on the testimony of Plan Administrator/Debtor's Counsel, the Plan Administrator/Debtor was fully aware that he was not able to perform the Plan as confirmed through the refinance. Rather than coming back to court and addressing the issue, Plan Administrator/Debtor found it to be to his advantage to elect a path that would give him a $63,774.33 benefit and divert that amount away from Creditors. Adopting the adage, "It is better to seek forgiveness rather than request permission" is not an effective, productive strategy in bankruptcy proceedings. FN.2.
> . . .
> It appears that between the litigation strategy of the Plan Administrator/Debtor, Creditors, and their respective counsel, they have driven this case to one in which it probably will have to be converted or dismissed. It appears that conversion may well be the better option so that an independent fiduciary can figure out how the strategies and conduct of these Parties and their counsel have damaged the bankruptcy estate and other creditors. At the time, the Motion is denied."

Id.

The court continues the Status Conference to allow the parties to get real and prosecute this case in good faith. If not, then the court can consider motions to convert this case and allow an independent fiduciary plan administrator to perform the plan, recover assets, and liquidate the estate.

JULY 26, 2017 STATUS CONFERENCE

In connection with the hearing on a motion to approve proposed distribution under the Chapter 11 Plan (Civil Minutes, Dckt. 210) the court was afforded the opportunity to address the status of this bankruptcy case and prosecution thereof. On July 21, 2017, the Plan Administrator/Debtor filed a Status Report. Dckt. 213. The Plan Administrator/Debtor reports about an agreement to modify the confirmed plan to address the financial issues identified post-confirmation.

The court continues the Status Conference to afford the Parties to continue in their good faith efforts to keep a confirmed plan in this case moving forward.

After a review of the file in this case, the reports by counsel for the Plan Administrator/Debtor and counsel for Creditors Michael Kletchko and Patrick Ruedin, it is demonstrated that these parties are not acting to prosecute their rights in this case. No significant action taken or effort has been made since the July 17, 2017 Status Conference, for which the court ordered both attorneys and their respective clients to appear in person. It was at that forced interface that parties reported the terms of a possible settlement had been discussed. Since then, it appears nothing has been done.

2. **11-37716-E-13** **MILTON/TANISHA FLOWERS** **CONTINUED MOTION TO DISMISS**
17-2138 **JPMORGAN CHASE BANK, N.A.**
9-15-17 [14]

FLOWERS ET AL V. U.S. BANK NATIONAL ASSOCIATION ET AL

APPEARANCE OF JOSEPH E. ADDIEGO, III, COUNSEL FOR JPMORGAN CHASE BANK, N.A., AND APPEARANCE OF A SENIOR REPRESENTATIVE OF JPMORGAN CHASE BANK, N.A., RESPONSIBLE FOR OVERSIGHT AND DIRECTION OF DEFENSE PROSECUTION IN THIS ADVERSARY PROCEEDING

REQUIRED AT THE NOVEMBER 16, 2017 HEARING

TELEPHONIC APPEARANCES PERMITTED

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.

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

FN.1. Defendant has not specified clearly how the Motion is noticed, whether written opposition is required, a deadline for opposition, or who must be served, which violates Local Bankruptcy Rule 9014-1(d)(3)(B). Local Bankruptcy Rule 9014-1(f)(2)(A) provides that it does not apply to motions in adversary proceedings. The Notice of Motion states that a hearing will be held and will be based upon submitted pleadings as well as argument at the hearing. Counsel is reminded that not complying with the Local Bankruptcy Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(l).

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor's Attorney on September 15, 2017. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss Adversary Proceeding is xxxxxxxxxxxxxxx.

JPMorgan Chase Bank, N.A. ("Defendant") moves for the court to dismiss all claims against it in Milton Flowers and Tanisha Gordon-Flowers's ("Plaintiff-Debtor") Complaint according to Federal Rule of Civil Procedure 12(b)(5) & (6). FN.2.

FN.2. Defendant is reminded that the Local Bankruptcy Rules require the use of a new Docket Control Number with each motion. LOCAL BANKR. R. 9014-1(c). Here, the moving party failed to use a Docket Control Number. That is not correct. The Court will consider the motion, but counsel is reminded that not complying with the Local Bankruptcy Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(c)(l).

OCTOBER 26, 2017 HEARING

At the hearing, Defendant did not appear. The court posted the tentative ruling on October 25, 2017, identifying specific issues in connection with the Motion, the arguments advanced, and the conduct of Defendant's counsel. Dckt. 30.

Though those concerns were posted for counsel and Defendant to review, nobody appeared to address those matters.

At the October 26, 2017 hearing, counsel for Plaintiff-Debtor appeared and advised the court that a Stipulation to dismiss Defendant from the Adversary Proceeding had been filed. A review of the court's docket shows that it was not filed until 1:49 p.m. on October 25, 2017—less than one day before the scheduled hearing.

The Stipulation to Dismiss purports to have been signed by counsel for Plaintiff-Debtor on September 18, 2017, only three days after the present Motion was filed. Then, the Stipulation bears the signature of Defendant's counsel, which is dated October 9, 2017. Apparently, Defendant and its counsel had the dismissal they demanded since October 9, 2017. No explanation was provided why such dismissal was not promptly filed on October 9, 2017.

The court continued the hearing to 11:00 a.m on November 16, 2017, to afford Defendant and its counsel time to address the concerns identified by the tentative ruling as well as to address the delay in filing the dismissal. Dckt. 31. Additionally, the court ordered the personal appearance of Joseph E. Addiego, III, and a senior representative from Defendant responsible for the oversight and direction for the prosecution of its defense in this Adversary Proceeding. The court suspended the application of Federal Rule of Civil Procedure 41(a)(1)(A) as made applicable by Federal Rule of Bankruptcy Procedure 7041, with dismissal of the Motion to be made only upon further order of the court.

REVIEW OF MINIMUM PLEADING REQUIREMENTS FOR A MOTION

Federal Rule of Civil Procedure 7(b) states,

> "(b) Motions and Other Papers
>
> (1) In General. A request for a court order must be made by motion. The motion must:
>
> (A) be in writing unless made during a hearing or trial;
>
> (B) **state with particularity the grounds for seeking the order**; and
>
> (C) state the relief sought."

FED. R. CIV. P. 7(b) (emphasis added). The same "state with particularity" requirement is included in Federal Rule of Bankruptcy Procedure 9013 for all motions in the bankruptcy case itself.

Consistent with this court's repeated interpretation of Federal Rule of Bankruptcy Procedure 9013, the bankruptcy court in *In re Weatherford*, applied the general pleading requirements enunciated by the United States Supreme Court to the pleading with particularity requirement of Bankruptcy Rule 9013. *See* 434 B.R. 644, 646 (N.D. Ala. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)). The *Twombly* pleading standards were restated by the Supreme Court in *Ashcroft v. Iqbal* to apply to all civil actions in considering whether a plaintiff had met the minimum basic pleading requirements in federal court. *See* 556 U.S. 662 (2009).

Interestingly, in adopting the Federal Rules of Civil Procedure and of Bankruptcy Procedure, the Supreme Court endorsed a stricter, state-with-particularity-the-grounds-upon-which-the-relief-is-based standard for motions rather than the "short and plain statement" standard for a complaint.

Law and motion practice in bankruptcy court demonstrates why such particularity is required in motions. Many of the substantive legal proceedings are conducted in the bankruptcy court through the law and motion process. These include sales of real and personal property, valuation of a creditor's secured claim, determination of a debtor's exemptions, confirmation of a plan, objection to a claim (which is a contested matter similar to a motion), abandonment of property from the estate, relief from the automatic stay, motions to avoid liens, objections to plans in Chapter 13 cases (akin to a motion), use of cash collateral, and secured and unsecured borrowing.

The court in *Weatherford* considered the impact to other parties in a bankruptcy case and to the court, holding,

> The Court cannot adequately prepare for the docket when a motion simply states conclusions with no supporting factual allegations. The respondents to such motions cannot adequately prepare for the hearing when there are no factual allegations supporting the relief sought. Bankruptcy is a national practice and creditors sometimes do not have the time or economic incentive to be represented at each and every docket to defend against entirely deficient pleadings. Likewise, debtors should not have to defend against facially baseless or conclusory claims.

434 B.R. at 649–50; *see also In re White*, 409 B.R. 491, 494 (Bankr. N.D. Ind. 2009) (holding that a proper motion must contain factual allegations concerning requirements of the relief sought, not conclusory allegations or mechanical recitations of the elements).

The courts of appeals agree. The Tenth Circuit Court of Appeals rejected an objection filed by a party to the form of a proposed order as being a motion. *St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982). The Seventh Circuit Court of Appeals refused to allow a party to use a memorandum to fulfill the pleading with particularity requirement in a motion, stating:

> Rule 7(b)(1) of the Federal Rules of Civil Procedure provides that all applications to the court for orders shall be by motion, which unless made during a hearing or trial, "shall be made in writing, [and] *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." The standard for "particularity" has been determined to mean "reasonable specification."

Martinez v. Trainor, 556 F.2d 818, 819–20 (7th Cir. 1977) (citing 2-A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 7.05 (3d ed. 1975)).

Not stating with particularity the grounds in a motion can be used as a tool to abuse other parties to a proceeding, hiding from those parties grounds upon which a motion is based in densely drafted points and authorities—buried between extensive citations, quotations, legal arguments, and factual arguments. Noncompliance with Federal Rule of Bankruptcy Procedure 9013 may be a further abusive practice in an attempt to circumvent Bankruptcy Rule 9011 by floating baseless contentions to mislead other parties and the court. By hiding possible grounds in citations, quotations, legal arguments, and factual arguments, a movant bent on mischief could contend that what the court and other parties took to be claims or factual contentions in the points and authorities were "mere academic postulations" not intended to be representations to the court concerning any actual claims and contentions in the specific motion or an assertion that evidentiary support exists for such "postulations."

Grounds Stated in Motion

Defendant has not provided any grounds, merely unsupported conclusions of law. The insufficient statements made by Defendant are:

A. "Plaintiffs failed to properly serve Chase, and fail to state an actionable claim for relief against Chase . . . ."

Those "grounds" are merely conclusions of law by Defendant. Presumably, Defendant believed that the court would make these conclusions, but the "grounds" cannot merely state the anticipated conclusions.

Defendant is reminded that "[f]ailure of counsel or of a party to comply with these [Local Bankruptcy] Rules . . . may be grounds for imposition of any and all sanctions authorized by statute or rule within the inherent power of the Court, including without limitation, **dismissal of any action**, entry of

default, finding of contempt, imposition of monetary sanctions or attorneys' fees and costs, and other lesser sanctions." LOCAL BANKR. R. 1001-1(g) (emphasis added).

The Motion states that grounds are found in:

A. Memorandum of Points and Authorities;
B. Defendant's Request for Judicial Notice;
C. Exhibits;
D. All other pleadings and papers on file; and
E. Anything else that may be presented to the court at or before the hearing.

The court generally declines an opportunity to do associate attorney work and assemble motions for parties. It may be that Defendant believes that the Points and Authorities is "really" the motion and should be substituted by the court for the Motion. That belief fails for multiple reasons. One is that under Local Bankruptcy Rule 9004-2(c)(1), a motion and a memorandum of points and authorities are separate documents. The court has not waived that Local Rule for Defendant.

REVIEW OF TWELVE PAGE POINTS AND AUTHORITIES APPENDED TO THE "MOTION"

Alleged Defect in Service

For what is purported to be a "simple" request for relief, Defendant has found it necessary to provide the court with a twelve-page points and authorities. Dckt. 14. The complexity of the points and authorities requires a one-page table of contents and two-and-one-half pages of case and statutory citations. The need for such complexity in the points and authorities belies a contention that the basis for relief is "obvious."

The basis for the requested relief is Federal Rule of Civil Procedure 12(b)(6), which is incorporated into Federal Rule of Bankruptcy Procedure 7026. These grounds are based on the pleadings filed by the Plaintiff-Debtor, not additional facts added by Defendant.

Defendant first contends that Plaintiff-Debtor failed to comply with Federal Rule of Bankruptcy Procedure 7004(h) for service on Defendant, a federally insured financial institution. From the twelve-page points and authorities, the court believes that the argument advanced is:

> As a federally insured financial institution, Plaintiffs must serve Chase by certified mail addressed to an officer of the bank. Plaintiffs, however, only mailed the pleadings to "Chase C/O Five Lakes Agency, Inc." in Rochester, Michigan, "Chase C/O Shermeta, Adams & Von Allemn, P.C." in Rochester, Michigan, and to other addresses without anyone's attention in Columbus, Ohio and Arlington, Texas. See Adv. ECF No. 6. This does not meet the requirements under Bankruptcy Rule 7004(h).

Points and Authorities appended to Motion, p. 11:9–14; Dckt. 14. It appears that the major heartburn for Defendant is that the notices were not addressed to "anyone's attention."

Federal Rule of Bankruptcy Procedure 7004(h), which is at the core of this basis (not stated in the Motion) for dismissal of the Complaint states:

> (h) Service of process on an insured depository institution. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless—
>
> > (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;
> >
> > (2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or
> >
> > (3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

The court notes that the 1111 Polaris Parkway address used by Debtor is the one listed as the "Headquarters" on the FDIC website for finding federally insured banks. FN.3.

FN.3 https://research.fdic.gov/bankfind/detail.html?bank=628&name=JPMorgan Chase Bank, National Association&searchName=jp morgan chase bank&searchFdic=&city=&state=&zip =&address=&searchWithin=&activeFlag=&searchByTradename=false&tabId=2

The court cannot readily identify any officers of Defendant on the FDIC website. There is a link to the "Corporate Website" on the FDIC website, which is identified as http://www.jpmorganchase.com. That link takes a person to the website for JPMorgan Chase & Co., not JPMorgan Chase Bank, N.A. Clicking on the "About Us" tab, the information provided is:

> "About Us
>
> JPMorgan Chase (NYSE: JPM) is one of the oldest financial institutions in the United States. With a history dating back over 200 years, here's where we stand today:
>
> •We are a leading global financial services firm with assets of $2.6 trillion.
>
> •We operate in more than 60 countries.
>
> •We have over 240,000 employees.

•We serve millions of consumers, small businesses and many of the world's most prominent corporate, institutional and government clients.

•We are a leader in investment banking, financial services for consumers and small businesses, commercial banking, financial transaction processing and asset management.

•Our stock is a component of the Dow Jones Industrial Average."

https://www.jpmorganchase.com/corporate/About-JPMC/about-us.htm.

To the right of the above text is the following additional informational links provided by JPMorgan Chase & Co. "About Us:"

"About Us

Art Collection

Global Business Resiliency

Historical Prime Rate

History of Our Firm

Media Contacts

Newsroom"

Id. Conspicuously absent is any information about officers of Defendant JPMorgan Chase Bank, N.A. Looking at the JPMorgan Chase & Co. website (from the FDIC link), the court could not identify any links to or information about JPMorgan Chase Bank, N.A.

It appears that the actual officers of Defendant are hidden behind a screen of the parent company. Defendant offers no explanation about how the identity of such officers would be found—from a reliable source.

It further appears that JPMorgan Chase Bank, N.A. is asserting that mailing a summons and complaint to the address listed at its headquarters by the FDIC is not reasonably calculated for it to be delivered to the proper officer (of Defendant's choice) to receive such documents. Thus, it appears that Defendant's assertion is that it does not have the proper systems in place to receive summons and complaints, its mail room does not know what to do with summons and complaints, and that its record keeping and management systems are not up to the task of receiving and properly handling summons and complaints.

Appearance in Adversary Proceeding by Defendant

On August 22, 2017, Defendant JPMorgan Chase Bank, N.A., acting through its current counsel, filed a notice that it elected to appear in this Adversary Proceeding. Dckt. 7. The **Notice of Appearance** (as stated in bold on the title to the pleading) states:

> "TO THE COURT AND TO ALL PARTIES AND THEIR COUNSEL OF RECORD:
>
> PLEASE TAKE NOTICE that Defendant, JPMORGAN CHASE BANK, N.A., hereby appears in the above-entitled action by and through Joseph E. Addiego III of DAVIS WRIGHT TREMAINE LLP and requests that all further papers, pleadings, filings, and electronic filings, except original process, be served upon these attorneys at both of the addresses and email addresses above stated."

In the **Notice of Appearance**, Defendant and Defendant's counsel expressly instruct **that all further pleadings**, which appears to acknowledge/admit the service of prior pleadings, be served from that point forward on Defendant's counsel. Interestingly, in the present points and authorities Defendant asserts that it has not appeared by counsel in this Adversary Proceeding, which "appears" to conflict with the plain language of the **Notice of Appearance** filed by Defendant and Defendant's counsel. Thus, it "appears" that Defendant has admitted that it has been served, is a party to this Adversary Proceeding, and that "further...pleadings..." are to be served directly on the counsel for Defendant appearing in this Adversary Proceeding.

This Notice of Appearance pleading is not made for any special purposes, such as to challenge service or in personam jurisdiction.

As noted by the Ninth Circuit Court of Appeal in *Republic International Crop. Amco Engineers, Inc.*, 516 F.2d 161, 164 (9th Cir. 1975), making a "general appearance" in federal court did not waive the right of a defendant to assert a defect in service, with "special appearances" to challenge jurisdiction no longer required under the Federal Rules of Civil Procedure. See *In re Hijazi*, 589 F.3d 401, 413 (7th Cir. 2008) for a more recent restatement of this principle; Moore's Federal Practice, Civil ¶ 13.21[2].

The fact that Defendant filed the current motion seeking relief pursuant to Federal Rule of Civil Procedure 12(b) and Federal Rule of Bankruptcy Procedure 7012 is not a waiver of a defense based on a defect in service. In the points and authorities, Defendant argus that the complaint was not served as required by the Federal Rules of Bankruptcy Procedure. What Defendant does not address is the effect of having elected to file the Notice of Appearance that:

A. "JPMORGAN CHASE BANK, N.A., hereby appears in the above-entitled action..."

B. "and request that all further papers, pleadings, filings, and electronic filings, except original process, be served upon [its attorneys]...."

Notice of Appearance, Dckt. 7.

It appears that Defendant wants to have its cake and eat it too. Defendant states that it has appeared in this Adversary Proceeding. While saying that it does not request that the original process, which pre-dates the Notice of Appearance, be served on the attorneys, it does say that Defendant "hereby appears" in this Adversary Proceeding.

At the end of the day on this point, Plaintiff-Debtor served the summons and complaint at the headquarters, as reported by Defendant by the FDIC, where its officers apparently are located. It was sent to an address reasonably calculated to have the summons and complaint delivered by Defendant's mail room to the correct officer (rather than some person selected by Plaintiff-Debtor) of Defendant's choosing.

On the contention that JPMorgan Chase Bank, N.A. has not been properly served, the motion is denied.

Asserted Additional Factual Grounds That Defendant No Longer Has Any Interest In or Control of the Deed of Trust At Issue

In the twelve-page points authorities, interwoven in the all of the case and statutory citations, is a contention that Defendant does not claim title to the property at issue and Defendant does not assert an interest in the property. In making that contention, Defendant first recites the history of the failing of Washington Mutual, travels through Bank of America, N.A., and then to Defendant. The points and authorities then recounts the history of the bankruptcy case, and asserts that "[Defendant] filed a Transfer of Claim in Plaintiffs' bankruptcy case. (See RJN, Ex. C.)" Points and Authorities, p. 2:26–27; Dckt. 14. Exhibit C is a "Transfer of Claim Other Than for Security," by which Defendant JPMorgan Chase Bank, N.A. purports to transfer the claim stated in Proof of Claim No. 2 in case no. 11-37716, to U.S. Bank, N.A., as successor trustee to Bank of America, N.A., successor in interest to LaSalle Bank, N.A., as trustee, on behalf of the holders of the WaMu Mortgage Pass-Through Certificates, Series 2007-OA2 Serviced by Select Portfolio Servicing, Inc. Exhibit C, Dckt. 18.

Proof of Claim No. 2 was filed in the Plaintiff-Debtor's bankruptcy case on August 25, 2011. The creditor stated on Proof of Claim No. 2 is: "U.S. Bank National Association, as Trustee, successor in interest to Bank of America, National Association as Trustee as successor by merger to Lasalle Bank, National Association as Trustee for WaMu Mortgage." Thus, as of the August 25, 2017 filing, U.S. Bank, N.A., as Trustee, was already the creditor in the case.

The court is unsure as to what "claim" Defendant JPMorgan Chase Bank, N.A. was transferring when it filed a Transfer of Claim purporting to transfer Claim No. 2, which was already filed by U.S. Bank, N.A., Trustee, to U.S. Bank, N.A., Trustee.

Defendant then states that it is no longer servicing this loan, thus there is no claim that could be stated against it. The court is unsure of what new evidence Defendant is trying to introduce for this motion to dismiss based on the pleadings.

LACK OF REASONABLENESS IN PROSECUTION OF DEFENSE

In considering Defendant's contention that dismissal is proper and so simple to show, the court notices that there is no reference to, nor is there a copy of a polite, professional letter sent by counsel for Defendant to counsel for the Plaintiff-Debtor providing the information that Defendant was no longer the servicer and enclosing a simple stipulation dismissing Defendant pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii) and Federal Rule of Bankruptcy Procedure 7041. Likely, such would have resulted in the dismissal of Defendant, saved Defendant and counsel for Defendant filing a **Notice of Appearance** in this Adversary Proceeding, and Defendant incurring the cost and expense of a one-page motion and a twelve-page points and authorities.

SUPPLEMENTAL PLEADINGS BY JPMORGAN CHASE BANK, N.A.

Defendant filed supplemental pleadings for the November 16, 2017 hearing. The first is a Reply in Support of the Motion. Dckt. 38. The Reply identifies two declarations and exhibits to provide information concerning Defendant's prosecution of this Adversary Proceeding and the communications between counsel.

The first declaration is filed for Joseph E. Addiego, III, Esq., counsel for JPMorgan Chase Bank, N.A. Dckt. 39. The testimony of Mr. Addiego includes the following:

A. On August 24, 2017, he sent a letter to counsel (Peter Macaluso) for Plaintiff-Debtor requesting a twenty-one-day extension of the time to answer the Complaint. A copy of the letter is identified as Exhibit A.

B. Mr. Addiego testifies that an assistant in Plaintiff-Debtor's counsel's office confirmed on August 24, 2017, that a twenty-one-day extension was agreed to, as communicated in a August 24, 2017 e-mail, which is filed as Exhibit B.

C. The testimony continues, recounting several attempts prior to the September 15, 2017 extension date for the parties stipulating to dismiss Defendant. Mr. Addiego testifies that on September 18, 2017, he received an e-mail from the assistant in Plaintiff-Debtor's counsel's office that included a stipulation to dismiss. A copy of the e-mail and stipulation are filed as Exhibit E.

D. Mr. Addiego testifies that on October 9, 2017, he returned the executed stipulation to the assistant (twenty-one days after receiving the requested stipulation). Exhibit F is identified as the of the October 9, 2017 transmission document. Mr. Addiego states that the delay in responding was caused, in part, by his schedule.

E. The testimony continues, stating that the assistant informed Mr. Addiego on October 11, 2017, that the stipulation to dismiss had been filed with the court. Exhibit G is identified as the document communicating that information.

F. Mr. Addiego testifies that on October 25, 2017, he sent an e-mail to the assistant inquiring why the filed stipulation to dismiss was not on the court's docket. Exhibit H is identified as the document of this correspondence. He states that the assistant confirmed that the stipulation to dismiss was "refiled" on October 25, 2017.

G. Mr. Addiego testifies that he did not appear at the October 26, 2017 hearing based on a stipulation of the parties to dismiss pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii) and Federal Rule of Bankruptcy Procedure 7041 to be effective on the stipulation itself, with no order of the court required.

The second declaration is provided by Lauren Dorsett, an attorney for Defendant. Declaration, Dckt. 41. Ms. Dorsett does not identify if she is in-house counsel, counsel with another law firm, or with Mr. Addiego's firm. Ms. Dorsett testifies that she spoke with Plaintiff-Debtor's counsel on September 13, 2017, requesting that the Complaint be dismissed for the reasons advanced by Mr. Addiego. She further testifies that Plaintiff-Debtor's counsel refused her request, commenting that if the Bank believed that dismissal was proper, it should file a motion to dismiss. Ms. Dorsett does not address that the confirmation of the request for dismissal was communicated to Mr. Addiego two days later. (A review of the California State Bar website discloses that a person with the name Lauren Dorsett is not listed as authorized to practice law in the State of California. FN. 4).

FN.4.
http://members.calbar.ca.gov/fal/MemberSearch/QuickSearch?FreeText=Lauren+Dorsett&SoundsLike=false

---

The court has reviewed the Exhibits, Dckt. 40, which it summarizes below.

Exhibit A

Exhibit A begins with a letter dated August 24, 2017. It requests that counsel for Plaintiff-Debtor reconsider the request for an extension of time and for dismissal of the Complaint. The court notes that this is exactly the type of "Exhibit A Communication" one wants to have when demonstrating professional, respectful, constructive communications between attorneys representing adverse parties.

Exhibit A continues with an e-mail thread in which counsel for Plaintiff-Debtor initially rejected the request for a continuance, by e-mail dated August 23, 2017, for what is stated to be "hardball" or "unresponsive" litigation strategies by the Bank in other unrelated matters. It is this concern that Mr. Addiego addresses in his August 24, 2017 letter.

Exhibit B

Exhibit B is the e-mail thread in which the request for extension was granted. The response e-mail from counsel for Plaintiff-Debtor continues the professional, constructive tone of Mr. Addiego's letter earlier that day, noting that there had been a misidentification of his client (confusing it with the asserted non-responsive bank).

Exhibit E

Exhibit E is an e-mail thread showing the transmission of a stipulation to dismiss and order thereon, which was sent at 5:02 p.m. on September 18, 2017.

Exhibit F

Exhibit F is an e-mail from Mr. Addiego sent at 3:30 p.m. on October 9, 2017, to the assistant to counsel for the Plaintiff-Debtor, apologizing for the delay in responding and transmitting the executed stipulation to Plaintiff-Debtor's counsel. A copy of the executed Stipulation signed by Mr. Addiego is included as part of Exhibit F.

Ruling

Counsel for Defendant has provided a detailed, credible responses addressing a number of issues concerning the prosecution of this defense. It appears that the "credit" for this situation would not rest only with such counsel, but also with counsel for Plaintiff-Debtor. Though in attendance at the prior hearing, counsel for Plaintiff-Debtor did not volunteer such information.

While demonstrating professional conduct in communicating with counsel for Plaintiff-Debtor, the Reply does not address all of the court's concerns. In large part, that is because some of the concerns go to Defendant's conduct itself and documents it filed in Plaintiff-Debtor's bankruptcy case.

Proof of Claim No. 2

One issue is how Defendant purports to transfer Proof of Claim No. 2 to U.S. Bank, N.A. to U.S. Bank, N.A., as Trustee. U.S. Bank, N.A., as Trustee, is already named as the creditor on Proof of Claim No. 2. At the hearing counsel for Defendant, explained **xxxxxxxxxxxxxxxxxxxx**

Sufficiency of Service—General Appearance

At the hearing, counsel for Defendant addressed the contention that notwithstanding Defendant having filed a Notice of Appearance and demanded that all "further pleading" (indicating that prior pleadings had been served) be serve on that counsel, Defendant could assert that the court did not have *in personam* jurisdiction. Counsel explained, **xxxxxxxxxxxxxxxxxxxxxxxxxxx**.

Lack of Service on an Officer

Though the summons and complaint were served as required by Federal Rule of Bankruptcy Procedure 7004(h), though not to a specific officer, at the address listed by the FDIC for Defendant, Defendant asserted that such service was not sufficient. Counsel for Defendant explained at the hearing that serving such pleading at Defendant's headquarters would not result in it being directed to the officer of said bank's choice because **xxxxxxxxxxxxxxxxxxx**.

Counsel for Defendant identified the following inabilities of Defendant to properly instruct its staff to direct a summons and complaint to the officer to receive such service as xxxxxxxxxxxxxxxxxxxxxxxx.

Locating Information as to Officers of Defendant

At the hearing, counsel Defendant addressed the difficultly in a person identifying any of Defendant's officers from an apparent reliable bank information source as xxxxxxxxxxxxxxxxxx.

Stipulation for Order Dismissing Defendant from this Adversary Proceeding

The Stipulation for Defendant to be dismissed from the Adversary Proceeding states that it is an agreement for Defendant "to be" dismissed, and does not provide for the dismissal of Defendant from this Adversary Proceeding. These parties lodged with the court a proposed order by which the court would dismiss Defendant.

The proposed order lodged with the court states:

> Based upon the Stipulation to Dismiss Defendant from Adversary Proceeding filed on (Dkt. ____) and good cause appearing, this adversary proceeding is dismissed with prejudice.

As is apparent, there is no "Defendant" identified in the proposed order. In the caption for the proposed order lodged with the court, there are three named defendants. This order form potentially could have resulted in all defendants named in the caption being dismissed with prejudice.

At the hearing xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss filed by JPMorgan Chase Bank, N.A. ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is xxxxxxxxxxxx.

3. **11-37716-E-13** **MILTON/TANISHA FLOWERS** **CONTINUED STATUS CONFERENCE RE: COMPLAINT**
17-2138 **7-26-17 [1]**

FLOWERS ET AL V. U.S. BANK NATIONAL ASSOCIATION ET AL

Plaintiffs' Atty: Peter G. Macaluso
Defendants' Atty:
Joseph E. Addiego [JPMorgan Chase Bank, N.A.]
Jennifer C. Wong [Select Portfolio Servicing, Inc.; U.S. Bank National Association]

Adv. Filed: 7/26/17
Answer: 11/7/17 [Select Portfolio Servicing, Inc.; U.S. Bank National Association]

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 bankruptcy case)

Notes:
Continued from 11/1/17 to be heard in conjunction with the continued Motion to Dismiss.

Answer to Adversary Complaint [Select Portfolio Servicing, Inc.; U.S. Bank National Association] filed 11/7/17 [Dckt 34]

SUMMARY OF COMPLAINT

Milton Flowers and Tanisha Gordon-Flowers ("Plaintiff-Debtor") commenced this Adversary Proceeding on July 26, 2017. The claims asserted in this Adversary Proceeding relate to Plaintiff-Debtor having valued the secured claim of US Bank, N.A., as Trustee, in their Chapter 13 Bankruptcy Case, provided for said claim in their Chapter 13 Plan, satisfied the claim as valued by the court in full, and completed the Chapter 13 Plan. It is further alleged that U.S. Bank, N.A., as Trustee, failed to reconvey the deed of trust as required by state and federal law, and by the contract. The Causes of Action are titled: First Cause of Action, Breach of Contract; Second Cause of Action, Quiet Title; Third Cause of Action, Violation of California Civil Code § 2941(d); and Fourth Cause of Action, Attorney's Fees (pleaded as a cause of action as formerly required by a prior version of Federal Rule of Bankruptcy Procedure 7008).

SUMMARY OF ANSWER

On November 7, 2017, Select Portfolio Servicing, Inc., as the servicing agent for U.S. Bank N.A., Trustee, filed an answer. Dckt. 34. The Answer is not filed by U.S. Bank, N.A., Trustee. Select Portfolio Servicing, Inc. admits and denies specific allegations in the Complaint. Defendant Select Portfolio Servicing, Inc. also asserts five affirmative defenses.

MOTIONS TO DISMISS

Before filing its Answer, Select Portfolio Servicing, Inc. filed a Motion to Dismiss the Compliant. Dckt. 8. The grounds stated with particularity for such relief (FED. R. CIV. P. 7(b), FED. R. BANKR. P. 7007) were stated as "The causes of actions asserted by Plaintiffs' are moot as Defendant (Select Portfolio Servicing, Inc.) has already released the lien and recorded a discharge of the lien on 03/13/2017." The Motion to Dismiss was denied. Order, Dckt. 24. The denial of the Motion to Dismiss addresses procedural, factual, and legal shortcomings in the Motion and supporting pleadings. Civil Minutes, Dckt. 23.

On September 15, 2017, Defendant JPMorgan Chase Bank, N.A. filed a Motion to Dismiss the Complaint. Dckt. 14. The court identified concerns with the Motion and continued the hearing to November 26, 2017, to be conducted in conjunction with this Status Conference.

ISSUANCE OF PRE-TRIAL SCHEDULING ORDER

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

a. Plaintiff-Debtor alleges that jurisdiction exists for this Adversary Proceeding 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)(A), (N), and (O). First Amended Complaint, ¶¶ X, X, Dckt. X. Defendant admits the jurisdiction and that this is a core proceeding. Answer, ¶¶ X, X, Dckt. X. To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued in this is Adversary Proceeding are related to proceedings, the parties consented on the record to this bankruptcy court entering the final orders and judgment 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 **-----, 2017**.

c. Expert Witnesses shall be disclosed on or before **----------, 2017**, and Expert Witness Reports, if any, shall be exchanged on or before **----------, 2017**.

d. Discovery closes, including the hearing of all discovery motions, on **----------, 2017**.

e. Dispositive Motions shall be heard before **----------, 2017**.

f. The Pre-Trial Conference in this Adversary Proceeding shall be conducted at **------- p.m. on ----------, 2017**.

4. **11-41628-E-13** **EDDIE DAKI** **MOTION TO DISMISS ADVERSARY PROCEEDING**
17-2122
PIB-1 **9-28-17 [12]**
DAKI V. J.P. MORGAN CHASE BANK

Final Ruling: No appearance at the November 16, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor's Attorney on September 28, 2017. By the court's calculation, 49 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

By prior order, the Motion to Dismiss Adversary Proceeding is dismissed without prejudice.

JP Morgan Chase Bank, N.A. ("Defendant") moves for the court to dismiss all claims against it in Eddie Daki's ("Plaintiff-Debtor") Complaint according to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction under 28 U.S.C. § 157(b)–(c), and according to Federal Rule of Civil Procedure 12(b)(6).

On November 14, 2017, the parties filed a Joint Notice of Settlement and Request Vacate Motion to Dismiss for this matter. Dckt. 29. Pursuant to that Notice of Settlement and Request to Vacate Motion to Dismiss, the court entered an order dismissing Defendant's Motion to Dismiss without prejudice. This matter is removed from calendar.

5. **13-24069-E-13** **DAWN LAWSON** **MOTION FOR ENTRY OF DEFAULT JUDGMENT**
17-2119 **10-3-17 [23]**

LAWSON V. JPMORGAN CHASE BANK, N.A.

Final Ruling: No appearance at the November 16, 2017 hearing is required.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor and Defendant on October 2, 2017. By the court's calculation, 45 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Entry of Default Judgment is granted.

Dawn Lawson ("Plaintiff-Debtor") filed the instant Motion for Default Judgment on October 3, 2017. Dckt. 23. Plaintiff-Debtor seeks an entry of default judgment against JPMorgan Chase Bank, N.A. ("Defendant") in the instant Adversary Proceeding No. 17-02119.

The instant Adversary Proceeding was commenced on July 11, 2017. Dckt.1. The summons was issued by the Clerk of the United States Bankruptcy Court on July 11, 2017. Dckt. 3. The complaint and summons were properly served on Defendant. Dckt. 10.

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on September 20, 2017. Dckt. 18.

REVIEW OF COMPLAINT

Plaintiff-Debtor filed a complaint for injunctive relief against Defendant. The Complaint contains the following general allegations as summarized by the court:

A. Plaintiff-Debtor owns real property commonly known as 7332 Almond Avenue, Orangevale, California ("Property"). Plaintiff-Debtor resides there as a primary residence.

B. As of March 26, 2013, the date of the filing of the Chapter 13 bankruptcy case, the Property had a fair market value of approximately $150,000.

C. Plaintiff-Debtor owned the Property at the time of filing for bankruptcy, and the Property was secured by two loans: a primary mortgage in favor of GMAC and a second mortgage in favor of Defendant, which was secured by a second deed of trust.

D. Plaintiff-Debtor filed a Motion to Value Secured Claim regarding the Property, which was granted on June 19, 2013, and the secured claim was determined to be in the amount of $0.00 and wholly unsecured.

E. Plaintiff-Debtor completed the Plan in January 2016.

F. Defendant has not filed a Deed of Reconveyance.

First Claim for Relief—Extinguishment of the Second Trust Deed Claim

Plaintiff-Debtor alleges the following for the First Cause of Action:

A. Included in the debts discharged is Defendant's claim.

B. Defendant has failed to reconvey the Property, despite demands.

C. As a direct result of Defendant's conduct, Plaintiff-Debtor has sustained attorneys' fees and costs under California Civil Code § 1717.

Second Claim for Relief—Violation of California Civil Code § 2941(d)

Plaintiff-Debtor alleges the following for the Second Cause of Action:

A. Pursuant to California Civil Code § 2941(a), thirty days having passed after the satisfaction of the mortgage by discharge in Case No. 13-24069, Defendant has failed to reconvey the Second Deed of Trust.

B. As a direct result of Defendant's conduct, Plaintiff-Debtor has sustained damages including but not limited to attorneys' fees and costs. Defendant is further liable for $500.00 pursuant to California Civil Code § 2941(d).

Prayer

Plaintiff-Debtor requests the following relief in the Complaint's prayer:

A. Extinguish the Second Deed of Trust;

B. Find that the debt has been fully discharged;

C. Award attorneys' fees and costs;

D. Award compensatory damages in an amount according to proof;

E. Award statutory damages in the amount of $500.00; and

F. For such other relief as the court deems just and proper.

APPLICABLE LAW

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

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, because the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors that the court may consider in exercising its discretion include:

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

Id. at 1471–72 (citing 6 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.)); *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62 (B.A.P. 9th Cir. 1994).

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

DISCUSSION

Reconveyance

The First Cause of Action seeks a declaration as between the parties that the court's June 19, 2013 order is a real, enforceable order and that it really means that Defendant's secured claim has a value of $0.00 (now that the Plan has been completed said modification of the agreement, and 11 U.S.C. § 506(a) valuation is final), and therefore, there is no debt for the Deed of Trust to secure.

Plaintiff-Debtor states that on March 26, 2013, they filed a Chapter 13 bankruptcy case. As of that date, the Property had two liens encumbering it: (1) First Deed of Trust in favor of GMAC and (2) Second Deed of Trust in favor of Defendant.

Plaintiff-Debtor states that Chapter 13 plan payments were completed, which required Defendant to reconvey the Second Deed of Trust on the Property. Plaintiff-Debtor was discharged on May 9, 2016. Case No. 13-24069, Dckt. 40.

According to the Chapter 13 Trustee's Final Report and Account in Plaintiff-Debtor's bankruptcy case, Case No. 13-24069, Debtor's Plan was confirmed on June 21, 2013, and completed on January 20, 2016. Bankr. E.D. Cal. No. 13-24069, Dckt. 32, March 15, 2016. Plaintiff-Debtor's discharge was entered on May 9, 2016. Bankr. E.D. Cal. No. 13-24069, Dckt. 40. Plaintiff-Debtor states that more than thirty days have passed and that Defendant has not reconveyed, requiring Plaintiff-Debtor to file an adversary proceeding.

Here, it appears that Plaintiff-Debtor was entitled to the full reconveyance of the Second Deed of Trust on the Property. This court has addressed—in detail—California state law, the standard note and deed of trust contractual basis, and possible 11 U.S.C. § 506(d) basis for a creditor being obligated to reconvey a deed of trust upon a debtor successfully completing a Chapter 13 plan that provides for the payment of the secured claim in the 11 U.S.C. § 506(a) determined amount. *Martin v. CitiFinancial Servs., Inc. (In re Martin)*, 491 B.R. 122 (Bankr. E.D. Cal. 2013); *In re Frazier*, 448 B.R. 803 (Bankr. E.D. Cal. 2011), *aff'd sub nom. Frazier v. Real Time Resolutions, Inc.*, 469 B.R. 889 (E.D. Cal. 2012) (discussing "lien striping" in Chapter 13 case).

Upon completion of the Chapter 13 Plan and its terms becoming the final, modified contract between Plaintiff-Debtor, Defendant, and creditors, there remains no obligation that is secured by the Second

Deed of Trust. As a matter of California law, the Second Deed of Trust is void. FN.1. The lien is also rendered void by operation of 11 U.S.C. § 506(d) upon completion of the Chapter 13 Plan. *In re Martin*, 491 B.R. at 127–30.

FN.1. 4 B.E. WITKIN ET AL., WITKIN SUMMARY OF CALIFORNIA LAW § 117 (10th ed. 2005) (citing CAL. CIV. CODE § 2939 et seq.; RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 6.4; 4 POWELL § 37.33; 2 C.E.B., MORTGAGE AND DEED OF TRUST PRACTICE § 8.84 (3d ed.); 13 AM.JUR. LEGAL FORMS § 179:511 (2d ed.)).

In addition, California Civil Code § 2941(b)(1) imposes a statutory obligation on the beneficiary under the deed of trust (Defendant in this Adversary Proceeding) to reconvey the deed of trust when the obligation secured has been satisfied. The Chapter 13 Plan having been completed, and Defendant having been paid the full amount of the secured claim as finally determined pursuant to 11 U.S.C. § 506(a), and the confirmed plan having been completed, that secured obligation has been satisfied.

California Civil Code § 2941(b)(1) requires that within thirty days of the obligation secured by a deed of trust having been satisfied, the beneficiary shall deliver to the trustee under the deed of trust an executed request for reconveyance and supporting documents. The trustee under the deed of trust then has twenty-one days from receipt of the request for reconveyance to reconvey the deed of trust. CAL. CIV. CODE § 2941(b)(1)(A). The trustee under the deed of trust, not the beneficiary, is responsible for providing a copy of the reconveyance to the owner of the property—here, Plaintiff-Debtor. CAL. CIV. CODE § 2941(b)(1)(B)(ii).

Here, Plaintiff-Debtor completed the plan on January 20, 2016. To date, Defendant has not reconveyed the Second Deed of Trust as required by § 2941 within thirty days after the obligation has been satisfied (here being after the completion of the Plan).

Statutory Penalty

The California Legislature has provided for a statutory forfeiture of $500.00 (expressly stated as a forfeiture in the statute) in connection with the reconveyance of a deed of trust, as follows:

> The violation of this section shall make the violator liable to the person affected by the violation for all damages which that person may sustain by reason of the violation, and shall require that the violator forfeit to that person the sum of five hundred dollars ($500).

CAL. CIV. CODE § 2941(d). The grounds for the possible violations of California Civil Code § 2941 in connection with this Adversary Proceeding are (as summarized by the court):

> (b)(1) Within thirty calendar days after the obligation secured by any deed of trust has been satisfied, the beneficiary or the assignee of the beneficiary shall:

(A) execute and deliver to the trustee the original note, deed of trust, request for a full reconveyance, and other documents as may be necessary to reconvey, or cause to be reconveyed, the deed of trust.

(B) The trustee shall execute and record the reconveyance within twenty-one calendar days after receipt by the trustee of the original note, deed of trust, request for a full reconveyance, and fees as may be necessary to reconvey, or cause to be reconveyed, the deed of trust.

(C) The trustee shall deliver a copy of the reconveyance to the beneficiary or its servicing agent, if known.

(2) If the trustee has failed to execute and record, or cause to be recorded, the full reconveyance within sixty calendar days of satisfaction of the obligation, the beneficiary, upon receipt of a written request by the trustor, shall execute and acknowledge a document pursuant to Section 2934a substituting itself or another as trustee and issue a full reconveyance.

CAL. CIV. CODE § 2941(b).

The thirty-day period at issue is for the beneficiary to execute and deliver the original note, deed of trust, and request for reconveyance to the trustee under the deed of trust.

Defendant failed to answer and offers no evidence that it took any action to provide the documents or demand the reconveyance within the thirty-day period.

Attorney's Fees

Plaintiff-Debtor requests attorney's fees pursuant to California Civil Code §§ 1717 and 2941. For the § 1717 request, Plaintiff-Debtor argues that they are entitled to reimbursement of attorney's fees under the reciprocal contractual attorney's fees clause because the Second Deed of Trust contains an attorney's fees and cost provision.

For their request pursuant to § 2941, Plaintiff-Debtor asserts entitlement to fees as the prevailing party in this action.

Plaintiff-Debtor provides evidence of the relevant provision at Paragraph 7 in the Second Deed of Trust or note stating that reasonable attorney's fees are included in Plaintiff-Debtor's rights. Exhibit A, Dckt. 27 at 6.

CONCLUSION

Applying these factors, the court finds that Plaintiff-Debtor will be prejudiced if the Second Deed of Trust is not reconveyed, or if the court does not enter judgment determining that the Deed of Trust is void and that the Property is held free of such purported interests thereunder. The continued existence of record

of the Second Deed of Trust will cloud title and restrict Plaintiff-Debtor's full and unfettered use of the real property and any interests therein. The court discussed the effect of a completed Chapter 13 Plan recently and the effect on a secured claim determined by the court pursuant to 11 U.S.C. § 506(a). *See In re Martin*, 491 B.R.

The court finds that the Complaint is sufficient, and the requests for relief requested therein are meritorious. The court has not been shown that there is or may be any dispute concerning material facts. Defendant has not contested any facts in this Adversary Proceeding, nor did it dispute facts presented in the Plaintiff-Debtor's bankruptcy case regarding the motion to value Defendant's secured claim to have a value of $0.00 or regarding confirmation of the Chapter 13 Plan. Further, there is no evidence of excusable neglect by Defendant. Although the Federal Rules of Civil Procedure favor decisions on the merits through the crucible of litigation, Defendant has been given several opportunities to respond, and there is no indication that Defendant has a meritorious defense or disputes Plaintiff-Debtor's right to judgment in this Adversary Proceeding. Failing to fulfill one's contractual and statutory obligations, and then failing to respond to judicial process, is not a basis for denying relief to an aggrieved plaintiff. The court finds it necessary and proper for the entry of a default judgment against Defendant.

ATTORNEY'S FEES

Plaintiff-Debtor seeks attorney's fees pursuant to California Civil Code § 1717(a), which provides for attorney fees if the contract specifically provides attorney's fees, which are incurred to enforce the contract, to the prevailing party.

The prevailing party must establish that a contractual provision exists for attorney's fees and that the fees requested are within the scope of that contractual provision. *Genis v. Krasne*, 47 Cal. 2d 241 (1956). California Civil Code § 1717 provides for application of contractual attorney's fees provisions to any prevailing party to the contract and that the reasonable attorney's fees shall be determined by the court.

California Civil Code § 1717(a) provides:

> 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.

Here, Plaintiff-Debtor states that the underlying contract has an attorney's fees provision that, pursuant to § 1717(a), is reciprocal. Plaintiff-Debtor provides evidence at Paragraph 7 of the contract provision. Exhibit A, Dckt. 27 at 6.

Plaintiff-Debtor's counsel has also provided a billing statement, showing approximately 9.6 hours' work on the Complaint, preparation of entry of default, and hearing, for $2,400.00 in attorney's fees and $263.50 in costs. FN.2.

FN.2. The court could "force" Plaintiff-Debtor and counsel to file a separate post-judgment motion for attorney's fees as provided in Federal Rule of Bankruptcy Procedure 7054(b) and Federal Rule of Civil Procedure 54. That would of in course entail Plaintiff-Debtor incurring even more legal fees and costs, quite possibly doubling the amount, raising the attorney's fees and costs to $5,000.00.

It appears that JPMorgan Chase Bank, N.A. has made the business decision that it is less expensive to have a consumer debtor and the consumer debtor's counsel commence federal court litigation to obtain a quiet title judgment, award of statutory damages, and award of attorney's fees than reconveying a void deed of trust. Plaintiff-Debtor's counsel appears to have extended the economic courtesy of keeping that cost to a minimum by seeking such recovery as part of the judgment—which has not (economically prudently) been opposed by JPMorgan Chase Bank, N.A.

CALIFORNIA CIVIL CODE § 2941

Plaintiff-Debtor also seeks an award of $500.00 pursuant to California Civil Code § 2941, which requires lenders to reconvey deeds of trust when the debt is satisfied.

California Civil Code § 2941(b)(1) imposes an affirmative obligation on the beneficiary (creditor) when the obligation secured by the deed of trust has been satisfied. When no obligation remains, the beneficiary must instruct the trustee under the deed of trust to issue a full reconveyance of the deed of trust. Once the obligation no longer exists, resulting in the lien being extinguished by operation of law, the trustor or mortgagor (debtor) is entitled to a certificate of discharge, the mortgage cancelled or satisfied as of record, and the deed of trust reconveyed.

Here, Defendant failed to have the deed of trust reconveyed after the obligation secured had been satisfied, as required by California Civil Code § 2941(b)(1). Therefore, the violation of that section allows Plaintiff-Debtor to seek the penalty of $500.00 pursuant to California Civil Code § 2941(d).

RULING

The court grants the default judgment in favor of Plaintiff-Debtor and against Defendant JPMorgan Chase Bank, N.A. and holds that the deed of trust is void. Attorney's fees of $2,400.00 and costs of $263.50 are awarded. The court further awards $500.00 pursuant to California Civil Code § 2941(d).

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion for Entry of Default Judgment filed by Dawn Lawson ("Plaintiff-Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Entry of Default Judgment is granted. The court shall enter judgment determining that the second deed of trust, and any interest, lien or encumbrance pursuant thereto, held by JPMorgan Chase Bank, N.A. ("Defendant") against the real property commonly known as 7332 Almond Avenue, Orangevale, California, APN 257-0200-019, with the County Recorder for Sacramento County, California, is void, unenforceable, and of no force and effect. Further, the judgment shall adjudicate and determine that Defendant has no interest in the real property pursuant to the Second Deed of Trust.

IT IS FURTHER ORDERED that the debt associated with the second deed of trust has been satisfied and fully discharged pursuant to Federal Rules of Bankruptcy Procedure § 4007(a) and (b).

IT IS FURTHER ORDERED that Plaintiff-Debtor is awarded $2,400.00 in attorney's fees and $263.50 in costs.

IT IS FURTHER ORDERED that Plaintiff-Debtor is awarded $500.00 pursuant to California Code § 2941(d).

Counsel for Plaintiff-Debtor shall prepare and lodge with the court a proposed judgment consistent with this Order. The judgment shall provide that attorney's fees and costs allowed by the court shall be enforced as part of the judgment.

6. **17-21173-E-13** **ODETE CABRAL** **MOTION TO DISMISS ADVERSARY PROCEEDING**
17-2056 **DWE-1** **10-6-17 [36]**

CABRAL V. NATIONSTAR MORTGAGE, LLC

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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor, Plaintiff-Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on October 6, 2017. By the court's calculation, 41 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss Adversary Proceeding is granted as to the First and Third Causes of Action and denied as to the Second Cause of Action.

Nationstar Mortgage LLC ("Defendant") moves for the court to dismiss all claims against it in Odete Cabral's ("Plaintiff-Debtor") Complaint according to Federal Rule of Civil Procedure 12(b)(6).

APPLICABLE LAW

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 a complaint have 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 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 that would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. 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 Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Federal Rule of Civil Procedure 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*, 556 U.S. 662, 687 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do.").

In ruling on a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6), 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 reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994) (citations omitted).

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: either a lack of a cognizable legal theory, or insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (citation omitted).

REVIEW OF MOTION

The Motion responds to the Complaint's claims with the following grounds:

A. The first cause of action for breach of contract does not allege what contract and what terms were breached and what action by Defendant caused a breach.

B. The second cause of action for breach of the covenant of good faith and fair dealing is unclear because Plaintiff-Debtor alleges grievance for not receiving a permanent loan modification and for damages from a loan modification offer. Additionally, there is no reference of violated contract terms, unfulfilled terms, or unfair interference.

C. The third cause of action for violating California Business and Professions Code § 17200 is not supported by any facts of kickbacks or commissions from loan modifications. Instead, the cause states unsupported conclusions of unlawful acts. Even if there were acts, Plaintiff-Debtor cannot show that they cause her economic

injury when she defaulted on the mortgage prior to the alleged loan modification bad acts.

The Motion discusses the Complaint further and states that any allegations of negligence fail because no breach has been shown. Defendant argues that amendment is futile and asks the court to dismiss without leave to amend because Plaintiff-Debtor filed a similarly-worded complaint originally, and the Amended Complaint "does not set forth any facts with respect to any legally cognizable claim. . . . [and] is simply a document containing vague, conclusory and boilerplate allegations." Dckt. 36 at 6:17–19.

PLAINTIFF-DEBTOR'S OPPOSITION

Plaintiff-Debtor filed an Opposition on November 2, 2017. Dckt. 47. Plaintiff-Debtor asserts that Defendant offered a loan modification application to Plaintiff-Debtor on January 20, 2017, which Plaintiff-Debtor submitted on February 2, 2017. Plaintiff-Debtor argues that she was not contacted within five business days of her trial loan modification application being accepted and that the sale date for her real property was not extended.

For the Amended Complaint's first cause of action, Plaintiff-Debtor argues that the claim should stand because Defendant breached a contract with Plaintiff-Debtor (the trial loan modification) by not canceling a foreclosure sale during trial payments.

For the second cause of action, Plaintiff-Debtor argues that Defendant breached a covenant of good faith and fair dealing by denying Plaintiff-Debtor's loan modification subjecting her to a five-year Chapter 13 plan.

On the third cause of action, Plaintiff-Debtor alleges that Defendant used "unlawful, unfair and/or fraudulent business practices, which are unfair, deceptive, and misleading acts" to foreclose on Plaintiff-Debtor's real property by providing a trial loan modification and not cancelling a foreclosure sale.

In the Opposition, Plaintiff-Debtor also presents argument for a fourth cause of action for negligence that is not listed in the Amended Complaint but that is part of the Original Complaint. Plaintiff-Debtor argues that there is a cause of action for negligence that should stand because Defendant violated a duty by setting a foreclosure sale date and accepting a loan modification at the same time.

The arguments presented in the Opposition are summarized versions of the allegations presented in the Amended Complaint (and Original Complaint).

DISCUSSION

The court reviews the Amended Complaint to determine what has been alleged, and then applies the standards most recently refined by the Supreme Court in the *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) line of cases, whether the mere allegations are sufficient.

The court's review of the allegations in the Amended Complaint discloses the following. Plaintiff-Debtor has filed a complaint seeking to state claims for relief for:

> (1) BREACH OF CONTRACT
> (2) BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING
> (3) VIOLATION OF CA. BUSINESS PROFESSIONAL CODE 17200

In the general allegations it is asserted that Defendant entered into a trial loan modification agreement with Plaintiff-Debtor, then failed to postpone a then-pending foreclosure sale. This failure to postpone is what Plaintiff-Debtor asserts necessitated the filing of a Chapter 13 bankruptcy case.

The general allegations stated in the Amended Complaint (identified by the paragraph number in the Amended Complaint) include the following:

> 11. Plaintiff-Debtor executed a promissory note.
>
> 12. The promissory note is secured by a first deed of trust (which the court infers was recorded against and encumbered Plaintiff-Debtor's real property).
>
> 13. On January 20, 2017, Plaintiff obtained a loan modification application from Defendant, who is the servicing representative.
>
> 14. On February 1, 2017, Chase caused to be recorded a Notice of Sale, setting a date of sale . . . for February 27, 2017.
>
> 15. On February 2, 2017, Plaintiff submitted a loan modification application to Nationstar.
>
> 16. On February 8, 2017, having not been contacted by Nationstar, and more than six (6) days having passed, Plaintiff sought bankruptcy advice.
>
> 21. On February 9, 2017, Nationstar had failed to send written acknowledgment of receipt of the loan modification application.
>
> 22. On February 9, 2017, Plaintiff was notified of the Notice of Sale.
>
> 23. On February 25, 2017, Plaintiff filed the underlying voluntary petition under Chapter 13 of the bankruptcy code as case number 17-21173-E-13C.
>
> 24. The submitted Trial Loan Modification was not denied prior to February 25, 2017.
>
> 27. On March 14, 2017, Nationstar generated a "Trial Period Plan," which required payments of $1,757.12 to be due on April 1, May 1, and June 1, 2017.

> 28. On April 7, 2017 (at the time of the "Trial Plan Period" commencing), Counsel for Plaintiff attempted contact with Nationstar's Dedicated Loan Specialist, Jonathan Blinco, to no avail, and has received no followup return call from Nationstar.
>
> 29. Plaintiff's payments were made via the Chapter 13 Trustee to the Defendant pursuant to the terms of the Trial Loan Modification.
>
> 30. Defendant did offer a Trial Loan Modification without seeking Bankruptcy Court approval.
>
> 31. Defendant denied the Permanent Loan Modification after excepting [sic] payments on the Trial Loan Modification thru the Chapter 13 Trustee.

Amended Complaint, Dckt. 33.

From the above, it appears that at the core of Plaintiff-Debtor's allegations are a trial loan modification having been entered into (without court approval, but paid through the Chapter 13 Trustee) and then the denial of a final loan modification.

First Cause of Action
(Titled Breach of Contract and requesting specific performance)

In the First Cause of Action, it is asserted that Defendant has breached its obligations under a loan modification. It is asserted that the Defendant, as the assignee-payee under the note, has a "fiduciary duty" to prosecute the loan modification and adhere to the California Homeowners Bill of Rights. While the court is unsure as to how the assignee-payee or servicer thereof is a "fiduciary" of Plaintiff-Debtor, the series of events upon which the contention is asserted concern Defendant's conduct.

Plaintiff-Debtor argues that Defendant had to timely prosecute Plaintiff-Debtor's loan modification application but failed to do so and failed to prevent "dual tracking" of the loan modification application and of a foreclosure sale. The Amended Complaint alleges that a trial loan modification was entered into, but the final loan modification was denied.

Plaintiff-Debtor asserts the legal and factual conclusion that "unjustly denied the permanent loan modification." No allegations are made as to why it was "unjustly," the grounds (or no grounds) stated by Defendant, or why the failure to give notice of the continuance of the pending foreclosure sale (which necessitated Plaintiff-Debtor seeking relief under Chapter 13 of the Bankruptcy Code) are a basis for concluding that there was a "breach of contract" for which specific performance—judicial imposition of the permanent loan modification—is proper.

Second Cause of Action
(Breach of Covenant of Good Faith and Fair Dealing)

In the Second Cause of Action, Plaintiff-Debtor states that there is a contractual relationship between Plaintiff-Debtor and Defendant, and pursuant thereto a duty of good faith and fair dealing exists. Plaintiff-Debtor then alleges that this duty of good faith and fair dealing was breached by Defendant by pursuing a foreclosure while purporting to process a loan modification. Plaintiff-Debtor alleges that Defendant never provided receipt of a loan modification application submitted on February 2, 2017, but noticed a sale for February 27, 2017, and did not inform Plaintiff-Debtor of a trial loan modification until after the noticed sale date.

Further, the Amended Complaint makes the general allegation that "Defendant systematically and pervasively grants loan modifications after participating in the Chapter 13 confirmation process, filing proof of claims, notice mortgage payment changes, and accepting confirmation of such plans." Amended Complaint ¶ 53, Dckt. 33.

For the breaches of the implied covenant of good faith and fair dealing under the contract and applicable state law relating to responding to requests for loan modifications and postponing foreclosure sales, Plaintiff-Debtor asserts that she has incurred damages and seek recover thereon. In substance, Plaintiff-Debtor appears to be asserting that the contract was intentionally breached.

Third Cause of Action
(Titled California Unfair Competition Law)

The Third Cause of Action seeks to assert a claim for unfair business practices pursuant to California Business and Professions Code §§ 17200 et seq. It is asserted that the practices upon which such a claim are based are:

> "a. Manipulating the loan modification process,
>
> b. Failing to maintain and properly process the loan modification, and duties, as to the Notice of Sale,
>
> c. Arranging for kickbacks, commissions, or other compensation for itself and/or its affiliates in connection with loan modifications."

Id., ¶ 64.

In substance, Plaintiff-Debtor states the above legal and factual conclusions, merely "labels and conclusions, and a formulaic recitation of a cause of action's elements" and not actual grounds. As discussed by the Supreme Court above, these are not sufficient.

Counter "Facts" Alleged In Motion

Defendant counter alleges "facts" in the Motion to Dismiss. For the court to consider such alleged facts and have them overcome the grounds stated in the Amended Complaint, a trial will be required (or at least a summary judgment motion for which evidence is presented and factual determinations are made if there is no countervailing evidence).

STATUS OF ADVERSARY PROCEEDING

On November 9, 2017, Plaintiff-Debtor filed an updated Status Report. Dckt. 50. Plaintiff-Debtor reports that the parties have met to discuss settlement and possible resolution through the issuance of a loan modification. The Parties were to meet and confer on November 9, 2017, but had not done so as of the time the Status Report was filed.

DECISION

For the First and Third Causes of Action, Defendant's Motion is well taken. Plaintiff-Debtor states a series of (some inflammatory) conclusions and demands relief, but Plaintiff-Debtor has failed to state actual grounds, which if taken as true, would cause the court to make the necessary factual and legal conclusions to grant the relief requested. The Motion is granted as to the First and Third Causes of Action.

For the Second Cause of Action, Plaintiff-Debtor asserts specific alleged violations of state law and the contractual obligation between the parties under the promissory note and deed of trust. What dollar amount damages flow therefrom only discovery will tell.

Because leave to amend was previously granted *carte blanche* for the Amended Complaint, and while the Amended Complaint is better, the court believes that the Parties and the court will be better served by further amendments made by obtaining leave of the court on noticed motion.

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

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Dismiss Adversary Proceeding filed by Nationstar Mortgage LLC ("Defendant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Dismiss is granted, and the First and Third Causes of Action are dismissed without prejudice.
>
> **IT IS FURTHER ORDERED** that the Motion is denied as to the Second Cause of Action.

IT IS FURTHER ORDERED that Odete Cabral ("Plaintiff-Debtor") may seek leave, by noticed motion, for the filing of further amended complaints. The Exhibits to such a motion for leave to file a further amended complaint shall include a copy of the proposed further amended complaint.

IT IS FURTHER ORDERED that Defendant shall file an answer to the Amended Complaint for the remaining Cause of Action on or before November 28, 2017.

7. **17-21173-E-13** **ODETE CABRAL**
17-2056

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
9-6-17 [33]

CABRAL V. NATIONSTAR MORTGAGE, LLC

Plaintiff's Atty: Peter G. Macaluso
Defendant's Atty: Dane W. Exnowski

Adv. Filed: 4/11/17
Answer: none

Amd. Cmplt. Filed: 9/6/17
Answer: none

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

The Status Conference is continued to 11:00 a.m. on December 21, 2017 (specially set date and time).

Notes:
Continued from 11/1/17 to be heard in conjunction with the Motion to Dismiss.

8. **17-25576-E-11** **KEVIN KENNEDY** **CONTINUED STATUS CONFERENCE RE: COMPLAINT**
8-23-17 [1]

Debtor's Atty: Mikalah R. Liviakis

The Chapter 11 Status Conference is continued to 2:00 p.m. on xxxxx, 2018.

Notes:
Operating Reports filed: 9/15/17

[MRL-1] Application to Employ Liviakis Law Firm, PC as Counsel for Debtor filed 8/30/17 [Dckt 11]; Order granting filed 10/9/17 [Dckt 27]

Status Report filed 8/30/17 [Dckt 16]

U.S. Trustee Report at 341 Meeting docketed 9/21/17

Ex Parte Application to Continue Hearing or Excuse Attendance filed 10/10/17 [Dckt 28]; order pending

[MRL-2] Liviakis Law Firm PC's Application for Interim Compensation filed 10/22/17 [Dckt 32], set for hearing 12/7/17 at 10:30 a.m.

NOVEMBER 16, 2017 STATUS CONFERENCE

On October 25, 2017, Debtor in Possession Kevin Kennedy filed the Monthly Operating Report for September 30, 2017. The information in the September 2017 Monthly Operating Report is summarized as follows:

A. Income in September 2017.....$10,737

B. Expenses in September 2017.....($6,567)
Including Legal Fees.....($1,734)

No Status Report has been filed by Debtor in Possession ("ΔIP") advising the court and parties in interest as to how the ΔIP intends to prosecute toward a Chapter 11 plan in this case.

At the Status Conference, counsel for the ΔIP advised the court **xxxxxxxxxxxxxxxxx.**

NOVEMBER 1, 2017 STATUS CONFERENCE

STATUS CONFERENCE SUMMARY

This Chapter 11 case was commenced by Debtor on August 23, 2017. No Chapter 11 Status Report has been filed by Debtor in Possession.

The court has continued this Status Conference pursuant to the ex parte motion of Debtor in Possession. Dckt. 28. The continuance was necessitated due to out of state work commitments that Debtor in Possession's "employer" would not let him out of.

In reviewing Schedule I, Debtor lists his employer as "Kennedy/Jenks Consultant." On Schedule B, Debtor lists having "Stocks in Current Employer," which are valued at $3,000.00. Dckt .23 at 5. A review of the California Secretary's of State website discloses there being two "Kennedy/Jenks Consultant" corporations:

A. Kennedy/Jenks Consultants, Engineers & Scientists P.C.; and

B. Kennedy/Jenks Consultants, Inc.

MONTHLY OPERATING REPORT SUMMARY

September, 2017 Report			**Filed: October 25, 2017**	
INCOME	**Current**		**Cumulative**	
"Paychecks"	$ 10,737		$ 10,737	
Medical Reimb.	$ 0		$ 160	
Cking Acct Dep.	$ 1		$ 157	
Total	$ 10,738		$ 11,054	
EXPENSES	$ (6,567)		$ (8,077)	
PROFIT/(LOSS)	$ 4,171		$ 2,977	

Specific Expenses			
Rent	($1,475)		
Legal Fees	($1,717)		
Food, Household, Utilities	($1,717)		

SUMMARY OF SCHEDULES

Real Property Schedule A	FMV	LIENS	
None			

Personal Property Schedule B	FMV	LIENS	
Prius	$8,264		
Accord	$4,446		
401k	$155,000		

Secured Claims Schedule D	TOTAL CLAIM AMOUNT	FMV	UNSECURED CLAIM PORTION
None			

PRIORITY UNSECURED CLAIMS SCHEDULE E	TOTAL CLAIM AMOUNT	PRIORITY	GENERAL UNSECURED
Franchise Tax Board	($12,000)	($5,600)	($6,400)
Internal Revenue Service	($272,416)	($11,000)	($261,416)
Stacey Macdonald (marital)	($45,517)	($45,517)	

GENERAL UNSECURED CLAIMS SCHEDULE F	TOTAL CLAIM AMOUNT		GENERAL UNSECURED
Total	$129,048		
		Student Loans	($113,414)
		Others	($15,634)

INCOME, SCHEDULE I Total Average Monthly Income		
Wages	$14,887	
	Voluntary Retirement	($710)
	Required Repayment Loans	($90)
	Stock Loan	($552)

EXPENSES, SCHEDULE J Total Average Monthly Expenses		
	($4,910)	
Rent/Mortgage		($1,424)
Food/Housekeeping Supplies		($640)

STATEMENT OF FINANCIAL AFFAIRS

Question 1 Income

2017 YTD	$102,000	
2016	$182,000	
2015	$147,000	

Question 2 Non-Business Income

2017 YTD	None	
2016	None	
2015	None	

Question 3 Payments within 90 days

Creditor	Amount	Date
None		

Payments within one year

Creditor	Amount	Date
Stacy McDonald	$4,500	Monthly payments, Settlement
FTB Garnishment	$8,394	